A CONCEPTUAL FRAMEWORK FOR EFFECTIVE CORPORATE SOCIAL RESPONSIBILITY FOR COMPANIES IN THE NIGERIAN EXTRACTIVE INDUSTRY

By

AMODU, NOJEEM AKINJIDE

MATRIC NO: 099061009

SCHOOL OF POSTGRADUATE STUDIES

UNIVERSITY OF LAGOS

JUNE, 2017

A CONCEPTUAL FRAMEWORK FOR EFFECTIVE CORPORATE SOCIAL RESPONSIBILITY FOR COMPANIES IN THE NIGERIAN EXTRACTIVE INDUSTRY

By

AMODU, NOJEEM AKINJIDE

LL.B (HONS) (LASU), LL.M (LAGOS), B.L

MATRICULATION NUMBER: 099061009

A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, UNIVERSITY OF LAGOS, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN COMMERCIAL AND INDUSTRIAL LAW

JUNE, 2017

SCHOOL OF POSTGRADUATE STUDIES
UNIVERSITY OF LAGOS

CERTIFICATION

This is to certify that the thesis:

A CONCEPTUAL FRAMEWORK FOR EFFECTIVE CORPORATE SOCIAL RESPONSIBILITY FOR COMPANIES IN THE NIGERIAN EXTRACTIVE INDUSTRY

Submitted to the School of Postgraduate Studies, University of Lagos

For the award of the degree of

DOCTOR OF PHILOSOPHY (Ph.D.)
is a record of the original research carried out
By:

AMODU, NOJEEM AKINJIDE
In the Department of Commercial and Industrial Law

AUTHOR'S NAME	**SIGNATURE**	**DATE**
1ST SUPERVISOR	**SIGNATURE**	**DATE**
2ND SUPERVISOR	**SIGNATURE**	**DATE**
1ST INTERNAL EXAMINER	**SIGNATURE**	**DATE**
2ND INTERNAL EXAMINER	**SIGNATURE**	**DATE**
EXTERNAL EXAMINER	**SIGNATURE**	**DATE**
SPGS REPRESENTATIVE	**SIGNATURE**	**DATE**

DEDICATION

This is dedicated to my wife, 'Debola Aminat for her patience and love, and to my children, Hikmah Olajumoke, Hiba Ayomiposi and Abdur-Rahman Odunayo Oluwamayomikun for the indescribable joy to my life.

ACKNOWLEDGMENTS

I am grateful to a number of people without whom this thesis would never have been completed. Truly deserving of my unreserved appreciation are my supervisors, Professor Joseph E.O. Abugu and Dr Adewale A. Olawoyin, *SAN* for their painstaking reviews despite tight schedules, invaluable criticisms and insightful comments.

I thank Professor C.K. Agomo, Professor P.K. Fogam, Professor I.O. Bolodeoku, Professor A.O. Sanni, Professor A.O. Oyewunmi, Professor I.O. Smith, Professor 'Dayo Amokaye, Dr Yemi Oke, Dr Dayo Ayoade, Dr Oluwatoyin Adejonwo-Osho, Dr Sope Williams-Elegbe, Dr Simon Akaayar and Mr Folarin Philips for their respective priceless guidance at different crucial moments. Special thanks must go to Professor Olanrewaju Fagbohun for the inspiration and moral support to undertake a doctoral research in the first place.

For access to crucial materials and general counsel, I must acknowledge the individual contributions of Professor Janet Dine, Dr Sorcha MacLeod, Dr Olufemi Amao, Dr Rhuks Temitope Ako and Dr Ishanlosen Odiaua.

I am also grateful to the following: Olaiwola Amodu, Mahmud Kazaure, Bolaji Owolabi, Mobolaji Olaide, Mike Akhigbe, Kayode Yakub, Kamar Ogunneye, Uduak Ndiokho, Ellias Ajadi, Moshood Rasaq, Tosin Adeolu, and Jerome Okoro for their support and constant reminder to complete this thesis.

I wish to also thank the University of Lagos Muslim Alumni for the scholarship granted for the 2013/2014 academic session.

Finally, but in no way the least, for the gift of life, health and sustenance, I express my immense gratitude to Almighty Allah and my parents, Mr and Mrs Fatai Owolabi Amodu.

AMODU, Nojeem Akinjide
June, 2017.

TABLE OF CONTENTS

TABLE OF CASES

A

B

C

D

L

M

N

O

P

R

TABLE OF STATUTES

Federal Legislation

Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004

Constitution of the Federal Republic of Nigeria Cap C23 Laws of the Federation of Nigeria, 2004 as amended

Corporate Social Responsibility Bill 2007

Financial Reporting Council of Nigeria Act 2011

Investments and Securities Act 2007

Nigerian Extractive Industry Transparency Initiative Act 2007

Nigerian Minerals and Mining Act 2007

Petroleum Industry Bill 2012

Foreign Legislation

Companies Act 2006 (UK)

Companies Act 2013 (India)

Corporations Act 2001 (Australia)

LIST OF ABBREVIATIONS

ABI	Association of British Insurers
AI	Amnesty International
All ER	All England Law Reports
ATCA	Alien Torts Claims Act
BIT	Business Investment Treaty
CAMA	Companies and Allied Matters Act
CBI	Confederation of British Industry
CBN	Central Bank of Nigeria
CDA	Community Development Agreement
COP	Communication on Progress (under the UN Global Compact)
CSR	Corporate Social Responsibility
EITI	Extractive Industries Transparency Initiative
ESV	Enlightened Shareholder Value
EU	European Union
FDI	Foreign Direct Investment
HL	House of Lords
HRC	Human Rights Council
ICC	International Chambers of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
ILO	International Labour Organization
IMF	International Monetary Fund
ISA	Investments and Securities Act
LFN	Laws of the Federation of Nigeria
MCO	Mining Cadastre Office

MDA	Management's Discussion and Analysis of Financial Condition and Results of Operations
MECD	Mines Environmental Compliance Department
MID	Mines Inspectorate Department
MMSD	Ministry of Mines and Steel Development
MNC	Multinational Corporation
MNE	Multinational Enterprise
MREMC	Mineral Resources and Environmental Management Committee
NAICOM	National Insurance Commission
NCC	Nigerian Communication Commission
NCP	National Contact Point (under the OECD Guidelines for MNE)
NDA	Niger Delta Avengers
NEITI	Nigerian Extractive Industries Transparency Initiative
NGO	Non-Governmental Organisation
NNPC	Nigerian National Petroleum Corporation
NMMA	Nigerian Minerals and Mining Act
NSWG	National Stakeholders Working Group
OECD	Organisation for Economic Cooperation and Development
OECD Guidelines	OECD Guidelines on Multinational Enterprises
OEEC	Organisation for European Economic Co-operation
PENCOM	National Pension Commission
PHCF	Petroleum Host Communities Fund (under PIB)
PIB	Petroleum Industry Bill
PRR	Protect, Respect, Remedy framework (under UNGP)
PRT	Promoting Revenue Transparency

RSM	Responsible Stakeholder Model
SEC	Securities and Exchange Commission
SGSR	UN Secretary-General's Special Representative
SIP	Specific Instance Procedure (Under OECD Guidelines)
TBL	Triple Bottom Line
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCTAD	UN Conference on Trade and Development
UNCTC	UN Commission on Transnational Corporations
UNGC	UN Global Compact
UNGP	UN Guiding Principles on Business and Human Rights
USA	United States of America
WBCSD	World Business Council for Sustainable Development
WCED	World Commission on Environment and Development

ABSTRACT

Corporate Social Responsibility (CSR) is a popular concept but disparately conceived and operationalized amongst practitioners within business communities and across different jurisdictions. While CSR in Nigeria is restrictively conceived as voluntary corporate charity or community development projects, more industrialized economies consider the subject in terms of an overarching business management philosophy. This study interrogates and clarifies the CSR concept in Nigeria and addresses regulatory and enforcement challenges towards embedding effective CSR practices in Nigeria, especially amongst companies in the extractive industry. The study analyses the theoretical underpinnings of corporate actions and CSR practices within a socio-legal context; juxtaposed against acceptable objectives of law within the society, the study queries the dominant corporate law ideology which appears to encourage corporate law isolation from other disciplines in the provision of effective remedies for human rights, economic rights and environmental abuses using the corporate form. Relevant legal and regulatory techniques (at the domestic level, in selected foreign jurisdictions and international organizations) towards embedding effective CSR are also critically examined. The study clarifies that CSR is a neutral construct to which different regulatory mechanisms (voluntary or mandatory) may be applicable. The study finds that the majority of regulatory techniques feature self-regulatory, internal and voluntary mechanisms which appear to have undermined CSR regulation and enforcement having occasioned the opportunity by many businesses to 'greenwash' CSR. In the end and by way of response to the inadequacies of prevalent self-regulatory CSR framework, the study synthesizes a corporate law theory called the Responsible Stakeholder Model (RSM). Based on the assumptions of the RSM, the thesis suggests an alternative meta-regulatory CSR framework in Nigeria within which much more corporate social responsible operations may be anticipated, even from the so-called 'greenwashing' companies.

Keywords: *Companies, Conceptual, Effective CSR, Extractive Industry, Framework, Nigerian.*

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The fundamental assumptions of capitalism and the shareholder primacy theory have dominated corporate law and practice, particularly in the Anglo-American world.[1] Capitalism appears to have introduced efficiency in the distribution of resources by ensuring free flow of capital to the business community and wealth maximisation for entrepreneurs. However, both the capitalist and the shareholder primacy models are not without their deficiencies especially in the wake of market failures, financial crises, economic imbalances, human right abuses, environmental degradation and social exclusion.[2] These recurring market failures, human rights abuses and other infringements resulting from corporate abuses appear to have increased agitations for checks on corporate power and systemic reforms in corporate governance. From corporate governance reform discourse, the idea of corporate social responsibility (CSR) arose as some form of a countervailing power to raw exercise of corporate power.

---

1 See generally, Hadden, T., *Company Law and Capitalism*, (Weidefeild and Nicolson, London, 1972); United Kingdom's Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework* (Department of Trade and Industry, 1999) 37; Dine, J., 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' [2012] 3 (1) *Journal of Human Rights and the Environment* 44, 57; Keay, A., 'Stakeholder Theory in Corporate Law: Has It Got What It Takes?' [2010] 3 (9) *Rich. J. Global L. & Bus*. 249; (hereinafter simply 'Keay Stakeholder Theory') and Keay, A., 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *Modern Law Review* 663 electronically available at http://ssrn.com/abstract=1889236 last accessed 20th November, 2016 (hereinafter simply 'Keay Ascertaining Corporate Objective').

2 Parkinson, J. E., *Corporate Power and Responsibility* (Clarendon Press, Oxford 1993) 23; Ireland, P., `Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (1996) 17 *Journal of Legal History* 40 (Hereinafter simply 'Ireland Capitalism without Capitalist'); see also Ireland, P., 'Company Law and the Myth of Shareholder Ownership*'* [1999] 62 (1) *Modern Law Review* 32, footnotes 40 to 52 and at 164 to 168; and also, Emeseh, E., *et al*, 'Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?' (2010) II *German Law Journal* 230; and MacLeod, S., 'Towards Normative Transformation: Re-conceptualising Business and Human Rights', Unpublished PhD Thesis, University of Glasgow, 2012, available at http://theses.gla.ac.uk/3714/1/2012macleodphd.pdf last accessed 5th November, 2016; and also Kaplow, L., 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke Law Review* 557.

CSR was originally conceived by Engel in terms of 'the obligations and inclinations, if any, of corporations organised for profit, voluntarily to pursue social ends that conflict with the presumptive shareholder desire to maximise profit.'[3] CSR was seen as anything done by an enterprise outside its core operational objects. However, a more recent definition of CSR in the 21st century was given by Campbell. He defined CSR as 'obligations (social or legal) which concern the major actual and possible social impact of the activities of the corporation in question, whether or not these activities are intended or do in fact promote the profitability of the particular corporation.'[4] Similarly, according to Horrigan, CSR in recent times has become a business behavioural philosophy or better still a corporate governance model enjoining companies not just to *do well* in terms of economic profits but also be responsible, socially, ethically, economically and very importantly legally.[5] The recent definitions by Eijsbouts also suggest that CSR now transcends the idea of simply *giving back to the society* out of the surpluses of businesses.[6]

The most significant contribution of CSR to global economic reforms would seem to be that it is no longer sufficient for businesses to claim success by simply declaring huge profits for investors. Nowadays, corporate success appears no longer simply understood as the success of just the shareholders as a whole,[7] but probably of a stakeholder group of the business, of which group shareholders are included. Companies are now expected to be intrinsically responsible and create: returns for their shareholders; good products and services for their customers; good

---

3 Engel, D., 'An Approach to Corporate Social Responsibility', (1979) 32 *Stanford Law Review* 1, 5 and 6.

4 Campbell, T., 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach', in McBarnet, D., Voiculescu, A., and Campbell, T., (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, (CUP, Cambridge, 2007) 532-33 and 541-42.

5 Horrigan, B., *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham, UK, 2010) 13; see generally, Amodu, N., 'Effective Corporate Social Responsibility in Corporate Nigeria: Understanding the Matters Arising', Conference Paper (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013).

6 Eijsbouts, J., *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* (Inaugural Lecture, Maastricht University, 2011) 56.

7 Farrar, J.H., *Company Law* (2nd Edn Butterworths, London 1988) 12; see also Davies, P.L., *Gower and Davies' Principles of Modern Company Law* (8th edn Sweet & Maxwell, 2008) 510 and 511.

job and wages for their employees and communities; benefit the public together with the natural environment and generally demonstrate responsibility in the exercise of corporate power by effectively balancing different stakeholder interests in the course of making profits.[8]

CSR is usually discussed in connection with the activities of multinational companies (MNCs) and transnational corporations (TNCs) because of their enormous powers and influence (negative or positive) on the world economy. This is not however saying that CSR only applies to them. Intrinsic, effective and efficient CSR is a business governance and management model applicable to all corporate forms: companies and corporations, small or big, domestic or transnational, private or public.[9]

1.2 Statement of the Problem

Although CSR activities benefit companies in manifold ways as they are largely able to avoid unnecessary costs associated with irresponsible corporate behavior,[10] embedding effective CSR practices in businesses is nonetheless attended by conceptual problems. A few academics, corporate managers and business owners continue to view CSR as just a source of undue public pressure, a detraction from serious business[11] and a deviation from the primary economic objects in doing business which is primarily profit maximization for shareholders.[12] This thesis

---

8 Cherry, A. M. and Sneirson, J. F., 'Chevron, Greenwashing, and the Myth of "Green Oil Companies"' (2012) 3 *WASH. & LEE J. ENERGY, CLIMATE & EVN'T* 133, 141; see also, Villiers, C., 'Corporate Law corporate power and corporate social responsibility' in *Perspectives on Corporate Social Responsibility*, Boeger, N., Murray, R., and Villiers, C., (eds) (Edward Elgar, Cheltenham, 2008) 97.

9 Ruggie, J., Final Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework' A/HRC/17/31, 21 March 2011 http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf last accessed 5th November, 2016, General Principles at 6 and Principle 14; see also, Raynard, P., and Forstater, M., *Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries* (United Nations Industrial Development Organization, Vienna 2002) 2.

10 Ako, R.T., Obokoh, L.O., and Okonmah, P., 'Forging Peaceful Relationships between Oil-Companies and Host-Communities in Nigeria's Delta Region: A Stakeholder's Perspective to Corporate Social Responsibility' [2009] 3 (2) *Journal of Enterprising Communities* 205, 206; see also Cherry and Sneirson *supra* note 8 at 141 and 142.

11 Smerdon, R., *A Practical Guide to Corporate Governance,* (3rd edn, Sweet & Maxwell, London, 2007) 470.

12 Dodge *v*. Ford Motor Co. (1919) 204 Mich. 459; see also Wolf, M., 'Sleep-walking with the Enemy: Corporate Social Responsibility distorts the Market by Deflecting Business from its Primary Role of Profit Generation',

argues, amongst other points, for the need for companies to rather view CSR as a catalyst business governance model to succeed.

Further, while CSR appears very popular, it has perhaps become a victim of its own popularity. Every business claims to be involved in CSR, whether genuinely or otherwise;[13] while many companies may actually be conducting their businesses responsibly and communicating same effectively to stakeholders, others rather constitute free riders, paying lip-service[14] to CSR and involved only in greenwashing.[15]

Greenwashing appears to have also dovetailed into regulatory and enforcement debates. There are concerns regarding CSR conception as mere tokenism or voluntary corporate charity and subject to the whims and caprices of the companies involved; a conception that seems to have been popularized at the European Union (EU).[16] It has thus been difficult to embed effective

---

Financial Times, (May 16th, 2001); see also, Owen, G., 'Time to Promote Trust, Inside the Company and Out', *Financial Times, (*August 30th, 2002); see also, Lambooy, T., *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000-2010 and Case Studies* (Kluwer, 2010) 17. *Cf:* It is instructive to note that there is no corporate statute in any jurisdiction around the world specifically stating that the sole purpose of a corporation is to maximize profits for its shareholders. See generally for this position, section 279 (3) to (5) of Companies and Allied Matters Act, Cap C20, LFN, 2004 (CAMA); and, Nelson II, W.A., 'Post-Citizens United: Using Shareholder Derivative Claims of Corporate Waste to Challenge Corporate Independent Political Expenditures' (2012) 13 *Nevada Law Journal* 134, 141citing Elhauge, E., 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 *N. Y. U. L. Rev*. 733, 763.

13 The famous Enron corporate governance scandal, the British Petroleum oil spill saga in the gulf of Mexico despite its 'green operations' tagged 'Beyond Petroleum', the popular 2006 'cover-up' involving Cadbury Schweppes which was forced to recall chocolate bars on a large scale after discovering tiny amounts of undisclosed salmonella are exemplary in the circumstance; Smerdon *supra* note 11 at 441. See also the recent shocking revelations of Volkswagen's manipulated emission tests just after receiving the Dow Jones Sustainability Indices (DJSI) award as the 'most sustainable automaker'. See generally, Guarino, D., 'Volkswagen AG to be Removed from the Dow Jones Sustainability Indices' (New York and Zurich, September 29, 2015) available at http://www.sustainability-indices.com/images/150929-statement-vw-exclusion_vdef.pdf last accessed 5th November, 2016.

14 Nwete, B., 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?' [2007] 8 (4) *German Law Journal* 311, 313.

15 Zerk, J., *Multinational and Corporate Social Responsibilities: Limitations and Opportunities in International Law* (CUP, Cambridge 2006) 100 and 101; see the general description of such greenwash and lip service to CSR as "faux CSR" in Cherry, M., 'The Law and Economics of Corporate Social Responsibility and Greenwashing' (2014) 14 *U.C. Davis Bus. L. Journal* 281 to 303; and Cherry and Sneirson *supra* note 8 at 140. According to Cherry and Sneirson, 'greenwashing' - meaning making fake, insincere, dubious, inflated or misleading environmental claims – is said to have first been used by an American environmentalist, Jay Westerveld in 1986 in response to a hotel's efforts to encourage guests to re-use towels in order to help the environment by saving water and energy. Westerveld had suspected that the true motivation was profit maximization for the hotel. See Cherry and Sneirson *supra* note 8 at 140 and 141.

16 European Union, 'Communication of European Union Country's Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility', COM (2001) 366 Final (July 18, 2001); see also

and intrinsic CSR values within the business community as a result of (what this thesis will argue) desperate cling to voluntary and self-regulatory CSR techniques at intergovernmental level. This difficulty remains a clog in the wheel of advancing an effective and efficient CSR regulatory framework at the global level that should legally bind companies. Indeed, under the prevalent voluntary self-regulatory regime, relatively few companies have been held liable for actions or activities that may be deemed irresponsible even under the present arguably lax ideological and regulatory framework. While better justificatory details in respect of the extent of holding companies liable under the so-called lax framework are provided in Chapter 5 of this thesis, at this stage, it instructive to state that the prevailing framework essentially involves the use of codes of conduct and non-binding guidelines for businesses; such codes and guidelines are largely premised on the ultimate threat of reputational loss for companies involved. Research shows this voluntary and soft law self-regulatory regime has not been very effective within the business community.[17] Again, this point is addressed in fuller details under discussions on CSR regulation and enforcement in Chapter 5.

Finally, CSR practices within the Nigerian business community (as in many developing[18] economies) including amongst multinational enterprises (MNEs) in the extractive industry also compounds the conceptual challenges sought to be addressed in this thesis;[19] many business

Wouters, J., and Chanet, L., 'Corporate Human Rights Responsibilities: A European Perspective,' (2008) 6 *Nw U.J. Int'l Hum. Rts* 262 at 266 – 267 paras 26 and 27.

17 MacLeod *supra* note 2 at 75; Horrigan *supra* note 5 at 65; Yu, X., 'Impacts of Corporate Code of Conduct on Labor Standards: A Case Study of Reebok's Athletic Footwear Supplier Factory in China' (2008) 81 *Journal of Business Ethics* 513 to 529; and Cheffins, B. R., *Company Law: Theory, Structure and* Operation (Clarendon Press, Oxford 1997) 125.

18 See for instance, Mukthar, J., and Pavithran, S., 'Corporate Social Responsibility in Birla Group of Companies' Conference Paper (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013); see also Ollong, K. A., 'Corporate Social Responsibility and Community Development in Cameroon' Conference Paper (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013). *Cf:* Interestingly, South Africa is one of the developing economies where this conceptual problem appears not to exist. CSR and sustainability issues are discussed at an advanced level, devoid of the restrictive corporate charity conception. See Institute of Directors in Southern Africa, 'King Report on Governance for South Africa', and the 'King Code of Governance Principles' 2009 at 51 (Hereinafter simply 'King III').

19 The foundation of the problem appears to be the fact there has been no reference to CSR or even to its related ideological theory of stakeholder theory in many leading corporate law texts. See for instance, Orojo, J. O.,

actors in Nigeria still restrictively conceive CSR in terms of voluntary corporate charity, donations and just 'giving back to the society.'[20] CSR is thus viewed in light of a company accumulating and setting aside some part of its profit and at year end, doling same out in philanthropy and as donations towards community development. This restrictive conception appears to also currently undermine CSR legal and regulatory framework in Nigeria. Among other goals, this thesis seeks to conceptually clarify CSR beyond the restrictive view as corporate charity and community development projects which only constitute a sub-set of CSR.

1.3 Research Aim and Objectives

The aim of this study is to delineate the scope of a meta-regulatory CSR framework towards embedding effective CSR in the Nigerian extractive industry. Towards achieving this aim, the following objectives were set:

1. To undertake a conceptual analysis of CSR towards improved operationalization of its core values in Nigeria;
2. To investigate the fundamental assumptions underlying corporate practices and CSR;
3. To re-theorize corporate law theories and corporate governance models underpinning corporate practices and CSR;
4. To examine the features of CSR regulation and enforcement in the business community; and

Company Law and Practice in Nigeria (5th edn, LexisNexis, 2008); Ajogwu, F., *Corporate Governance in Nigeria: Law and Practice* (Centre for Commercial Law Development, Lagos, 2007); Barnes, K.D., *Cases and Materials on Nigerian Company Law* (Samadex Printing Works, Ibadan, 1992); *Cf*: Abugu, J. E. O., *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers, 2014) which not only dedicates a chapter to CSR but also explains the frontiers of the subject especially in its modern conception.

[20] FSDH Merchant Bank Limited, 'Corporate Social Responsibility (CSR) Activities in 2015', *The Guardian*, 19th January, 2016; Agary, K., 'Is CSR worth the trouble for companies? (1)' *Punch*, 26th July, 2015; see also Akingbolu, R., 'Building Equity through CSR: The Grand Oak Example', *Thisday*, 22th March, 2013, 36; and Akingbolu, R., 'CSR: Groups Hail Nigerite's Efforts', *Thisday*, 14th May, 2010. There are many newspaper columns such as these where companies pride themselves as 'good corporate citizens' and displaying their CSR conception and practices as confined to corporate donations and at its best, community development projects. *Cf*: Oyewole, N. and Azeez, O., 'Business School Netherlands (BSN) Nigeria Introduces 3 CSR Initiatives' *Daily Trust*, 23rd December, 2015 demonstrating a good grasp of the CSR concept beyond mere tokenism.

5. To assess the legal and regulatory framework of CSR in the Nigerian extractive industry.

1.4 Operational Definition of Terms

The following important terms in this thesis bear the following meanings:

1.4.1 *Corporate Social Responsibility (CSR) or Corporate Responsibility (CR)*

CSR or CR denotes the responsibility of a company to consider, manage and balance the social, economic and environmental impacts of its activities.[21] It may not be construed as voluntary giving back to the society or simply philanthropic corporate actions done beyond the requirements of the law.[22]

1.4.2 *Company and Corporation*

Despite sometimes very abstract meaning attributable to words such as *company*, *business*, or *corporation* in different jurisdictions around the world,[23] the terms are interchangeably used in this thesis to connote a legal entity or an incorporated association

---

21 Parliamentary Joint Committee on Corporate and Social Responsibility, *Corporate Responsibility: Managing Risk and Creating Value*, (Parliament of Australia, 2006)) xiii; also see King III *supra* note 18 at 51. *Cf*: Osuji, O., 'Corporate Social Responsibility, Globalisation, Developing Countries and International Best Standards: The Incoherence of Prescriptive Regulation', Conference Paper (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013). At footnotes 41 to 46 and accompanying texts, Osuji appears to differentiate between CSR and CR, conceptualising CSR largely as a moralistic ethical concept beyond legal requirements and CR as being underpinned by legal requirements.

22 McBarnet, D., 'Corporate Social Responsibility Beyond law, Through Law, for Law' (University of Edinburgh School of Law Research Paper, No.3, Augenstein, D., (ed), 2009) 1 and 18; see also Cowe, R., *Investing in Social Responsibility: Risks and Opportunities* (Association of British Insurers, London 2001)1. *Cf:* Section 135 of the 2013 Indian Companies Act with effect from 1st April, 2014 available online at http://www.mca.gov.in/D90E2FD7-99B9-4CB8-870F-0151E8094C1C/FinalDownload/DownloadId-20D934C8FD5E06E61A081F2FA6703697/D90E2FD7-99B9-4CB8-870F-0151E8094C1C/Ministry/pdf/CompaniesAct2013.pdf last accessed 5th November, 2016 with its CSR perspective in terms of community development projects such as: eradicating extreme hunger and poverty; promotion of education; promoting gender equality and empowering women; reducing child mortality and improving maternal health amongst others; see further Schedule VII of the 2013 Indian Company's Act. The attending problem with this conception of the CSR idea is the usual reduction of CSR to a financial charge or tax. In order to avoid running into such murky waters, this research deviates from such rather narrow CSR conception.

23 Armour, J., Hansmann, H., and Kraakman, R., 'The Essential Elements of Corporate Law: What is Corporate Law?' in *The Anatomy of Corporate Law: A Comparative and Functional Approach*, Kraakman, R., *et al* (eds) (Oxford University Press, 2009) 25, footnote 79.

of persons - regardless of size[24] - carrying on commercial activities using the corporate form.

1.4.3 *Extractive Industry*

Although the phrase 'extractive industry' is sometimes loosely confined to mean activities in the oil and gas sector, this thesis has however used the phrase to consist of oil and gas extraction, mining, dredging and quarrying. Consequently, with a view to affording an overarching discussion of the extractive industry, legal reviews and regulatory assessments in this thesis have been extended beyond the oil and gas sector.

1.4.4 *Greenwashing and Free Riding*

The thesis uses these terms interchangeably to mean fake, insincere, inflated or misleading CSR representations by some companies. Accordingly, other parts of speech and grammatical forms of these terms shall have corresponding meanings.

1.4.5 *Responsible Stakeholder Model (RSM)*

RSM refers to a corporate law and governance model which assumes the need to enhance shareholder value (wealth creation for shareholders) but conjunctively, safeguards the aggregate welfare of stakeholders who are relevant to the long term survival of the company. It places positive duty on companies to effectively balance both shareholder and stakeholder interests in reaching corporate decisions. A diagram illustrating the theoretical formulation together with the policy and regulatory features of the RSM is provided in Chapter 5 of this thesis.

---

[24] Many prevailing CSR regulatory framework assume that CSR principles should be applicable to all companies and business regardless of size. See Ruggie *supra* note 9 at Principle 14; Eijsbouts *supra* note 6 at 41 and Okon, E., 'Corporate Social Responsibility by Companies: The Liberal Perspective' (1997) *Nigerian Current Law Review* 193, 201.

1.4.6 *Social Efficiency*

This is used in this thesis to represent the employment of the principles of corporate law to promote public interest and advance the aggregate welfare of all who are affected by a company's activities, including the shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment.

1.5 Research Scope and Delimitation

CSR is both multidisciplinary and interdisciplinary. Accordingly, it is capable of several definitions and also appears differently to experts and scholars across different disciplines and fields. For the avoidance of unchecked generalization, while there are allusions to business management, human rights, environmental, labour law and international law principles in this thesis, such allusions are only necessitated for an overarching discussion of the socio-legal subject; the thesis has not made any postulations or advanced analysis in such fields. Rather, it places emphasis on corporate law and governance. It explores CSR and corporate law principles with a view to synthesizing ideas and principles related to embedding effective CSR in Nigerian companies by way of, *inter alia*, enactment of CSR-inspired regulatory legislation[25] or integrating meta-regulatory CSR provisions into existing laws such as the Nigerian

[25] Already in places such as the UK, Denmark and India, there are either existing legislated corporate law CSR obligations on companies or legislative proposals to bound companies by CSR obligations. See Lambooy *supra* note 12 at 25 and 41. Denmark was the first country in Europe to require CSR (integrated and non-financial) reporting systems for its bigger companies. See generally, Danish Financial Statements Act 2008, operative from 1st January, 2009.

Companies and Allied Matters Act[26] (CAMA) or otherwise incentivizing effective CSR practices by corporate bodies.[27]

Aside the corporate law perspective, this thesis also focuses its investigations and legal assessments on the Nigerian extractive industry. Beyond analyzing the overarching legislative proposal in the Nigerian oil and gas industry (that is, the Petroleum Industry Bill), research was extended to other relevant extractive industry legal framework such as the Nigerian Minerals and Mining Act, 2007 and the Nigerian Extractive Industries Transparency Initiative Act, 2007. The research focus on CSR practices in the Nigerian extractive industry is due to the following reasons: the fact that CSR discussions in Nigeria originated from observed corporate irresponsibility (especially human rights violations and environmental degradation) by multinational companies (MNCs) in the industry;[28] the significant contribution and impact of the industry to the Nigerian economy;[29] and for the purpose of facilitating further research and future empirical tests on the research findings within a delineated and manageable purview.

Structurally, the thesis is divided into six (6) chapters as follows:

---

[26] Cap C20, Laws of the Federation of Nigeria (LFN), 2004.This is eventually done in Chapter 5 of this thesis. In the 2006 English Companies Act, sections 172 and 417 (5) thereof, CSR obligations have already found their way into the body of English corporate law and practice. The combined effect of the said provisions amongst other provisions of the English Companies Act 2006, is to implement the European Union Fourth Directive on annual accounts (popularly called the Accounts Modernisation Directive) which imposes obligations on companies to consider and report on non-financial (social and environmental) matters in their annual reports. The Accounts Modernisation Directive states that companies in member states shall report annually on 'non-financial key performance indicators relevant to the particular business, including information relating to environment and employee matters' in relation to the worldwide operations of that company. See generally, Council Directive, 2003/51/EC, 18th June, 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003.

[27] In the USA for instance, evidence of effective ethics and CSR practices constitute a mitigating factor in sentencing corporate crime. See chapter 8 of the 2015 United States Sentencing Commission Guidelines Manual available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_8.pdf last accessed 4th January, 2016.

[28] Amao, O., 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' [2008] 1 (52) *Journal of African Law* 89 -113; see also Idemudia, U., and Ite, U.E., 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (2006) 13 *Corp Soc Resp Environ Mgmt* 194, 195; and Ijaiya, H., 'Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria' [2014] 3 (1) *Journal of Sustainable Development Law and Policy* 60.

[29] Ekhator, E. O., 'Corporate Social Responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: An Appraisal' (2014) 28 *Cadernos de Estudos Africanos* 119, 127.

Chapter one introduces the thesis and offers a general overview of the thesis presentation. It delineates the thesis into areas including Background to the Study, Statement of the Problem, Research Aim and Objectives, Operational Definition of Terms, Research Scope and Delimitation, Research Questions, Theoretical Framework and Research Methodology.

Chapter two sets the agenda for a critical inquiry into the CSR conception in corporate governance discourse. It reviews relevant literature on, *inter alia*, the emergence of CSR from corporate governance discourse, historical perspectives, definitions and popular debates surrounding CSR. The chapter also embodies literature on the interrogation of the popular restrictive CSR conception in Nigeria.

Chapter three undertakes an investigation of the theoretical underpinnings of companies and their CSR practices. It highlights the shortcomings and defects of the analyzed theoretical models in providing acceptable corporate objective or offering workable normative foundation for effective CSR practices.

Chapter four examines both extant and proposed legal and regulatory framework for CSR practices amongst companies in the Nigerian extractive industry. The chapter underscores the implications of: the popular restrictive CSR notion in Nigeria; the faulty legal transplantation of doctrines to Nigeria; and incoherence in primary and secondary legislation on effective CSR regulation and enforcement within the Nigerian extractive industry. The chapter not only argues for reforms to the industry existing regulatory framework but also sets the agenda for the formulation of an alternative regulatory approach towards effective CSR practices within the Nigerian extractive industry.

Chapter five largely rejects existing corporate law models of shareholder primacy and *stakeholderism* and in their place argues for an alternative theoretical model called the Responsible Stakeholder Model (RSM). The thesis elucidated on the synthesized RSM and its

policy ramifications as an effective technique towards embedding effective CSR in the business community. The chapter also analyzed the relevance of international regulatory dialogues such as the United Nations Global Compact (UNGC), the United Nations Guiding Principles on the Implementation of the Protect, Respect and Remedy Framework (UNGP) and the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines) to CSR regulation and their usefulness within the RSM framework. After comparing RSM to similar alternative corporate objective formulations such as the Entity Maximisation and Sustainability Model (EMS), the chapter also appraises RSM as an alternative meta-regulatory technique in the Nigerian extractive industry towards filling the gap created by the inadequacies of prevailing voluntary CSR regulatory mechanisms.

Chapter six concludes with summaries, findings, contributions to knowledge and recommendations.

1.6 Research Questions

The study seeks to provide answers to certain questions with a view to making fundamental submissions towards effective CSR practices within the Nigerian extractive industry. The questions include:

1. What concepts and principles underpin CSR in corporate governance discourse?
2. What fundamental assumptions of corporate law theories inform or should inform corporate behaviour and CSR?
3. To what extent can corporate law be isolated from other disciplines against sustained societal pressure for effective CSR practices?
4. What features of regulation currently underpin CSR practices in the business community?
5. Under what legal and regulatory framework are CSR practices embedded and measured in Nigeria?

6. Within what alternative enforcement regime can effective CSR practices be better embedded and measured in the Nigerian extractive industry?

1.7 Theoretical Framework

There are different theoretical approaches and models from which corporate actions and CSR may be and has been analysed.[30] The goal of theorizing about companies and their CSR practices in the study is towards making informed postulations about a model to better embed effective CSR practices. The following relevant theories on CSR were accordingly discussed:

1.7.1 *Shareholder Primacy Model*

The leading proponents of the Shareholder Primacy model include the Nobel Prize winning economist, Milton Friedman, Professor Friedrich Hayek and more recently Professors Henry Hansmann and Reinier Kraakman amongst others. The model assumes that corporate managers have an obligation primarily, if not exclusively, to shareholders and the maximization of their wealth.[31] Put differently by Abugu, companies should be run for the sole and exclusive benefit of shareholders - their owners.[32] The theory is also based on the fundamental assumption that companies and businesses are private properties[33] of their owners and as such the success of the company (overall economic performance) must be taken as the success of the shareholders. Shareholder primacy model can be summarised in the following principles:

(i) Shareholders alone are the parties to whom corporate managers should be accountable;

---

30 Garriga, E., and Mêlé, D., 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) *Journal of Business Ethics* 53, 65; see also Amodu, N., 'Theoretical Underpinnings of Corporate Social Responsibility: Victim of Ideological Clashes' [2014] 3 (6) *Journal of Corporate Governance* 1160, 1214.

31 Parkinson, J., 'Models of the Company and the Employment Relationship' (2003) *British Journal of Industrial Relations* 481, 482 (hereinafter simply 'Parkinson Models of the Company'); Fairfax, L. M., 'Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric' (2007) 59 *FLA. L. REV*. 771, 779 citing Bainbridge, S., 'Director Primacy: The Means and Ends of Corporate Governance' (1997) *NW. U. L. Rev*. 547, 563. *Cf:* See Nelson II *supra* note 12 at 141.

32 Abugu, J., 'Primacy of Shareholders' Interests and the Relevance of Stakeholder Economic Theories' (2013) 7 *Company Lawyer* 201, 204, 205 *et seq*.

33 Whitehouse, L., 'Corporate Social Responsibility as Regulation: The Argument from Democracy' in J O'Brien (ed), *Governing the Corporation, Regulation and Corporate Governance in an Age of Scandal and Global Market* (John Wiley & Sons, West Sussex, 2005) 156.

(ii) Social welfare is best served by encouraging corporate managers to pursue corporate interests;

(iii) Non-shareholder protection is important but not primarily the province of corporate law.[34]

In view of the modern realities in the business community, this Shareholder Primacy model (together with its variant model in the UK called the 'Enlightened Shareholder Value'[35]) has not been very useful to this study towards embedding effective CSR practices. Although some of its other assumptions have been used in the synthesis of the RSM, however, because of its faulty fundamental assumption that enhancing shareholder value and enhancing stakeholder values are mutually exclusive activities, the thesis principally rejects this theoretical model, finding it as morally untenable and out of tune with prevailing social norms.[36]

1.7.2 *Stakeholder Model*

While organised thinking about the Stakeholder model began with Edward Freeman in his 1984 seminal book 'Strategic Management: A Stakeholder Approach', and the 1932 classical work of Professors Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* made references to a group outside the shareholders, Professor Merrick E. Dodd is generally

---

34 Hansmann, H., and Kraakman, R., 'The End of History for Corporate Law' in Gordon, J., and Roe, M., (eds) *Convergence and Persistence in Corporate Governance* (CUP, Cambridge, 2004) 97; see also Confederation of British Industries, *Boards Without Tiers: A CBI Contribution to the Debate* (CBI, London, 1996) 8; and Parkinson Models of the Company *supra* note 31 at 482.

35 This principle of Enlightened Shareholder Value is similar to the Australian 'Business Approach to Corporate Responsibility' and underlies the 'Business Case' model for CSR which enjoins corporate managers to consider stakeholder interests and report on non-financial matters of CSR like employee or environmental matters so long as it will make *business sense* (cost-benefit implications) to so do and such considerations are in relation to the overall economic performance of the company and without prejudice to enhancing shareholder value; see Villiers *supra* note 8 at 85, 97, 98 *et seq.*.

36 Parkinson Models of the Company *supra* note 31 at 483; Donaldson, T. and Preston, L. E., 'The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications', (1995) 20 *The Academy of Management Review* 65, 88; Johnson, L., 'The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law' (1990) 68 *Texas Law Review* 865, 934; see also Bolodeoku, I. O., 'Economic Theories of the Corporation and Corporate Governance: A Critique' (2002) *J.B.L.* 420; and Bolodeoku, I. O., 'Contractarianism and Corporate Law: Alternative Explanations to the Law's Mandatory and Enabling/Default Contents' [2005] 13 (2) *Cardozo Journal of International and Comparative Law* 433. *Cf.* Miller, R. T., 'The Coasean Dissolution of Corporate Social Responsibility' [2014] 17 (2) *Chapman Law Review* 28, 23 and 26.

considered as the father of the stakeholder model from his 1932 Harvard Law Review article, 'For Whom are Corporate Managers Trustees?'[37] Under this model, it is assumed that a company ought to exist for the mutual benefit of those with relevant stakes or interests in or against the company (usually called constituents or stakeholders) as a going concern.[38] The stakeholders, aside the shareholders, include those with 'stakes' or 'interests' in the company such as creditors, suppliers, consumers, employees, local communities, the society, and the environment amongst others. Under the model, no singular interest of any stakeholder is particularly more important than the other. All such interests from different constituents must be balanced in determining the success of the business.[39] This theory has provided justifications to many academic scholars and corporate managers towards integrating CSR in businesses.

Especially when compared with the assumptions of the shareholder primacy model, this thesis considers the stakeholder model very useful as it is better favourably disposed to effective embedding of the core values of CSR in companies; in other words, more businesses can act or omit to act in the interest of not just the business investors (today's needs) but also in the interest of all stakeholders including the environment and the needs of future generations.

However, the biggest shortcoming of the stakeholder model appears in its assumption that shareholder interests and other (unspecified) stakeholder rights are equal[40] (no priorities) in

---

37 Dodd, M.E., 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145; see also Freeman, E., *Strategic Management: A Stakeholder Approach* (Pitman, Boston 1984) and Berle Jr., A. A. and Means, G. C., *The Modern Corporation and Private Property*, (The Macmillan Company, New York, 1932). Andrew Keay actually traced the stakeholder theory to 17th century work of the German social theorist, Johannes Atthusius. See Keay Stakeholder Theory *supra* note 1 at footnote 17 citing Orts, E., 'A North American Legal Perspective on Stakeholder Management Theory' in *Perspectives on Company Law* (Patfield, M. L., ed., 1997) 170.

38 Parkinson Models of the Company *supra* note 31 at 495; see also Parkinson *supra* note 2 at 310; and generally, Freeman *supra* note 37; and United Nations Conference on Trade and Development, *Guidance on Good Practices in Corporate Governance Disclosures* (United Nations, New York and Geneva, 2006) 7.

39 Farrar *supra* note 7 at 12.

40 Parkinson Models of the Company *supra* note 31 at 495; the stakeholder theorists argue that all interests, shareholders' and stakeholders alike, are to be managed, preserved and protected equally and the protection of stakeholder interests should be seen as an end in itself not a means towards protection of shareholders' interests. See Keay Stakeholder Theory *supra* note 1 at 256.

any existential or survival discourse of companies. Further, the stakeholder model also appears to lag in the provision of practicable paradigm with which corporate managers can effectively balance the *equal* interests of all stakeholders and in the best interest of the company. This shortcoming lends credence to the criticism that CSR, as underpinned by this model, is just a detraction of corporate managers from serious business.[41] This shortcoming essentially informs the deviation of this thesis from wholesale acceptance of CSR policy prescriptions within the stakeholder model.

1.7.3 *Economic Contractualism / Nexus of Contracts Theory*

Notwithstanding that Michael Jensen and William Meckling are regarded as the foremost protagonists of this theory, the primary expositors of the Nexus of Contracts theory or Economic Contractualism theory as it is also known, include Eugene Fama and more especially Judge Frank Easterbrook and Daniel Fischel. The theory is relevant to discussions in this thesis as it provides the notional foundation for the shareholder primacy model earlier discussed[42] and is the leading legal and economic corporate law theory in Anglo- American literature and beyond.[43]

According to the economic contractarian, the sole purpose of the corporation is to maximize shareholders' profits and that other stakeholder groups are protected to the extent of the provisions of their contracts with the company.[44] The theory brings to bear the voluntary, free market-oriented nature of the company and dismisses the notion that companies owe their

41 Parkinson Models of the Company *supra* note 31 at 498.

42 Keay, A., 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 *Sydney Law Review* 577, 580; see also Bradley, M., Schipani, C., Sundaram A., and Walsh J., 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 62 *Law and Contemporary Problems* 9, 38.

43 Parkinson Models of the Company *supra* note 31 at 485.

44 Amao, O., 'Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria' (2007) 29 *Dublin University Law Journal* 312, 313 and 314 (hereinafter 'Amao Reconstructing of Corporation'); Abugu *supra* note 19 at 213 and 214.

existence and operations to state creation or any justifications for state interventionism.[45] It states that a business corporation is a mere central hub for series of contractual relationships.[46] Easterbrook and Fischel described the theory as 'a short hand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves'.[47] Accordingly, the firm or company itself is taken as a mere fiction,[48] a mere nexus or link for contractual relationships involving the business owners, the creditors, corporate managers, customers, suppliers, employees amongst other constituents. Therefore, corporate law is taken only as a fictional extension of contract law and whose business really should be focusing on facilitating the contractual interrelationships in the most efficient manner.[49] This theory is hinged on the fundamental notions of *Rational Actors* and *Efficiency*. It is argued that a combination of the nexus of contracts framework and the freedom of individual contractors acting accordingly in a rational manner will result in an effective and efficient allocation of resources in the society.[50]

This study argues that the theory will limit the capability of businesses to demonstrate effective CSR towards many stakeholders especially those without 'contract' with the company.[51] The theory, using the instrumentality of contracts and for the purpose of enhancing shareholder value, affords the externalisation of costs, shifting of risks to stakeholders like employees, creditors *et cetera* and probably (in cases of market failures) misallocation of resources.[52] It

---

45 Hayden G. M., and Bodie, M. T., 'The Uncorporation and the Unravelling of the "Nexus of Contracts" Theory' (2011) 109 *Michigan Law Review* 1127; see also Parkinson Models of the Company *supra* note 31 at 488 and 489.

46 Hayden and Bodie *supra* note 45 at 1129.

47 Easterbrook, F. and Fischel, D., 'The Corporate Contract', (1989) 89 *Columbia Law Review* 1416, 1426.

48 Fama, E., 'Agency Problems and the Theory of the Firm' (1980) 99 *Journal of Political Economy* 288, 290.

49 Butler, H.N. and Ribstein, L.E., 'Opting out of Fiduciary Duties: A Response to the Anti-Contractarian' (1990) 65 *Wash L Rev* 1, 7; see also Miller *supra* note 36 at 25; Hayden and Bodie *supra* note 45 at 1130; and Dine, J., *The Governance of Corporate Groups* (New York, Cambridge University Press, 2000) 10 (Hereinafter simply 'Dine Governance of Groups').

50 Cheffins *supra* note 17 at 4, 5 *et seq.*

51 Parkinson Models of the Company *supra* note 31 at 485.

52 Blair, M. M., 'Shareholder Value, Corporate Governance and Corporate Performance' in *Corporate Governance and Capital Flows in a Global Economy*, Cornelius, P., and Kogut, B., (eds) (Oxford University Press, 2003); see also Parkinson *supra* note 2 at 310.

therefore justifies wealth maximization drive of corporate managers for shareholders at all costs and usually at the expense of the non-contractual stakeholders who may not even be influencers of corporate decisions but which may be necessary in the long term or crucial to the survival of the company.

1.7.4 *The Communitarian Theory*

The leading proponents of the communitarian approach to corporate law include Lawrence E. Mitchell, William Bratton Jnr and David Millon and the theory seeks to regulate and define the legal institution of property and contract in service of social values.[53] Under this theory, a company is therefore not only taken as a concessionary creation of the state but also a veritable state instrument for driving social cohesion, social inclusion and public welfare. The thesis highlights the assumptions of this theory showing its relevance as an extreme thinking in corporate governance discourse in parallel to the individualistic contractarian approach of the Nexus of Contract theory.

Communitarians regard a company as a 'community of interdependence, mutual trust and reciprocal benefit' whereby corporate managers must ensure the company is managed for the benefit of all and any present or potential stakeholders of the company such as creditor, employees, suppliers, customers and local communities where such a company operates.[54]

Therefore, this theory has certain implications:

(i) The company has no strong commercial identity because it has become a political tool with diffused goals;

---

53 See generally, Millon, D. K., 'New Directions in Corporate Law Communitarians, Contractarians, and the Crisis in Corporate Law' (1993) 50 *Wash. & Lee Law Review* 1373; see also Amao Reconstructing of Corporation *supra* note 44 at 315.

54 Millon, D.K., 'Communitarianism in Corporate Law: Foundations and Law Reform Strategies' in Lawrence E Mitchell (ed), *Progressive Corporate Law: New Perspectives on Law, Culture and Society* (Westview Press, 1995) 10.

(ii) The company's diffused goals remove its commercial focus.[55]

(iii) It is very easy to justify or accommodate the interests of other constituents/ stakeholders in the scheme of business affairs.

Although the effectiveness of CSR practices under this theoretical model is in doubt as a result of the pure political tool in which the corporate form may have been adapted, the theory is nonetheless relevant to the thesis as a few of its fundamental assumptions have been useful in the synthesis undertaken in this study.

1.7.5 *The State Concession Theory*

The state concession theory holds the view that companies owe the state their existence and should be grateful for such privilege even in their corporate governance by tolerating state interferences. While this theory is not as extreme as the communitarian theory in seeking to align the interests of both the state and the business community in perfect simulacrum, it however shares in the view that the existence and operation of companies is a concession by the state, which grants the ability to trade using the corporate tool, particularly where they operate with limited liability.[56] By this theory, companies do not exist in reality but are mere fictional creations of the state enjoying the privileges of delegated powers to operate commercially within the bounds[57] granted[58] by the state. While exponents of this theory include Von Savigny, Albert Venn Dicey, John Austin amongst many others, its leading academic proponents include Kent Greenfield and Stephen Bottomley who have further argued

---

55 Dine Governance of Groups *supra* note 49 at 17.

56 Dewey, J., 'The Historic Background of Corporate Legal Personality' (1926) 35 *Yale Law Journal* 655, 666 – 669; see also Dine, Governance of Groups *supra* note 49 at 21.

57 Such bounds can be exemplified in the many rules, whether default, permissive or mandatory, in statutory company laws in many jurisdictions around the world.

58 Concession was first granted to religious orders, local authorities and guild of merchants and later extended to a point of introducing incorporation by registration and limited liability. See the Joint Stock Companies Act 1844 and the Limited Liability Act 1855 cited by Okoye, A.C., 'Re-defining Corporate Social Responsibility as a Legitimizing Force for Corporate Power: To what extent can law and a law-jobs perspective contribute to Corporate Social Responsibility?' at 218 (PhD Thesis, University of Hull, 2012) available at https://hydra.hull.ac.uk/resources/hull:7077 last accessed 5th November, 2016.

for the introduction of public law principles such as constitutionalism, citizenship, legitimacy and separation of powers into corporate governance discourse.[59]

The assumptions of this theory (particularly that companies depend on the state for their existence and powers) have been adapted in this study in combination with the relevant assumptions of the stakeholder model in the formulation of the RSM. The said adaptation becomes imperative since under this theory, as a creation of the state, it is permissible for companies to be taken as political animals which must owe duties to the public.[60]

Concluding under this heading, it is instructive to note that this study synthesises the RSM from a smart admixture of relevant and useful assumptions embedded in the above highlighted models as it has been otherwise challenging to situate effective CSR practices within the theoretical ambits of one single model. The formulation of the RSM and discussions of its fundamental assumptions are contained in Chapter 5.

1.8 Research Methodology

In order to enhance comprehensive discussions, this study is a doctrinal, socio-legal and policy oriented research, largely from corporate law perspective. The doctrinal methodology also affords an improved understanding of the CSR concept as it provides the foundation for an informed interrogation of the restrictive CSR notion popular in Nigeria. The study undertakes library-based desk research of literature and investigations into primary and secondary legal materials and texts on the subject. The socio-legal context of the research methodology is also

---

59 Hobbes, T., *Leviathan,* (Oxford, Blackwell, 1960) chapter 22 at 146; see also Bottomley, S., 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 *Sydney Law Review* 277; Greenfield, K., *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities,* (University of Chicago Press, Chicago, 2006); Fraser, A., 'The Corporation as a Body Politic' (1983) *Telos* No. 57, 5-40 and Parkinson Models of the Company *supra* note 31 at 491 and 497.

60 Campbell, D., 'Why Regulate the Modern Corporation? The Failure of 'Market Failure' in McCahery, J., Picciotto, S., and Scott, C., (eds), *Corporate Control and Accountability* (Clarendon, Oxford, 1993)103.

necessary for an overarching research finding in a multidisciplinary subject and to further juxtapose the research findings against some assumptions in other disciplines that there are sufficient good laws in Nigeria but that implementation has been the one going in the opposite direction.[61]

This thesis also reviews principles and CSR international regulatory dialogues at the level of the UN, EU, UK, USA and India. The said reviews at the above mentioned intergovernmental levels are essential to the study against the background of the appreciable policy innovations and legislative advancements recorded at such levels and from which useful insights are drawn for effective CSR practices in the Nigerian extractive industry.

[61] Ewelukwa, N.O., 'Actualising Economic Development through Privatisation Legal Reform: A General Assessment of Privatisation in Africa with a Specific Case Study of Nigeria and Sub Focus on the Nigerian Electricity Sector' (Unpublished PhD Thesis, Queen Mary, University Of London, 2009) 47 citing: Obayomi, O., 'Nigeria's New Investment Laws' (1997) JBL 593, 603; Akpan, G.S., 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' (2006) IELTR 1, 3 and 11.

CHAPTER TWO

LITERATURE REVIEW

2 Introduction

Corporate Social Responsibility (CSR) is a corporate governance and business management model now used, *inter alia*, as a catalyst for economic prosperity for businesses and sustainable growth in the society; it may although be shrouded in mystery coupled with a number of issues and debates, many scholars in the field however agree that situating CSR within a proper conceptual, operational or regulatory framework offers great prospects for achieving sustainable development for both the business community and the society.

Despite varying definitions, debates, approaches and views on the CSR subject as shall be later demonstrated in this chapter, the subject has nonetheless received general recognition in many jurisdictions around the globe. In other words, notwithstanding differences in specific nomenclature across jurisdictions, CSR has become widely accepted as a business model. Many businesses are now desirous of been tagged as 'good corporate citizen', 'socially responsible', 'environmentally conscious', and 'economically sustainable'.[1] CSR has become commonly known: as 'Corporate Responsibility' (CR) in the United Kingdom (a term now understandably receiving wider adoption amongst commonwealth countries),[2] as 'Corporate Citizenship' (CC) in the United States of America and South Africa, *'Maatschapelijk Verantwoord Ondernemen'*[3] (MVO) in the Netherlands, *'Responsabilite Social des Enterprises'* (RSE) in France,[4] *'Responsabilidad Social Empresarial'* (RSE) in Spain,[5]

1 Amodu, N., 'Effective Corporate Social Responsibility in Corporate Nigeria: Understanding the Matters Arising', Conference Paper, (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013).

2 Smerdon, R., *A Practical Guide to Corporate Governance* (3rd edn, Sweet & Maxwell, London, 2007) 429.

3 Lambooy, T., *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000-2010 and Case Studies* (Kluwer, 2010) 10.

4 *Id*.

5 *Id*.

Responsabilita Socialedelle Impresse'[6] (RSI) in Italy, '*Unternehmerische Gesellschaftsverantwortung'*[7] (UG) in Germany; and in India, such business involved in CSR is referred to as 'Socially Sensitive Corporation'[8] amongst other nomenclatures in other countries. In Nigeria, as will also be expatiated in the course of this chapter, the construct is commonly called CSR and it is usually simply construed as simple corporate charity or 'giving back to the society'.

Notwithstanding the different CSR nomenclatures across different jurisdictions as highlighted above, this chapter reviews literature on the emergence of CSR from corporate governance discourse from both the US and UK perspectives. It also reviews differences in CSR definitional attempts together with their respective associated problems and underscores the interconnectedness between CSR and corporate governance. Further, the chapter not only interrogates the restrictive conception of the CSR subject in Nigeria but also highlights the factors militating against effective CSR practices in Nigeria. Following reviews of relevant literature on CSR conceptual analyses and clarifications, the chapter concludes by setting an agenda for investigations into philosophical underpinnings of corporate actions and CSR with a view to situating effective CSR practices within an acceptable theoretical, regulatory and enforcement framework in the business community.

---

6 *Id.*

7 *Id.*

8 *Id.* However, by virtue of the Indian Companies Act 2013, the most widely used term of *Corporate Social Responsibility* appears to have been endorsed. See sections 134 and 135 of the 2013 Indian Companies Act with effect from 1st April, 2014 available online at http://www.mca.gov.in/D90E2FD7-99B9-4CB8-870F-0151E8094C1C/FinalDownload/DownloadId-20D934C8FD5E06E61A081F2FA6703697/D90E2FD7-99B9-4CB8-870F-0151E8094C1C/Ministry/pdf/CompaniesAct2013.pdf last accessed 20th May, 2016.

2.1 Literature on Emergence of CSR

According to Emeseh *et al*,[9] although capitalism provided efficient means of optimal distribution of resources, it also engendered market failures and the ensuing economic recession and accordingly public trust in businesses has dwindled significantly and the fundamental assumptions of the free market shareholder primacy theory continue to gather queries and rebuttals. Moreover, as confirmed by the 1987 Brundtland Report,[10] certain pertinent ideological and policy questions have become inevitable in the manner in which the world's largest economies are run. There are questions, for instance, surrounding the role of state institutions and governments in the economy; such questions usually relate to whose responsibility it must be to provide public goods and social services in the society. Further, in the wake of recurring near collapse of economies and government bail-outs as usually sourced from public taxes, many queries continue to attend the efficacy of the most developed 'invisible hand' of the free market in sustainably distributing resources in the society.

The apparent inability of the present economic structure to counterbalance recurrent negative ethical, social and environmental developments in terms of poverty reduction, decreasing unemployment and inequality has reinforced arguments for systemic economic reforms and better corporate governance mechanisms. These systemic reforms have taken different shapes including: agitations for social inclusion; and the gradual shift from using the traditional economic parameters of Gross Domestic/National Product to gauge the health of any economy to more progressive and people-oriented (rather than transaction-oriented) parameters such as the *Gross National Happiness*[11] amongst others. It transpires that CSR is also one of the

---

9 Emeseh, E., *et al*, 'Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?' (2010) II *German Law Journal* 230; see also MacLeod, S., 'Towards Normative Transformation: Re-conceptualising Business and Human Rights' (Unpublished PhD Thesis Submitted to the School of Law, University of Glasgow, 2012) 46.

10 World Commission on Environment and Development (WCED), *Our Common Future*, Report of the WCED, 1987, annexed to United Nations General Assembly, document A/42/427.

11 Ura, K., Alkire, S., Zangmo, T. and Wangdi, K., *An Extensive Analysis of GNH Index* (Centre for Bhutan Studies, Bhutan, 2012) 4, 5, 6, *et seq*.

systemic reform responses to the above mentioned economic imbalances, corporate irresponsibility and sustainability challenges attributable to capitalism. CSR enjoins corporations not just to 'do well' economically in the course of their operations but also to 'do good' as corporate success is nowadays measured in terms of the success of all relevant stakeholders.[12]

However, in view of the manner in which CSR was introduced into corporate governance discourse coupled with issues, debates and policy questions inherent in the CSR concept itself, the relevant ultimate question appears to be: (at least as CSR is presently conceived in many jurisdictions around the world including within the Nigerian business community) is CSR really capable of addressing the fundamental queries and inadequacies of corporate capitalism and shareholder primacy in the business community? Put differently, to what extent can the responsibilities and obligations of businesses and companies be broadened in reaction to societal pressure for effective CSR and sustainable development?

2.1.1 *Historical Perspectives from the United States of America*

By way of CSR history especially in its traditional form, although in ancient Mesopotamia around 1700 BC, king Hammurabi was reported to have introduced a code in which builders, inn keepers and farmers were put to death if their negligence caused the deaths of others or major inconvenience to citizens; in ancient Rome, senators reportedly grumbled about the failure of business to contribute sufficient taxes to fund their military campaigns and in 1622 disgruntled shareholders in the Dutch East India Company were said to have also issued pamphlets complaining about management secrecy and self-enrichment.[13] However, Aaron

---

12 Farrar, J.H., *Company Law* (2nd edn Butterworths, London 1988) 12; see also Davies, P.L., *Gower and Davies' Principles of Modern Company Law* (8th edn Sweet & Maxwell, 2008) 510 and 511.

13 Udomkit, N., 'CSR Analysis: A Reflection from Businesses and the Public in Thailand' [2013] 2 (3) *Journal of Management and Sustainability* 155; see also, Amodu, N., 'Modern Trends in Corporate Social Responsibility: Nigerian Companies as Case Study' (Unpublished Dissertation submitted to the School of Postgraduate Studies, University of Lagos, Nigeria in partial fulfilment of the requirements for the award of the degree of Master of Laws LLM, 2010) 10.

Chatterji and Siona Listokin[14] traced the origin of CSR back to the philanthropic work of wealthy business owners such as John D. Rockefeller, Andrew Carnegie and Henry Ford who gave away millions of dollars for social uses and causes.[15] Yet still, Michael Blowfield and Jedrzej Fryna contended that CSR dates back to the United States' 19th century boycotts of foodstuff produced with slave labour.[16]

However, according to Douglas Branson and Sorcha MacLeod, the modern conception of CSR as discussed in this thesis originated from corporate governance debates (largely captured in the published works of Professors Adolf Berle and Merrick Dodd in the Harvard Law Review[17]) and calls for reforms in the early 1930s.[18] Branson, for instance, maintained that majority of the issues and problems which characterised discussions in corporate governance (including CSR) among academics are traceable to Adolf Berle and Gardiner Means' postulations on the theory of Separation of Ownership from Control in their 1932 work, *The Modern Corporation and Private Property*.[19] Branson contended that the ideas of the Columbia Professors Berle and Means:

> … have proven more durable still. The separation of ownership from control, problems it poses, whether indeed

[14] Chatterji, A., and Listokin, S., 'Corporate Social Irresponsibility' (2007) 3 *Democracy* 2; Chatterji and Listokin explained that Rockefeller and Carnegie must have believed that they were stewards of a social contract between business and society and as such were required by way of philanthropy and good management to hold society's resources in trust in order to increase total social welfare. See also, Broomhill, R., 'Corporate Social Responsibility: Key Issues and Debates' (Don Dunstan Foundation Research Paper No. 1, University of Adelaide, 2007) 9 and 10.

[15] Steiner, J. A., and Steiner, G. A., *Business, Government and Society: A Managerial Perspective* (11th Edition, McGraw –Hill, New York, 2006); see also, Meehan, J., Meehan, K., and Richards, A., 'Corporate Social Responsibility: the 3C-SR Model' (2006) 33 *International Journal of Social Economics* 386.

[16] Blowfield, M. and Frynas J. G., 'Setting New Agendas: Critical Perspective on Corporate Social Responsibility in the Developing World' [2005] 81 (3) *International Affairs* 499-513, 500; see also Broomhill *supra* note 14 at 9 and 10.

[17] Berle, A. A., 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049; Dodd, E., 'For Whom Are Corporate Managers Trustees?' (1931) *Harvard Law Review* 1049; .Berle, A. A. 'For Whom Are Corporate Managers Trustees?' (1932) *Harvard Law Review* 1365. See part 2.2.1 below for highlights of the arguments underpinning the debate.

[18] Branson, D. M., 'Corporate Governance "Reform" and the New Corporate Social Responsibility' (2001) 62 *University of Pittsburgh Law Review* 605, 606; see also MacLeod *supra* note 9 at 40 and 41.

[19] Berle A. A., and Means G. C., *The Modern Corporation and Private Property* (The Macmillan Company, New York, 1932).

> it poses any problems at all, and proposals to "reform" corporate governance by filling the void the separation of ownership from control creates, continue to monopolize corporate governance theorists' discussion to the present day.[20]

Branson also noted that corporate governance reforms in its earliest form centred around finding an effective check on the raw exercise of corporate power and these checks were said to have begun in respect of social and environmental concern about businesses and consequently the advent of government intervention in terms of prescriptive legislation to check corporate powers appears widely accepted as characterising the beginning of the CSR movement. [21] Therefore when, in the United States of America, a large number of large corporations consolidated to the detriment of the public in 1890, there was government intervention by way of regulation of utilities and anti-trust movements.[22] Also in 1914, the government passed further anti – trust laws in other to prevent the formation of monopolies.[23] Further strict government regulations were made even in the 1960s up to 1970s to curb raw exercise of corporate powers.[24] Similarly, one of the early writers espousing on this check on corporate powers was the Harvard economist, John Kenneth Galbraith.[25] Galbraith theorised on the incidence of government's exercise of 'countervailing power' as a check on raw corporate powers by way of farm legislations, labour and minimum wages legislation *et cetera.*[26]

---

20 Branson *supra* note 18 at 608.

21 *Id*; see also Whellams, M., 'The Role of CSR in Development: A Case Study Involving the Mining Industries in South Africa' (Unpublished thesis, Saint Mary's University, 2007) 12 and 13.

22 Whellams *supra* note 21 at 13.

23 *Ibid* 12; see also Branson *supra* note 18 at 608 to 610.

24 *Ibid* 13; by Melissa Whellams' accounts, on the global level, the United Nations pressed on establishing codes of conduct for the activity of TNCs or MNEs. See *United Nations Code of Conduct on Transnational Corporations*, (UNCTC), 23 *I.L.M.* 626 (1984).

25 Branson *supra* note 18 at 607, fn 6 citing Galbraith, J. K., *American Capitalism: The Concept of Countervailing Power* (1952).

26 *Ibid* 609.

Literature however revealed that although there were other notable early contributions on the CSR subject by writers such as Keith Davis, William C. Frederick and Joseph W. McGuire amongst others,[27] it was not until 1954 that the expression 'Corporate Social Responsibility' was first introduced in corporate America by Howard R. Bowen in his book, *Social Responsibilities of the Business.*[28] Bowen defined CSR as:

> … the obligation of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society.[29]

Bowen also contended that corporate executives must perform the ethical duty and ensure that the broader social impacts of their decisions are considered and that all corporations failing to give due regard to the social impacts of their activities ought not to be seen as legitimate.[30]

In spite of the important contribution of Bowen, Branson insisted that the crucial moment in the emergence of modern CSR movement came however in the 1970s from the wave of legal academics who suggested methods of governmental intrusion in response to the problems posed by the Separation of Ownership from Control.[31] The thesis of the movement was that, in order to solve the ills of society thought in large part to be the product of corporate behaviour (in turn thought to be the result of the Separation of Ownership from Control), some sort of government intervention must remain essential to make large corporations and their managers alike accountable, if not to the owners of such corporations then, to the society as a whole.[32]

---

27 Carroll, A. B., 'Corporate Social Responsibility: Evolution of a Definitional Construct' [1999] 3 (38) *Business & Society* 268, 269 to 273 citing Davis, K. "Can business afford to ignore social responsibilities?" (1960) *California Management Review* 2; Davis, K., "Understanding the Social Responsibility Puzzle: What does the businessman owe to society?" (1967) *Business Horizons* 10; Frederick, W. C.,"The growing concern over business responsibility." (1960) *California Management Review* 2; and McGuire, J. W., *Business and Society* (New York: McGraw-Hill, 1963). Especially from business management perspective, Professor Archie Carroll succinctly traced and discussed the evolution of CSR from classical conception to modern realities.

28 Bowen, H. R., *Social Responsibilities of the Businessman*, (Harper and Row, New York, 1953); Whellams *supra* note 18 at 27.

29 Bowen *supra* note 24 at 215.

30 *Id.*

31 Branson *supra* note 16 at 609.

32 *Ibid* 611.

Justifications for CSR activism was based on the fact that large corporations were no longer merely aggregations of private property.[33] Corporations were so large, and their behaviour affected so many in the society that the law should regard them as public, or quasi-public, institutions and regulate them as such. The influence of these corporations on the society was summarised by Lawrence Mitchell as follows:

> [N]o institution other than the state so dominates our public discourse and our private lives.... [C]orporations make most everything we consume. Their advertising and products fill almost every waking moment of our lives. They give us jobs, and sometimes a sense of identity. They define communities and enhance both our popular and serious culture. They present the investment opportunities that send our children to college, and provide for our old age. They fund our research.
> …
>
> They pollute our environments. They impoverish our spirits with the never-ending messages of the virtues of consumerism. They provide a living, but often not a meaning. And sometimes they destroy us; our retirement expectations are unfunded, our investment hopes are dashed, our communities are left impoverished. The very power that corporations have over our lives means that, intentionally or not, they profoundly affect our lives.[34]

The goal was to push upon the senior executives and directors of these large corporations the notion that, as a matter of general corporate law, those managers had responsibility for the welfare of workers, to make products safe, to be good citizens in the communities in which their corporations operated, to protect and promote clean air and clean water, and so on. In a

---

[33] *Id*. As examples of proponents of this public interest foundation of corporations, see: Schwartz, H., 'Governmentally Appointed Directors in a Private Corporation-The Communications Satellite Act of 1962, (1965) 79 *Harvard Law Review* 350, Ratner, D., 'The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"' (1970) 56 *Cornell. Law Review* I cited in Branson *supra* note 18 at fns 18 and 22.

[34] Mitchell, L.E., *Progressive Corporate Law* (Lawrence E. Mitchell ed., 1995), *Preface*, XIII; see also, De Miranda, B. M., 'The Global Governance of Corporate Responsibility' Conference Paper, (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013); and, Fauchald, O. K., and Stigen, J., 'Corporate Responsibility Before International Institutions' (2009) 40 *The Geo. Wash. Int'l L. Rev*. 1025, 1027.

nutshell, CSR agitations centralised on compliance with occupational health, safety, clean water, clean air and other labour and environmentally friendly legislations.[35]

While efforts at reforming corporate governance and checking corporate powers in the early 1970s and its preceding years had taken the shape of increased government intervention, things took a different dimension in the late 1970s and early 1980.

The CSR construct as a countervailing power was not received with open arms by many academics, corporate managers and executives. Perhaps the response of certain corporate managers to CSR advocates is best captured in Calvin Coolidge's retort that 'the business of business is business.'[36] Furthermore, Mellissa Whellams also noted that as a result of the stagnation in the mid-1970s, legal academics who delved into economics began to question the potency and efficacy of national governments and legislation to bring about sustainable development and act as a sufficient check on the enormous corporate powers of giant corporations.[37] The World Bank and the International Monetary Fund (IMF) which were founded to ensure that national governments could manage temporary balance of payment problems eventually saw government interference in such businesses and economic planning as an ineffective and inappropriate way to stimulate economic growth.[38]

According to Colin Mark and Nancy Rapoport, the CSR construct as a countervailing power received criticism mostly from apologists of the influential assertions of the Nobel Prize winning economist from the University of Chicago, Milton Friedman.[39] To Friedman:

---

35 Branson *supra* note 18 at 615, fn 26 citing for instance, Nader, R., Green, M., and Seligman, J., *Constitutionalizing the Corporation; The Case for the Federal Chartering of Giant Corporations* (The Corporate Accountability Research Group, 1976).

36 Branson *supra* note 18 at 638.

37 Whellams *supra* note 21 at 13.

38 *Ibid*, 14 citing Lesser, B., 'When Government Fails, Will the Market Do Better? The Privatization/Market Liberalization Movement in Developing Countries*'* (1991) 12 *Canadian Journals of Development Studies* 276-289.

39 Marks, C., and Rapoport, N. B., 'The Corporate Lawyer's Role in a Contemporary Democracy' (2009) 77 *Fordham Law Review* 1269 – 1293, 1272 citing Friedman, M., *Capitalism and Freedom* 133 (2nd edn, 1982); see

> …there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits…[40]

As a corollary of Adam Smith's *'Invisible Hand of Market Forces*', Friedman further argued that the markets were so accurate in their allocation of capital and pricing of inputs that a corporation which had funds to spend on CSR activities must be reaping monopoly profits, at the expense of consumers and many others in the society.[41]

Upon the perceived failure of government countervailing power and intervention, the invisible hand of the market[42] was introduced as a substitute countervailing power on raw exercise of corporate power. Branson[43] surmised as follows:

> The questions early generations had asked still existed. What prevented managers from lying down on the job, playing golf three times a week and neglecting their management duties? What prevented managers from "ripping off' the owners, by misuse or embezzlement of corporate funds or property or by other forms of purposeful venality? The answer law and economics gave was not 'more regulation' or 'public interest directors,' or 'intervention by the federal government,' but 'market forces.'

---

also McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 2.

40 Friedman, M., 'The Social Responsibility of Business' in *The Essence of Friedman* (Kurt R. Leube ed., 1987) 36 to 38.

41 Branson *supra* note 18 at fn 70 citing McClaughry, J., 'Milton Friedman Responds: A Business and Society Interview' (1972) I *Bus. & Society Rev.* 5 (discussion of Corporate Social Responsibility is "Utter hogwash"); Friedman, M,, 'The Social Responsibility of Business is to Increase its Profits*' (N. Y. Times,* Sept 13, 1970) Section 6, 32 (Corporate Social Responsibility could thoroughly undermine the very foundations of our society 'and is a fundamentally subversive doctrine').

42 This is an adjunct of the Open Economies Movement of the Chicago school. They advocated that market forces governed human behaviour more effectively than laws or law suits ever could. The term 'invisible hand' was first used by Adam Smith to describe the guiding force that leads to the efficacy of the free market. In 1776, Smith stated that the guiding force is the propensity in human nature to pursue self – interest. '*It is not the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest*'. See Smith, A., 'An inquiry into the Nature and Causes of the Wealth of Nations' Vol. 1, in R. L. Heilbroner (ed.), *The Essential Adam Smith* (New York: W. W. Norton Company, 1776) 169 cited in Whellams *supra* note 21 at 15.

43 Branson *supra* note 18 at 619.

The prevailing market forces intervention in corporate governance climaxed into the contractarian movement (comprising economist cum legal academics) in the 1980s which suggested that corporate legislation should not only be minimalist, but should have no mandatory content at all.[44] It was further suggested that the role of corporate legislations should stop at providing an 'off the rack' standard form contract whereby parties to an incorporated venture would negotiate, absent transaction costs *et cetera*.[45] To the contractarian, even the basic conception of fiduciary duties of directors and corporate managers can be varied or eliminated by way of contract, e.g. through a majority vote of the shareholders.[46] In essence, the corporation is taken in terms of the private contractual arrangements of its statutory constituents (stockholders, directors and officers), governed largely by market forces. By way of criticism, the contractarian argument has no regard for the function corporate legislation ought to and actually plays in society. In reality as shall be further shown in Chapter 3, it is not everything that could be or should be contractually varied or eliminated.[47]

In reaction to the market forces theory and contractarian movement of the 1980s, in the late 1990s, Branson posited that what is closest to the modern day conception of the CSR construct became more prevalent in the US.[48] This new CSR movement accommodates both the stakeholder theory and the communitarian model of the corporation.[49] Basically, the stakeholder theory enumerates a number of stakeholders - including a company's work force, consumers, suppliers, the society, the environment where it operates and the investors in such a corporation - as key actors in the corporation. The communitarians emphasised the

44 *Ibid* 620.
45 *Ibid* 621.
46 *Id.*
47 See generally, Dine, J., *The Governance of Corporate Groups* (CUP, 2006) 12 to 17; see also, Branson, D.M., 'The Death of Contractarianism and the Vindication of Structure and Authority in Corporate Governance and Corporate Law' in Mitchell, L.E., (ed.) (1995) *Progressive Corporate Law* 93.
48 Branson *supra* note 18 at 639.
49 *Id.*

sociological and moral phenomenon of the corporation as a community, in contrast to the individualistic, self-reliant group of purely economic actors who are the only significant players in a corporation. The new CSR movement also comprises academics who advocate a legal responsibility of corporations to workers and their families.[50]

2.1.2 *Historical Perspectives from the United Kingdom*

Interestingly, the expression *corporate governance* is famously said to have appeared first in American journals before it was imported into the United Kingdom (UK) and the concept of CSR was virtually non-existent in the UK before 1970.[51] As a matter of fact, it was not until 1973 that the most influential business community pressure group in the United Kingdom – the Confederation of British Industry (CBI) - accorded some recognition and made a statement on the CSR phenomenon.[52]

The approach to checking raw exercise of corporate power in corporate governance discourse in the UK was not totally different from what obtained in the USA. The sudden insolvency of major large companies which had only recently issued financial statements which revealed nothing of the horror to come, led to the setting up of various committees to defuse public pressures for reform. The reform reports on corporate governance by the various committees culminated into the bulk of the provisions of the Combined Codes of Best Practices which is now known as United Kingdom Corporate Governance Code. The UK Corporate Governance Code has some history. It was first published in 1992 as the Cadbury Committee Report,[53]

---

50 *Ibid*, 640, fn 71 - 74.

51 Sheikh, S., *A Practical Approach to Corporate Governance*, (Tottel Publishing, West Sussex, 2006) 296. *Cf*: see generally, Liberal Industrial Inquiry, *Britain's Industrial Future: Being the Report of the Liberal Industrial Inquiry*, (2nd edn Ernest Benn Limited, London, 1928) 503; Shenfield, B. E. *Company Boards: Their Responsibilities to Shareholders, Employees, and the Community* (Allen and Unwin [for] Political and Economic Planning, London, 1971) 11.

52 *The Responsibilities of the British Public Company* (C.B.I., 1973) cited in L.C.B. Gower, *Gower's Principle of Modern Company Law* (4th edn, Stevens & Sons , London, 1979) 62 and 63.

53 The Committee on the Financial Aspects of Corporate Governance, Report with Code of Best Practice (Cadbury Report), London, UK: Gee Publishing Ltd, 1 December 1992, available at http:// www.ecgi.org/codes/documents/cadbury.pdf accessed on 22nd November, 2016.

followed by the Greenbury Report of 1995;[54] both of which were combined by the Sir Ronald Hampel chaired Committee Report in 1998.[55] And then, the Turnbull Report[56] of 1999 to take care of the scope and extent of Internal Control in corporate governance. There was the Higgs Review of the code in 2003[57] and subsequently now, the UK Financial Reporting Council has been undertaking regular review of the code. The latest version of the code is the April 2016 version.[58] The enforcement method adopted for the code was through the listing rules of the Financial Services Authority which required all listed companies registered in the UK to comply with the provisions or give good reasons why they have not in their annual report to the Authority. In fact, the 'comply or explain' enforcement approach of corporate governance code is the trademark of corporate governance in the UK.[59]

Although the acronym CSR did not feature specifically in the UK Corporate Governance Code, the code however features some elements of modern CSR conception. For instance, traces of CSR has been noticed in the 1998 Sir Ronald Hampel Committee Report stating that '... good corporate governance ensures that constituencies (that is stakeholders) with a relevant interest in the company's business are fully taken into account'.[60] Further, directors are enjoined to set the company's values and standards and ensure that its obligations to its shareholders and

---

54 Greenbury Committee, *Directors' Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury* 17th July, 1995 (London: Gee Publishing Ltd) available at http://www.ecgi.org/codes/documents/greenbury.pdf last accessed 22nd November, 2016.

55 Hampel Committee, *Final Report of the Committee on Corporate Governance*, January 1998 (London: Gee Publishing Ltd) available at http://www.ecgi.org/codes/documents/hampel.pdf last accessed 22nd November, 2016.

56 The Turnbull Report was first published in 1999 and set out best practice on internal control for UK listed companies. In October 2005 the Financial Reporting Council (FRC) issued an updated version of the guidance with the title 'Internal Control: Guidance for Directors on the Combined Code'. In September 2014 this was superseded by the FRC's Risk Guidance. See generally, ICAEW, Internal Control: Turnbull Report, 1999 available at http://www.icaew.com/en/library/subject-gateways/corporate-governance/codes-and-reports/turnbull-report last accessed 22nd November, 2016.

57 Higgs, D., *Review of the Role and Effectiveness of Non-Executive Directors*, January, 2003 (London: Department of Trade and Investment, DTI).

58 See https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Final-Draft-UK-Corporate-Governance-Code-2016.pdf last accessed 24th October, 2016.

59 *Ibid* 4 and 5.

60 See Hampel Committee Report *supra* note 55 at para 1.3.

others are understood and met.[61] A reasonable and necessary inference from the above is that obligations to such *others* would mean obligations to certain stakeholder group of creditors, suppliers, contractors, employees and so on.

The concept of CSR is evolving. It has evolved from corporate charity[62] or philanthropy into more modern issues such as the triple bottom line (TBL) of planet, people and profit;[63] the green movement;[64] (comprising green advertising, green product manufacture and competition and green management) and more recently, the advocacy for sustainable development[65] amongst others. In modern times, CSR is construed in terms of a business management model which requires the consideration of the interests of a certain stakeholder group in the day to day activities of business associations and organizations. The concept of CSR has broadened the roles of companies, especially large multinational corporations; it has increased the responsibilities of corporate managers and has raised the bar on the expectations of the society from corporate owners. From the foregoing, it is no longer business as usual; it is no longer commercially wise to simply declare huge profit margins in annual reports without justifying how such bottom lines were legitimately reached without contravening accepted core values of the society. Otherwise, such businesses run the likely reputational risks of losing its so-called

---

61 *Ibid*, supporting principles A.1. It is interesting to also note that the word *stakeholder* was only mentioned in the Preface section and not in any Main or Supporting Principles of the code.

62 The general attitude of both 'prudent' corporate managers and even the judiciary to Corporate Charity in those days has been expressed thus: '… *Charity has no business to sit at boards of directors qua charity…'* See *Hutton v West Cork Railway Co*. (1883) 23 ChD., 654. See also the following: *Miles* v *Sydney Meat Preserving Co Ltd* (1912) HCA 87; *Dodge v Ford Motor Co.* (1919) 204 Mich. 459, 170 N.W. 668, *Amalgamated Society of Woodworkers of South Africa v Die 1963 AmbagsaaWereniging* (1967) 1 SA 586 (T).

63 Branson *supra* note 18; see also Mullerat, R., 'Corporate Social Responsibility: New Trends' (2006) *American Bar Association Section of International Law* 3.

64 Smith, I. O., 'Corporate Social Responsibility towards a Healthier Environment' [2000] 1 (4) MPJFIL 22 to 40; Branson *supra* note 16 at 644 and 645.

65 WBCSD, *Corporate Social Responsibility: Making Good Business Sense* (Geneva, Switzerland, 2000); According to the 1987 Brundtland Report, sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It is said to have three pillars namely: Economic Growth, Environmental Protection and Social Equity; see generally, World Commission on Environment and Development (WCED), *Our Common Future*, Report of the WCED, 1987, annexed to United Nations General Assembly, document A/42/427.

social license[66] to operate and its attendant effects. Suffice to say at this stage that the evolution of CSR is on-going and is more likely to continue in corporate governance reforms and corporate law discourse to address key economic and corporate issues as they arise. The relevance of the CSR construct in the 21st century is perhaps best summarised by Bryan Horrigan thus:

> CSR is a major feature of the 21st century business environment. For better or worse, it affects the work of corporate insiders (e.g. corporate shareholders, boards, managers, and employees), corporate advisers (e.g. company secretaries, in-house counsel and external legal and business financiers), and all of the communities in which the corporations operate (e.g. local business sites, transnational consumer markets and global supply chains). Everyone in the world therefore belongs in one CSR camp or another, whether you support CSR, tolerate it or condemn it.[67]

2.2 Literature on CSR Conception, Definitional Attempts and Debates

Conceptualising CSR is not very simple in corporate governance discourse. This difficulty is not unconnected to the interdisciplinary and multidisciplinary[68] nature of this socio-legal subject; CSR is relevant and therefore discussed in many disciplines ranging from accountancy, geography, economics, sociology, law and many others; such interdisciplinary and multi-disciplinary nature even sometimes extends to discourse within a particular discipline. For instance in the law discipline, varying writers in different aspects of the law (industrial law, environmental law, corporate law, human rights law and so on) write differently on the CSR subject.

---

66 Nwete, B., 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?' [2007] 8 (4) *German Law Journal* 324; see also, Prno, J., 'An Analysis of Factors Leading to the Establishment of a Social Licence to Operate in the Mining Industry' [2013] 4 (38) *Resources Policy* 577-590.

67 Horrigan, B., *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business*, (Edward Elgar, Cheltenham, UK, 2010) 4.

68 Hemingway, C. A., 'An Explanatory Analysis of Corporate Social Responsibility: Definitions, Motives and Values' (University of Hull Business School Research Memorandum, 2002) 34.

2.2.1 *The Berle/Dodd Debate*

Literature has shown that CSR discourse, in terms of history and conception, is perhaps inseparable from the popular debate in the academic circle of the early 1930s. Notably at the centre of the debate are the arguments of Professors Adolf Berle and Merrick E. Dodd.[69] The crux of the debate is that while Berle argued in 1931 that 'all powers granted to a corporation or to the management of a corporation … are necessarily at all times exercisable only for the rateable benefit of all shareholders,'[70] Dodd nevertheless argued against Berle's 'single-minded devotion to stockholder profit'[71] in his celebrated 1932 article.[72] He contended that 'the view that business corporations exist for the sole purpose of making profits for their stockholders is apt to give way to a theoretically defensible and law-informing view of the business corporation as an economic institution which has a social service as well as a profit-making function.'[73]

Although Berle was said to have succumbed to Dodd's pro-CSR arguments at some point in the mid-1960s,[74] there are still relevant corporate law implications from the arguments proceeding therefrom and is still the basis of fierce debate (including CSR debates) among scholars.[75] For instance, the submissions of Milton Friedman as shown in Part 2.1.1 above and as underpinned by the shareholder primacy model (discussed in detail in Chapter 3) are still

---

69 Although two prominent schools of thought are popularly believed to have arisen from the views of the professors viz (i) the Shareholder Primacy School; and (ii) the Stakeholder School, however, William Bratton and Michael Wachter have argued that the generally accepted historical picture putting Berle in the position of being the grandfather of Shareholder Primacy and Dodd cast as the grandfather of pluralist Stakeholder theory, as has been done in this study, is actually mistaken. To these authors, it appears the two learned professors were *per se* discussing other corporate law topics and not the origins of shareholder primacy or CSR for that matter. However, this argument appears too grandiose for justifications to be made within the purview of this study. See Bratton, W. W. and Wachter, M. L., 'Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation' [2008] 34 (1) *The Journal of Corporate Law* 99, 101 and 103.

70 Berle, A., 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049.

71 Dodd, M.E., 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145.

72 *Id*.

73 *Ibid*,1148.

74 Horrigan *supra* note 67 at 89.

75 *Cf:* Bratton and Wachter *supra* note 69 at 150. The authors are rather of the opinion that a number of academic writings purporting to originate from the views of Berle are now opposite them.

largely premised on Berle's arguments. Unlike Friedman however, some others rather align with Dodd's position seeing a company as a social institution 'tinged with a public purpose'.[76] This approach is concerned with not just the shareholders but also the non-shareholder stakeholders. In the stakeholder model, corporations do not have an obligation to maximize societal wealth, but they do have a duty to be good corporate citizens.[77] Again, this Dodd's stakeholder perspective is still relevant till date and underpin recent arguments and theories attempting to explain the nature of firm, corporate actions and CSR practices.[78] I anticipate that the dichotomy of views in terms of stakeholder model versus shareholder primacy model and their coloration on the CSR discourse constitutes a rich field for independent and separate research outside the scope of the present chapter. These views are accordingly discussed in detail in both Chapters 3 and 5.

The relevance of the above highlighted debate together with its modern day argumentative colorations to CSR literature is not far-fetched. One implication has been that a scholar's conception, views and arguments around CSR are almost automatically monopolised and dependent on the side of the debate from which such views originate. For instance, the adoption of a CSR which is intrinsically based on voluntariness as advocated at the level of the EU[79] and the OECD[80] adopts Professor Berle's perspective and is *friedmanesque* in nature and almost

---

76 Marks and Rapoport *supra* note 39 at 1279.

77 See generally, Freeman, E. *et al*, 'Stakeholder Theory and "The Corporate Objective Revisited"' (2004) 15 *Organization Science* 364; see also Freeman, E., *et al*, *Stakeholder Theory: The State of the Art* (Cambridge University Press, 2010); and Parkinson, J. E., 'Corporate Governance and the Regulation of Business Behaviour', in *Global Governance and the Quest for Justice* (Macleod, S., ed.), Volume II, Corporate Governance, (Oxford and Portland, Oregon, 2006) and also Parkinson, J. E., Corporate Power and Responsibility (Clarendon Press, Oxford, 1993).

78 See for instance the arguments and underpinning assumptions of theories such as 'the Team Production Theory' canvassed by Professors Margaret Blair and Lynn Stout in Blair, M. and Stout, L., 'A Team Production Theory of Corporate Law' [1999] 2 (85) *Virginia Law Review* 247 and 'the Entity Maximisation and Sustainability Model' (EMS) canvassed by Professor Andrew Keay in Keay, A., 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *Modern Law Review* 663. These theories are discussed in Chapter 5; they are compared and contrasted with another stakeholder theory-inspired model (the Responsible Stakeholder Model, RSM) which is a formulation of this thesis.

79 *Infra* at notes 117 and 119.

80 *Id*.

automatically skews views on consequential issues such as CSR regulation and enforcement towards an adoption of self-regulatory regime. This submission will be further developed in the course of this chapter.

2.2.2 *Definitional Approaches and Associated Problems*

There is definitional problem in CSR discourse. According to John Meehan, Karon Meehan and Adam Richards in their *Corporate Social Responsibility: the 3C-SR Model*, everybody talks about CSR and yet nobody has been so far able to give a generally acceptable definition.[81] In fact, Bryan Horrigan citing Tom Campbell is rather of the view that a generally accepted definition of the CSR concept is simply impossible.[82] Since CSR is multidisciplinary, it has caught the attention of many scholars and experts in different disciplines and each of these scholars usually offer his or her biased perspective on the subject.

As will be demonstrated below in respect of business management scholars, legal scholars have similarly struggled to offer a generally acceptable definition of CSR. David Engel[83] defined CSR as 'the obligations and inclinations, if any, of corporations organized for profit, voluntarily to pursue social ends that conflict with the presumptive shareholder desire to maximize profit.' Evident from Engel's attempt is that CSR was originally conceived as anything done by companies outside their core operational objects; this would therefore ordinarily involve voluntary corporate charity and philanthropy. Little wonder many companies primarily understand CSR initiatives under this conception in terms of giving back to the society a proportion of company's profits and absolutely discretionary provision of public goods and social services. This sort of definition and CSR conception has drawn

---

81 Meehan *et al supra* note 15 at 386; see also, Mullerat, R., 'The Still Vague and Imprecise Notion of CSR*',* (2004) *International Business Lawyer* 236.

82 Horrigan *supra* note 67 at 34 citing Campbell, T., 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' 532-533 in McBarnet, D., Voiculescu, A., and Campbell T., (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP, 2007) 529-64.

83 Engel, D., 'An Approach to Corporate Social Responsibility' (1979) 32 *Stanford Law Review* 1, 5 and 6.

criticisms from many commentators and scholars as an approach serving no one any particular good – from the most conservative business person, to the most ambitious ideals-driven NGO or the most market-oriented government official.[84] For instance, a voluntary CSR will most likely not serve a traditional capitalist businessman any particular good since such voluntary idea of giving back can only constitute sheer detraction from his core business of profit maximization.[85] Similarly, the very ambitious ideals-driven NGO may also not derive so much utility from a centrally voluntary CSR concept as such approach is likely to jeopardize an efficient compliance framework under which businesses may be held responsible. In other words, if demonstrating effective CSR is very important as recognized in the business community, where it is voluntary, what then happens in cases of non-compliance or demonstrating sheer irresponsibility? A voluntary CSR will definitely fall short in providing answers to such questions; the same argument may also be advanced in the case of government officials whose traditional objective of ensuring an efficient legal framework may also be jeopardized if a central theme of voluntariness is adopted on the CSR discourse. This approach to CSR and its consequences in CSR regulation and enforcement discourse are discussed in detail in Chapter 4.

Gabriel Eweje citing Marydee Ojala had defined CSR as 'the obligation of both business and society to take proper legal, moral-ethical and philanthropic actions that will protect and

[84] Ward, H., 'Corporate Social Responsibility in Law and Policy' in *Perspectives on Corporate Social Responsibility*, Boeger, N., Murray, R., and Villiers, C., (eds) (Edward Elgar, Cheltenham, 2008) 8 and 11; see also Villiers, C., 'Corporate Law, Corporate Power and Corporate Social Responsibility' in *Perspectives on Corporate Social Responsibility*, Boeger, N., Murray, R., and Villiers, C., (eds) (Edward Elgar, Cheltenham, 2008) 96 and100 and 107.

[85] Parkinson, J. E., 'Models of the Company and the Employment Relationship' (2003) *British Journal of Industrial Relations* 481 to 509 at 498 (hereinafter simply 'Parkinson Models of the Company').

improve the welfare of both society and business as a whole, all of which must be accomplished within the economic structures and capabilities of parties involved.'[86]

However, Horrigan quoting Tom Campbell more succinctly defined the subject in the modern business world as 'obligations (social or legal) which concern the major actual and possible social impact of the activities of the corporation in question, whether or not these activities are intended or do in fact promote the profitability of the particular corporation.'[87] The above more recent definitions rather reflect the gradual shift from the usual primary focus on wealth maximization philosophy of companies and business enterprises and showing that CSR in recent times now transcends the ideology of simply giving back to the society out of the excess or surplus of the business. In modern times therefore, CSR has broadened responsibilities beyond the traditional obligations of businesses to focus on wealth maximization for business owners first, then giving back to the society on a second note if there are surpluses; it has extended the responsibilities of businesses towards obligations for environmental protection, ethical business practices and social inclusion in their operations amongst others; it is now desirable to speak of intrinsically responsible companies and businesses; a business which is not primarily focused on wealth maximization for its owners *at all costs* but considers the legal, social and ethical repercussions of its operations on its employees, local communities where it operates, the society, the government and the environment in general; a business which is not solely after the race to the bottom line of profit but rather the more inclusive TBL; a balanced business with the right blend of the interests of its shareholders and stakeholders altogether.[88]

---

86 Eweje, G., "Multinational oil companies' CSR Initiatives in Nigeria: The Scepticism of Stakeholders in Host Communities" [2007] 5/6 (49) *Managerial Law* 218 – 235 citing Ojala, M. 'Finding socially responsible companies', *Database*, October/November, Vol. 17 No.5, 86-89.

87 Horrigan *supra* note 67 at 34.

88 Villiers *supra* note 84 at 97.

In business management literature, CSR appears mostly conceived as the responsibility of businesses to the wider societal good, not only beyond, but also in addition to, the economic performance of the business. A number of CSR models have evolved since its introduction in corporate governance discourse. However, this thesis finds Archie Carroll's model, in his *A Three – Dimensional Conceptual Model of Corporate Performances,* most interesting.[89] 'The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time,'[90] he explained. By implication, he identified four components or elements of his conception of CSR namely: (i) economic responsibilities; (ii) legal responsibilities; (iii) ethical responsibilities; and (iv) discretionary/philanthropic responsibilities.[91] The economic responsibilities of a corporation or business entail its responsibility to make profits for its investors.[92] The legal category of responsibilities represents the responsibilities of the business to operate within the 'framework of legal requirement.'[93] Carroll explained that '... just as society had sanctioned the economic system by permitting business to assure the productive role, as a partial fulfilment of the "social contract", it has also laid down the ground rules – the laws and regulations – under which business is expected to operate.'[94] He explained further that the ethical responsibilities of a corporation entail 'the responsibility to do what is right, just, and fair'. These ethical responsibilities are meant to include society's expectations of business over and above (any) legal requirements. In other words, the corporation must endeavour to surpass legal duties and obligations in its relation to the members of the society.[95] Finally, the discretionary

89 Carroll, A. B., 'A Three – Dimensional Conceptual Model of Corporate Performances', (1979) 4 *Academy of Management Review* 499 (Hereinafter simply Carroll 3 Dimensional Model); see also Carroll, A. B., 'The Pyramid of Corporate Social Responsibility – Toward the Moral Management of Organizational Stakeholders' (1991) 34 *Business Horizons* 39, reprinted in Craine, A., Matten, D., and Spence, L.J., eds, *Corporate Social Responsibility: Readings and Cases in a Global Context* (Routledge, Abington 2008) 64.

90 Carroll 3 Dimensional Model *supra* note 89 at 500.

91 *Ibid* 499.

92 *Ibid* 500.

93 *Id*.

94 *Id*.

95 *Id.*

responsibility[96] represents society's expectation that a business should assume social roles and above and beyond its economic, legal and ethical responsibilities.[97] These discretionary duties, which naturally mean that a business not engaging in them is not necessarily breaching any other legal or ethical duties, include contributions to various kinds of social, educational, recreational or cultural purposes.

Carroll's categorisation of CSR are not mutually exclusive of one another but ordered in their fundamental role in the evolution of their importance. Aviva Geva confirmed that Carroll's categories of CSR are comparable to a pyramid. [98] In the pyramidal structure, economic responsibilities are at the bottom, topped by legal responsibilities, then ethical responsibilities and ultimately topped by discretionary responsibilities.

Source: Carroll (1991, p. 42)

Figure 2.1 *Carroll's Initial Pyramidal Structure of CSR categories*[99]

96 Mark and Rapoport *supra* note 39 at 1274 identified this as the most controversial of the categories by scholars; see also Zur, A., and Evans, J., 'Corporate Social Responsibility Orientation and Organizational Performance in the Australian Retail Industry' (2008) *Melbourne Business School* 5.

97 Carroll 3 Dimensional Model *supra* note 89 at 500.

98 Geva, A., 'Three Models of Corporate Social Responsibility: Interrelationship between Theory, Research and Practice*'* (2008) *Business and Society Review* 5.

99 Carroll *supra* note 89 at 608.

This categorisation and conception of CSR by Carroll appears later criticised as out-dated by Andrew Zur and Jody Evans[100] who rather discussed CSR in terms of *business orientations* and identified heterogeneous capabilities including: (i) Environmental Capability entailing environment–friendly business culture and practice (ii) Work place capability representing good health and safety for employees. (iii) Market place capability entailing long-term relationship with suppliers, customers and business partners (iv) Societal capability which involves short-term investment into local community for future generations. Zur and Evans posited that:

> ... the traditional four obligations of CSR represent outdated thinking and do not lend themselves to conceptualisation of CSR as a business orientation... we conclude that a broader, but more specific classification is needed in order to examine CSR orientation in a manner that better reflects the current business retail climate.[101]

While Zur and Evans' counter –proposals on the four heterogeneous CSR dimensions are not only commendable but also relevant towards improved understanding and operationalisation of the CSR subject, however, their criticism of Carroll's categories as being archaic appears unfounded after all; the authors appear not to have averted their minds to the fact that Carroll had maintained that there were in existence certain 'issue' elements to which his categories or elements of CSR are tied.[102]

In any event, Carroll later modified his CSR model. In the later analysis, a Venn diagram with three CSR elements or domains was suggested in place of the earlier four domain pyramidal structure.[103] Schwarz and Carroll proposed the three (3) categories of Economic, Legal and Ethical Responsibilities. The Discretionary or Philanthropic category was abandoned as an

---

100 Zur and Evans *supra* note 96 at 2.

101 Zur and Evans *supra* note 96 at 5.

102 Amodu *supra* note 1 at 13.

103 Schwarz, H. and Carroll, A.B., 'Corporate Social Responsibility: A three – Domain Approach' (2003)13 *Business Ethics Quarterly* 503, 505 to 507.

independent category and rather subsumed within the Ethical and the Economic Responsibilities.[104] Amongst others reasons, the three domain approach was adopted by the authors because, in their view, the philanthropic category is unnecessary, inaccurate and a misnomer as an element of CSR.[105] CSR is a responsibility and an obligation and it is inaccurate and a misnomer to simultaneously describe it in terms of discretionary and voluntary activities.[106] It is also argued that it is difficult to really distinguish between ethical responsibilities and philanthropic responsibilities and many philanthropic or discretionary activities are actually based on economic interests. [107]This correction turned out crucial to his earlier postulations and has been greeted with more acceptability.[108]

To a large extent, this thesis aligns with Carroll's views on the CSR conception especially as initially categorised into four (4) domain base. While the philanthropic category as an independent element has been rejected by a number of scholars as being inaccurate and a misnomer, – since an activity cannot be an obligation or responsibility and at the same time described in terms of discretion or voluntariness[109] - unlike Carroll however, who abandoned the fourth philanthropy domain, this thesis begs to differ and retain it as an independent element for a few reasons.

First, this researcher does not think that the terms *discretion* and *obligation*/*responsibility* are necessarily mutually exclusive in all connotations. There are instances in law (especially for administrative and judicial decisions) where there might be an *obligation* to exercise *discretion* or which obligation entails the exercise of *discretion.* Further, howsoever examined, discretionary activities constitute an integral part of any business operations. There will always be elements of discretion in the manner business managers carry out operations and policies of

104 *Ibid* 505, 506, 507, *et seq*.
105 *Id.*
106 *Id*.
107 *Id*.
108 Lambooy *supra* note 3 at 15.
109 Schwarz and Carroll *supra* note 103 at 505 to 507.

the business. There is even discretion in the manner in which obligations and responsibilities whether legal, ethical or economic responsibilities are carried out. In most cases, the framework under which an obligation is exercised usually warrants the exercise of discretion. For instance, it is a regulatory obligation on employers to pay salaries and wages to a certain group of employees as agreed with them. However, the same regulatory framework usually admits of discretion as to the manner such obligation or responsibility is to be exercised as per for instance which exact time of the week or month such salaries are to be paid. It is therefore not so much of a misnomer having discretion or voluntary activities in respect of such obligations. Secondly, the level of CSR integration in businesses and manner of practice in some jurisdictions especially amongst the less industrialised economies of Africa and Asia are still suggestive that philanthropy, charity and discretionary activities constitute an integral part of CSR conception.[110] For instance in India, by virtue of section 135 of the 2013 Indian Companies Act with effect from 1st April, 2014, CSR is still largely perceived in terms of voluntary philanthropic community development projects as the activities which may be included by companies in their Corporate Social Responsibility Policies Activities relate to: (*i*) eradicating extreme hunger and poverty; (*ii*) promotion of education; (*iii*) promoting gender equality and empowering women; (*iv*) reducing child mortality and improving maternal health; (*v*) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; (*vi*) ensuring environmental sustainability; (*vii*) employment enhancing vocational skills; (*viii*) social business projects; (*ix*) contribution to the Prime Minister's

[110] Raynard, P., and Forstater, M., *Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries* (United Nations Industrial Development Organization, Vienna 2002) 17 citing Centre for Social Markets, First World Report on Corporate Social Responsibility (CSR): Internet consultation of Stakeholders 2001; see also Ollong, K. A., 'Corporate Social Responsibility and Community Development in Cameroon' Conference Paper, (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013). *Cf:* Interestingly, South Africa is one of the developing economies where there this conceptual problem does not exist. CSR and Sustainability issues are discussed at an advanced level, away from the restrictive corporate charity conception. See Institute of Directors in Southern Africa, 'King Report on Governance for South Africa', and the 'King Code of Governance Principles' 2009 (King III) at 51.

National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and (*x*) such other matters as may be prescribed.[111] Again for instance in Cameroun[112] and Nigeria,[113] many business actors still restrictively conceive CSR in terms of philanthropic corporate charity, donations and just giving back to the society.[114]

In light of the above therefore, while this thesis confirms that the CSR domains ought to be represented in a Venn diagram as opposed to a pyramid, it however also differs in the representation of the relationship existing among the four CSR elements. As a result of the inseparable and interwoven nature of the four elements, efficient CSR practice is (or should be) at the core of any business operations involving the right balance and integration of the entire four CSR categorisation in business. In other words, CSR should simply underlie the obligations of businesses (whether legal, ethical, economic or philanthropic). Consequently therefore, this thesis rather situates CSR at the centre and as the foundational core from which economic, legal, ethical and philanthropic obligations of any company emanate. Accordingly, the diagram below represents the elementary categorisation of CSR and the position it occupies in the activities of a corporate form:

---

111 See generally schedule vii of the 2013 Indian Company's Act; and Mukthar, J., and Pavithran, S., 'Corporate Social Responsibility in Birla Group of Companies' Conference Paper, (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013).

112 Ollong *supra* note 110.

113 Amaeshi, K. M., *et al*, 'Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Influences?' (2006) 24 *JCC* 83 to 99; see also Ijaiya, H., 'Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria' [2014] 3 (1) *Journal of Sustainable Development Law and Policy* 60, 62.

114 FSDH Merchant Bank Limited, 'Corporate Social Responsibility (CSR) Activities in 2015', *The Guardian*, 19th January, 2016; Agary, K., 'Is CSR worth the trouble for companies? (1)' *Punch*, 26th July, 2015; see also Akingbolu, R., 'Building Equity through CSR: The Grand Oak Example', *Thisday*, 22th March, 2013, 36; and Akingbolu, R., 'CSR: Groups Hail Nigerite's Efforts', *Thisday,* 14th May, 2010. There are many newspaper columns such as these showing the popular conception of CSR in Nigeria which is still diminished to corporate donations and at its best, community development projects. Cf: Oyewole, N. and Azeez, O., 'Business School Netherlands (BSN) Nigeria introduces 3 CSR initiatives' *Daily Trust*, 23rd December, 2015 demonstrating a good grasp of the CSR concept 'beyond mere tokenism'.

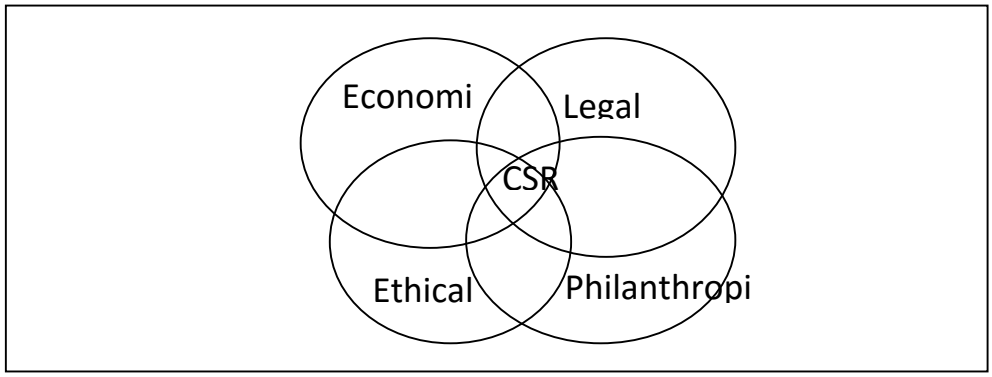

Figure 2.2 - *Effective CSR occupying the core of corporate operations.*

2.2.3 *Institutional Attempts to Define CSR*

The World Business Council for Sustainable Development (WBCSD) is a merger of the Business Council for Sustainable Development and the World Industry Council for the Environment in January, 1995.[115] The WBCSD defines CSR as:

> The continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.[116]

To the WBSCD, CSR defines what a company has to do in order for it to win and enjoy the confidence of the community as it generates economic wealth and responds to the dynamics of environmental improvement.

The Organisation for Economic Cooperation and Development (OECD) in its Guidelines for Multinational Enterprises[117] defined CSR in the light of a set of 'voluntary principles and standards for responsible business conduct consistent with applicable laws.' The International Chamber of Commerce (ICC) proposes the following definition of corporate responsibility

[115] The WBCSD is a CEO-led organization of forward-thinking companies that galvanizes the global business community to create a sustainable future for business, society and the environment.

[116] World Business Council for Sustainable Development, *CSR: Meeting Changing Expectations* (1st WBCSD CSR Report, 2000) 3; see also WBCSD *Stakeholder Dialogue on CSR* (the Netherlands, 1998) 6 to 8.

[117] Organisation for Economic Co-operation and Development, 'Guidelines for Multinational Enterprises'. The Guidelines were updated in 2011 for the fifth time since they were first adopted in 1976. See Chapter 5 for full discussions on the OECD guidelines.

from a business perspective as the: 'the voluntary commitment by business to manage its activities in a responsible way.'[118]

According to a Green Paper issued by the European Commission in 2001,[119] CSR is 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' and clarifying further that 'being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with stakeholders.'[120]

It is apt to reiterate the earlier mentioned attention to the recurring theme of voluntariness pervading the above cited CSR definitions. The significance of this point is most appreciated on the question of enforcement mechanisms of CSR. This question of whether or not CSR obligations ought to be enforced mandatorily or left to self-regulation remains a major CSR debate. As earlier noted, Halina Ward, Charlotte Villiers and John Parkinson amongst other scholar have been criticised this approach to CSR.[121] Such voluntary approach already discernible from a definition puts too much emphasis and rather shows bias for a particular regulatory and enforcement regime. Essentially, this approach has also been criticised because usually in the end, it turns out that effective CSR practice in many cases is mostly embedded upon adopting the right balance and combination of different regulatory techniques, be it voluntary or mandatory amongst others.[122]

---

118 Lambooy *supra* note 3 at 11. However, the word *voluntary* appears to have been omitted in more recent publications of the ICC.

119 European Union, 'Communication of European Union Country's Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility', COM (2001) 366 Final (July 18, 2001).

120 *Ibid* 6.

121 Ward *supra* note 84 at 8 and 11; see also Villiers *supra* note 84 at 96-100; Parkinson, J. E., 'Corporate Governance and the Regulation of Business Behaviour' in *Global Governance and the Quest for Justice*, (Macleod, S., (ed), Volume II, Oxford and Portland, Oregon, 2006) 4 – 7 (hereinafter 'Parkinson CG').

122 Parkinson CG *supra* note 121 at 4 to 7. See Chapter 4 for different regulatory techniques and features together with their respective implication on CSR enforcement

Arising from the above, little wonder therefore that attitudes appear changing towards CSR definitions. While the ICC has removed the word *voluntary* from its CSR definition,[123] the European Union also in its 2011 communication deviated from its earlier voluntary approach. A new definition depicting a modern understanding of the CSR subject was given as 'the responsibility of enterprises for the impact on Society.' [124]

Consequently, this thesis submits that the CSR construct is a neutral concept and there is nothing inherently voluntary or mandatory about it. It is a business model which actors, players and parties concerned may choose to adopt on a voluntary basis and accordingly base on a soft law self-regulatory regime for efficacy or on a hard law (legal prescription) and probably based on mandatory regime for efficacy. A recent example is contained in section 135 of the 2013 Indian Companies Act mandating CSR within the Indian business community. Therefore, varying circumstances and challenges faced in any society coupled with the societal attitude about CSR issues and values may ultimately inform whether or not the business model is better adopted on a voluntary basis or otherwise.

In the researcher's view, CSR should be defined as a business governance and management model which broadens the responsibility of companies in an attempt to align the interests of business managers and the interest of not only the shareholders as a whole but also that of a stakeholder group within the environment of such companies. It should be emphasised that the environment referred to includes the company's physical environment (its surrounding land, air, water, and the likes), its human environment (such as its shareholders and employees), its social environment (its relations with and reputation in the society or local community where it operates), its economic environment (entailing the interests of investors to create and

123 *Supra* note 118.

124 European Union, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Region: *A Renewed European Union Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 Final 6.

distribute resources and wealth) and political environment (the substantive government and agencies regulating its operations). Therefore, such stakeholders within a company's environment will usually include the company's employees, contractors, suppliers, creditors, customers, or the community where the company operates, the government, the media and so on. The danger of everybody or anything claiming to be part of the stakeholder group of a business is appreciated here. This would mean that each business would have to reasonably qualify and delimit its stakeholder group within an acceptable business framework. A qualification of relevant and legitimate stakeholders for businesses has been, for instance, proposed in Chapter 5.

Adopting the CSR business governance and management model as described above will see a business enterprise reasonably balancing out the following interests and pressures: (i) the need to create wealth for business owners (ii) the need to comply with laws, rules and regulations as set by constituted authorities governing operational activities (iii) the need to demonstrate fairness, responsiveness and high ethical standards in its operations (iv) the need to show responsibility in response to societal pressures and needs to the best of its ability whether or not such responsibility will create wealth for the business or not. This CSR conception would mean that the business community can no longer continue to see the provision of public goods and social services as fundamentally secondary to its primary focus of wealth maximisation for its owners. It will also mean that no company will be able to claim effective intrinsic CSR practice without demonstrating efficient balancing and aligning of certain necessary interests as highlighted above. The researcher is of the view that the world economy is simply too important to be left in the hands of a self-regulating business community on the assumption of an efficient or perfect free market. It is too significant for us to continue to adopt the view that public goods and social services should be the exclusive responsibility of the government or

that CSR model should only entail voluntary corporate responses to societal pressures. Further arguments are in the course of this thesis in support of the above assertions.

2.3 Literature on Nature and Reception of CSR within the Business Community

According to official documents from the United Nations coupled with contributions from a few learned authors including Jan Eijsbouts, Tineke Lambooy, Olufemi Amao amongst others, despite the debates surrounding the CSR conception a few of which were highlighted in 2.2 above, by its nature, certain basic values appear generally agreed as integral to CSR.[125] These core values include amongst others: human rights protection, employee rights, environmental protection, community development, information disclosure, stakeholder engagement and management, combating bribery, consumer protection and monitoring. Such broad value system is probably responsible for its adoption across different disciplines and field and is probably also responsible for difficulties surrounding a generally acceptable definition.

As observed in the Statement of Problem in Chapter 1, notwithstanding its wide interdisciplinary reach, some continue to view CSR as just another source of undue public pressure and not only ridiculous but also a distraction and detraction from serious business.[126] Such view was expressed in *The Economist* that:

> The most fundamental criticism of CSR is what executives spend on it is other people's –ie, shareholders'- money. They may mean well, and it may give them satisfaction to write a cheque for hurricane victims or disadvantaged youth, but that is not what they are hired to do. Their job is

---

[125] Eijsbouts, J., *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* (Inaugural Lecture, Maastricht University, 2011) 40; and, Amao, O., 'Mandating Corporate Social Responsibility: Emerging Trends in Nigeria', [2008] 1 (6) *Journal of Commonwealth Law and Legal Education* 75 (hereinafter simply 'Amao Mandating Responsibility'); Lambooy *supra* note 3 at 495 and 630; also see: UN Global Compact, UN Press Release SG/SM/6881, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, Text of Speech by Kofi Annan, 1 February 1999, at 1, http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html (last accessed 5th November, 2016); and see Ruggie, J., Final Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy ' Framework,' A/HRC/17/31, 21 March 2011 http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf last accessed 5th November, 2016.

[126] Smerdon *supra* note 2 at 470.

> to make money for shareholders. It is irresponsible for them to sacrifice profits in the (sometime vain) pursuit of goodness.[127]

Aside being victimized by its own popularity also earlier noted in Chapter 1,[128] CSR is largely criticized as having no real value as it cannot be legally enforced. In a more subtle way, Lambooy quoting Charlotte Villiers noted that without a regulatory approach, CSR appears not to have sufficient impact on solving the problems it is expected to solve.[129] Put differently, Saleem Sheikh noted that CSR may be criticized for the notion that companies have a direct responsibility for solutions to many problems that plague society, and that they have the ability, to unilaterally solve them.[130]

However, more ethically conscious executives now place increasing significance on CSR. According to Andre de Waal and Giovanna Orcotoma Escalante in their *The Relation between Corporate Social Responsibility and the High Performance Organizations Framework: the case of mining Multinationals in Peru*,[131] CSR is seen in the light of a creative opportunity to fundamentally strengthen businesses while contributing to society at the same time. As found by Rhuks Temitope Ako, Lawrence Ogechukwu Obokoh and Patrick Okonmah, corporate organizations and corporate managers appear more receptive towards CSR values seeing that they stand to profit in manifold ways by spending on CSR projects and avoid otherwise unnecessary costs attending irresponsible corporate behaviour.[132]

---

127 The Economist, 'Just Good Business: A Special Report on Corporate Social Responsibility' 19th January, 2008, 8 – 9.

128 See Part 1.2 on the Statement of the Problem.

129 Lambooy *supra* note 3 at 49 citing Villiers, C., 'Enforcement of CSR standards with incentives or sanctions?' Conference Paper (Hill Law of the Future Conference: Globalisation, the Nation-State and Private Actors: Rethinking Public-Private Cooperation in Shaping Law and Governance, The Hague, 8 and 9 October, 2009) 16.

130 Sheikh *supra* note 51 at 299.

131 Waal, A., and Escalante, G.O., 'The Relation between Corporate Social Responsibility and the High Performance Organizations Framework: the case of mining Multinationals in Peru' (2007) *Maastricht School of Management* 1.

132 Ako, R.T., Obokoh, L.O., and Okonmah, P., 'Forging Peaceful Relationships between Oil-Companies and Host-Communities in Nigeria's Delta Region: A Stakeholder's Perspective to Corporate Social Responsibility' [2009] 3 (2) *Journal of Enterprising Communities* 205, 206.

Richard Smerdon has succinctly summarized modern attitude to CSR in the following words:

> … the debate has moved on from the position five or so years ago when, as a generalization, companies and their investors were ambivalent as to whether investment in social and environmental projects was justified in terms of shareholder value, to a position where there is a much greater understanding by a significant proportion (but not by any means all) of investors and companies of the necessity for a business model which puts sustainability as a high priority, followed closely by ethical practices and a significant social contribution: all are seen as simply good business.[133]

The modern economic realities as a result of global financial crisis appear to have whittled down arguments that CSR only constitutes a deflection from serious business. To this end, Bryan Horrigan quoted the former Australian's Minister for Superannuation and Corporate Law (Senator Nick Sherry) as saying:

> … the world financial crisis is not just a corporate issue; the economy is not a private product but a critical piece of the social infrastructure … While some commentators have speculated that the financial crisis will put a stop to CSR programs – I believe this not to be the case. Such views are driven by a misunderstanding of what CSR is all about. If anything the current crisis should accelerate its adoption. Companies may need to refocus their efforts, and concentrate on the shared values between them and the wider community in which they operate. I believe the current circumstances highlight the realities of CSR as an important means of companies to manage non-financial risk and maximise their long term value.[134]

Therefore, Bede Nwete noted that CSR has not only become the rhetoric of every business enterprise (whether genuinely or just paying lip service), especially those engaged in natural resource development, but also occupies a pre-eminent position in board room discourse.[135] Further, Nojeem Amodu observed that effective and efficient CSR strategy and initiatives can

133 Smerdon *supra* note 2 at 431.
134 Horrigan *supra* note 67 at 13.
135 Nwete *supra* note 66 at 2.

be directly linked to growth in businesses and mitigation of social risks that may have profound effects on the bankability of an enterprise and the rate of returns on its projects.[136] In addition, according to research conducted at the Canadian Centre for Social Performance and Ethics at the University of Toronto, over a long term, companies that rate highest on ethics and CSR usually turn out most profitable.[137]

Further, in the EU, a lot of progress has been recorded on the adoption of CSR among companies. More EU enterprises have signed the United Nations Global Compact (one of the major CSR implementation documents);[138] many more are also signing agreements demonstrating responsibility towards higher labour standards;[139] businesses publishing sustainability reports have also increased.[140]

It should be stressed at this point that it was in the process of activism[141] for sustainable development and sound corporate governance practices in multinational enterprises (MNEs) that a set of business behavioural philosophy to not just do well but also do good arose. [142]

In view of the linkage between CSR and corporate governance in history and concept noted in 2.1 above, it appears trite at this stage to review literature in respect of the concept of corporate governance and depict the relation or interconnectedness (if any) with CSR.

---

136 Amodu, N., 'Broadening Access to Finance through CSR: the Guaranty Trust Bank Plc Case' [2013] 1 (7) *International Bar Association Legal Practice Division* 12 - 16; see also, Sheikh *supra* note 51 at 310; Smerdon *supra* note 2 at 438 – 441; and Ward *supra* note 84 at 15.

137 Clarkson, M., 'Good Business and the Bottom Line' (1991) *Canadian Business Magazine* 28.

138 European Union, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Region: *A Renewed European Union Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 Final 6. See discussions on the United Nations Global Compact in Chapter 5.

139 *Id*.

140 *Id*.

141 Branson *supra* note 18 at 605.

142 It should be appreciated that the CSR construct is usually discussed in connection to the activities of multinational companies and corporations because of their enormous powers and the influence of their operations (negative or positive) on the world economy. This is not however saying that CSR only applies to them. Intrinsic, effective and efficient CSR is a business governance and management model applicable to all corporate forms: companies and corporations, small or big, domestic or transnational, private or public. See generally, Raynard and Forstater *supra* note 110 at 2; see also Eijsbouts *supra* note 125 at 41.

2.4 Literature on Interconnectedness of Corporate Governance and CSR

Corporate governance is about the administration of a company, the relationship between the board of directors and management. According to John Farrar, it is also ultimately about regimes of accountability.[143] To Monks and Minow, corporate governance is the 'relationship among various participants in determining the direction and performance of corporations.'[144] It is about power and influence: in what manner is the power in a business distributed; who plays a role in conveying this power; and how is this power used?[145]A comprehensive definition is given by OECD. The OECD originated in 1948 as the Organisation for European Economic Co-operation (OEEC) for the reconstruction of Europe after World War II. Its mission is to help its member countries to achieve sustainable economic growth and development, and to raise the standard of living in member countries while maintaining financial stability – in order to contribute to the development of the world economy. It described corporate governance as follows:

> Corporate governance is one key element in improving economic efficiency and growth as well as enhancing investor confidence. Corporate governance involves a set of relationships between a company's management, its board, its shareholders, and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentive for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring.[146]

It is mostly accepted now that discussions on the proper governance of businesses are probably as important as the proper governance of countries. The reforms in corporate governance

143 Farrar *supra* note 12 at 301.

144 Monks R. and Minow N., *Corporate Governance* (Blackwell Publishers, Cambridge, 1995) 1.

145 Lambooy *supra* note 3 at 49.

146 See the Preamble to the OECD Principles of 2004. Colin Tricker who originally coined the term corporate governance in 1984, made the important distinction between management and direction, stating, 'if management is about running business, governance is about seeing that it is run properly which is the old distinction between doing things right and doing the right thing'.

discourse are mostly premised on the concept of Separation of Ownership from Control and the Agency Cost problem.[147] Spearheading[148] this reform was the work of Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* first published in 1932 and the subsequent history of corporate governance and its reform have since focused on solutions to problems[149] posed by the phenomenon of Separation of Ownership from Control in companies.[150] Douglas Branson summarised thus:

> … with public offering of shares on a widespread basis, many industrial and mercantile corporations were widely held. Because of modern communications and other mechanisms such as stock exchanges, the holders of shares in these corporations were dispersed, perhaps from Maine to California, and their holdings were atomized into 100, 500 or perhaps 1000 share lots. Thus, the shareholders who owned the corporations which, in turn, owned vast amounts of property, no longer controlled the property. Those corporations' assets represented a new form of property in that the persons who owned it no longer controlled it. There had come to exist a "separation of ownership from control"[151] (Emphasis mine)

Closely related to the theory of Separation of Ownership from Control is the problem of Agency Costs in corporate governance discourse. This problem appears to be premised on an age-long assumption that corporate managers, being human beings that they are, will find it difficult to prudently manage corporate funds the way they would manage their personal funds and efforts by corporate owners to check the excesses of these corporate managers will further

147 Bhatta, G., 'Corporate Governance and Public Management in Post-Crisis Asia' [2001] 23 (1) *Asian Journal of Public Administration* 7.

148 Some scholars argue that the discourse on the problems of Separation of Ownership from Control pre-dates the writings of Berle and Means. Adam Smith was reported to have observed that corporate managers do not watch over "other people's money" with the same vigilance as partners in a private company watch over their own. See Schwartz, B., and Goodman, A. L., *Corporate Governance: Law and Practice* (Vol. 1, LexisNexis 2005) 2 citing Smith, A., *Wealth of Nations*, (Vol. 2 Glasgow 1776) 741.

149 For instance, subsequently, authors such as Professor Gower made several postulations on *inter alia*, finding solutions to the inherent problem of lack of accountability of corporate managers to the stockholders originating from separation of ownership from control. See generally, Davies P. L., *Gower's Principle of Modern Company Law* (6th edn, Sweet and Maxwell, London) 66.

150 Branson *supra* note 18 at 605; see also Schwartz and Goodman *supra* note 148 at 2.

151 Branson *supra* note 18 at 606.

add to the agency costs.[152] To Ige Omotayo Bolodeoku, the problem of Agency Cost is a characteristic feature of the concept of Separation of Ownership from Control.[153] As a concept, it describes the issue of how the shareholders (as corporate owners or principals) can provide the agents (the corporate managers) with incentives to induce behaviour beneficial to the shareholders. In similar words, the agency cost analysis studies the costs of providing such incentives and the costs resulting from the extent to which agents will still deviate from the interest of the principal even in the presence of such incentives.[154] Under this agency cost discourse, the crux of comments and articles appear to be attempting to align the interests of both the principals and the agents in business ventures such that despite the myriads of agency problems, principals may still have proper welfare and sufficient motivation to remain in business in terms of returns on investment. Bolodeoku quoted Michael Jensen and William Meckling as noting that Agency Cost is the sum of the monitoring expenditures by the principal, the bonding expenditures by the agent, and the residual loss.[155] In other words, the agency problem is rooted in the opportunity cost of ensuring that corporate powers in the hands of corporate managers are properly utilized in the best interest of the owners of the companies. These costs, that is, the cost attributed to monitoring, bonding and aligning the interests of both the corporate owners and managers alike sometimes eventually serve as disincentives to corporate owners; the bottom line, for instance, which would have been available to the corporate owners, would have been reduced significantly. Bolodeoku also added that the dynamics between Agency Costs and Separation of Ownership from Control is such that it is the degree of separation of ownership from control that will determine the acuteness of the

152 *Ibid* 606 and 607.

153 Bolodeoku, I.O., 'Corporate Governance: The Law's Response to Agency Costs in Nigeria' (2007) 32 *Brooklyn Journal of International Law* 467, fn 38 citing Jensen, M.C., and Meckling, W.H., 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *J. FIN. ECON.* 305, 309.

154 *Id.*

155 *Id.*

associable agency problems and the measures that should be taken to solve the problems.[156] It is observed that subsequent postulations and modern writings in corporate governance are all almost still addressed to solving the agency problem. This is usually by means of redefinition and expansion of duties of directors, managerial structures, and broadening the responsibilities of companies and corporate owners to accommodate more recent values such as CSR core values of human rights protection, dignity of labour, environmental protection, sustainable development and many more.

From discussions above, it is evident that while CSR and corporate governance are two distinct concepts, they share some common agenda. By way of explanation, since it is not humanly possible for legislators to envisage or anticipate every mischief scenario in the corporate law and practice discipline, it is also virtually impossible to strictly provide for every possible corporate law and practice issue. This in turn also means that there will exist certain lacunae to be filled by case law and agreed standards, norms, rules, regulations, traditions, customs, conventions or codes which have not passed through legislative processes. The principles of both CSR and corporate governance as presently usually expressed in codes are thus largely applicable to fill in these gaps; the principles of both CSR and corporate governance also share the common objective of giving effects to legislated provisions especially in the absence of case law. Tineke Lambooy in her *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000-2010 and Case Studies*[157] reflects on the above in respect of Dutch Law in the following words:

> CSR and corporate governance apply mainly to the conduct of companies, their executives and financiers. Statutory provisions on corporate conduct leave considerable margins of discretion commonly filled in by case law through

[156] *Id*.

[157] Lambooy *supra* note 3 at 50 citing Timmerman, L., 'Gedragsrecht, belangenpluralisme en vereenvoudiging van het vennootschapsrecht' (Rules of conduct; diverging interests and simplification of company law), Ondernemingsrecht, (2005) 1 *Company Law Review* 2-8, specifically § 2.d.

> reasonableness tests. CSR and corporate governance contribute towards filling in these margins by introducing new standards for the conduct of businesses and their executives. These new standards have largely developed from initiatives taken by the business sector itself. They could be regarded as standards of behaviour or 'codes of conduct.

In spite of the shared features, CSR and corporate governance are distinct concepts with different values and issues. It is said that the development of CSR is aimed at adjusting corporate behaviour for the purpose of: preventing depletion of the Earth's natural resources; preventing unsustainable irresponsible corporate actions aimed solely at profit maximisation; promoting human rights protection; promoting a fair and social corporate policy for all employees in all countries where the company carries out business operations amongst others. On the other hand, the development of corporate governance codes for instance, is targeted at restoring the balance between corporate bodies with an aim to boosting shareholder confidence in company directors and the capital market.[158]

Interestingly, it had been argued that corporate governance only constitutes a subject of CSR and that CSR encompasses corporate governance.[159] Walsh and Lowry had contended that:

> ...corporate governance is an increasingly important aspect of CSR. And, as they continue to develop, corporate governance principles will continue to provide the more solid foundations on which broader CSR principles - and business ethics - can be further enhanced. [160]

However, in modern times, it appears now settled that CSR rather constitute an integral part of corporate governance and one of the modern trends in corporate governance discourse.[161] The words of Bob Tricker lends credence to this modern conception when he explained that:

---

158 *Id*.

159 de Hoo, S.C., *In Pursuit of Corporate Sustainability and Responsibility: Past Cracking Perceptions and Creating Codes* (Inaugural Lecture Maastricht University, 2011) 29.

160 Walsh, M. and Lowry, J., 'CSR and Corporate Governance' in Mullerat, R., (ed.) *Corporate Social Responsibility: The Corporate Governance of 21st Century* (The Hague, IBA & Kluwer Law International, 2005) 38, 39.

161 Eijsbouts *supra* note 125 at 43.

> The original corporate governance codes, dating from the early 1990s, were voluntary. At the time they were derided by some company chairmen as being no more that expensive, box ticking exercises. But since then three significant changes have taken place. Firstly, corporate governance compliance has increasingly become mandatory, enshrined in regulation or in some cases law. Complaints now tend to be about the cost of compliance not about the need of corporate governance codes. Secondly, risk analysis and risk management have become an integral part of the corporate governance process. Thirdly and most recently, corporate social responsibility and sustainability have been added to the corporate governance portfolio.[162] (Emphasis mine)

Summing up on this heading, it is instructive to simply note that CSR in terms of responsible business practices constitute an integral part of sound corporate governance practices. Therefore, CSR may be simply seen, especially from historical perspectives, as one of the modern constructs or devices used in addressing the age-long agency problems; that is to say, with CSR, companies are being reconceptualised as social institutions with proposals over the years to broaden the duties of directors, and ensuring that corporate managers do not only enhance shareholder value but also balance the interests of a larger group now popularly referred to as stakeholders.[163]

2.5 Literature on CSR Conception in Nigeria

Although there is paucity of materials on CSR in Nigeria especially from a corporate law view point, the CSR construct is not entirely strange within the Nigerian business climate. Many authors including Felix Tuodolo, Olufemi Amao, Idemudia and Ite have traced CSR in Nigeria to the practices of TNCs especially those in the oil and gas sector.[164] Gabriel Eweje noted that

---

162 Tricker, B., *Corporate Governance, Principles, Policies and Practices* (Oxford: Oxford University Press 2009) 349.

163 Dodd *supra* note 17 at 1145 to 1163; and Parkinson Models of the Company *supra* note 85 at 492 and 493.

164 Tuodolo, F., 'Corporate Social Responsibility: Between Civil Society and Oil Industry in the Developing World', *ACME: (2009) 8 International E-Journal for Critical Geographies* 530-541 at 531; Amao, O., 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' [2008] 1 (52) *Journal of African Law* 89-113;(hereinafter, 'Amao MNC and Law'); Idemudia, U., and Ite, U.E.,

the TNCs adopted a CSR regime with a focus on corporate charity and embarking on community development projects such as building of schools, providing scholarships, constructing roads, providing health care facilities and services and water supply amongst other infrastructure ordinarily provided by state institutions and governments.[165] The reason for these CSR practices and initiatives in Nigeria amongst TNCs in the extractive industry as characterized by corporate gifts, philanthropy and community development projects is not far-fetched and it is addressed under the next heading below.

However, before going further with the review of literature on CSR conception in Nigeria, it is perhaps instructive to once again clarify CSR as a subject. It is important to reiterate what CSR is and what it is not. The CSR construct as it had originated and currently evolving[166] denotes a business governance and management model which broadens the obligations and responsibility of corporate entities. CSR in its strict connotation is not corporate donation or corporate charity *per se*.

Following the above clarification, it is notable that since its introduction in the Nigerian business climate, a number of issues and factors appear to militate against effective CSR practices. Some of these issues are discussed below.

2.5.1 *Restrictive CSR Conception*

Review of relevant literature depicts one fundamental challenge surrounding CSR in Nigeria which is the seeming restrictive construction afforded the subject. In other words, CSR is

Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives, (2006) 13 *Corp Soc. Resp. Environ Mgmt.* 194, 195.

165 Eweje *supra* note 86 at 218.

166 Simon identified three generational stages of the CSR construct. See generally, Zadek, S., *The Civil Corporation: the New Economy of Corporate Citizenship* (Earthscan London, 2001).

largely[167] restrictively conceived in terms of corporate charity, donations[168] and just giving back to the society. On this note, it is no longer news on the pages of Nigerian newspapers seeing companies blow their own trumpets of practicing 'effective' CSR or as being champions of CSR or 'good corporate citizen' simply because they have provided pipe-borne water, hospitals, schools or have given scholarships *et cetera*. Again, a necessary implication of this restrictive conception is the reduction of CSR to gratuitous activities of the business community beyond the requirements of the law.[169]

Further, literature also reveals that but for the recent publication of Joseph Abugu in his *Principles of Corporate Law in Nigeria*[170] which discusses CSR in its modern conception, many leading authors and reputed standard texts and materials[171] on Nigerian corporate law and governance including from Olakunle Orojo, Fabian Ajogwu, Barnes K.D. appear rather silent on the CSR subject. Emeka Chianu, Emmanuel Okon amongst some others[172] instead confine their CSR discourse within the ambits of corporate gifting and community development projects beyond legal requirements. For instance, Hakeem Ijaiya defined CSR in terms of

---

167 See generally, Amaeshi *et al supra* note 113 at 83 to 99; see also Ijaiya *supra* note 113 at 62; see amonst others, FSDH Merchant Bank Limited, 'Corporate Social Responsibility (CSR) Activities in 2015', *The Guardian*, 19th January, 2016; Agary, K., 'Is CSR worth the trouble for companies? (1)' *Punch*, 26th July, 2015; see also Akingbolu, R., 'Building Equity through CSR: The Grand Oak Example', *Thisday*, 22th March, 2013, 36; and Akingbolu, R., 'CSR: Groups Hail Nigerite's Efforts', *Thisday*, 14th May, 2010.

168 The Nigerian Companies and Allied Matters Act (CAMA) 1990, Cap C20, Laws of the Federation of Nigeria, 2004 did not prohibit corporate gifting or donation with the exception of donations to political associations or parties. See section 38 thereof.

169 See generally, Vogel, D., *The Market for Virtue. The Potential and Limits of Corporate Social Responsibility* (Brooking Institution Press, Washington, 2005); and Davis, K., 'The Case for and against the Assumption of Social Responsibilities' [1973] 16 (2) *Academy of Management Journal* 312-322; and also, Davis, k., *et al Business and Society: Concepts and Policy Issues* (4th ed. McGraw-Hill, New York 1980) 50-57.

170 Abugu, J. E. O., *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers, 2014); see chapter 15 thereof dedicated to CSR. See also Smith, I.O., 'Corporate Social Responsibility towards a Healthier Environment' [2000] 1 (4) MPJFIL 22 to 40 for another succinct discussion of CSR as conceptualised in this study but from environmental management perspective.

171 See for instance, Orojo, J. O., *Company Law and Practice in Nigeria* (5th edn, LexisNexis, 2008); Ajogwu, F., *Corporate Governance in Nigeria: Law and Practice* (Centre for Commercial Law Development, Lagos, 2007); Barnes, K.D., *Cases and Materials on Nigerian Company Law* (Samadex Printing Works, Ibadan, 1992).

172 Chianu, E., *Company Law* (LawLords Publications, Lagos, 2012) at 236; Okon, E., 'Corporate Social Responsibility by Companies: The Liberal Perspective' (1997) *Nigerian Current Law Review* 193 at 201; Amaeshi *et al supra* note 113 at 93; see also Ijaiya *supra* note 113 at 62 and Raimi, L., *et al*, 'How Adequate and Efficient are Regulations on Corporate Social Responsibility and Social Reporting? Evidence from the Nigeria Telecommunication Industry' [2014] 4 (6) *Asian Journal of Empirical Research* 315, 318.

obligations on companies to consider the interests of the communities by providing social infrastructure such as schools, hospitals, roads, water supply in their area of operation.[173] In similar vein, Kenneth Amaeshi *et al* contend that *'CSR is a socially embedded construct and practice'*[174] and thus provides justification to the construction of CSR within the peculiar Nigerian social –economic business climate. The authors posit that:

> CSR in Nigeria would be aimed towards addressing the peculiarity of the socio-economic development challenges of the country (e.g. Poverty alleviation, health care provision, infrastructure development, education, etc) and would be informed by socio-cultural influences (e.g. communalism and charity). They might not necessarily reflect the popular western standard/expectations of CSR (e.g. consumer protection, fair trade green marketing, climate change concerns, social responsible investments, etc).[175]

The above conception has become so widespread that in 2007, a CSR Bill[176] was also presented before the Nigerian National Assembly, the crux of which is principally to, *inter alia,* establish a CSR Commission to collect some 'CSR contribution' or levy from corporations for the purpose of executing community development projects for the citizenry. This approach simply reduces CSR to just some levy or some further corporate tax; this development has been decried.[177]

As mentioned earlier, the trend of linking CSR to corporate gifting and community developments in Nigeria may not be unconnected to how it was introduced and by what agents. It can be argued that it was not until the peak of corporate irresponsibility amongst the then

---

173 Ijaiya *supra* note 113 at 4.
174 Amaeshi *et al,* at 93.
175 *Ibid* 19.
176 It had the title: 'A BILL FOR AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF THE CORPORATE SOCIAL RESPOSIBILITY COMMISSION'. Although the Bill passed the second reading in the National Assembly, legislative actions were subsequently discontinued as a result of public outcry about its obvious shortcomings. It was introduced by the late Senator Uche Chwukwumerije; while we must commend the introduction of this Bill for legislation, however, some of its provisions, especially those in respect of a mandatory 3.5 % contribution of each and every firm, are far from being desirable. See section 5 of the draft bill.
177 Amao MNC and Law *supra* note 164 at 90.

existing TNCs in the extractive industry in the early 1990s which culminated in the death of environmentalists such as the Ogoni Nine (9) that attention was drawn to the social responsibility of the business community. Apparently, discussions on CSR started against the background of poor community development policies of the TNCs in the extractive industry and this continued to dominate CSR discussions till date in Nigeria. Almost every company still conceives CSR in terms of what efforts the business community takes towards donating to the society or developing the local communities where they operate. For instance, Statoil once stated that:

> Because of past and present experiences with petroleum activities in the Niger-Delta with widespread environment destruction and little or no economic development, the population is deeply suspicious towards oil companies. Because of this, Statoil has to prove itself when it comes to corporate social responsibility in Nigeria.[178]

While it may be correct that the socio-cultural, economic and political environment of a country may colour its CSR issues, however, the core elements, values, categories or components of CSR conception remain largely similar everywhere. No corporation should practice or engage in the vain CSR of corporate donations or charity without ensuring, for instance, compliance with legal requirements guiding its operations or considering the welfare of its workforce.[179] Perhaps Freeland has succinctly summarized the issue at hand:

> The Gulf oil spill and the financial crisis have taught us , rather brutally, that the heart of the relationship between business and society doesn't lie with the charitable deeds companies do in their off-hours but whether they are doing their day jobs that help – or hurt the rest of us.[180]

---

178 Amadi, S., Germiso, M., and Henriksen, A., 'Staoil in Nigeria: Transparency and Local Content Report' (Framtiden, Ivare hender, No 1/2006) 19.

179 Even, in a corporate system where shareholder primacy holds sway, the company responsibility and directors' duties towards employee interests appear to still be enshrined. In support of this, see sections 172 of the English Companies Act, 2006 and section 279 of the Nigerian Companies and Allied Matters Act, 1990 as amended.

180 Freeland, C., "What's BP's social responsibility?" 19th July, 2010, Reuters online, http://blog.reuters.com/chrystia-freeland/2010/07/19/whats-bps-social-responsibility/ last accessed 24th October, 2106.

CSR is a global phenomenon and its elements, values and domains are similar everywhere. CSR is much broader in scope than just *corporate charity*, *corporate culture* or some simple call for *business ethics* which is concerned with moral dilemmas such as bribery and corruption.[181]

Generally speaking, this researcher is of the view, adopting Carroll's original model, that the CSR construct, in its true sense, has at least four elements or components and several core values and issues. As earlier noted, it is a business governance and management model which transcends just corporate philanthropy. Effective CSR practice by any business association will see such business obeying all relevant laws governing its operations, being ethical, socially responsive and responsible in its wealth creation for its owners. In other words, effective and intrinsic CSR will also entail simultaneous but balanced consideration of: economic profit maximization; ethical responsibilities towards employees; environmental responsibility in operations and not to say the least, constantly ensuring compliance with all legal rules and regulations governing their operational activities. It is also part of CSR in modern times to show the corporations activities in the areas of consumer protection, human rights protection, concerns for global warming and biodiversity among others. The modern practice by ethically conscious managers and companies is to balance out all these interests one way or the other. This is the intrinsic and effective CSR practice which ought to be the practice within the Nigerian business community.

2.5.2 *Government's Regulatory Chill Syndrome with Large Companies*

Extant literature also reveals that another issue for consideration is the 'regulatory chill' syndrome (that is, governments reluctance to undertake legitimate regulation for fear of

[181] Smerdon *supra* note 2 at 436; see also Osuji, O., 'Corporate Social Responsibility, Globalisation, Developing Countries and International Best Standards: The Incoherence of Prescriptive Regulation', Conference Paper, (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013) at footnote 34 and accompanying texts.

lawsuits from investors or withdrawal of investment) observed within the Nigerian extractive industry especially in relation to the interaction of the Nigerian government (as represented by the Nigerian National Petroleum Corporation) with the MNE partners in their oil exploration joint ventures. For instance, fundamental challenges surface in the preparation and interpretation of international conventions and Business Investment Treaties (BITs) between the MNEs and developing host state such as Nigeria. It turns out difficult for the host state to realize a regime of legal protection of investors (MNEs) and guarantees of a number of BIT provisions under International Investment Law. According to Leyla Davarnejad, such provisions are usually interpreted in favour of the MNEs to the detriment of the developing countries include, clauses on admission, treatment, alternative dispute settlement and against expropriation.[182] Faith Stevelman appears to better summarize this issue in the following words:

> Too often, host states have been so needful of financing and assistance in project development that they have agreed to halt social welfare regulation during the pendency of such a project of financing (or to pay damages if they do enact such regulations). These BITs have thus too often stymied host governments from enacting new regulations essential to social welfare. Indeed, in a given country, such a privately enforced 'hiatus' in social welfare regulation may persist for decades.[183]

From the above, it seems that the challenge centres around the non-integration of core CSR values of environmental protection, human rights and other similar responsibility and obligations in the BITs leading to their disregard by MNEs in the decision-making and consequently by international arbitral tribunals.[184] As earlier hinted, at the receiving end of this

[182] Davarnejad, L., 'Strengthening the Social Dimension of International Investment Agreements by integrating Codes of Conduct for Multinational Enterprises' OECD Conference Paper, (Session 2.2 of the OECD Global Forum on International Investment, 27-28 March, 2008) 10.

[183] Stevelman, F., 'Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie' (2011) 9 *Santa Clara J. Int'l L.* 101, 110.

[184] See for instance, Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID case No. ARB(AF)/00/2(2003); Compania del DesarrollodeSanta Elena, S.A. v. Republic of Costa Rica, ICSID case No. ARB/96/1, 15 ICSID Review- (2000) *Foreign Investment Law Journal* 72, 192.

scourge are developing countries who most times, in order to attract FDI, give concessions to MNEs allowing these corporations to 'skirt labour and environmental regulations' amongst other irresponsible corporate practices.[185] The growing body of jurisprudence of the International Centre for Settlement of Investment Disputes (ICSID) perhaps attests to this point.[186] The United Nations summarized the helplessness of most governments especially in the developing economies in addressing this problem as follows:

> The major difficulty…is how to identify the point at which a process of governmental action changes to an incremental deprivation of an owner's rights, such that the deprivation becomes the subject of a duty to compensate. If that definition is drawn too widely it will catch entirely legitimate regulatory and administrative action… So an extensive interpretation of regulatory takings can limit the national policy space by hindering a government's right to regulate, creating the risk of regulatory chill, with governments unwilling to undertake legitimate regulation for fear of lawsuits from investors.[187] (Emphasis mine)

Finally, Charlotte Villiers succinctly sums up the challenge noting that the fear of capital flight by investors in many developing countries appears to suppress the regulatory powers of government legislators for effective CSR practices even in BITs. [188]

2.6 Conclusion

By way of summary, CSR is both interdisciplinary and multi-disciplinary. It is capable of several definitions and the multiplicity is reflected even within the academic community where scholars and experts of international law, environmental law, labour law, human rights law, immigration law and business or corporate law amongst others adopt different definitions and stand points on issues as they relate to CSR. This chapter analyzed the CSR construct and conceptually clarified the subject from a corporate law perspective.

---

185 UNCTAD, World Investment Report 2003, 88.
186 Davarnejad *supra* note 182 at 8.
187 UNCTAD World Investment Report 2003, 111.
188 Villiers *supra* note 84 at 88.

In this chapter, the researcher stressed that the definitional stance of each commentator on CSR appears to monopolize such commentator's view points on issues as they relate to CSR and sustainability. For instance, on the issue of CSR regulation and enforcement mechanisms, it was shown that an adoption of a CSR construct of a *voluntary* nature (traceable to the disposition both at the OECD and the EU) has almost automatically pre-conditioned the adoption of soft law self-regulatory mechanisms and in turn result in adoption of codes of conduct and other non-binding guidelines as opposed to government hard law intervention (legal prescription). Adopting such rather restrictive voluntary approach has only contributed to the current global challenge of CSR greenwashing whereby companies only pay lip service to effective CSR practices. Consequently, in this chapter, the researcher has submitted that CSR ought to be conceptualized as a neutral subject to which either soft or hard law or a combination of both may be applicable. The CSR construct is simply what it is; it is a comprehensive business governance model through which the economic, legal ethical and discretionary responsibilities of a company are balanced for the sustainable development of both the business and society. There is nothing intrinsically voluntary or mandatory about it.

Also in this chapter, it was observed that notwithstanding the disparate views on CSR issues, it is still widely accepted across many jurisdictions and that CSR offers prospects for solutions to several sustainability questions and constitutes a potent tool to mitigating the adverse impacts of the capitalist and shareholder primacy oriented operations of companies on our common heritage, the planet earth. CSR continues to find acceptance in the hearts of many corporate managers, governments and corporate owners alike. It is getting settled that companies cannot be given unrestrained freedom, even in a free market economy, to simply focus on increase of shareholders' wealth. Put differently, further to the contributions of CSR to corporate governance discourse, it is no longer acceptable to strictly privatise corporate

powers and corporate properties for the sole interest and benefits of corporate owners (shareholders). There are more arguments around the world nowadays on how to use the CSR concept as a check on the exercise of raw corporate powers.

Aside highlighting a number of factors militating against effective CSR in Nigeria, the chapter also decries the paucity of standard materials on the CSR conception in Nigeria especially from the corporate law perspective. As earlier depicted, there is also room for improvement in the conceptualisation of the CSR construct in the Nigerian business climate. In order to facilitate efficient and intrinsic CSR in Nigeria, this improved understanding should be followed by a well-defined regulatory and legal framework for CSR practice. It would be imagined that such framework would not be too stringent to stifle or bar investment opportunities on the one hand but sufficiently regulatory to confine operations in the business community within the ambits of internationally accepted best practices and minimum legal requirements.

Finally, this chapter has highlighted different areas of gap in literature which this thesis shall attempt to fill. For instance, a proper appreciation of the meaning and significance of effective CSR conception amongst others, has been underscored in this chapter. This shall be followed by a clearly-defined legal, regulatory and enforcement framework of CSR. However, before delineating any regulatory and enforcement CSR framework which may only be antithetical to the commercial focus within the business community, it appears imperative to investigate the theoretical underpinnings of corporate practices and their CSR activities to understand the nature and purpose for which companies operate in the business community. This is the focus in the following Chapter 3.

CHAPTER THREE

THEORETICAL ANALYSIS OF COMPANIES AND THEIR CSR PRACTICES

3 Introduction

The ideological foundation of commerce and corporate law focusing on profit maximization drive for shareholders within the business community with little or no regards for the welfare of other constituents of the society continues to gain grounds in business communities. However, apart from reducing the costs of organization and running of businesses smoothly through the corporate form, one other objective of corporate law, as indeed should be any aspects of the law, is the pursuit of overall social welfare and efficiency. Further to discussions in Chapters 1 and 2, the emergence of CSR as a catalyst corporate governance model for furthering such overall social welfare and efficiency is no longer news.[1] As also earlier discussed in Chapter 2, CSR appears to have effortlessly won many hearts already as it affects the work of corporate insiders, corporate advisers, and all of the communities in which the corporations operate. Therefore, based on the popularity of CSR, almost everyone belongs to one CSR camp or another, whether supporting it, tolerating it or otherwise condemning it.[2] Again, the popularity of the concept has also succeeded in drawing to itself, a number of theoretical approaches, regulatory and policy questions in relation to the legal and economic justifications for its adoption within any business community. These questions for instance include: are there justifications to promoting stakeholder interests and public good objectives even at the expense of shareholders' interests? Assuming but not conceding that companies must be responsible for the social and environmental impact of their operations, under what

---

1 See generally, Amodu, N., *Effective Corporate Social Responsibility in Corporate Nigeria: Understanding the Matters Arising,* Conference Proceedings ISSN 2048 – 0806 (12th International Conference on Corporate Social Responsibility, Universidad Federal Fluminense, Niteroi and Rio de Janeiro, Brazil, June, 2013).

2 Horrigan, B., *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham, UK, 2010) 4.

theoretical, regulatory or enforcement framework should companies be held accountable or responsible?

3.1 Theorizing about CSR: Useless Waste of Time?

A theory is a group of logically organized and deductively related laws.[3] Theoretical models may also be described as searchlights that illuminate particular judgments and show them for what they really are.[4] Theories have also been seen as humanly constructed means by which people make sense of the judgments that constitute their ethical and political worlds.[5] Put in other words, theories are constructed principles, guidelines and assumptions aiding deeper interpretations of concepts, ideas, actions and inactions.

Generally speaking, there are different theoretical approaches and models from which corporate actions and CSR may be and has been analysed.[6] However, whether the theories are on the nature of the corporation or on corporate legal personality, these theories are usually overlapping and interwoven. Most often than not, individual authors adopt different theoretical approaches under disparate categorizations to serve varying purposes depending on the individual theme of research involved.[7] This is by no means strange in the present case of CSR given its multi-disciplinary nature and the broad based interactions of companies with political,

---

3 Marx, K., *Early Writings* translated and edited, Bottomore, T., (McGraw-Hill, 1963) 52.

4 Sunstein, C., *Legal Reasoning and Political Conflict* (Oxford University Press, 1996) 52.

5 *Id*.

6 Garriga, E., and Mele, D., 'Corporate Social Responsibility Theories: Mapping the Territory', (2004) *Journal of Business Ethics* 53, 65; Parkinson, J. E., 'Models of the Company and the Employment Relationship' (2003) *British Journal of Industrial Relations* 481 to 509.

7 Parkinson *supra* note 6 at 481 to 509; and Okoye, A. C., 'Re-defining Corporate Social Responsibility as a Legitimizing Force for Corporate Power: To what extent can law and a law-jobs perspective contribute to Corporate Social Responsibility?' (Unpublished) PhD Thesis submitted to the School of Law, University of Hull, 2012 at 219 citing amongst others: Hallis, F., *Corporate Personality: A study of jurisprudence* (OUP, Oxford 1930); Maitland, F. M., *Introduction to Gierke's Political Theories in the Middle Ages* (CUP ,1900), Machen Jr., A., 'Corporate Personality (1911) 24 *Harvard Law Review* 253 -267, Vinogradoff, P., 'Juridical Persons' (1924) 24 *Columbia Law Review* 594 -604; see also Dewey, J., 'The Historic Background of Corporate Legal Personality' (1926) 35 *Yale Law Journal* 655; Sacco, R., 'Legal Formants: A Dynamic Approach to Comparative Law', (1991) 39 *American Journal of Comparative Law* 10 to 20.

economic, legal and human elements. Accordingly, effort has therefore been made in this chapter to streamline the analyses of the ideologies with an eye on the target of finding an acceptable yardstick from which corporate behaviour and business decisions may be measured, incentivized or otherwise punished.

But before proceeding too far, why theorize about CSR in the first place? Within the English corporate legal system for instance, there appears to be little or no regard for theories. Theories are described as 'interesting philosophical speculations' or 'intellectual games', 'metaphysical' or just bluntly called 'useless waste of time'.[8] While many scholars would object to any philosophical voyage into many conceptions such as CSR which is supposedly practice-based, this thesis has come up with a few reasons for theorizing about companies and their CSR practices as adduced below:

(i) Examining corporate theory aids the development of a framework within which we can assess the values and assumptions that either unite or divide the plethora of cases, reform proposals, legislative amendments, and practices that constitute modern corporate law.[9]

(ii) Theorizing about companies and their CSR practices is also important in making progress in the process of steering companies in a desired direction.[10]

(iii) It also aids an understanding of the *raison d'être* behind different corporate governance models applicable from one jurisdiction to the other.

---

8 Foster, N. H. D., 'Company Law Theory in Comparative Perspective: England and France' [2000] 48 (4) *American Journal of Comparative Law* 588.

9 Dine, J., *The Governance of Corporate Groups* (New York, Cambridge University Press, 2000) 1 citing Bottomley, S., 'Taking Corporations Seriously: Some Consideration for Corporate Regulation' (1990) 19 *Federal Law Review* 203, 204.

10 *Ibid* 2.

(iv) As a corollary of the above, an underlying theoretical framework will engender a coherent approach to policy-making, regulation and standard setting initiatives on CSR.[11]

(v) Finally, theories can be used as interpretational answers to the increasingly challenging organizational structure, governance and management of businesses in general and their CSR practices in particular.

In concluding this part, it is instructive to reiterate that the theoretical investigations undertaken in this thesis are aimed at properly situating the nuances of effective and intrinsic CSR practices within a body of corporate law theory and towards demonstrating from where the eventual research findings and recommendations in this thesis originate.

3.2 CSR and Theoretical Underpinnings of Companies

Theories governing company operations or explaining their nature take various shapes including: business models, foundational theories, operational theories, organic theories, instrumental theories, political theories, integrative theories, ownership theories, and ethical theories amongst others.[12] As earlier noted, different authors attempt a delimitation of these theories as applicable to his or her CSR perspective or in line with a particular conclusion sought to be achieved.[13] This thesis has categorized the CSR theoretical approaches into the following broad headings viz: (i) *the Ideological Corporate Models*; (ii) *the Legitimation*

---

11 Horrigan *supra* note 2 at 73 and 76. Horrigan submits that corporate theorizing is the bedrock of normative justifications that inform corporate law making, law reform and practice.

12 Marks, C., and Miller, P. S., 'Plato, The Prince and Corporate Virtue: Philosophical Approaches to Corporate Social Responsibility' [2010] 45 (1) *University of San Francisco Law Review* 1; Dine *supra* note 9 at 1 and 2; see also, Garriga and Mêlé *supra* note 6 at 52-53; Amao, O., 'Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria' (2007) 29 *Dublin University Law Journal* 312 to 320; Windsor, D., 'Corporate Social Responsibility: Three Key Approaches' [2006] 43 (1) *Journal of Management Studies* 93-114; Klonoski, R. J., 'Foundational Considerations in the Corporate Social Responsibility Debate' [1991] 34 (4) *Business Horizons* 9 to18.

13 *Id*.

Theories; and (iii) *the CSR Operational Theories*. It is important to reiterate that the categorizations and headings of theories adopted in this chapter are adopted for convenience of discussions only and may not represent any generally accepted headings in any discourse on the theoretical underpinnings of corporations and their CSR practices.

Discussions under the heading of Ideological Corporate Models inquire into the existential nature and the purpose of companies themselves while discussions in relation to the Legitimation Theories offer explanations on the possible yardsticks for measuring the responsibility or otherwise of corporate behaviour. The third heading represents operational groupings of CSR theories.

3.3 Ideological Corporate Models

These Ideological Corporate models characterized the popular debate in the academic circle since the early 1930s as earlier discussed under part 2.2.1 of Chapter 2. Many ideas and thinking[14] have sprung up in connection with the said debate amongst different scholars from different fields. As earlier observed, although at the centre of the debate were the arguments of Berle and Dodd, the debate has however, over time, taken different descriptions and shapes; a few of its popular description are: *Shareholder Primacy Model* versus *Stakeholder Model*, the *Communitarian* versus *Contractarian* debate, the *Berle* versus *Dodd* debate, *Monotonic* versus *Pluralistic* views of corporate objectives.

This debate is still relevant till date (and very useful in this thesis) despite Berle's supposed concession of the outcome of the debate to Dodd. This is because extenuating arguments from both divides of the debate have continued to polarize scholastic thinking on the existential

[14] Horrigan *supra* note 2 at 17 to 25 and 97. Such related ideas appear to focus on any one or more of the following ideas: the standard shareholder-oriented model, state-oriented model, stakeholder-oriented model, manager-oriented model, voluntary *do-gooderism* model, higher-order society-oriented model.

nature of companies and consequently on the responsibility or otherwise of corporate behaviour in any given jurisdiction. Usually, two prominent schools of thought are said to have emerged from the debate viz: (i) the shareholder primacy model; and (ii) the stakeholder model.[15] These identified schools also constitute the two major types of Ideological Corporate models and are discussed in turn.

3.3.1 *Shareholder Primacy Model*

Proponents of this model posit that directors in companies have the primary obligation to enhance shareholder value and maximize shareholder wealth.[16] Put differently, Joseph Abugu described this model as assuming that corporations should be run for the sole and exclusive benefit of their owners.[17] It is based on a fundamental individualistic assumption that whosoever risks investing his funds in doing a business should naturally have such business managed for his/her sole benefit.[18] Further, this is a business model which situates the shareholders of a company at the core of activities and decision-making process of a company. The major rationale behind this model is that whoever bears the greatest risks in the operations of a company should naturally have such company run for his/her exclusive benefits; after-all,

---

15 It is instructive to note that William Bratton and Michael Wachter have argued that the generally accepted historical picture putting Berle in the position of being the grandfather of shareholder primacy and Dodd cast as the grandfather of pluralist *stakeholderism*, as has been done in this thesis, is mistaken. To the authors, it appears the two learned professors Berle and Dodd were *per se* discussing other corporate law topics and not the origins of shareholder primacy or CSR for that matter. However, this argument appears grandiose to form within the purview of this thesis. See generally, Bratton, W. W., and Wachter, M. L., 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation', [2008] 34 (1) *Journal of Corporate Law* 99, 101 and 103.

16 Parkinson *supra* note 6 at 482; Fairfax, L. M., 'Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric' (2007) 59 *FLA. L. REV*. 771, , at 779 citing Bainbridge, S., 'Director Primacy: The Means and Ends of Corporate Governance' (1997*) N.W. U. L. Rev*. 547,563; C*f:* It is instructive to note that this is only an assumption as there is no corporate statute in many jurisdictions around the world specifically stating that the sole purpose of a corporation is to maximize profits for its shareholders. See generally for this position, Nelson II, W. A., 'Post-Citizens United: Using Shareholder Derivative Claims of Corporate Waste to Challenge Corporate Independent Political Expenditures' (2012) 13 *Nevada Law Journal* 134, 141citing Elhauge, E., 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 *N. Y. U. L. Rev*. 733, 763.

17 Amao *supra* note 12 at 317; see also Abugu, J., 'Primacy of Shareholders' Interests and the Relevance of Stakeholder Economic Theories' (2013) 7 *Company Lawyer* 201 at 204, 205 *et seq*.

18 *Id*.

if anything goes wrong, others like creditors and debenture holders and employees will have their interests considered before theirs.

The leading proponents of the shareholder primacy model include Milton Friedman, Friedrich Hayek and more recently Henry Hansmann and Reinier Kraakman. The theory proceeds on a fundamental assumption that companies and businesses are private properties[19] of their incorporators and investors and as such the success of the company must be taken as the success of the shareholders. This assumption is said to have been borne out of the historical development of the body of laws now known as 'company law' out of Joint Stock Company or better still laws governing partnerships.[20]

The shareholder primacy model also underlies decided cases invalidating corporate decisions - however reputable or noble towards other constituents or stakeholders in the society - which are not taken towards promoting the success (profit maximization) of the company.[21] In more specific terms, besides being authorities on the *ultra vires* doctrine, these cases also constitute classic authorities for holding that the success or interest of the company is equal and in perfect simulacrum with the interest/success of the shareholders as a whole.[22]

---

19 Whitehouse, L., 'Corporate Social Responsibility as Regulation: The Argument from Democracy' in O'Brien, J., (ed), *Governing the Corporation, Regulation and Corporate Governance in an Age of Scandal and Global Market* (John Wiley & Sons, West Sussex, 2005) 156.

20 Abugu, J. E. O., *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers, 2014) 45 to 65; see also Ireland, P., `Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (1996) 17 *Journal of Legal History* 40; see also Ireland, P., 'Company Law and the Myth of Shareholder Ownership*'* [1999] 62 (1) *Modern Law Review* 32-57 footnotes 40-52, 164-168 (hereinafter simply 'Ireland').

21 See generally, Hutton *v.* West Cork Railway Co. (1883) 23 Ch.D., 654; Percival *v.* Wright (1902) 2 Ch 421; Dodge *v.* Ford Motor Co. (1919) 204 Mich. 459, 170 N.W. 668*;* Re Lee, Behrens & Co Ltd (1932) Ch 46; Rogers *v.* Hill 289 U.S. 582 (1933); McQuillen *v.* National Cash Register Co., 27 F. Supp. 639 (D. Md. 1939); Greenhalgh *v.* Arderne Cinemas Ltd (1951) Ch. 286, 291; Gottlieb *v.* Heyden Chemical Corp., 90 A. 2d 660 (Del. 1952); Parke *v.* Daily News Ltd (1962) 3 WLR 566; Amalgamated Society of Woodworkers of South Africa *v.* Die *1963* AmbagsaaWereniging (1967) 1 SA 586 (T); Michelson *v.* Duncan 407 A. 2d 211 (Del 1979). The principles of law enunciated in many of these cases also include that although directors are given wide latitude in making business judgement, however, the law (Business Judgment Rule) still binds them to act out of fidelity and honesty in their roles as fiduciaries.

22 *Id*. This principle appears to have been codified under section 172 of the UK Companies Act 2006.

The submission of Milton Friedman is the most cited academic authority adopting the shareholder primacy model. Friedman had postulated that: 'Few trends could so thoroughly undermine the very foundation of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible'[23] and that 'there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say engages in open and free competition, without deception or fraud.'[24] Corroborating Friedman, Hayek also argued against the use of corporate properties and resources 'for specific ends other than those of a long-run maximization of the return on the capital placed under their control' and further warned that the fashionable doctrine that their policy should be guided by 'social consideration' is likely to produce most undesirable results.[25]

It is important to also state that the shareholder primacy model received impetus from the agency theory. It is argued that corporate managers are employed by the shareholders to manage the company on their behalf as they do not have the time and/or competence to manage the businesses themselves, the corporate fiduciary duty automatically ought to be enforced to the benefits of the principals (shareholders) of the agents (corporate managers). The argument

---

23 Friedman, M., *Capitalism and Freedom* (University of Chicago Press, Chicago, 1962) 133.

24 Friedman, M., *Capitalism and Freedom* (40th anniversary edition, University of Chicago Press, Chicago, 2002) 133. It is very important to stress that while it is obvious that a company under this model should strictly pursue wealth maximization for its shareholders, such drive for profit, as advocated by Friedman at least, is not at all costs. The model still recognizes certain restrictions to act within the limits of the law and play 'within the rules of the game'. However, Friedman's views appear to be a classic view. More recent exponents of the shareholder primacy model argue that in the drive for profit maximization for shareholders, corporate managers may simply treat statutory laws and regulations as mere cost of operation and may willingly flout them if despite paying penalties for non-compliance or violation, there will in the end be a result for more profits for shareholders. See generally, Sneirson, J. F., 'Shareholder Primacy and Corporate Compliance' (2015) 26 *Fordham Environmental Law Journal* 1, 4, 5, 6 *et seq.*

25 Horrigan *supra* note 2 at 98 citing Hayek, F., 'The Corporation in a Democratic Society: In Whose Interest Ought It and Will It Be Run?' in Anshen, M., and Bach, G., (eds), *Management and Corporations* (New York: McGraw-Hill, 1985) 100.

concludes that without the shareholder primacy model, corporate managers will be encouraged to engage in opportunistic behaviour ('shirking') which will only add on to the agency cost – the cost resulting from corporate managers' opportunistic behaviour and the costs expended in monitoring the managers in order to prevent them abusing their positions.[26]

The 21st century representation of the shareholder primacy model by neo-classical economics has no doubt been succinctly captured by Professors Henry Hansmann and Reinier Kraakman in their landmark essay, *The End of History for Corporate Law*, where they contended that the shareholder primacy model had become so dominant that 'there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.'[27] They stated that:

> … the ultimate control over the corporation should be in the hands of the shareholder class: … the managers of the corporation should be charged with the obligation to manage the corporation in the interest of its shareholders; …other corporate constituencies, such as creditors, employees, suppliers and customers should have their interests protected by contractual and

[26] See generally, Jensen, M.C., and Meckling, W.H., 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *J. FIN. ECON.* 305. Perhaps the arguments of Michael Jensen at the Harvard Business School together with William Meckling, a graduate student of Milton Friedman, remains crucial to almost ending any debates or doubts that shareholder primacy and agency theory hold supreme in corporate law discourse. See McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 7; see also Keay, A., 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 *Sydney Law Review* 577, 583.*Cf:* However, Michael Jensen later in 2011 attempted to alter his almost *immoral* argument for a strict shareholder value by advocating 'integrity' in the course of profit maximization. Notwithstanding this turn by Jensen, Duff McDonald noted that such attempt has been largely unsuccessful as the harm was done already; to McDonald, Jensen's propagation of the agency theory and shareholder primacy theory at the Harvard Business School helped in the creation of Frankenstein monster corporations which no one knows how to kill. McDonald also noted that Jensen's ideas may even be linked to the Enron scandal and collapse. See McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 11,12 and 13.

[27] Hansmann, H. and Kraakman, R., 'The End of History for Corporate Law' in Gordon, J. and Roe, M., (eds), *Convergence and Persistence in Corporate Governance*, (Cambridge University Press, Cambridge, 2004) 33-68, 34; see also Roe, M. J., 'The Shareholder Wealth Maximization Norm and Industrial Organisation' (2001) 149 *U. PA. L. REV*. 2063, 2065; and Fairfax *supra* note 16 at 779, fn24. *Cf:*, Armour,J., Deakin, S., and Konzelmann, S. J., 'Shareholder Primacy and The Trajectory of UK Corporate Governance' (2003) 41 BRIT. J. INDUS. REL. 531 available at http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp266.pdf last accessed 3rd November, 2016..

> regulatory means rather than through participation in corporate governance …[28]

The shareholder primacy model appears to have gained so much dominance as a corporate culture particularly in the Anglo-American jurisdictions and almost all corporate governance mechanisms and activisms in the Anglo-American jurisdiction are geared towards only enhancing returns on investment for shareholders.[29] In fact, corporate governance activists in the USA in particular have been arguably concerned overwhelmingly with financial performance rather than long term productive investment.[30] In the UK, despite the conscious effort[31] at promoting a seeming third way model in between shareholder primacy model and stakeholder model, called the 'Enlightened Shareholder Value'[32] (ESV) - where extraneous competing interests of certain stakeholders are supposedly balanced but for the long term benefits of the shareholders[33] - there are still concerns that the ideological foundation of the so-called ESV is deeply rooted in the shareholder primacy model having not given the

---

28 Hansmann and Kraakman *supra* note 27 at 35.

29 United Kingdom's Company Law Review Steering Group, Department of Trade and Industry, 'Modern Company Law for a Competitive Economy: The Strategic Framework' (1999) 37. Dine, J., 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' [2012] 3 (1) *Journal of Human Rights and the Environment* 44,57; Ireland *supra* note 20 footnotes 129 and 133 citing Craypo, C., `The Impact of Changing Corporate Governance Strategies on Communities, Unions and Workers in the U.S.A.' (1997) 24 *JLS* 10 and Ghilarducci, T., *et al*, `Labour's Paradoxical Interests and the Evolution of Corporate Governance' (1997) 24 *JLS* 26; see also, Davies, P., 'Enlightened Shareholder Value and the New Responsibilities of Directors' Lecture at University of Melbourne Law School (Inaugural W E Lecture, 2005).

30 Ireland *supra* note 20 at footnote 129; and Keay, A., 'Stakeholder Theory in Corporate Law: Has It Got What It Takes?' [2010] 3 (9) *Rich. J. Global L. & Bus*. 249 (hereinafter simply 'Keay Stakeholder Theory').

31 Williams, C., and Conley, J., 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' *University of Carolina Legal Studies Research Paper* No 04-09, 4 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632347 last accessed 7th November, 2016.

32 This principle of Enlightened Shareholder Value is similar to the Australian 'Business Approach to Corporate Responsibility' and underlies the 'Business Case' model for CSR which enjoins corporate managers to consider stakeholder interests and report on non-financial matters of CSR like employee or environmental matters so long as it will make *business sense* (cost-benefit implications) to so do and such considerations are in relation to the overall economic performance of the company and without prejudice to enhancing shareholder value; see Villiers, C., 'Corporate Law Corporate Power and Corporate Social Responsibility' in *Perspectives on Corporate Social Responsibility*, Boeger, N., Murray, R., and Villiers, C., eds (Edward Elgar, Cheltenham, 2008) 85, 97, 98 *et seq.; see also*, Mohd-Sulaiman, A. N., [2011] 7 (13) *J. Appl. Sci. Res.*, 2411-2420 at 2418.

33 Armour and *et al supra* note 27 at 7.

stakeholders any real justiciable rights enforceable in courts.[34] To start with, corporate managers are statutorily required to '… promote the success of the company for the benefit of its members as a whole …'[35] By way of other examples, shareholders still retain the ultimate control of the corporate managers;[36] the business 'owners' have several participatory rights in corporate governance;[37] the investors are specifically promised returns and benefits from the company's profits;[38] the stockholders who may find themselves in minority are also assured of some protection;[39] the legislative and regulatory framework for mergers and takeovers of companies still largely prioritizes shareholders' interests as opposed to other stakeholders such as employees.[40]

It is seriously doubted if those on the other side of the spectrum - the stakeholders - other constituents of the company - such as the employees and their families, the creditors, the suppliers, business partners, the local community, the society and any other group with which the company may interact in the course of its business have similar benefits, especially beyond contractual stipulations. As a matter of fact, while 'other' interests other than shareholders' can be deduced in the latest version of the UK Corporate Governance Code as published by the

---

34 Eijsbouts, J., *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* (Inaugural Lecture, Maastricht University, 2011) 51; see also generally, Abugu *supra* note 17.

35 The English Companies Act, 2006, section 172. The provisions of the American Sarbanes Oxley Act of 2002 have also confirmed the shareholder-oriented corporate culture of corporate America; see Armour *et al* others *supra* note 27 at 10 and 11; see also section 181 of the Australian Corporations Act, 2001.

36 The shareholders may remove directors with unsatisfactory performance. English Companies Act 2006, section 168 thereof.

37 This includes voting rights at general meetings. Going by the pages of the April 2016 UK Corporate Governance Code as now published by the Financial Reporting Council and despite the point made at item 9 of the Preface, it is rather evident that the code is shareholder primacy-oriented. https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Final-Draft-UK-Corporate-Governance-Code-2016.pdf last accessed 24th October, 2016.

38 English Companies Act 2006, section 581.

39 There are provisions for derivative claims and petitions for unfairly prejudicial conducts. See the English Companies Act, 2006, sections 260 and 994.

40 Armour *supra* note 27 at 7-16. It is not impossible to find other aspects of the law, such as employment law safeguarding the interests of stakeholders in takeovers. But core corporate law principles have been predominantly shareholder oriented in nature.

Financial Reporting Council in April, 2016,[41] the word 'stakeholder' did not feature in any Main Principle or Supporting Principles in the entire document of over 35 pages whether by design or default. It should be said however that mention was made just once of the word stakeholders in the nearly inconsequential Preface section of the code.

The shareholder primacy model is applicable in Nigeria because of the colonial ancestry with Britain and the domestication of British laws into local laws in Nigeria[42] The shareholder primacy model is for instance statutorily embedded in the below:

> Directors are trustees of the company's moneys, properties and their powers and as such must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interests.[43]

By way of summary, the shareholder model - or pyramidal business form, exit system, stock-market capitalism[44] as otherwise variously known - can thus be seen as a business model which gives very little or no support to any considerations or interests outside the interest of the business owners which is in any event assumed to be different from the interest of anybody who is not an owner of the business. A major advantage of this model is that it absorbs the

---

41 See https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Final-Draft-UK-Corporate-Governance-Code-2016.pdf last accessed 24th October, 2016.

42 See the Companies and Allied Matters Act (CAMA), Cap C20 Laws of the Federation of Nigeria, 2004, especially at sections 279, 314 and 315 all to the effect that the interests of shareholders should be held paramount by directors and state regulators with little or no regard for societal or community concerns from companies' activities. *Cf*: section 279 (4), CAMA. See also Orojo, J. O., *Company Law in Nigeria* (3rd edn, Mbeyi & Associates, Lagos, 1992) 1; Amao MNC and Law *supra* note 154 at 91, 95 and 96; Guobadia, A., "Protecting Minority and Public Interests in Nigeria Company Law: the Corporate Affairs Commission as an Ombudsman" in McMillan, F., (ed) *International Company Law*, Annual Vol. 1, (Hart Publishing, 2000) 81 – 83. In fact, English Laws were practically domesticated in Nigeria; English corporate law was no exception. The first companies' law in Nigeria was the 1912 Companies Ordinance which was a local enactment of the 1908 English Companies (Consolidation) Act. Subsequent versions of the Nigerian company laws were also local enactment of English statutes. The Nigerian 1968 Companies Act was based on the 1948 English Companies Act.

43 CAMA, section 283 (1).

44 Spisto, M., 'Unitary Board or Two – Tiered Board for the New South Africa?'[2005] 1 (2) *International Review of Business Research Papers* 85 to 87.

management of the company from undue distractions and external pressures.[45] The argument is that this will in turn prevent abuse of corporate powers by managers who are 'forced' to one - and just one – goal in running the company: maximizing returns for the business owners.[46] From the above analysis, it is not surprising that the proponents of the shareholder primacy model will pay little or no attention to encouraging board room consideration of CSR matters relating to the society, labour, creditor or environmental concerns. As far as these theorists are concerned, wealth maximization for the shareholders is tantamount to effective economic distribution of resources in the society. It will simply be unacceptable for business managers to sacrifice profits which would otherwise have been available for sharing by the shareholders on the altar of some grandiose ethical, social, or environmental considerations. This attitude should not be strange at all; the whole idea here is that the business itself is a private property[47] of the investors who should operate in a free and perfect market as the incorporators and their agents (corporate managers) may deem fit.[48] After all, as they say, he who pays the piper, dictates the tune.

3.3.1.1 Critique of the Shareholder Primacy Model

Contrary to the assertions of Hansmann and Kraakman, it is seriously doubted if indeed it is the end of history for corporate law on the monotonic versus pluralist views of corporate governance. Series of criticisms and queries continue to trail the fundamental assumptions

45 Henderson, D., 'Misguided Virtue: False Notions of Corporate Social Responsibility' (2001) cited in Miller, R. T., 'The Coasean Dissolution of Corporate Social Responsibility' [2014] 17 (2) *Chapman Law Review* 1, 2.

46 *Id.*

47 Whitehouse *supra* note 19. Assuming the private property argument is valid, there is really hardly any absolute right to private ownership of property. See limitation to land ownership rights for instance under sections 43 and 44 of the Constitution of the Federal Republic of Nigeria Cap C23 LFN 2004; see also sections 28 and 29 of the Land Use Act Cap L5 LFN 2004.

48 Parkinson *supra* note 6 at 482.

underlying this shareholder primacy theory of corporate law. A few of these are highlighted below:

(i) The first criticism is that the protagonists of the shareholder oriented model appear to adopt a zero-sum mentality whereby it is assumed that an adoption of a pluralist or stakeholder model of corporate governance which encourages CSR practices will be suicidal to the company and its incorporators. Whereas, there is no credible evidence anywhere to the effect that corporate managers will be courting corporate suicide when they decide to act socially responsibly.[49]

(ii) Perhaps a fallacious premise on which the shareholder primacy model is based may be the assumption that the interest of the shareholders is always at variance with the interests of relevant stakeholders on issues. Sometimes, however few such situations may be, pluralist views regarding a corporate decision may just be aligned.

(iii) Historically speaking, the adequacy of the shareholder model to justify the existential nature of modern day businesses has also been queried. The argument is that unlike in the past when there were factory-like companies (whereby the business owners essentially provided the whole capital and assembled all the factors of production and therefore should have the business primarily run to maximize their profits), modern day companies are rather organized by professionals, managed using the skills and knowledge of employees and operated on huge risks undertaken by creditors and leveraging the well-being and peaceful co-existence with the local communities. Under this sort of modern arrangement, it appears illogical and quite frankly irrational to insist

[49] Horrigan *supra* note 2 at 94; see generally, Freeman, E., Harrison, J., Wicks, A., Parmer, B, and de Cole, S., *Stakeholder Theory: The State of the Art* (CUP, Management, 2010) 209.

on the advocacy that the business of companies should primarily be managed for the wealth maximization of the shareholders alone.[50] The point made here is that modern day businesses and corporations exist and to a very large extent can be argued, not capable of successful operation and long term survival *but for the recognition, support, cooperation, dependence and interaction with relevant stakeholders* in the society. If some basic questions must be asked: How truly successful can a corporation be without peaceful co-existence with its local community? How profitable can a business get without the cooperation of competent, hardworking and loyal employees? Regardless of the risks business owners are willing to take, how successful can the business really get without support from mortgagors, creditors and debenture holders? How effectively or efficiently can a company operate without proper interaction and appropriate management of state regulators, where relevant? In summation, as it is important to appreciate the contribution of business owners to the success or profitability of the business so is it crucial not to underrate the contributions of other stakeholders.

(iv) Further, the concept of CSR may not receive positive evaluation under the shareholder primacy model or the ESV for that matter as the directive to corporate managers under this regime to only have 'regard to' the interests of stakeholders seems to only constitute a means of ensuring better returns for the business owners. The principles of law enunciated in cases such as *Hutton v. West Cork Railway Co,*[51] *Greenhalgh v. Ardene Cinemas Ltd,*[52] or *Parke v. Daily News Ltd*[53] that '… the law does not say that there are

---

50 Horrigan *supra* note 2 at 98 to100; see also, Karmel, R.S., 'Implications of the Stakeholder Model' (1993) 61 *Geo. Wash. L. Rev*. 1156, 1171; and Johnson, L., and Millon, D., 'Corporate Takeovers and Corporate Law: Who's in Control?' (1993) 61 *Geo. Wash. L. Rev* 1177, 1197 to 1207.

51 *Supra* note 21.

52 *Id.*

53 *Id.*

to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company'[54] and equating the success of the company to the success of the shareholders, largely undermine the interests of other stakeholder groups and jeopardize the true meaning of the CSR concept. In other words, by the shareholder primacy model, corporate managers can only legitimately engage in CSR practices only with a view towards the financial advancement of the shareholders. This criticism was echoed by Pennington thus:

> The other question of policy is whether it is satisfactory that directors should be required by law to manage the company's affairs solely with a view to the financial benefit of the shareholders … it would, surely, be more in accordance with modern views about the functions of business enterprises in society to relieve directors from this myopia which the law forces on law.[55]

In conclusion, in view of the modern realities in the business community, the above enunciated principles in the Hutton's case amongst others in relation to CSR is not only unsatisfactory as limiting CSR to corporate charity and donations but also portends serious injustice to legitimate stakeholders in the company.

(v) The communitarian team production theorists have also identified a crack in the shareholder primacy model. Professors Margaret Blair and Lynn Stout maintained that the appropriate normative goal for a board of directors is to build and protect the wealth-creating potential of the entire corporate team – 'wealth' that is reflected not only in dividends and share appreciation for shareholders, but also in reduced risk for creditors, better health benefits for employees, promotional opportunities and perks for

---

54 Dictum per Bowen L.J. in Hutton's case at 672.

55 Pennington, R. R., 'Terminal Compensation for Employees of Companies in Liquidation' (1962) 25 *Modern Law Review* 715, 719.

executives, better production support for customer, and good 'corporate citizenship' in the community.[56]

(vi) Further to the above mentioned shortcomings of the shareholder primacy model, it may also been criticized as not only morally untenable but also out of line with prevailing social norms;[57] it is convenient to hold that the success/interest/benefit to the company is equal to the success/interest/benefit to the shareholders with little regard for a balance in the ratio of returns on investment and each shareholder equity contribution. However, by extension, can it be argued that the failure/liability/debts of the company is equal to the failure/liability/debts of the shareholders? The point this thesis is making here is that while there is no limit to the amount of returns on shareholders' investment, (the bigger the profit, the higher his returns without any form of limitation), morally (and logically) speaking, there should not have been a limitation as to the amount of liability on shareholders' investments.

(vii) The dominance claim of the shareholder primacy model also received some jurisdictional queries. The state of corporate governance in the United Kingdom for instance has been contended to be in rather a 'state of flux' than being dominated by the shareholder-oriented principles.[58] The reason for this assertion is not far-fetched. There are a number of principles and provisions in the UK corporate governance code

---

56 Blair, M. M. and Stout, L. A., 'Specific Investment: Explaining Anomalies in Corporate law' [2006] 1 (31) *Journal of Corporate Law* 719; see also, Bolodeoku, I.O., 'Economic Theories of the Corporation and Corporate Governance: A Critique', (2002) *J.B.L*. 420, 420 and 421.

57 Parkinson *supra* note 6 at 483; Donaldson, T. and Preston, L. E., 'The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications', (1995) 20 *The Academy of Management Review* 65, 88; 'see also Johnson, L., 'The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law' (1990) 68 *Texas Law Review* 865, 934. *Cf.* Miller *supra* note 45 at 23 and 26.

58 Hopt, K. J., 'Comparative Corporate Governance: The State of Art and International Regulation' (*European Corporate Governance Institute Working Paper Series in Law* No 170, 2011) available on http:ssrn.com/abstract=1713750 last accessed on 26th October, 2016.

and the Companies Act of 2006 still suggesting that corporate managers should balance competing stakeholder interests in running the companies.[59] Within the provisions of section 172 of the UK Companies Act 2006 alone, corporate managers are still enjoined to have regards to the interests of employees, local communities, customers, suppliers, and other related stakeholder concerns in working for the success of the company. Creditors' interests are specifically made crucial under subsection (3) of the said section 172.

(viii) It can also be argued that there is no reason to insulate corporate law from obligations of other areas of law[60] – such as human rights law, environmental law, labour law and others; all areas of law, including corporate law, should be instrumental to moving our society closer to what we want it to be – social efficiency.[61] The mainstream claim that corporate law should serve only the interests of the shareholder and managerial elite is highly suspect, especially if we believe that the purpose of corporations is to serve society as a whole rather than a small, wealthy minority.[62]

---

59 Armour *et al supra* note 27 at 531 and 532.

60 There are indeed instances where the shareholder primacy model may encourage non-compliance with legal obligations if such may increase the earnings of shareholders in the long run. For instance, under the shareholders primacy regime, corporate managers may deliberately evade tax obligations if calculations suggest that penalty for such evasion is lesser than the tax obligation itself and thereby saving a few company funds to be made available for distribution to the shareholders as dividends. After all, it is all about profit maximization almost at any costs. See generally Sneirson *supra* note 24.

61 Social efficiency denotes the employment of the principles of corporate law to promote public interest and advance the aggregate welfare of all who are affected by a company's activities, including the shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment. See Armour, J., Hansmann, H., and Kraakman, R., 'The Essential Elements of Corporate Law: What is Corporate Law?' Harvard John M. Olin Discussion Paper Series, No. 63, 7/2009 available at http://www.law.harvard.edu/programs/olin_center/ at 25 last accessed on 25th October, 2016 (hereinafter 'Armour Hansmann and Kraakman'). In fact, in the words of the former CEO of General Electric, Jack Welch, "on the face of it, shareholder value is the dumbest idea in the world. Shareholder value is a result, not a strategy … Your main constituencies are your employees, your customers and your products…". see McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 9.

62 Bratton and Wachter *supra* note 15 at 151.

(ix) The shareholder primacy model can also be criticized and perhaps rendered ideologically baseless on the ground that its fundamental assumption of taking the shareholders as the 'owners' of the businesses is after all not unassailable. While John Parkinson characterized such assumption as a 'technical error' and invincibly circular as it assumes the very point it seeks to prove,[63] Paddy Ireland demonstrated with the aid of historical evidence on the meaning of 'shares' that it is hardly correct to state that businesses are 'owned' by shareholders.[64] It has also been argued that the idea that the shareholders own the company does not sit well with the concept of the company being a separate legal entity. Shareholders actually own 'shares' as their private properties and cannot claim to own the company itself. Corporate properties belong to the company itself as a separate legal personality.[65]

(x) Finally, it is also arguable that the shareholder primacy model, having unduly focused the entire resources of the company on the shareholders, is a dangerous theory. Its principles are not only dangerous to the continued existence of the human society as we presently know it but also dangerous to the long-term survival of the company itself. Firstly, it appears intrinsically antithetical to progressive calls for companies to be

63 Parkinson *supra* note 6 at 483 and 484.

64 Ireland *supra* note 20 at 32-57; in fact there is also argument to the effect that as the shareholder primacists contend that shareholders may claim private ownership of the company because of their investment, so can, as stakeholder theorists argue, stakeholders such as employees, financiers, creditors and other constituents who have also invested their skills and monies lay similar ownership claim to the company. See Letza, S, *et al*, 'Shareholding versus Stakeholding: A Critical Review of Corporate Governance' (2004) 12 *Corporate Governance: An Int'l Rev*. 242, 251.

65 As held in plethora of cases such as Bligh v. Brent (1837) 2 Y & C Ex. 268, Salomon v. Salomon (1897) AC 22, Short v. Treasury Commissioners (1948) 1 KB 116; Fulham Football Club Ltd *v*. Cabra Estates Plc (1994) 1 B. C. L. C. 363, 379; Marina Nominees Ltd. v. Federal Board of Inland Revenue (1986) 2 N.W.L.R. 48; Habib Nigeria Bank Limited v. Ochete (2001) FWLR (Pt. 54) 384; CDBI v. COBEC (Nigeria) Ltd (2004) 13 NWLR (Pt. 948) 376; Mezu v. Co-operative Commerce Bank & Anor (2013) 12 W.R.N. 1, 4; shareholders have no proprietary interest in the company but in shares as the company has a separate personality of its own with which it can sue or be sued. See generally also, Keay *supra* note 26 at 586; Lynch-Fannon, I., *Working within Two Kind of Capitalism: Corporate Governance and Employee Stakeholding: US and EU Perspectives* (Hart Publishing, 2003) 82.

mindful of negative societal and environmental impacts of their activities. If the justifications for the shareholder-oriented corporate model are not intellectually challenged and its fundamental assumptions duly queried, the model has the capacity of (and some would contend has started) breeding extremely profitable and humongous companies with dangerous influences and powers to revolutionize human societies and with very weak or no legal ideology to checkmate such powers. Instances of modern day corporations' and cartel's complicity in drug trafficking, money laundering, terrorism and illegal international gun trades appears exemplary.[66] Secondly, the idea is also dangerous to the continued existence of the company itself as such other excluded stakeholders have been shown to have the capacity of engineering the 'sudden death' of such companies in reaction to the company's exclusionary policy and stakeholder mismanagement. The forced business shut down by Shell Petroleum Development Company of Nigeria as a result of stakeholder mismanagement in the wake of Ken Saro-wiwa's activism era in the oil rich Niger-Delta region of Nigeria is instructive.

3.3.2 *Stakeholder Model*

It is settled that the landmark article[67]of Merrick E. Dodd entitled him to be the father of the stakeholder model although organised thinking about the stakeholder model only began with

---

66 Fauchald, O. K., and Stigen, J., 'Corporate Responsibility Before International Institutions' (2009) 40 *The Geo. Wash. Int'l L. Rev*. 1027, 1034; Villiers *supra* note 32 at 85 and 86; Kleiman, M., Illicit Drugs and the Terrorist Threat: Casual Links and Implications for Domestic Drug Control Policy, CRS Report for Congress < http://www.fas.org/irp/crs/RL32334.pdf> last accessed 26th October, 2016; and De Miranda, B. M., 'The Global Governance of Corporate Responsibility' Conference Paper, (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013).

67 Dodd, M.E., 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145.

Edward Freeman,[68] while the classical work of Adolf Berle and Gardiner Means[69] had also made references to 'a group far wider than either the owners or the control.'[70]

The stakeholder model is a business management model which assumes that corporations ought to exist for the mutual benefit of those with relevant 'stakes' or 'interests in or against' the corporation as a going concern.[71] While the shareholder primacy model is prevalent in Anglo-Saxon jurisdictions such as United Kingdom, Australia, the United States of America, Canada, and New Zealand amongst others, the Stakeholder model has been mostly adopted in East Asia, and continental Europe, the Netherlands and Germany[72] in particular.

The group of stakeholders of a business is usually a large one although traditionally, there were just six (6) stakeholder groups namely: shareholders, employees, customers, managers, suppliers, and the local community.[73] The group may change over time due to change in business operations and the list of a company's stakeholders cannot be easily closed. The usual suspects in the stakeholder groups now include, apart from the business owners, the creditors, suppliers, consumers, employees, local communities, the society, the environment amongst others. The stakeholder group also represents the various *constituents* of the business or corporation.

---

68 See Freeman, E., *Strategic Management: A Stakeholder Approach* (Pitman, Boston 1984).

69 Berle Jr., A. A. and Means, G. C., *The Modern Corporation and Private Property*, (The Macmillan Company, New York, 1932).

70 Jones, T. M., Wicks, A. C., and Freeman, R. E., 'Stakeholder Theory: The State of the Art' in *The Blackwell Guide to Business Ethics*, Bowie, N. E., (ed) (Wiley-Blackwell, 2001) 20, 21, 22 *et seq.*

71 Parkinson, J. E., *Corporate Power and Responsibility* (Clarendon Press, Oxford 1993) 310 (hereinafter simply 'Parkinson CP').

72 Confirming Germany as the cradle of codetermination, *industrial democracy* and other stakeholder-oriented doctrines, see, Hopt, K, and Leyens, P., 'Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy' [2004] 2 (1) *European Company and Financial Law Review* 135, 141and Block, D. and Gerstner, A., 'One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany' (2016) *Comparative Corporate Governance and Financial Regulation* 1.

73 Mullins, L. J., *Management and Organizational Behaviour* (Prentice 2002) cited in Amao *supra* note 12 at 320.

The Stanford Research Institute in 1963 defined *stakeholders* as 'those groups without whose support the organization would cease to exist.'[74] In 1999, Freeman who probably made the stakeholder model most popular in the *Strategic Management: A Stakeholder Approach,*[75] also defined the term *stakeholder* as the 'groups and individuals who benefit from or are harmed by, and whose rights are violated or respected by, corporate actions'.[76] In 2002, Post and others defined Stakeholders as 'individuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities, and who are therefore its potential beneficiaries and/or risk bearers.'[77]

The stakeholder groups of the corporation are sometimes divided into primary and secondary stakeholders.[78] The primary stakeholders include the shareholders, employees, customers and others which ensure the continuity of the corporation as going concern.[79] The secondary stakeholders are described as those who influence or affect or are influenced or affected by the corporation but are not in transaction with the company or essential for its survival.[80]

Although the stakeholders of a company exist in large numbers independent of any recognition by the business or companies involved, the stakeholder group is, however, not unrestricted. It will be sheer absurdity to assert that anybody or entity who considers himself a stakeholder can be regarded as a legitimate stakeholder of a business. Although Freeman who had popularized

---

74 Donaldson and Preston *supra* note 57 at 72 citing Freeman, E., *Strategic Management: A Stakeholder Approach* (Pitman, Boston 1984) 31.

75 Freeman *supra* note 68 at 46.

76 Freeman, E., 'A Stakeholder Theory of the Modern Corporation' 174 in Pincus L.B. (Ed) *Perspectives in Business Ethics* (McGraw-Hill, Singapore, 1998) 171 to 181.

77 Post, J. E. *et al*, 'Managing the Extended Enterprise: The New Stakeholder View' [2002] 45 (1) *California Management Review* 6, 8.

78 Clarkson, M. B. E., 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 *Academy of Management Review* 92 cited in Amao *supra* note 12 at 320.

79 Amao *supra* note 12 at 320

80 Moir, L., 'What do we mean by Corporate Social Responsibility?' (2001) 1*Corporate Governance* 16 cited in Amao *supra* note 12 at 320.

the stakeholder concept is quoted to have also defined stakeholders as 'any group or individual who can affect or is affected by the achievement of the firms objectives',[81] an important yardstick to identifying legitimate stakeholders appears to have been provided by Donaldson and Preston who enjoined drawing a distinction between 'stakeholders' and 'influencers' of a corporation.[82] The point made here is that the stakeholder group does not extend to such broad group of anything influencing or influenced by the operations of the company. Influencers of corporate decisions such as the media should not be categorized as stakeholders as they have no *stakes or interests in or against* the corporation. Sometimes, even some legitimate stakeholders of a corporation maybe unable to influence corporate actions. Example of such are job seekers who are said to have an interest in ensuring that their job applications are considered by the companies involved (not that they should be hired however).[83] Another probable example will be the natural environment. Even the environment in almost every situation is a stakeholder in the wake of ever increasing concerns for climate change and global warming and their numerous social, economic and environmental effects resulting from emissions and wastes from industrial activities of corporations.

Edward Freeman, Andrew Wicks and Bidham Parmar summarized the rationale behind the stakeholder theory as follows:

> Business is about putting together a deal so that suppliers, customers, employees, communities, managers and shareholders all win continuously over time. In short, at some level, stakeholder interests have to be joint – they must be travelling in the same direction- or else there will be exit, and a new collaboration formed.[84]

---

81 Freeman *supra* note 68 at 46.

82 Donaldson and Preston *supra* note 57 at 85 and 86.

83 *Id*.

84 Freeman, E., Wicks, A., and Parmar, B., 'Stakeholder Theory and "The Corporate Objective Revisited"' (2004) 15 *Organization Science* 364, 365.

In a nutshell, the stakeholder theory is the ideological business model underlying the arguments that corporate decisions, actions and inactions must demonstrate due consideration of multiple stakeholder interests including shareholder interests. Therefore, within the ambits of this model, no singular interest of any stakeholder is particularly ranked higher than the other. All such interests from different constituents must be balanced in determining the success of the business.[85]

It should be noted that the stakeholder theory is an evolving model and just like the concept of CSR itself, it also has been plagued by the problems of definitions, pluralism in conception, backgrounds of views amongst others especially in the business management field.[86] Due to these pluralism and terms definitional problems, Donaldson and Preston gave a classical synthesis of the stakeholder theory and identified four key ideas (contents) of the theory namely: normative, descriptive, instrumental and managerial contents.[87] Since Donaldson and Preston's categorization, different perspectives[88] have since been canvassed as to the best suitable content (normative, instrumental, descriptive or managerial) by many writers, others arguing for a rather convergent theory.[89]

---

85 Farrar J. H. *Company Law* (2nd edn, Butterworths, London, 1988) 12.

86 Jones *et al supra* note 70 at 30, 31 *et seq;* see also Keay Stakeholder Theory *supra* note 30 at 250.

87 *Ibid* 24.

88 Stoney, C., and Winstanley, D., 'Stakeholding: Confusing or Utopia? Mapping the Conceptual Terrain [2001] 38 (5) *Journal of Management Studies* 603 to 626; see also, Heugen, P., and van Oosterhout, H., 'The Confines of Stakeholder Management: Evidence from the Dutch Manufacturing Sector', (2002) *Journal of Business Ethics* 40 at 387 – 403; Orts, E. W., and Strudler, A., 'The Ethical and Environmental Limits of Stakeholder Theory' (2002) *Business Ethics Quarterly, Philosophical Documentation Centre* 12 at 215.

89 Jones, T. M., and Wicks, A. C., 'Convergent Stakeholder Theory', (1999) *Academy of Management Review*, 24 206-221; see also, Jones, T. M., 'Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics', 1995 *Academy of Management Review* 20 at 92 to 117, where Jones essentially argued that companies whose managers are able to create and sustain mutually trusting and cooperative relationship with their stakeholders will achieve competitive advantage over companies whose managers cannot.

Compared with the shareholder primacy model, this thesis considers this model better favourably disposed to embedding the core values of CSR and sustainable development in companies as more businesses can act or omit to act in the interest of not just the business investors (today's needs) but also in the interest of all stakeholders including the environment and the needs of future generations. However, the biggest shortcoming of the stakeholder model appears in its assumption that shareholder interests and other stakeholder rights are equal[90] (no priorities) in any existence or survival discourse of companies. Further, the stakeholder model also lags in the provision of practicable paradigm with which corporate managers can actually or effectively balance the *equal* interests of all stakeholders and in the best interest of the company.

As a result of the importance of this theory to this thesis, regardless of its few highlighted shortcomings, it is imperative to enumerate its usefulness and rationale behind its consideration in this thesis as follows:

3.3.2.1 Justifications for the Stakeholder Model

(i) The stakeholder theory has been justified on the same argument upon which the shareholder primacy model was rejected. The theory questions the argument that businesses are absolute private properties of their owners and as such businesses ought to be managed solely for them; as it is reasonably impossible to claim absolute ownership of any property in modern sense without restrictions, so it is unreasonable to assert that businesses are absolute private properties of investors.[91] More so, the idea

[90] Parkinson *supra* note 6 at 495; ; the stakeholder theorists argue that all interests, shareholders' and stakeholders alike, are to be managed, preserved and protected equally and the protection of stakeholder interests should be seen as an end in itself not a means towards protection of shareholders' interests. See Keay Stakeholder Theory *supra* note 30 at 256

[91] Donaldson and Preston *supra* note 57 at 65 to 91.

of shareholders being referred to as 'owners' have also been historically and logically dislodged by Paddy Ireland[92] as they are at best owners of 'shares' in the business rather than owners of the business itself.

(ii) As feeble as it may seem, as opposed to shareholder primacy model, the stakeholder model also appears justified on the strength of wide adoption of the model in modern legal principles,[93] codes of corporate governance,[94] (business conducts) court judgments[95] and legislations[96] around the world. It can even be argued that the ESV adopted under section 172 of the English Companies Act 2006 demonstrates an ideological shift (or attempt thereof) towards adopting the stakeholder theory.

(iii) Another justification for the theory is rooted in deontological ethics. It is said that a business model which takes into consideration the interests of people with stakes in the company before most of its corporate decisions is fair.[97] But the question may be asked,

---

92 Ireland *supra* note 20 at footnotes 40 to 52, 161 to 163.

93 For instance the weakening of the hitherto supreme principle of Business Judgment Rule such that some form of protection is afforded stakeholders in what is considered legitimate management of a business enterprise; corporate managers may now legitimately increase wages of employees rather than declare profits for the shareholders; also, the definition of a 'reasonable takeover' now involves consideration of the impact of such takeover on employees, suppliers, local communities and creditors in determining how reasonable or not a takeover may be permitted. see amongst others: Hampson *v.* Price's Patent Candle Co (1876) 45 LJ Ch. 437; Shlensky *v*. Wrigley (237 N.E 2d 776 ill. App 1968); Harlowe's Nominees Pty Ltd *v*. Woodside Lakes Entrance) Oil NL (1968) 121 CLR 483, 493; Teck Corporation Ltd v. Millar (1973) 33 DLR (3d) 288 (BCSC); People's Department Stores Inc *v*. Wise (2004) 3 S. C. R. 461; Lonrho Ltd *v*. Shell Petroleum Co. Ltd (1980) 1 WLR 627 (HL); Unocal Corporation *v*. Mesa Petro Co. (1985) Del. Supr. 493 A.2d 946; see also Horrigan *supra* note 2 at 108 citing Lynn Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 *Southern California Law Review* 1189, 1202-203.

94 See for instance: principle 4 of the *Central Bank of Nigeria Code of Corporate Governance*, May 2014; Part D principle 28 of the Nigerian *Securities and Exchange Commission Code of Corporate Governance for Public Companies*, 2011 and principle 10 of the *Nigerian Communication Commission Code of Corporate Governance for the Telecommunications Industry*, 2014; see also, Fairfax *supra* note 16 at 774, 775 *et seq.*

95 Even courts within the Anglo-American jurisdiction have stated that corporate managers may take into account, instead of short term benefits of maximizing profits for the shareholders, the long term well-being of a company. See for instance, Provident International Corporation v. International Leasing Corp Limited (1969) 1 NSWR 424 at 440; Paramount Communications Inc *v*. Time Inc 571 A. 2d 1140 (Del, 1989); People's Department Stores *v*. Wise (2004) 3 S. C. R. 461; and BCE Inc. *v*. 1976 Debentureholder (2008) 3. S. C. R.560. See also Keay, A., 'Stakeholder Theory in Corporate Law: Has It Got What It Takes?' [2010] 3 (9) *Rich. J. Global L. & Bus*. 249, 250.

96 Indian Companies Act, 2013, section 166; English Companies Act 2006, section 172; Nigerian Companies and Allied Matters Act, 1990 as amended, section 279.

97 See generally, Donaldson and Preston *supra* note 57.

what is fair? Is fairness a universal or neutral concept? Is it possible for a fair scenario to A be at the same time and in similar circumstances be unfair to B? Who determines fairness?

(iv) The socio-economic realities of modern times where the corporations can no longer exist in isolation but naturally depend on material contributions from non-shareholder stakeholders such as creditors and employees also offers ample justification to consider such stakeholder interests in the management of such companies.

(v) Finally, against the backdrop of the imminent threat of climate change and undue influences of the very large TNCs, the need for sustainable development in both the society and within the business community has become imperative. The targets of sustainable development are better fostered by a stakeholder model under which more corporations and businesses can act and/or omit to act more responsibly in the interest of not just business investors (today's needs) but also in the interest of all relevant and legitimate stakeholders including the environment.

3.4 The Legitimation Theories

Having considered the Ideological Corporate models, the Legitimation theories[98] are hereafter discussed with focus on finding appropriate theoretical undercurrents to legitimize CSR practices. For emphasis, the theories discussed here can be (and are being) employed as

[98] As earlier hinted, discussions on the contractarian and the communitarian theories as Operational Legitimation theories are only for argumentative convenience. Other writers such as Lynch-Fannon for instance, may otherwise in the context of this chapter discuss the contractarian and the communitarian theories as Ideological corporate models. See Lynch-Fannon *supra* note 65 at 77 and 78.

microscopic theoretical lenses through which corporate behaviour may be measured or categorized as either responsible or otherwise.

As will be demonstrated below, it is not impossible that the earlier discussed ideological models overlap into the present legitimation theories. Some would argue for instance that the shareholder primacy model is more attributable to the contractarians while the stakeholder model is more readily canvassed by the communitarians.[99] Having said this, there appears to be some thin lines separating these ideas and theories and for the purposes of clarity, they have been discussed under distinct headings.

3.4.1 *The Contractarian Theories*

Two major theories can be distilled from the philosophical approach that a company is a web of contractual interrelation;[100] the contractarian theories are analysed from the perspective that business organizations or companies are platforms through which groups of two or more contractors conduct business operations. The theories are: (a) Legal Contractarianism and (b) Nexus of Contract Theory (Economic Contractualism).

3.4.1.1 Legal Contractarianism

The legal contractarian takes a company as the product of private contracts freely entered into between or amongst its incorporators or owners. The company is said to be efficient as a result of the freedom of the contractors to freely determine the terms and conditions of their relationship, the contract. A company is born when two or more parties are said to have come together to form a pact to carry on commercial activity.[101] If the whole company is one huge

[99] Amao *supra* note 12 at 312.
[100] Dine *supra* note 9 at 1; see also Bolodeoku *supra* note 56 at 417, 418 *et seq.*
[101] Dine *supra* note 9 citing Bottomley, S., 'Taking Corporations Seriously: Some Consideration for Corporate Regulation' (1990) 19 *Federal Law Review* 203, 208.

interconnection of contracts, it would appear justified to take the Articles (and Memorandum) of Association of companies as the ultimate contract, or better still, the constitution or *grund norm* of the contractors. This view seems approved in a number of corporate law provisions around the world.[102]

As Janet Dine pointed out, this theory is largely foundational[103] as opposed to an operational theory and will therefore offer little or no assistance for our analytical purposes in this thesis. Further rendering this theory of little significance are historical facts confirming that a company cannot simply be reduced to a contract since for a long time now, companies have primarily and largely come into existence not by means of contract but by means of positive concession of state or registration.[104]

What implication will this legal contractualism theory have on the CSR concept? A thinking reducing a company to a contractual relationship between the owners of the company *inter se* on the one hand and possibly between the owners and other constituents such as the employees, creditors and suppliers on the other hand will create a number of problems for effective CSR practices. For instance, while it may be possible to legitimately justify the interests of creditors and employees in a company under this theory as having contractual relationship with the business, it is doubtful, if the same can be said of the interests of the natural environment or the local communities or any other non-directly influencing constituents of the company which may not have a signed *contract* with the business.

---

102 A crude adoption of the nexus of contract view appears under section 41 of the Nigerian Companies and Allied Matters Act 1990 as amended. However, a refined adoption of the legal contractarianism can be garnered from the combined effect of sections 17 and 33 of the 2006 English Companies Act to the effect that the articles of a company shall have the effect of binding covenants between the company and members. Similarly, section 10 of the Indian Companies Act, 2013 has similar provisions.

103 Dine *supra* note 9 at 1.

104 In the history of the United Kingdom company law and practice, this is courtesy the 1844 Joint Stock Companies Act; see also Abugu *supra* note 20 at 62.

3.4.1.2 The Nexus of Contracts Theory/Economic Contractualism

While Michael Jensen and William Meckling could be regarded as the foremost protagonists of this theory,[105] the primary expositors of the Nexus of Contracts theory include Eugene Fama[106] and more especially Frank Easterbrook and Daniel Fischel.[107] This theory appears to represent the extremist thinking of the contractarian theories and has been described as the classical foundation on which companies in the USA[108] and the UK[109]operate. The theory brings to bear the voluntary, market-oriented nature of the company or firm and dismisses the notion that companies or firms owe their existence and operations to states creation.[110] It states that a firm or any business corporation is a mere central hub for series of contractual relationships.[111] Easterbrook and Fischel described the nexus of contract theory as 'a short hand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves'.[112] Accordingly, the firm or company itself is taken as a mere fiction,[113] a mere nexus or link for contractual relationships involving the business owners, the creditors, corporate managers, customers, suppliers, employees amongst other constituents. Therefore, corporate law is taken only as an extension of contract law and

105 Jensen, M.C., and Meckling, W.H., 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *J. FIN. ECON.* 305, who appeared to build on the work of Alchian, A., and Demstez, H., 'Production, Information Costs, and Economic Organization', (1972) 62 *America Economic Review* 777. It is not impossible also that Meckling would be influenced in his writings by the assertions of Milton Friedman in criticism of CSR. Meckling was actually a graduate student of Milton Friedman. See McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 5 and 10.

106 Fama, E., 'Agency Problems and the Theory of the Firm' (1980) 99 *Journal of Political Economy* 288, 290.

107 Easterbrook, F., and Fischel, D., *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge) 1991; see also Fischel, D., 'The Corporate Governance Movement' (1982) 35 *V. and L. Rev.* 1259.

108 Amao *supra* note 12 at 314.

109 Parkinson *supra* note 6 at 485.

110 Hayden, G. M., and Bodie, M. T., 'The Uncorporation and the Unraveling of the "Nexus of Contracts" Theory' (2011) 109 *Michigan Law Review* 1127.

111 *Ibid* 1129.

112 Easterbrook, F., and Fischel, D., 'The Corporate Contract' (1989) 89 *Columbia Law Review* 1416, 1426.

113 Fama *supra* note 106 at 290.

whose business really should be focusing on facilitating the contractual interrelationships in the most efficient manner.[114]

Very importantly, economic contractualism is hinged on the fundamental notions of *rational actors* and *efficiency*. It is argued that a combination of the nexus of contracts framework and the freedom of individual contractors acting accordingly in a rational manner can only result in an effective and efficient allocation of resources in the society.[115] In other words, high value use of resources, and therefore efficient allocation of resources in society, is guaranteed in an economy where rational actors[116] as individuals exchange assets and resources rationally and each deriving utility and welfare therefrom.[117] Cheffins explained that 'rational actors under economic theory, make decisions so as to improve their personal well-being, frequently referred to as their "utility", "welfare" or "wealth".'[118]

There is need for some clarifications on the doctrine of *efficiency* discussed here. Efficiency is usually measured using two (2) standards as gauges on whether or not a change/transaction/business decision has been efficient having increased or capable of increasing aggregate social welfare.[119] Firstly, Pareto Efficiency was developed by an Italian economist, Mr Vilfredo Pareto and it is to the effect that a decision or transaction can be said to be *Pareto-efficient* if it will make someone better off without making anyone else feeling

---

114 Butler, H. N., and Ribstein, L. E., 'Opting out of Fiduciary Duties: A Response to the Anti-Contractarians' (1990) 65 *Wash L Rev* 1, 7; Miller *supra* note 45 at 25; Hayden and Bodie *supra* note 110 at 1130; Dine *supra* note 9 at 10.

115 Cheffins, B. R., *Company Law: Theory, Structure and Operation* (Clarendon Press, Oxford, 1996) 4, 5, 6 *et seq.*

116 Rational actors are described in terms of having necessary information about products and services they are interested in, can at little cost have sufficient financial resources to transact, can enter and leave the market or bargain with little difficulty and can carry out obligations which they agree to perform. See Cheffins *supra* note 115 at 6.

117 Cheffins *supra* note 115 at 6 citing Halper, L. A., 'Parables of Exchange: Foundations of Public Choice Theory and the Market Formalism of James Buchanan' (1993) 2 Cornell J. of law and Public Policy 229 at p.235 and T. S. Ulen, 'Rational Choices and the Economic Analysis of Law' (1994) 19 *Law and Social Inquiry* 487, 496.

118 Cheffins *supra* note 115 at 4.

119 *Ibid* 14.

worse off. This has received criticisms because hardly will any decision/transaction make all parties to the transaction feel better placed without producing losers.[120] Secondly, the British duo of Professors Nicholas Kaldor and John R. Hicks also developed another test. A transaction/law is *Kaldor-Hicks efficient* if on the aggregate and on the whole, the benefits/social welfare/utility derivable from it outweighs the associated cost. Under this test, rational actors who benefit and made better off are said to obtain enough to compensate fully those who lose (in the long run). Obviously, as the Pareto efficiency is almost impossible to attain, Kaldor-Hicks efficiency is usually adopted as it not only promotes social welfare but also creates some soft landing for losers.[121]

This Nexus of Contract theory provides notional foundation for the shareholder primacy model[122] as the sole purpose of the corporation, according to even the contractarians is to maximize shareholders' profits and that other stakeholder groups are protected to the extent of the provisions of their contracts with the corporation.[123]

3.4.1.3 The Nexus of Contract Theory Critique

From the original proponents of the Nexus of Contracts Theory to its recent expositors, economic contractualism has been attended by a number of critical antagonism. These include:

120 *Id*.
121 *Id*.
122 Keay *supra* note 26 at 580; see also Bradley, M., Schipani, C., Sundaram, A., and Walsh, J, 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 62 *Law and Contemporary Problems* 9, 38.
123 Amao *supra* note 12 at 313 to 314; see also Abugu *supra* note 17 at 213 and 214.

(i) While some simply say that this theory is *difficult to defend*,[124] others have categorically maintained that the Nexus of Contract Theory 'does not correspond with a realistic picture of the corporation, even at the level of metaphor.'[125]

(ii) Jensen and Meckling's approach to economic contractualism is also challenged in that despite the title of their work, a full-fledged theory of corporation or the firm (as they call it) has perhaps not been really offered as they appear to have only offered a theory of agency cost. Their theory seems to leave corporate law focused entirely on financial transactions that are cut off from the primary strategic operating transactions of the corporation. In other words, they are said to have assumed in their analysis of the nexus of contracts that a firm or company already exists and have only gone ahead to tackle a problem within the corporate model.[126]

(iii) Also fundamentally, the theory has been criticized to have missed the whole gist of the essence of a company. It is said that rather than being a *Nexus 'of' Contracts*, a company is actually a *Nexus 'for' Contracts* as it provides the platform through which series of contractual interrelations involving the company, the owners, the employees and other constituents are formed.[127]

---

124 Foster *supra* note 8 at 587; see also Bolodeoku, I. O., 'Contractarianism and Corporate Law: Alternative Explanations to the Law's Mandatory and Enabling/Default Contents' [2005] 2 (13) *Cardozo Journal of International and Comparative Law* 433 at 437, 438 *et seq.* (Hereinafter simply 'Bolodeoku Contractarianism'*).*

125 Hayden and Bodie *supra* note 110 at 1134; see also Bratton Jr, W.W., 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornel Law Review* 407, 445 saying that ('If the Corporation really *is* contract, as the new economic theory tells us, then the last doctrinal vestiges of state interference should have withered away by now … but the sovereign presence persists.').

126 Rock, E. B., and Wachter, M. L., 'Islands of Conscious Power: Law, Norms, and Self-Governing Corporation' (2001) 149 *U. PA. L. Rev.* 1619, 1629; see also McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 1 to 13.

127 Armour, Hansmann and Kraakman *supra* note 61.

(iv) Another criticism of the nexus of contracts theory is the relegation of the role of the corporate law and the state to the background *gap-filling* function. Easterbrook and Fischel had argued that:

> Why not just abolish corporate law and let people negotiate whatever contracts they please? The short but not entirely satisfactory answer is that corporate law is a set of terms available off-the-rack so that participants in corporate ventures can save the cost of contracting. There are lots of terms, such as rules for voting, establishing quorum, and so on, that almost everyone will want to adopt. Corporate codes and existing judicial decisions supply these terms 'for free' to every corporation, enabling the venturers to concentrate on matters that are specific to their operations.[128]

(v) The theory also appears fundamentally questionable against the background of the pseudo-scientific notion of *efficiency (whether Pareto-Efficiency or Kaldor-Hick's)* and the claim that creating wealth is beneficial to society as a whole means that the end result is a picture where interference with the freedom of markets needs to be justified by anyone who argues for any regulation of corporate behaviour.[129]

(vi) Just like the shareholder primacy model, the nexus of contract theory also focuses too much attention on the present contractors of a company – the present 'owners' and perhaps, present creditors and employees - without much consideration for the long term[130] interests of future generations of contractors who, unfortunately, are not present to negotiate favourable terms of contracts for themselves.

---

128 Hayden and Bodie *supra* note 110 at 1131 citing Easterbrook and Fischel *supra* note 112 at 1444.

129 Dine *supra* note 9 at 13.

130 Research has also shown the dangers associated with the pre-occupation of corporate managers with short term values such as share price as undermining conditions for innovation and human capital development and the long term competitive strength of such companies and of the economy as a whole. See Parkinson *supra* note 6 at 50; see also generally, Hanushek, E., and Wobman, L., *Education Quality and Economic Growth* (The World Bank, Washington, D.C. 2007).

(vii) Further, the economic contractualism analysis of Jensen and Meckling whereby corporations are pure inanimate contracts and incapable of social and moral obligations is said to be a misconception;[131] there is a difference between the ideas of having *social responsibilities* and having *social conscience*.

(viii) Just as the shareholder primacy model, this ideological stance also appears dangerous to maintaining a balance between business and society; shunning CSR, relegating all forms of state regulation and corporate law in the scheme of business affairs can only mean one thing: creation of bad companies and global monsters.[132]

In concluding this part, the question could be asked, what will be its implication on effective CSR practices? As identified in the discussions under the Legal Contractarian Theory, this present theory will surely limit the capability of businesses to demonstrate corporate responsibility towards many a constituent of the business especially those without 'contract' with the business.[133] It will justify wealth maximization drive of corporate managers for their appointers almost at all costs and usually at the expense of the non-contractual stakeholders who may not even be influencers of the corporate decisions.

---

131 Dine *supra* note 9 at 16 citing O'Neil, T., 'The Patriarchal Meaning of Contract: Feminist Reflection on Corporate Governance Debate' in Patfield (ed.) *Perspectives on Company Law: 2* (Kluwer, London, 1997) 27; see also Parkinson *supra* note 6 at 489.

132 Dine *supra* note 9 at 17; see also Mitchell, L. E., *Corporate Irresponsibility: America's Newest Export* (Yale University Press, 2001) 28; see also Bolodeoku Contractarianism *supra* note 124 at 418 saying: "Because there are differences in rights, responsibilities and expectations of each corporate constituent in relation to a corporation, it is crucial to investigate the contents of the various jural relationship within the corporation. The nexus of contract theoretical approach does not favour such investigation." Professor Bolodeoku at page 430 also quoted Brudney, V., 'Corporate Governance, Agency Costs and the Rhetoric of Contract' (1985) 85 *Colum. L. Rev.* 1404 saying that: "the rhetoric of contract … serves to obscure the erosion of fiduciary duties and to complete 'the process of legitimating the substantial discretion which corporate management has, both to shirk in its performance and to its own benefit at investor's expense'".

133 Parkinson *supra* note 6 at 485.

3.4.2 *The Communitarian Theory*

The leading exponents of the communitarian approach to corporate law include Lawrence E. Mitchell, William Bratton Jnr and David Millon and the theory seeks to regulate and define the legal institution of property and contract in service of social values.[134] The communitarian theory appears to represent an extremist thinking in corporate governance discourse away from the individualistic contractarian approach of the nexus of contract theory. Here, a company is not only taken as a concessionary creation of the state but also a veritable state instrument for driving social cohesion, social inclusion and public welfare. Communitarians regard a company as a 'community of interdependence, mutual trust and reciprocal benefit' whereby corporate managers must ensure the company is managed for the benefit of all and any present or potential stakeholders of the company such as creditor, employees, suppliers, customers and local communities where such a company operates.[135] The communitarian theorists would measure the economic success of businesses by how far such businesses can demonstrate commitment to social responsibilities and providing social goods and public services. Therefore, this theory has the following implications: (i) the company has no strong commercial identity because it has largely become a political tool with diffused goals; (ii) the company's diffused goals remove its commercial focus;[136] (iii) it is very easy to justify or accommodate the interests of other constituents/ stakeholders in the scheme of business affairs.

CSR practices can easily be justified hereunder although how effective or efficient such CSR practices will be remains another question. A necessary conclusion from the above may therefore be that the communitarian theorists are more likely to hold the interests of the

134 See generally, Millon, D. K., 'New Directions in Corporate Law Communitarians, Contractarians, and the Crisis in Corporate Law' (1993) 50 *Wash. & Lee Law Review* 1373; see also Amao *supra* note 12 at 315.

135 Millon, D. K., 'Communitarianism in Corporate Law: Foundations and Law Reform Strategies' in Mitchell, L. E., (ed), *Progressive Corporate Law: New Perspectives on Law, Culture and Society* (1995) 10.

136 Dine *supra* note 9 at 17.

corporate body to be in perfect simulacrum with the objectives of state institutions and the government in the provision of public goods and social services. Many companies from the former communist countries and the fascist Italy were modelled on this theory.[137]

The communitarian theory risk complete loss of the commercial focus of businesses in their arguments. This is the main argument against the communitarian theory; its diffusion of goals is more often than not inefficient as it would only confirm Friedman's argument to the effect that where profit maximization for shareholders ceases to be the narrow focus of companies, corporate managers are most likely to be confused as to in whose interests are the company's affairs to be run.[138] It is therefore in doubt if this theory can foster effective CSR practices as even the notion of CSR does not seek a complete removal of the commercial focus of the business as this theory tends to seek.

3.4.3 *The State Concession Theory*

The concession theory holds the view that business corporations owe the state its existence and should be gratified for such privilege even in its governance by tolerating state interference. State concession theorists argue that such state interferences are needed in ensuring that corporations remain useful socio-economic vehicles for development. While this theory is not as extreme as the communitarian in seeking to align the interests of both the state and the business community, it however shares in the view that the existence and operation of companies is a concession by the state, which grants the ability to trade using the corporate tool, particularly where they operate with limited liability.[139]

---

137 *Id.* citing Williamson, P. J., *Corporatism in Perspective: An Introductory Guide to Corporatist Theory* (Sage, London, 1989).

138 *Ibid* 20.

139 Dewey *supra* note 7 at 666 to 669; see also Dine *supra* note 9 at 21 citing Mark, G., 'The Personification of the Business Corporation in American Law' (1987)*University of Chicago Law Review* 1441.

Two forms of this theory were identified by William Bratton Junior[140] namely (i) a strong version which attributes the corporation's very existence to state sponsorship and (ii) a weaker version which sets up state permission as a regulatory prerequisite to doing business. Under the state concession theory, the businesses and companies do not exist in reality but are mere fictional creations of the state enjoying the privileges of delegated powers to operate commercially within the bounds[141] granted[142] by the state.[143] Popular exponents of this include Von Savigny, Albert Venn Dicey, and John Austin amongst others. Against the backdrop of its origins within the state authority, other leading academic proponents of this theory include Kent Greenfield and Stephen Bottomley who argued for the introduction of public law principles such as constitutionalism, citizenship, legitimacy and separation of powers into corporate governance discourse.[144] Against this backdrop, this thesis finds this model very useful in justifying the CSR construct, since, as a creation of the state, companies are political animals and must owe duties to the public.[145]

The major undoing of the state concession theory appears to be its association with the fiction theory. If the company is taken as a mere fiction and not existing in reality, how exactly then do we explain its *de facto* operational existence? It has even been said that just 'like the fiction theory, the concession theory is not a theory (as it practically explains nothing). It is no more

---

140 Bratton Jr, W. W., 'The New Economic Theory of the Firm: Critical Perspectives from History' (1989) 41 *Stanford Law Review* 1471, 1475.

141 Such bounds can be exemplified in the many rules, whether default, permissive or mandatory, in statutory company laws in many jurisdictions around the world.

142 Concession was first granted to religious orders, local authorities and guild of merchants and later extended to a point of introducing incorporation by registration and limited liability. See the Joint Stock Companies Act 1844 and the Limited Liability Act 1855 cited by Okoye *supra* note 7 at 218.

143 This is said to be the true basis of the doctrine of *ultra vires*. Dine *supra* note 9 at 22.

144 Hobbes, T., *Leviathan,* (Oxford, Blackwell, 1960) chapter 22 at 146; see also Bottomley, S., 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 *Sydney Law Review* 277; Greenfield, K., *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities,* (University of Chicago Press, Chicago, 2006); Fraser, A., 'The Corporation as a Body Politic' (1983) *Telos* No. 57, 5-40 and Parkinson *supra* note 6 at 491 and 497.

145 Campbell, D., 'Why Regulate the Modern Corporation? The Failure of 'Market Failure' in McCahery, J., Picciotto, S., and Scott, C., (eds), *Corporate Control and Accountability* (Clarendon, Oxford, 1993)103.

than an idea, an idea which is used to justify state interference in groupings other than the state.'[146]

While the theory can be easily dissociated from the extremist ideology of communitarian, it has however created the problem of justifying state interference in corporate governance and management without specifying to what extent such interference is permissible to guarantee the commercial focus of corporations. Further, under regulatory and policy making discourse on CSR, the state concession theory would justify externalized state prescription of CSR inspired corporate principles and rules to guide corporate managers in taking into consideration the interests of other constituents apart from the shareholders in corporate decision making.

Notwithstanding the criticisms above, the central idea of the state concession theory justifying prescription of business rules by the state in deserving circumstances appeals to this thesis, hence its consideration in the formulation of the Responsible Stakeholder Model (RSM).

3.5 The CSR Operational Theories

The CSR Operational Theories are the four CSR theories categorized by Elisabet Garriga and Domenec Mêlé[147] and they have been accepted by a few authors as representing a successful and brilliant account of foremost academic debates on CSR.[148] This mapping of CSR theories appears to be designed to situate the general CSR theories within relevant political, social and economic topics.[149] Gariga and Mêlé classified the theories as follows:[150] (i) Instrumental Theories (ii) Political Theories (iii) Integrative Theories and (iv) Ethical Theories.

---

146 Foster *supra* note 8 at 582.
147 Garriga and Mêlé *supra* note 6.
148 Okoye *supra* note 7 at 72 citing Crane, A., Matten, D., and Spence, L. J., *Corporate Social Responsibility: Readings and Cases in a Global Context* (Oxford, Routledge, 2008) 58.
149 Garriga and Mêlé *supra* note 6 at 52.
150 *Id*.

The Instrumental theories view CSR as instruments of achieving economic objectives of the business. The social responsibility of the corporations under these theories is wealth creation for shareholders. This group of theories are labelled 'instrumental' because under such theories CSR is perceived as a mere means to the end of profit for businesses;[151] Put differently, CSR is just a potent tool for wealth maximization for a corporation. They also discuss CSR as marketing and a method of building a brand for improved bottom line and an instrument for long-term wealth creation.[152]

The Political theories highlight the notion of corporate power and its relationship with responsibility within the society. This is the grouping of theories where the social power of the corporation is emphasized, specifically in its relationship with society and its responsibility in the political arena associated with this power.[153] Under these theories, CSR is also adopted using the corporate citizenship perspective. This is the view point of running a corporation as a political citizen within rights and responsibilities, be it social, economic, civic or political.[154]

---

151 *Id*.

152 Okoye *supra* note 7 at 74.

153 Garriga and Mêlé *supra* note 6 at 52.

154 Andriof, J., and McIntosh, M., (eds) *Perspectives of Corporate Citizen* (Greenleaf, Sheffield 2001). See also the US landmark case of Burwell *v*. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2781 (2014) where the United States Supreme Court allowed closely held for-profit corporations to be exempt from a regulation its owners religiously object to if there is a less restrictive means of furthering the law's interest, according to the provisions of the Religious Freedom Restoration Act (RFRA). Tenth Circuit Judge Neil Gorsuch testifying before the Senate Judiciary Committee on Tuesday, March 21, 2017 in respect of his confirmation as judge of the US Supreme Court also confirmed the holding in this case as correct interpretation of corporate law in the US. See http://www.washingtontimes.com/news/2017/mar/28/why-religious-freedom-is-important-to-both-dems-an/ last accessed 1st July, 2017. In Nigeria, it is codified that companies have all the power of a natural person with full capacity but expressly prohibited from making any political donations and otherwise gifting its properties for any political purposes. See section 38, CAMA.

The Integrative theories examine how businesses integrate social demands.[155] It is usually argued under these theories that businesses depend on society for its continuity and growth and even for the existence of business itself.[156] The theories are said to synthesize other categories of theories to provide a framework for gauging corporate response, analysis and developing corporate policy.[157] It may be noted that this approach has been adopted in the latter part of this thesis.

The Ethical theories are the moralistic and normative focus of running businesses with a constant recourse to some higher standard of what is fair, right and just for the society. To the authors, these theories lead to a vision of CSR from an ethical perspective and as a consequence, corporations ought to accept social responsibilities as an ethical obligation above any other consideration. It incorporates other theories such as stakeholder theories, sustainable development and common good approach.[158] Therefore, these theories will enjoin the adoption of CSR practices with due regard and fairness to all necessary constituents of the corporation.

3.6 Analysing the Theories in Terms of CSR Practices

Following the above discussions, the questions below seem pertinent: for whom should the corporation exist or be managed? Under what corporate philosophies or ideological principles are the social responsibility initiatives or practices legitimized or best operationalized within the business community? Put simply, by what policy framework and underpinned by what corporate law theory, can effective and efficient CSR practices be embedded in companies for sustainable development of both business and society alike? It has been predicted that answers

155 Preston, L.E., and Post, J. E., *Private Management and Public Policy: The Principle of Public Responsibility* (Prentice-Hall, Englewood Cliffs NJ 1975).
156 Garriga and Mêlé *supra* note 6 at 52.
157 Okoye *supra* note 7 at 75.
158 *Ibid* 76.

to the above questions may not be clearly discernible within any one of the existing theoretical corporate models especially as they are presently popularly canvassed.[159] Therefore, the objective of this section of the chapter is to attempt an answer from a careful consideration and sifting through the body of the above discussed corporate law theories and their synthesis into some inevitable conclusion. Having discussed a few models, it should be noted that this thesis proposes a synthetic theory; a synthesis of the shareholder primacy, stakeholder, contractarian, communitarian, state concession and integrative theories as above discussed in parts 3.3 to 3.5. Before proceeding, it is equally important to note the convenience with which to justify CSR practices using normative contents or pure moral persuasions. However, the analyses below are undertaken with the consciousness of excluding such moral considerations (as far as possible) from seeking theoretical justifications for CSR within corporate law. This is deliberately done to dissociate the findings and recommendations from otherwise the idea of morality.[160]

One thing is clear to the researcher; whether or not the phenomenon of CSR can be justified under any individual corporate law theory, however, the models and theories can surely be collectively utilized to provide some useful insights into effective CSR practices in the business community. For instance, it appears that CSR may not thrive very well under the shareholder primacy model or the contractarian theories. Many objective minds will find as unpalatable the idea that corporations and businesses should be taken as absolute private properties of investors on which basis companies ought to be managed for the sole and exclusive benefits of the

159 Bolodeoku Contractarianism *supra* note 124 at 436.

160 Miller *supra* note 45 at 1 to 28. *Cf:* see generally, McDonald, D., *The Golden Passport: Harvard Business School, the Limits of Capitalism, and the Moral Failure of the MBA Elite* (HarperCollins Publishers, New York, 2017); McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 1 to 13.

investors. As of fact, the concept of private ownership of properties itself admits of several exceptions for reasons of public safety and welfare.

The idea of absolute ownership without any considerations of non-owners of such properties (outside contractual relations) may not even exist in any jurisdiction any longer. Private property exceptions admitted for public interest purposes is a realization of the constant interaction and interdependence between individualism and collectivism. Therefore, it is seriously doubted if any company or business corporation anywhere in the world can operationally exist and survive without recognition, cooperation and interaction with stakeholders.[161] Besides, as earlier explained in 3.4 above, the idea of businesses constituting the private properties of shareholders has also been sufficiently dislodged by Paddy Ireland, Andrew Keay and Irene Lynch-Fannon amongst others. This appears to be a cogent justification for societal expectations from companies and legal obligation on such companies to respect the interests of other constituents and stakeholder groups. Consequently, investors must accept the reality of stakeholder recognition and engagement in corporate management even as they may seek wealth maximization from their investments.

Further, this researcher does not really see anything intrinsically wrong in the wealth maximization drive *simpliciter* of corporate managers for shareholders *per se*. It is crucial to draw a distinction between the implications of the arguments that companies *exist* for the sole purpose of shareholders on one hand; and that companies should be *managed* for the sole purpose of the shareholders on the other hand. It is arguable that the shareholders bring the entity into existence, give it life in reality as the realist scholars would argue (or at least

[161] Amao *supra* note 12 at 322; see also Vinogradoff, P., 'Juridical Persons' (1924) 24 *Columbia Law Review* 594 to 604.; Karmel, R.S., 'Implications of the Stakeholder Model' (1993) 61 *Geo. Wash. L. Rev*. 1156, 1171; and Johnson, L., and Millon, D., 'Corporate Takeovers and Corporate Law: Who's in Control?' (1993) 61 *Geo. Wash. L. Rev* 1177, 1197 to 1207.

provided the platform on which the state/crown could grant concession to exist, as the *state concession* theorists may argue), they have obviously sown seeds and should fairly and legitimately be allowed to reap therefrom by participating in the final profit/assets sharing (as residual claimants) in the final hours of the entity. Therefore, it seems not totally incorrect to maintain that the company exists *but for* their investments and conscious efforts can be deployed by the corporate managers towards maximizing shareholders' wealth. However, away from corporate existence, and into corporate governance and management, it appears fair and legitimate to assert that *but for* the *constant recognition, interaction and concession of the state and society* – comprising of other constituents of the company such as the creditors, the employees, the customers, the communities, even arguably the natural environment – the company may just be unable to survive, operate, function or otherwise achieve any economic gains. This argument shall be developed further in Chapter 5 during the formulation of a new corporate law model.

Against the backdrop of the constant and inevitable interaction and interdependence between business and society, and since one other goal of corporate law, presumably as any aspect of the law, is to serve the public interest[162] and ensure overall social efficiency, it is only reasonable to legally enshrine some corporate responsibility towards the society. It would follow therefore that it is rather fictional, unrealistic and unjustifiably restrictive to claim that corporate law ought not to be deployed towards protection against unfair labour practices of corporations or against any other irresponsible corporate behaviour in their operations.

Further, it could be argued that assuming but not conceding that corporate law should not be made to perform the roles of other aspects of the law such as environmental law, human rights

[162] Armour *et al supra* note 27 at 25.

law and industrial law, the relevant question is, should corporate law be so ideologically poised to jeopardize the protections already guaranteed or sought to be guaranteed under other aspects of the law?[163] Shouldn't the roles of different aspects of the laws be complementary rather than antithetical?

Many corporate law commentators would object to the suggested notion of aligning in perfect simulacrum the interests of business corporations and that of state institutions to provide public goods and social services. The primary focus of putting together resources to organize companies and other business entities must be appreciated; whether in *reality* or by way of a *fiction* in our minds, corporations exist and they exist for commercial purposes and economic gains. However, it will be sheer surrealism to insist that for some efficiency to be guaranteed, these companies shall own and operate their *absolute private properties* (companies) freely under some *invisible hand of a free (and perfect) market* with as little as possible *visible hand of state intervention* except in established cases of market failures. This thesis submits that this argument is weakened by the incidences of societal recognition of corporations and the state concessions of separate legal personality, limited liability and perpetual succession amongst other state privileges to corporations. It is seriously doubted if indeed shareholders can functionally solely operate companies with their funds for economic gains in any society independent of the recognition, interaction and concession of the society and state institutions.

In summation, history, especially in the Anglo-American jurisdiction, has it that the state introduced concepts, doctrines and principles in order to make the corporate form more efficient within the business community. An exemplar can be taken in the *limited* liability (for instance the Limited Liability Act 1855 in the UK) concept introduced by the state to foster

[163] Bratton and Wachter *supra* note 15 at 151.

investment and afford investors some protection where an ordinarily profitable business venture turns sour. Then if the state is justified in doing this in order to promote over all social efficiency, on what basis should the state not be justified to introduce legal cum economic mechanisms towards enforcing effective CSR practices within the business community and enhancing social efficiency?

Finally, consequent upon the foregoing, postulations attempting to condition the efficiency of CSR practices on eventual benefit to the shareholders seem misplaced, to say the least. It would seem as a matter of fact that the efficiency of CSR practices does not lie within the exclusive purview of any single theoretical models of corporate law discussed above. Further to this, this thesis in Chapter 5 develops a new corporate law theoretical model which synthesises the relevant assumptions different existing models towards prescribing a corporate objective to underlie corporate operations and effective CSR practices within the business community.

3.7 Conclusion

This chapter underscored the need to examine corporate law theoretical models towards an understanding of different assumptions underpinning corporate actions and CSR practices. It accordingly investigated and assessed relevant corporate law theories in CSR discourse; the established, though highly debated, corporate law models of shareholder primacy, stakeholder, economic contractarian, communitarian and the state concession models were respectively appraised with a view to finding acceptable corporate objective and ideological foundation for efficient operationalization of CSR within the business community. The chapter also discussed CSR theoretical groupings by Gariga and Mêlé into the instrumental theories, political theories, integrative theories and ethical theories**.** This chapter explained that despite some useful

insights individually offered by many of the discussed theories, many scholars have been unable to unreservedly adopt any of them or otherwise situate effective CSR practices within any one of these extant theoretical models. For instance, although the stakeholder and the state concession theories have been useful in explaining CSR and its significance within business and society, neither of them has so far particularly provided generally acceptable answers to the fundamental questions generated in the society as a result of the CSR construct. Accordingly, the chapter enumerated the key weaknesses in the examined theories and confirmed the difficulties associated with working with any of them in providing answers to many of the research questions sought to be addressed in this thesis.

Consequent upon the above and although the thesis synthesises a new corporate law model within which framework effective CSR practices may be conceptualised and better embedded in the business community, arguments supporting its normative and theoretical underpinnings are not canvassed until Chapter 5. It is envisaged that proper formulation of the new corporate law model will require considerable space and amount of legal arguments which may otherwise be unfit for this chapter. Further, before the synthesis and formulation of the new model, it is perhaps necessary to understand the conceptual, regulatory and enforcement challenges which underlie extant framework. Therefore, the following Chapter 4 critically examines extant laws, instruments, regulatory mechanisms and policy responses within the Nigerian business community (especially in the extractive industry). For the purpose of understanding the matters arising and putting the challenges in proper perspective, the Nigerian CSR legal and regulatory

framework were briefly juxtaposed against extant similar CSR regulatory attempts in other jurisdictions.

CHAPTER FOUR

REGULATION AND ENFORCEMENT OF CSR

4 Introduction

In Chapter 2, this thesis traced the origin of the modern conception of CSR to corporate governance reforms in terms of checks on the raw exercise of corporate powers in the 1970s.[1] There is no gainsaying that as a result of globalisation and cross-border operations of many corporate entities, a sizeable number of companies became so large,[2] powerful and influential[3] (making their behaviour affect so many in the society) that the law should properly regulate their activities. The anticipated regulation of these companies should be regardless of whether or not the companies are theoretically viewed as either aggregations of private economic property of shareholders[4] or as social, public, or quasi-public institutions[5] or both.[6]

---

1 Branson, D., 'Corporate Governance "Reform" and the New Corporate Social Responsibility' (2001) 62 *University of Pittsburgh Law Review* 605, 609. Others traced CSR to other sources. See generally, Mullerat, R., 'Corporate Social Responsibility: A European Perspective' (The Jean Monnet/Robert Schuman Paper Series, Vol. 13 No.6, 2013) 13; Meehan, J., Meehan, K., and Richards, A., 'Corporate Social Responsibility: the 3C-SR Model' (2006) 33 *International Journal of Social Economics* 386; Broomhill, R., 'Corporate Social Responsibility: Key Issues and Debates' (Dunstan Paper No. 1/2007, Don Dunstan Foundation for the Dunstan Papers Series, University of Adelaide) 9 and 10; and Blowfield, M. and Frynas J. G., 'Setting New Agendas: Critical Perspective on Corporate Social Responsibility in the Developing World' (2005) 81 (3) *International Affairs* 499, 500.

2 MacLeod, S., 'Towards normative transformation: Reconceptualising Business and Human Rights' (Unpublished, PhD thesis submitted to the University of Glasgow, United Kingdom, 2012) 48.

3 Greenfield, K., *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*, (University of Chicago Press, Chicago, 2006) 4 to 5; see also Hadden, T., *Company Law and Capitalism* (2nd edn, Weidenfeld and Nicolson, London, 1977) 486 and 487.

4 Percival v. Wright (1902) 2. Ch. 421; see also Adolf A. Berle Jr. and Gardiner C. Means, *The Modern Corporation and Private Property*, (The Macmillan Company, New York, 1932) at xiii and 396; Berle Jr., A. A., 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365; see also Whitehouse, L., 'Corporate Social Responsibility as Regulation: The Argument from Democracy' in J O'Brien (ed), *Governing the Corporation, Regulation and Corporate Governance in an Age of Scandal and Global Market* (Wiley Publications, 2005).

5 Dodd Jr., E. M., 'For Whom Are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145; Wedderburn, 'The Social Responsibility of Companies' (1985) 15 *Melbourne University Law Review* 4; see also Schwartz, H., 'Governmentally Appointed Directors in a Private Corporation-The Communications Satellite Act of 1962, (1965) 79 *Harvard Law Review* 350, Ratner, D., 'The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"' (1970) 56 *Cornell Law Review* I cited in Branson *supra* note 1 at footnotes 18 and 22; also see, Okon, E., 'Corporate Social Responsibilities by Companies: The Liberal Perspective' (1997) *Nigerian Current Law Review* 193 – 209, 197.

6 Smith Manufacturing Co. v. Barlow (1953) 346 U.S. 861. See generally the preceding Chapter 3 for analysis of theoretical models of companies and their CSR activities.

Pursuant to earlier discussions in this thesis, it is necessary to reiterate at this juncture that the whole idea behind the CSR conception is an attempt to impress upon the business community the notion that, as a matter of general corporate law and beyond corporate charity, businesses have responsibilities, amongst others, for the welfare of workers, to make products safe, to be good citizens in the communities in which they operate, to protect and promote clean air and clean water amongst other responsible business practices.[7]

It is interesting to note however that initial reactions of the business community to impress such responsible business practices by way of regulatory and enforcement attempts were superficially cooperative but antagonistic[8] in reality and the usual retort has largely remained that 'the business of business is business.'[9] Traces of this kind of reaction can be observed in a column in *The Economist* that:

> Governments, which are accountable to their electorates, should decide matters of public policy. Managers, who are accountable to their shareholders, should run their business ... businesses should not try to do the work of governments.[10]

---

7 Nader, R., Green, M., and Seligman, J., *Constitutionalizing the Corporation; the Case for the Federal Chartering of Giant Corporations,* (The Corporate Accountability Research Group, 1976) cited in Branson *supra* note 1 at 615, footnote 26.

8 See for example, UK Foreign and Commonwealth Office's Public Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally: Summary of Responses, 16th December 2009, Government response; see also the Secretary of State for Foreign and Commonwealth Affairs, Ministerial Statement of 16 December 2009 Private Military and Security Companies (Standards of Conduct) http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm last accessed 27th October, 2016; The Secretary of State for Foreign and Commonwealth Affairs, Written Ministerial Statement of 21 June 2011, Promoting High Standards in the Private Military and Security Company Industry http://www.fco.gov.uk/resources/en/press-statement/2011/June/wmsomscs-210611 cited in MacLeod *supra* note 2 at 79.

9 The assertions of the Nobel Prize winning economist from the University of Chicago, Milton Friedman, that '… *there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits*" were also towards gainsaying the legitimate statutory regulatory regime in terms of societal concerns.' For this see, Friedman, M., *Capitalism and Freedom* 133 (2nd edn, 1982); see also Friedman, M., 'The Social Responsibility of Business' in *The Essence of Friedman* (Kurt R. L., edn 1987) 36 and 38.

10 *The Economist*, 'The Good Company: A Survey of Corporate Social Responsibility' 22nd January, 2005 at 14 and 16.

From the above, it is obvious that the business community is inclined to argue that business (and corporate law) should as far as possible be insulated from government interventions and further contend that businesses should not be detracted and made to assume the traditional functions and responsibilities of states and governments in the provision of public goods and social services.[11]

As it has been theoretically established[12] that businesses cannot be allowed to operate and maximize profits at all costs, more shareholder primacy-oriented capitalist business managers now appear to have realised that maintaining such antagonistic stance to regulation is no longer sustainable in view of recurrent cases of corporate irresponsibility, and violations of the interests of legitimate stakeholders of companies. It is equally important to note that, perhaps upon realisation[13] of the non-sustainability of such stance or probably in fear or possibility of hard law mandatory government regulations, the business community adjusted its stance and became more receptive of at least minimum levels of self-regulation.[14] Therefore, the argument now is that, while some level of regulation may be permissible, pure externalised state or government regulation of business operations is inappropriate and unsuitable for smooth business operations.[15] Hence, a regime of self-regulatory framework, whereby businesses

---

11 MacLeod *supra* note 2 at 59 and 60.

12 As earlier noted in Chapter 3, even Milton Friedman advocated that businesses must operate 'within the rules of the game'. Friedman, M., *Capitalism and Freedom* (40th anniversary edition, University of Chicago Press, Chicago, 2002) 133; see also Sneirson, J. F., 'Shareholder Primacy and Corporate Compliance' (2015) 26 *Fordham Environmental Law Journal* 1, 4, 5, 6 *et seq.*

13 House of Lords, 'The Global Economic Crisis: Reasons, Repercussions and Remedies' UK 29th October, 2008 and Lanman, S., and Mathews, S., 'Bloomberg, Greenspan Urges Tighter Regulation after Breakdown' Update 1 both cited in Lambooy, T., *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000-2010 and Case Studies* (Kluwer, 2010) 62, and 227 footnotes 1 and 2.

14 Eijsbouts, J., *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* (Inaugural Lecture, Maastrict University, 2011) 39; see also Price, M. E., and Verhulst, S. G., *Self-Regulations and the Internet* (Kluwer Law International: The Hague, 2005), referring to Gibbons, T., Regulating the Media, Chapter 1 (2nd edn, Sweet & Maxwell, London, 1998) 275 to 285 cited in Lambooy *supra* note 13 at 251 footnote 93.

15 Dine, J., *The Governance of Corporate Groups* (Cambridge University Press, New York, 2000) 129; see also Ayres, I., and Braithwaite, J., *Responsive Regulation* (Oxford University Press, Oxford, 1992) 25; see also

themselves (based on the *laissez-faire* market model) work out internal rules and principles to regulate their business conducts, became entrenched. In turn, the internalised self-regulatory framework has heralded a number of international regulatory dialogues and emergence of a code of conduct mania[16] in corporate governance and CSR discussions which codes are largely ineffective (to be further elucidated below) as there is very little done to verify claims made by companies in such codes.[17] As shall be expatiated in this chapter, both domestic jurisdictions and the international community have had their fair share of these self-regulatory initiatives and usually voluntary guidelines.

Bryan Horrigan commented on the attitudinal adjustment within the business community noting that:

> 'Their (the self-regulatory initiatives) existence and prominence are a testament to the new reality and that civil society organisations have managed to implant elements of public accountability into the private transactional spaces of transnational firms.[18] (Words in parenthesis mine).

However, despite the attitudinal change and increase in codes of conduct and other self-regulatory guidelines, violations of human rights, environmental degradation and other stakeholder rights infractions have not ceased and constitute an irresistible implication of the inadequacies[19] (if not outright failure[20]) of self-regulation. It has now been discovered that

---

Horrigan, B., *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham, UK, 2010) 65.

16 MacLeod *supra* note 2 at 62.

17 Yu, X., 'Impacts of Corporate Code of Conduct on Labor Standards: A Case Study of Reebok's Athletic Footwear Supplier Factory in China' (2008) 81 *Journal of Business Ethics* 513 to 529.

18 Ruggie, J., 'Reconstituting the Global Public Domain – Issues, Actors, and Practices' (2004) 10 (4) *European Journal of International Relations* 499.

19 Cheffins, B., *Company Law* (Clarendon Press, Oxford, 1997) 125*;* see also Horrigan *supra* note 15 at 65; see also generally, MacLeod *supra* note 2.

20 MacLeod *supra* note 2 at 75.

many businesses involved in the self-regulatory CSR regime, attempting to legitimise[21] their operations are only greenwashing and paying mere lip service to effective CSR practices such as found in the humungous accounting scandal leading to the Enron collapse.[22] John Farrar had lamented:

> The Enron case demonstrates that a company can be widely respected for CSR in its environmental record, triple bottom line reporting, code of conduct respecting human rights and philanthropic contributions and yet have gross breaches of fiduciary duties by its key executives…[23]

It seems therefore that the searchlight on the anticipated solution to recurring irresponsible corporate behaviour must be beamed elsewhere or at least not strictly within self-regulatory regimes. There is a clear need for a rethink on strategies towards regulating and enforcing effective CSR practices in the business community.

4.1 Definition and description of CSR Regulation and Enforcement

Regulation is an intentional activity of attempting to control, order, or influence the behaviour of others.[24] There are many reasons for introducing regulations: sometimes, they are to cure problems associated with natural monopolies, or to ensure proper allocation of scare resources, or for public safety and welfare *et cetera*.[25] Regulation can include law but it is not limited to law as the concept of regulation is broader than law itself. Law can be an instrument of

---

21 Broomhill *supra* note 1 at 8.

22 McBarnet, D., 'Corporate Social Responsibility Beyond law, Through Law, for Law' (University of Edinburgh School of Law Working Paper No.3, Augenstein, D., ed, 2009) 15.

23 Farrar, J., *Corporate Governance: Theories, Principles and Practice* (3rd edn, Oxford University Press, Melbourne, 2008) 502; see also Keay, A., 'Stakeholder Theory in Corporate Law: Has It Got What It Takes?' [2010] 3 (9) *Rich. J. Global L. & Bus*. 249, 251 (hereinafter simply 'Keay Stakeholder Theory').

24 Black, J., 'Law and Regulation: The Case of Finance' in Parker, C., Scott, C., Lacey, N., and Braithwaite, J., (eds), *Regulating Law* (Oxford University Press, Oxford, 2004) 33-59 at 34; also see generally, Morgan, T., *Cases and Materials on Economic Regulation of Business* (West Publishing Co., Illinois, 1976).

25 Morgan *supra* note 24 at 18, 19, 20 *et seq*.

regulation which is the target of this thesis to use the instrumentality of law, amongst others, to provide a regulatory and enforcement system. When juxtaposed to governance, while governance concerns how and why an entity or system structures and conducts its affairs, regulation concerns how and why behaviour relating to the conduct of affairs of an entity is directed, steered and otherwise guided.[26]

On the other hand, enforcement is a means to an end and not an end in or of itself.[27] The goal of enforcement is compliance with regulations and the achievement of the underlying goals of regulations.[28]

4.2 Regulatory Consequences of Theoretical Approaches

In order to understand the rationale behind specific regulatory initiatives of corporate law as discussed in this chapter, it is important to highlight the regulatory consequences of a few corporate law models and theories.[29] For writing convenience and in consideration of their relevance to the research findings in this thesis, the researcher focuses on the shareholder primacy, contractarian, communitarian and the state concession theories. This part appraises the regulatory implications of adopting the assumptions of the different corporate law models. For instance, what will be the implications of holding a contractarian view within the context of a CSR regulatory framework? How does a state concessionist react to the regulation and enforcement of responsible corporate behaviour using the invisible hand of the free market?

For proponents of the shareholder primacy model, where the existential purpose of running a corporate entity is tied to profit maximization for shareholders, the shareholder has been raised

---

26 Horrigan *supra* note 15 at 60.
27 Lambooy *supra* note 13 at 260.
28 *Id.*
29 See generally Chapter 3 for detailed analysis of the corporate law models.

to the single most important regulator over the management power.[30] Hence, the general meeting of the body of shareholders is usually afforded various controlling and safeguarding governance mechanisms by the internal instruments such as the Articles of Association and the external statutory legislations towards ensuring corporate powers wielded by corporate managers are not abused and the *success and interest of the company* (which is usually interpreted to be the *success and interest of all the entire shareholders as a whole*[31]) is protected at all times. But in reality, shareholders have been found to no longer constitute an effective governance mechanism.[32] One ready argument to buttress this is that without prejudice to the instrumentality of minority protection, if the majority of the shares in a company are held by those controlling that company (and they often are), those controllers can perpetrate all kinds of wrong-doing to the detriment of the minority and/or employees or other stakeholders of the company but then vote that the company should take no legal action to gain compensation.[33]

What will be the regulatory consequences of the contractarian theory? The contractarian states that a corporate entity is a mere central hub for series of contractual relationships and the voluntary, market-oriented nature of the company is brought to fore while dismissing the notion

30 Dine *supra* note 15 at 118; see generally, section 63 (5) of CAMA.

31 The UK Companies Act 2006, section 172 thereof; see also CAMA, sections 283 (1), 303 (2) (d) and 390 (2) (b) thereof; see generally decided cases also to this effect: Hutton *v.* West Cork Railway Co. (1883) 23 Ch.D., 654; Percival *v.* Wright (1902) 2 Ch 421; Dodge *v.* Ford Motor Co. (1919) 204 Mich. 459, 170 N.W. 668*;* Re Lee, Behrens & Co Ltd (1932) Ch 46; Rogers *v.* Hill 289 U.S. 582 (1933); McQuillen *v.* National Cash Register Co., 27 F. Supp. 639 (D. Md. 1939); Greenhalgh *v.* Arderne Cinemas Ltd (1951) Ch. 286, 291; Gottlieb *v.* Heyden Chemical Corp., 90 A. 2d 660 (Del. 1952); Parke *v.* Daily News Ltd (1962) 3 WLR 566; Amalgamated Society of Woodworkers of South Africa *v.* Die *1963* AmbagsaaWereniging (1967) 1 SA 586 (T); Michelson *v.* Duncan 407 A. 2d 211 (Del 1979).

32 Dine *supra* note 15 at 119; see also Aigbokhaevbo, V., 'Evaluation of Corporate Governance in Nigeria and Directors Liability' (1997) *Nigerian Contemporary Law Journal Uniben* 82 to 102 at 83. Violet explained for instance that corporate governance and disclosure mechanisms hinged on shareholders are only effective when the shareholders are sufficiently knowledgeable to understand the information disclosed, have requisite shareholding to influence decisions and the shareholders not only willing but also able to resort to litigation if necessary.

33 *Id*.

that companies owe their existence and operations to state creation.[34] Therefore, in terms of regulatory features, the *laissez-faire* market system is assumed to constitute an effective regulator of corporate behaviour. By way of example, the idea of *hostile takeovers* has been argued as evidence of effectiveness of the free market as a tool of corporate regulation in reducing monitoring costs.[35] Dine had explained that:

> … if a wealthy company's assets are not being fully utilized by lazy and inefficient managers, then the company presents a tempting target for a predator company, which may make an offer for the shares (which will be undervalued because of the poor performance of management) acquire control of the company, put in an efficient management and restore the efficiency and profitability of the company.[36]

This was put differently by Cheffins that:

> … executives fear takeover bids since they usually lose their jobs after a successful offer. This anxiety has, however, a beneficial by-product: managers, with their jobs potentially on the line, have an incentive to run their companies in a manner which maximizes shareholders wealth.[37]

However, evidence concerning post-bid performance also casts doubt on the disciplinary hypothesis. Several studies have identified long-term share-price declines following mergers, whether resulting from a hostile or an agreed bid and the most comprehensive study has found that this negative effect intensifies over time and companies which were acquired by tender offers had slightly below industry-average cash flow and sales performance both before and

---

34 Hayden, G. M., and Bodie, M. T., "The Uncorporation and the Unravelling of the 'Nexus of Contracts' Theory" (2011) 109 *Michigan Law Review* 1127.

35 Deakin, S., and Slinger, G., 'Hostile Takeovers, Corporate Law and the Theory of the Firm' (1997) 24 *Journal of Law and Society* 124 at 126.

36 Dine *supra* note 15 at 120.

37 Cheffins *supra* note 19 at 119.

after takeover. Therefore to Cheffins, the hypothesis that takeovers improve performance is not supported.[38]

Under the communitarian framework where the corporate entity itself is considered a public agency in a planned economy, the company becomes a veritable state tool for driving social cohesion, social inclusion and public welfare. In this circumstance, not only does the state assume the role of the regulator but the consequential stultification and bureaucracy in corporate governance and business management occasioned by heavy government interferences may after all be legendary.[39]

A state concessionist takes the existence of the corporate entity to be the result of state concession and companies should be gratified for such state privilege even in its governance by tolerating state interference in order to keep business operations within the ambits of public policy and implant notions such as fairness or equity in the business community.[40] The attitude of the state concessionist to regulation is therefore permissive of government interference *whenever necessary*; this marks the slight difference between this model and the communitarian's position because the economy does not have to be holistically planned as advocated under the communitarian theory. Therefore, these state concession theorists will view regulations in terms of injection of more public law concepts such as the doctrine of *ultra vires* and citizenship into corporate law discuss.[41]

38 Deakin and Slinger *supra* note 35 at 114.
39 Dine *supra* note 15 at 122.
40 *Id*; see also Parkinson, J., 'Models of the Company and the Employment Relation' (2003) 41 [3] *British Journal of Industrial Relations* 481 to 509 at 481 (hereinafter simply 'Parkinson Models of the Company').
41 Dine *supra* note 15 at 122, 123 *et seq*.

The shareholder primacy and contractarian neo-classical economics approaches are de-regulatory in nature and have been rejected in this thesis having discarded regulations attempting to enforce social values on companies.[42] The regulatory consequences of the shareholder primacy approach is also criticized and therefore rejected in this thesis because the underlying social relations which underpin economic transactions appear undervalued, particularly by the contractarian and the attempt to justify regulation only to restore a free market (following market failures) seems wholly wrong.[43] Further, it is also evident that the communitarian, with the assumption that the corporate entity has a social conscience, embeds the company in a social environment and will regulate businesses behaviour with public, social and moral norms. Therefore, if not revisited and re-theorised as shall be done in Chapter 5 of this thesis, the communitarian approach to regulation may not be very useful as it will only constitute a potential source of distraction and incoherence[44] for businesses.

Consequent upon the above, it is submitted that the regulatory consequences of a model to be proposed in Chapter 5 are preferable as theoretical foundations of corporate actions; Under such model, whether or not there is market failure, it is understood that without the *recognition of the state, the support and cooperation of employees and creditors, and the peaceable interaction* with host communities and other stakeholders, the survival of companies in the long term is very doubtful.

In the final analysis on this, it should be noted that in spite of the marked differences in the theoretical regulatory approaches adopted by corporate law theorists, the dividing lines are

42 *Ibid* 109.
43 *Ibid* 111.
44 Selznick, P., 'Self-Regulation and the Theory of Institutions' in Farmer, G., and Murphy, E., (eds), *Environmental Law and Ecological Responsibility* (Wiley, Chichester, 1994) 398.

actually getting blurred[45] as there is usually a constant interplay and interconnectedness in the varying theoretical assumptions in the process of making regulations. Sometimes such interplay leads to inevitable confusion[46] in identifying which theoretical model actually underlies individual regulations. The regulatory features and enforcement approaches of the model (which is proposed in Chapter 5) for instance confirms the above modern trend of attributing the assumptions of more than one theory to regulatory dimensions on one subject.

4.3 Methods and Features of CSR Regulation

In light of the different regulatory consequences of the theoretical models highlighted above, regulations have taken varying shapes and forms. In other words, the vagaries[47] identified in methods of regulations over time have been informed by the different theoretical stance of regulators as discussed in 4.2 above. The following forms, features and methods of regulations have been identified and are discussed:[48]

1. Formal versus Informal Regulations;
2. Soft Law versus Hard Law Regulations;
3. Private versus Public Regulations;
4. International versus Domestic Regulations;
5. Principle-Based versus Rule-Based Regulations;
6. Voluntary versus Mandatory Regulations;
7. Internal versus External Regulations.

---

45 Hadden, T., *Company Law and Capitalism* (2nd edn, Weidenfeld and Nicolson, London, 1977) 496 and 497.

46 Dine *supra* note 15 at 124.

47 Zerk, J., 'Extraterritorial Jurisdiction: Lessons for Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Social Responsibility Initiative Working Paper No. 59 Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010) 82.

48 *Id*; this list provided is far from exhaustive because there are other methods. For instance, see the categorization of Jennifer Zerk into: Direct Extraterritorial Jurisdictional Regulations and Domestic Measures with Extraterritorial Implications.

4.3.1 *Formal versus Informal Regulations*

Formal regulations refer to regulations deliberately instituted to order a particular behaviour and are backed by established and mostly binding enforcement mechanisms. Informal regulations on the other hand occur through other informal means such as policies and guidelines. They may not be enforced in any formal way, but relevant actors may nevertheless feel compelled to comply with them in the interests, say, of remaining in good standing with different stakeholders.[49] Instances of the formal regulation will include duly enacted statutory laws guiding particular corporate behaviour in different jurisdictions. This will include the UK 2006 Companies Act, the US Sarbanes-Oxley Act of 2002 and the 1990 Nigerian Companies and Allied Matters Act, as amended (CAMA). On the other hand, informal regulation includes the UN Global Compact,[50] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework[51] and the OECD Guidelines for MNEs,[52] amongst others.

4.3.2 *Soft Law versus Hard Law Regulations*

Soft law regulation can be described as non-legally binding regulations usually containing the aspirational goals, lofty ideals and other best practices expected to govern or regulate certain behaviours. The importance of soft law non-legally binding regulations is underscored at

---

49 Zerk *supra* note 47 at 16.

50 UN Press Release SG/SM/6881, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, Text of Speech by Kofi Annan, 1 February 1999, at 1, http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html last accessed 28th October, 2016. For full discussions thereof see Chapter 5 of this thesis.

51 Ruggie, J., Final Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy ' Framework,' A/HRC/17/31, 21 March 2011 <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> last accessed 28th October, 2016. See Chapter 5 of this thesis for better details and discussions.

52 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing http://dx.doi.org/10.1787/9789264115415-en and also http://www.oecd.org/corporate/mne/48004323.pdf last accessed 28th October, 2016 as discussed in detail in Chapter 5.

international law given its state-centeredness.[53] In other words, since International Law is usually seen in terms of *law of nations* and its rules and regulations applicable only to state actors, (as opposed to private individuals, companies inclusive) regulations to order corporate behaviour at international level usually takes the shape of soft laws. These soft law instruments are those that do not have the status of international treaties which are ratified by states and they include guidelines, declarations, recommendations and resolutions.[54] Although soft law regulations are non-binding, they are not entirely useless. Sometimes they 'provide official credibility and impetus for the development of complementary multi-stakeholder CSR initiatives at industry, regional or wider levels …,'[55] or help to galvanise 'support for a particular programme or policy [and] can help to focus thinking about certain issues to clarify positions and to develop understanding between states'[56] or sometimes may 'harden into positive law, where it is seen as evidence of emergent new standards of international law'.[57] Soft laws also provide a quick and flexible response to contemporary challenges and allow non-state actors to participate in international law where they cannot in traditional international law making processes.[58] In other words, soft laws, can be useful at instances where consensus at international level is lacking and may become legally enforceable as a treaty someday, or become out rightly adopted in domestic/municipal legislations as a result of an eventual international consensus. Therefore, the majority of regulatory attempts at international law

53 Horrigan *supra* note 15 at 169.
54 Shaw, M., *International Law* (5th edn, CUP, Cambridge, 2003) 110 to 112.
55 Horrigan *supra* note 15 at 169.
56 Zerk, J., *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, Cambridge, 2006) 70- 71 (hereinafter simply Zerk Multinational CSR).
57 Muchlinski, P., 'Corporate Social Responsibility and International Law: the Case of Human Rights and Multinational Enterprises' in McBarnet, D., Voiculescu, A., and Campbell, T., (eds), *The New Corporate Accountability: Corporate Social Responsibility and The Law* (CUP, Cambridge, 2007) 431,456 to 458.
58 Villiers, C., 'Corporate Law, Corporate Power and Corporate Social Responsibility' in *Perspectives on Corporate Social Responsibility*, Nina Boeger, Rachel Murray and Charlotte Villiers (eds) (Edward Elgar, Cheltenham, 2008) 101.

level such as the UNGC, the UNGP and other similar regulatory framework at EU level have all been soft law instruments.

Hard Law regulations are the exact opposite of Soft Laws. Hard Law regulation is a positive, legally binding regulation with clear and predictable enforcement mechanism usually in domestic legislations. At the moment, very few CSR regulatory systems have adopted hard law approach. The provisions of section 135 of the 2013 Indian Companies Act requiring, *inter alia*, the constitution of a CSR Committee in the board of directors of qualified Indian companies is a clear example of CSR hard law regulation. In 2002, in the UK, effort was made to harden CSR regulation[59] by the introduction of a Private Member sponsored bill on the subject of CSR, but it never saw the light of day. Similarly, in March 2007 in Nigeria, a bill was presented before the highest legislative house in Nigeria, the National Assembly, but it also did not pass the second reading.[60]

4.3.3 *Private versus Public Regulations*

Private regulation is defined as a set of norms regulating individual (corporate) conduct that did not, or at least did not originally, stem from public authorities' formal legislative powers.[61] Even from the definition, the connection with earlier discussed soft law regulation and informal regulation becomes obvious. The concept of de-regulation which blossomed in the 1980s and

---

59 See the English Corporate Responsibility Act 2002, A Bill to make provision for certain companies to produce and publish reports on environmental, social and economic and financial matters; to require those companies to consult on certain proposed operations; to specify certain duties and liabilities of directors; to establish and provide for the functions of the Corporate Responsibility Board; to provide for remedies for aggrieved persons; and for related purposes. It was presented by Linda Perham, supported by Mr Barry Sheerman, Mr Tony Colman, Mr Frank Field, Mr Martin O'Neill, Mr Tony Banks, Sue Doughty, Mr Simon Thomas, Glenda Jackson, Mrs Jackie Lawrence, Sir Teddy Taylor and Mr John Horam available at http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/145/2002145.pdf last accessed on the 11th November, 2016.

60 See *infra* part 4.4.1.

61 Lambooy, T., and Rancourt, M. E., 'The Added Value of Private Regulation in an Internationalised World? Towards a Model of the Legitimacy, Effectiveness, Enforcement and Quality of Private Regulation' (HiiL's Concept Paper, 2008) (hereinafter Lambooy HiiL Report) cited in Lambooy *supra* note 13 at 229.

fed by the belief that too much regulation affects the smooth operation of the *laissez-faire* market (which can self-regulate) accounts for increase in the private soft law and self-regulatory CSR regime.[62] The growing CSR private regulations (or dialogues) excluding state/government actors at least directly, are reflexive of the increased legitimacy of private actors in the global economy[63] and this method of regulation differs in their objectives, origins, areas covered and implementation mechanisms.[64] For instance, some focus on general issues of human rights, labour issues, corruption, environment *et cetera* like UNGC and OECD MNE Guidelines, others focus on a particular and single aspect, say investment,[65] security[66] or forest conservation[67].

On the flip side, public regulatory regime involves governments, public and state authorities enacting formal legislations (whether domestically or with cross-border extraterritorial implications). An example includes initiatives at the EU[68] and these initiatives usually entail resolutions and directives to member states to adopt. An instance was the 2003 Accounts Modernisation Directive[69] of the EU which imposes an obligation on companies to consider

62 Lambooy *supra* note 13 at 234.

63 *Id.*

64 OECD/ILO, 'Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility', OECD/ILO Conference on CSR, Employment and Industrial Relations: Promoting Responsible Conduct in a Globalising Economy, Paris, 23-24, June 2008, at 5-6.

65 United Nations Principles for Responsible Investment, available at www.unpri.org last accessed 11th November, 2016.

66 The Voluntary Principles on Security and Human Rights developed by the governments, NGOs and companies operating in the extractive and energy sector; see http://www.voluntaryprinciples.org//participants/index.php, last accessed 28th October, 2016.

67 The Forest Stewardship Council set up a sustainably harvested timber certification programme, see http://www.fscus.org/ last accessed 28th October, 2016.

68 Council Directive (EC) 2003/51/EC, 18th June, 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003.

69 Council Directive, 2003/51/EC, 18th June, 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003; see also The Directive 2014/95/EU on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095 last accessed 28th October, 2016.

non-financial matters (social and environmental matters) in the preparation of their annual reports.

4.3.4 *International versus Domestic Regulations*

International Regulatory initiatives are regulations operational at an intergovernmental level of international law and therefore mostly applicable (though not necessarily) to nation states.[70] It must be appreciated at this stage that while there seems to be an international consensus for the need to regulate, queries have arisen however from using less well recognised or road-tested mechanisms[71] and therefore it has remained difficult[72] at the international law realm to achieve a global consensus and thus legally binding regulatory and enforcement CSR regime owing to a number of issues[73] such as *national interests* considerations, the s*overeign equality of states* doctrine[74] and the fear of o*ver-regulation.*[75] The fear of over-regulation amongst others has resulted in the current resort to a wide spread looser regime of soft law, private initiatives and transnational regulatory dialogues to combat corporate irresponsibility and has also made the

---

70 MacLeod *supra* note 2 at 127; see also Horrigan *supra* note 15 at 168 and 169.

71 See for instance, the Obama administration's 'Brief for the United States as Amicus Curiae' filed in the case of Morrison *v.* National Australia Bank, 547 F 3d 167 (2d Cir.2008) cited by Zerk *supra* note 47 at 71.

72 For instance, earlier CSR regulatory attempts by the United Nations with the aim of producing an international legally binding treaty through the instrumentality of the Draft Code of the UN Commission on Transactional Corporations (hereinafter simply 'UN Draft Code') and the UN Sub-Commission on the Protection and Promotion of Human Rights' Norms (hereinafter simply 'UN Sub-Commission Norms') both resulted in a failure to agree on a unified approach to CSR standards and ultimately the two projects collapsed, although for different reasons. The Draft code was said to have collapsed for political reasons as developing countries played the card of their fledging sovereignty while the UN Sub-Commission Norms were said to have proposed a regulatory regime contrary to international law. For better details, see MacLeod *supra* note 2, chapter 3 thereof.

73 Because of the interplay of these issues, some of the earlier regulatory attempts at international law level were turned into '*a forum for a shouting match'*. See Rubin, S. J., 'Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development' (1995) 10 (4) *Am. U. J. Int. L. & POL'Y* 1275, 1276.

74 See the Charter of the United Nations, Article 2(1) and a corollary principle that no state may interfere in the domestic affairs of another state. See generally, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA/Res/2625/(XXV): 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.'

75 Zerk *supra* note 47 at 67 and 68.

achievement of an overarching treaty far-fetched.[76] In summing up, Jennifer Zerk in expressing similar concern in terms of securities regulations has probably best captured the present situation of the CSR regulation at international law level thus:

> The main focus of international efforts … at present is on achieving greater convergence of regulatory approaches and standards and better cooperation and consultation between states to deal more effectively with cross-border regulatory problems. While no internationally binding framework is likely in the near future, international … organisations (such as United Nations[77]) seem to be gaining in international standing and influence…[78]

Domestic regulations are local, municipal or national regulations based on the territorial jurisdiction of a state over people or activities located/domicile within its own territorial boundaries.[79] Jennifer Zerk drew an important distinction between cases of direct assertion of jurisdiction over the foreign conduct of individuals and companies (for instance the US Sarbanes-Oxley Act) which represents extraterritorial jurisdiction from control over the conduct of foreign actors within the territory of the regulating state which is still strictly domestic/territorial jurisdiction. Where domestic regulatory initiatives have, geographically speaking, far reaching effects, they are said to be domestic measures but only with extraterritorial implications.[80]

---

76 *Ibid* 74.

77 Words in brackets mine. Indeed, the efforts of the United Nations especially, as will be seen in Chapter 5 together with the 2011 UNGP (the popular John Ruggie's framework) is very apt in this circumstance.

78 Zerk *supra* note 47 at 75.

79 *Ibid* 26.

80 *Ibid* 15. After the Enron collapse, the US regulatory regime has been more inclined towards a rule-based approach (e.g. the introduction of the pro-active 2002 Sarbanes-Oxley Act) which is not only highly prescriptive but also with far reaching extraterritorial implications. This has been criticized as over regulating the American regulatory framework. The fine distinction captured in this Part is significant to the thesis of this research. As will be demonstrated later, the solution proffered by the writer of this thesis is not an International Law regulatory initiative but rather a Domestic measure with extraterritorial implications which is a popular approach in the US.

4.3.5 *Principle-Based versus Rule-Based Regulations*

Principle-based regulations are the regulatory modes, as the name suggests, that contain usually non-prescriptive guidelines and principles such as the OECD Guidelines for MNE, UNGC *et cetera*. The Rule-Based Regulations are the prescriptive regulatory modes containing clearly defined enforcement mechanisms and predictable remedies for victims in cases of violations. Domestic legislations with positive rules and regulations include the US 2002 Sarbanes Oxley Act, UK 2006 Companies Act, Indian 2013 Company's Act and the Nigerian 1990 Companies and Allied Matters Act, as amended. It should be noted that while principle-based regulations may be common at international regulatory dialogues for reasons earlier explained, there is nothing intrinsically connecting principle-based regime and international regulations together. Some principle-based regulations also appear at the domestic level such as the various ethical codes of corporate governance in Nigeria.[81]

Invariably on the other hand, Rule-Based Regulations contain positive rules and regulations are backed by predictable enforcement mechanisms. Rule-based regulations are said to provide guidance for desired conduct in a clearer way than principle-based regulations.[82] One major reason for less adoption of and the antagonistic attitude of the business community to rule-based regulatory regime such as the Sarbanes-Oxley Act in the US is accusation that they are over-regulative, hasty, crash inductive, too prescriptive, intrusive and sometimes a disrespect of the other regulatory initiatives of other countries.[83]

---

81 See amongst others, the Central Bank of Nigeria Code of Corporate Governance, May 2014; the Nigerian Securities and Exchange Commission Code of Corporate Governance for Public Companies, 2011 and the Nigerian Communication Commission Code of Corporate Governance for the Telecommunications Industry, 2014.

82 Lambooy *supra* note 13 at 261.

83 Zerk *supra* note 47 at 66 and 67; see also see Institute of Directors in Southern Africa, 'King Report on Governance for South Africa', and the 'King Code of Governance Principles' 2009 (King III) at 5.

4.3.6 *Voluntary versus Mandatory Regulations*

Voluntary regulations are optional in terms of compliance. In CSR discourse, voluntarism appears to have been informed by two phenomena: First, the false notion that CSR is synonymous with corporate charity and secondly, the business case argument in CSR parlance. The idea that CSR represents corporate donation or something beyond the requirements of the law has been shown to be faulty.[84] This faulty notion constitutes a major factor behind the popular belief that CSR or its regulation must be on a voluntary basis. This is the stance of the EU[85] on CSR and its regulatory or enforcement regimes. In 2001, the European Commission[86] defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' and clarifying further that 'being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with stakeholders.'[87]

---

84 McBarnet *supra* note 22 at 1 and 18.

85 European Union, 'Communication of European Union Country's Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility' COM (2001) 366 Final (July 18, 2001); see also, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final. (Brussels, 25.10.2011).

86 European Union, 'Communication of European Union Country's Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility' COM (2001) 366 Final (July 18, 2001).

87 *Ibid* 6; in 2011, the Commission appreciated the need to improve its regime for undertaking disclosure of social and environmental information and also improved its CSR conception and therefore gave a modernised definition of CSR as 'the responsibility of enterprises for their impacts on society'. See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final (Brussels 25th October, 2011). Despite adopting the Directive 2014/95/EU of the European Parliament and of the Council of 22nd October 2014 which amended the Directive 2013/34/EU regarding disclosure of non-financial and diversity information by certain large undertakings and group and showing tendencies of improved conceptualisation of CSR beyond voluntarism, nonetheless, it appears the EU is only playing catch up as a opposed to being a front runner in terms of developments in CSR. See generally, The Directive 2014/95/EU on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095 last accessed 27th October, 2016.

Further, the *business case* argument of CSR appears to be the official CSR policy stance amongst many EU member states. It is argued that CSR is a voluntary concept and must be strategically shown to have some positive values, benefits and other company (shareholder)-success-related attributes before it may be embraced by the business community.[88] In other words, the business case argument for CSR means that CSR may only be engaged in by companies when it will make *business sense* in cost implications. As a corollary of the former statement, it is also argued that the normal interplay of free market forces is the best method to regulate CSR and therefore, there is no need for any hard law external and mandatory CSR rules.[89] Wouters and Chanet explained further that:

> Proponents of the 'business case' explain that corporations are financially rewarded for behaving responsibly in various ways. They argue that not only consumers, but also investors and even workers attach importance to corporations' human rights records and have a clear preference for responsible businesses. Thus, the market itself acts as an important and sufficient incentive for corporations to take human rights into account, since responsible behavior leads to higher profits. This assumption leads them to conclude that a voluntary approach to corporate responsibility is sufficient.[90]

Arguably, this is the most significant disservice to the CSR conception for a few reasons: This is partly because, it represents the official position of the EU (the largest economy in the world and the host community of the majority of the largest multinational enterprises in the world) and has provided the nest for the nefarious activities of many a rogue[91] company who will only

---

88 MacLeod *supra* note 2 at 257 *et seq;* see also Smerdon, R., *A Practical Guide to Corporate Governance* (3rd edn, Sweet & Maxwell, London, 2007) 436.

89 MacLeod *supra* note 2 at 257, 258 *et seq*.

90 Wouters, J., and Chanet, L., 'Corporate Human Rights Responsibilities: A European Perspective' (2008) 6 *Nw U.J. Int'l Hum. Rts* 262, 266 – 267, para.12.

91 There is no gainsaying that in a rush for profits at all or any costs, many rogue businesses (regardless of where they are domicile anywhere in the world) are willing and ready to do business regardless of elements of unlawfulness and irregularities involved. See for instance, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo, 12 April

fly below the radar of self-regulation. It is argued that such regulatory method will only likely breed mere brush-stroking and surface-scratching regulatory initiatives and at best, good enough only for Thomas McInerney's Group A or B businesses. McInerney had analysed four types of companies with which regulators have to deal: (Group A), those who know the law and are willing to follow it; Group B, those who do not know the law but would like to be law abiding; Group C, those who know the law and do not want to follow it; and Group D, those who do not know the law and do not wish to be law abiding.[92] Upon this analysis, the relevant question appears to be, how effective and efficient are the voluntary initiatives against Groups C and D businesses? In truth, however convincing the business case, together with the voluntary CSR approach and free market forces argument may be, the voluntary regulatory initiatives would probably never be strong enough to ensure responsible corporate behaviour.[93] This point resonates throughout this thesis and underpins the regulatory features and approaches formulated within the Responsible Stakeholder Model as proposed in Chapter 5.

Mandatory Regulatory initiatives are the exact opposite of the voluntary self-regulatory principles. They are not optional and must be complied with.

4.3.7 *Internal versus External Regulations*

Finally, internal regulations are insider regulations, self-generated, self-developed and self-enforced by corporate entities involved. Instances of internal regulations are systems of control in banks and insurance companies that identify transactions that are likely to be money

2001, S/2001/357 http://www.natural-resources.org/minerals/CD/docs/other/357e.pdf at 42, para.215 last accessed 18th June, 2014 and also at http://www.globalsecurity.org/military/library/report/2001/357e.pdf last accessed 22nd November, 2016; see also Broomhill *supra* note 1 at 24.

92 McInerney, T., 'Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2007) 40 *Cornell Int'l L.J*. 171-200, 185.

93 De Schutter, O.C., 'Corporate Social Responsibility European Style' (2008) 14 *European Law Journal* 203, 236.

laundering transactions.[94] Internal regulations are said to be effective because the regulator is an insider who truly understands the exact regulatory need and such regulations will likely not be resented by the regulated.[95] However, it is usually advised that mere internal regulation without more, or any recourse to any external control system hardly ever really works. It seems a smart admixture of the two or more methods (co-regulation) is usually the way to go.

External regulations are regulations which are prescribed by an external body such as the state authorities and usually outside the direct fold of the business community. It has been asserted that external punitive regulation that imposes penal or quasi-penal rules in order to prevent a particular aspect of behaviour, used in isolation, is an ineffective way of regulation.[96] Therefore, a regulator with both degree of discretion (externalised) and a relationship with the regulated body (internalised) is usually preferred by regulatory experts.[97]

In spite of the above discussions in respect of the headings in which regulations may appear, it is important to note that the usefulness of identifying the methods and differences in regulatory features in modern CSR regulation discourse appears also gradually whittling down. This is usually because as earlier noted in 4.2, no regulatory feature or theoretical consequence of regulation is cast in concrete; a single regulatory initiative can therefore be internal, private, soft law, domestic, voluntary and principle-based all at the same time. Therefore, for the purpose of effective regulation, the lines between the hitherto strictly voluntary and mandatory spheres are also getting blurred.[98] Further, Jennifer Zerk is quoted explaining that: 'in short, the "voluntary versus mandatory" debate is based on the mistaken impression that CSR and the

94 Dine *supra* note 15 at 131.
95 *Ibid* 131 and 149.
96 *Ibid* 128 and 149.
97 *Ibid* 130.
98 Horrigan *supra* note 15 at 57; see also Hadden *supra* note 45 at 496-7.

law are somehow separate, whereas in reality they are intertwined' which means that the crucial question is not whether CSR should be "voluntary" or "mandatory" but in light of a particular problem, what is the best regulatory response?'[99]

Bryan Horrigan also confirmed that, the voluntary-mandatory dichotomy is of limited use, even in accounting for how business responds to multi-order regulation, let alone understanding the 21st century environment for CSR.[100] Most often than not in recent time therefore, regulatory initiatives indirectly combine one or more of the methods using lighter and more subtle mechanisms to demand compliance. This trend was painted by Parker in these words:

> Meta-regulation should be about requiring organisations to implement processes … that are aimed at making sure they reach right results in terms of actions that impact on the world … It recognises, however, that lawmakers and regulators may not know exactly what the 'right' processes, and even the right results, will look like in each situation. The people who are involved in the situation are best placed to work out the details in their own circumstances, if they can be motivated to do so responsibly.[101]

From the above analysis and in light of the continuous blurring of traditional lines separating the various forms and methods of regulation, CSR regulation in the 21st century therefore appears to thrive under both co-regulation and meta-regulatory regime together with its subtle techniques of achieving compliance with regulations.

---

99 *Ibid* at 65 citing Zerk Multinational CSR *supra* note 56 at 34 to 36.

100 Horrigan *supra* note 15 at 66; see also MacLeod *supra* note 2 at 302.

101 Amao, O., 'Mandating Corporate Social Responsibility: Emerging Trends in Nigeria', [2008] 1 (6) *Journal of Commonwealth Law and Legal Education* 75, 79 (hereinafter simply 'Amao Mandating CSR') citing Parker, C., 'Meta-regulation: Legal accountability for corporate social responsibility?' in McBarnet, D., Voiculescu, A., and Campbell, T., (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press, 2007) 207 to 237.

4.4 CSR Regulation and Enforcement in Nigeria - Overview

This part discusses CSR regulatory and enforcement attempts in the Nigerian business community generally. It examines the regulatory mechanisms contained in hard law instruments such as: the aborted Corporate Social Responsibility Bill 2007 (Nigerian CSR Bill); the primary corporate law legislation in Nigeria – Companies and Allied Matters Act 1990 as amended (CAMA); the Investments and Securities Act 2007 (ISA); the Nigerian Extractive Industries Transparency Initiative Act 2007 (NEITI); the proposed 2012 Petroleum Industry Bill (PIB) and the Nigerian Minerals and Mining Act 2007. This segment also appraises CSR enforcement regime using soft law instruments within corporate Nigeria by examining enforcement mechanisms in relevant ethical codes of conducts of organizations across industries including: the Central Bank of Nigeria (CBN) Code of Corporate Governance, May 2014; the Nigerian Securities and Exchange Commission (SEC) Code of Corporate Governance for Public Companies, 2011 and the Nigerian Communication Commission (NCC) Code of Corporate Governance for the Telecommunications Industry, 2014, National Pension Commission (PENCOM) Code of Corporate Governance for Licensed Pension Operators, June, 2008; and the National Insurance Commission (NAICOM) Code of Corporate Governance for Insurance Companies 2009. The recently released October 2016 National Code of Corporate Governance by the Financial Reporting Council is also examined.

CSR regulations under the already mentioned legislations and proposed legislations as well as under ethical codes of conducts are now examined in turn.

4.4.1 *Recent Trends in CSR Legislation*

With a view to providing a comprehensive and adequate relief to host communities suffering the negative consequences of the industrial and commercial activities of companies operating

in their areas,[102] a Corporate Social Responsibility Bill was introduced to the Nigerian National Assembly in 2007.[103] The attempted CSR legislation sought to be the direct primary legislation in Nigeria and establish a CSR Commission which shall ensure a compulsory 3.5% of company's gross annual profit as CSR spent for the purpose of executing community development projects for the citizenry.[104]

The bill received very strong criticisms for its attempt to introduce another form of corporate tax and its poor atavistic conception of CSR as just some corporate gift or charity[105] and therefore never became law but only useful at the archives of the National Assembly bills.

For the purpose of improved operationalization of the CSR conception in Nigeria as compared to global practice, despite the ill-fate of the Nigerian CSR Bill, the bill is nonetheless juxtaposed below showing marked differences in approach and conception against similar attempts in other jurisdictions (UK, USA and India).

First, in 2002, a Corporate Responsibility Bill was introduced into the English Parliament which sought to create a government agency which will be directly and primarily responsible for coordination, regulations and enforcement of CSR activities within the UK business community and thereby institutionalise the CSR concept by way of hard law and mandatory regulation in the UK.[106] This Bill has not become legislation and appears unlikely to become one anytime soon. This would seem a demonstration that the UK has rejected any attempt to institutionalise CSR as a mandatory phenomenon within the English corporate law system. As

---

102 Explanatory notes to the Corporate Social Responsibility Bill; see Corporate Social Responsibility Commission (Establishment, etc.) Bill, 2007, C1239-1244, available at http://www.nassnig.org/document/download/1 last accessed 28th October, 2016, (hereinafter simply 'Nigerian CSR Bill').

103 The Private Member bill was sponsored by the late senator Uche Chukwumerije (Abia North).

104 Nigerian CSR Bill, 2007, section 5 thereof.

105 Amao, O., Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States [2008] 1 (52) *Journal of African Law* 83, 85.

106 See section 9 of the English Corporate Responsibility Act 2002; see above note 59.

a member of the EU, this is not a surprising development in view of the largely voluntary CSR conception at the EU. It can therefore be concluded that the UK expectedly opted for a principle-based (rather than rule-based) system of regulating corporate behaviour. The regulatory approach is based on the popular compliance or explanation doctrine[107] (comply with the rule or make an explanation for why not). The emphasis is on identifying a system that works for individual companies, rather than imposing a standard formula of corporate governance structure externally.[108]

Although its CSR framework is principle-based and on soft law basis, UK is still considered a global CSR leader because of its engaging and participatory approach to CSR.[109] The UK government facilitates CSR through a distinct government department headed by designated ministry-level officials which department is known as the UK *Department for Business Innovation and Skills*.[110]

Further, as a member of the EU, UK system, in the provisions of sections 417 and 423 amongst others of the English Companies Act 2006, are clear implementation of the EU Fourth Directive on annual accounts (popularly called the Accounts Modernisation Directive)[111] which imposes obligations on companies to consider and report on non-financial (social and environmental) matters in their annual reports. The Modernisation Directive states that companies in member

---

107 Dine *supra* note 15 at 135.

108 *Ibid* 136.

109 Ho, V. H., 'Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China' (2013) 46 *Vanderbilt Journal of Transnational Law* 375 at 394; see also Mullerat *supra* note 1 at 7, 8 *et seq*.

110 Smerdon *supra* note 88 at 462; Department of Business Innovation and Skills, http://www.bis.gov.uk last accessed 27th October, 2016. This department was recently merged with the Department for Energy and Climate Change to form and now called the Department for Business, Energy and Industrial Strategy (BEIS). See generally www.gov.uk/government/organisations/department-for-business-innovations-skills/about last accessed 26th November, 2016.

111 Council Directive, 2003/51/EC, 18th June, 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003.

states shall report annually on 'non-financial key performance indicators relevant to the particular business, including information relating to environment and employee matters' in relation to the worldwide operations of that company.[112] There are also CSR-related provisions in other legislations in the UK. For instance, in 2000, pension funds were required to state whether and how they took account of social, environmental and ethical considerations[113]in their investment decisions. However, there was no mandatory legal obligation on them to so disclose, the requirement was merely to disclose whether they did so or not. (Comply or explain doctrine). Furthermore, it is interesting to note that the UK government is improving on the non-financial-matter disclosure requirements through its 2013 amendment of the 2006 English Companies Act expecting qualified companies to produce a Strategic Report informing their *shareholders* and helping them assess how the directors have discharged their duty under section 172 of the Companies Act in actually promoting the success of the company.[114]

The above probably also confirms that the 2002 proposed Corporate Responsibility Bill still at the House of Commons will probably never become legislation, at least not any time soon. It is safe to summarise that the UK government encourages its business community to be involved in stakeholder engagement[115] and to disclose on non-financial matters in statutory documents such as the Strategic Report. It is therefore arguable that the combined effect of: the provisions of sections 172 and 417 (5) of the 2006 English Companies Act; the expanded non-financial matters disclosures in the Strategic Report from the 2013 amendment; and the adoption of the ESV stating that directors and corporate managers are *only* enjoined to have *regards to* the

112 Lambooy *supra* note 13 at 235.

113 Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc) (Amendment) Regulations 1999, S.I. 1999/1849.

114 See section 414C, the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, Statutory Instrument 2013 No. 1970, available online at http://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi_20131970_en.pdf last accessed 27th October, 2016.

115 Ho *supra* note 109 at 395.

interests of employees, local communities, customers, suppliers, and other related stakeholder concerns in working for the success of the company, all appear leading to the irresistible conclusion that the UK system is essentially principle-based and adopts a voluntary regulatory CSR approach. Expectedly, just as under the above mentioned pension funds regime, compliance with the requirements is not mandatory but on a 'comply or explain' basis.[116]

In summary therefore, in the UK unlike in Nigeria, CSR issues and disclosures on non-financial social and environmental matters are both a matter of requirements in its principal company legislation [sections 172, 417 and 423(5) in compliance with the EU directives] and demands of best financial reporting practices (further to the 2005 Accounting Standards Board's designed Reporting Standard ASB RSI – Operating and Financial Review).

Second, comparing the Nigerian CSR Bill with CSR regulation in the USA, measures adopted in the USA towards regulating corporate behaviour appear to have been largely through voluntary codes of ethical conducts and often in response to *laissez-faire* market forces and pressures from, investors, consumers, and NGOs.[117] Together with the free market regulation, CSR is facilitated by state/government agencies using enforcement strategies.[118] To start with, against human rights abuses, CSR regulation is usually discussed in terms of the Alien Tort Claims Act (ATCA).[119] While a full scale appraisal of this law is outside the corporate law purview of this thesis, it suffices to say that the efficacy of ATCA has been grossly undermined

116 Section 417 (5), (10) and (11) of the 2006 English Companies Act; see also section 414C (7) of the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013.

117 Ribstein, L., Accountability and Responsibility in Corporate Governance (2006) 81 *Notre Dame Law Review*, 1431, 1444 to 1447; see also McBarnet *supra* note 22 at 36.

118 Ho *supra* note 109 at 385.

119 Alien Tort Claims Act, codified at 28 USC § 1350. It dates back to 1789 and grants extraterritorial jurisdiction to the US District Court in respect 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*."

by recent interpretations of its enforcement ambits.[120] Therefore, the ATCA does not seem to constitute any real succour for victims of corporate irresponsibility and abuse even in the realm of human rights.[121] Further, enforcing the codes of conducts introduced by the 2002 Sarbanes-Oxley Act, agencies such as the US Sentencing Commission fosters CSR by making evidence of a corporate 'culture of integrity' a mitigating factor in sentencing corporate crime.[122] In addition, other agencies such as the Environmental Protection Agency are said to take account of internal policies in deciding on penalties;[123] the Securities and Exchange Commission (SEC) also requires the codes of ethics and evidence of implementation procedures;[124] in fact, SEC requires listed companies to disclose financial and non-financial information in their annual reports known as Management's Discussion and Analysis of Financial Condition and Results of Operations (MDA) and the MDA should identify and discuss key performance indicators, including non-financial performance indicators that their management uses to manage the business and that would be material to investors.[125] Furthermore, several federal agencies including the Department of Commerce, the Department of State, and the Department of Energy also endorse and facilitate CSR through explicit CSR award and training programs.[126]

---

120 Zerk *supra* note 47 at 152; Bowoto *v.* Chevron F. Supp. 2d 1229 (N.D. Cal. 2004). For instance, in this Bowoto's case which began in 1999, the US court applied the doctrine of *forum non conveniens* and declined jurisdiction under the ATCA having found that there existed a better and more adequate forum to determine the case outside the jurisdiction of the United States of America.

121 See generally MacLeod *supra* note 2 at 66, 67 *et seq*.; see also Ogutuga M O, 'CSR Obligations of Transnational Corporations and Legal Enforcement Mechanisms in the Extractive Industries: How Effective are these Mechanisms in the Protection of Human Rights in Africa', (Unpublished research paper submitted to the CEPMLP, University of Dundee, 2007) 13, 16 and 24.

122 In the USA for instance, evidence of effective ethics and CSR practices constitute a mitigating factor in sentencing corporate crime. See chapter 8 of the 2015 United States Sentencing Commission Guidelines Manual available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_8.pdf last accessed 27th October, 2016.

123 McBarnet *supra* note 22 at 36.

124 *Id*.

125 Osuji, O., 'Corporate Social Responsibility, Globalisation, Developing Countries and International Best Standards: The Incoherence of Prescriptive Regulation', Conference Paper (12th International Conference on Corporate Social Responsibility, ISSN 2048 – 0806, Niteroi and Rio de Janeiro, Brazil, June 2013) at footnote 57 and accompanying texts citing SEC, Interpretative Guidance (Release Numbers 33-8350 and 34-48960).

126 Ho *supra* note 109 at 390.

As a result of the foregoing, some US scholars have argued that, especially for public companies operating in the US, the ethical codes of conduct have become 'arguably a legal necessity'.[127] Therefore, the US framework seems to have combined both principle-based regulatory method (free market-driven system) and at the same time rule-based method (government agencies' CSR endorsing and facilitating requirements sometimes pursuant to the Sarbanes-Oxley Act of 2002) especially within the context of enforcement strategies.

It could be concluded therefore that in the US, although CSR and ethical codes are upheld as a voluntary business practice and largely regulated by the laissez-faire market forces,[128] yet at the same time, CSR is actively endorsed, facilitated and fostered by state authorities and agencies through indirect hard law regulatory and enforcement mechanism.[129]

Third and lastly, the aborted Nigerian CSR Bill is also juxtaposed against CSR provisions in the 2013 Indian Companies Act. [130] In India, the conception of CSR and its regulatory approach appears replete with many inconsistencies to say the least and an irresistible source of confusion. It is also unclear whether or not a co-regulatory or meta-regulatory approach is intended by the drafters of the relevant CSR provisions in the Indian companies' legislation. In order to put the point in proper perspective, the relevant provisions are reproduced below:

Section 135 provides:

> 135. (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee

127 McBarnet *supra* note 22 at 37.

128 Aaronson, S. A., 'Corporate Responsibility in the Global Village: The British Role Model and the American Laggard' (2003) 108 *Business and Society Review* 309, 318 to 329.

129 Ho *supra* note 109 at 391; see also McBarnet *supra* note 22 at 37.

130 2013 Indian Companies Act available at http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf last accessed 28th October, 2016.

of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(2) the Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3) The Corporate Social Responsibility Committee shall, —

(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII[131];

...

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:
Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, ***specify the reasons for not spending the amount.***

The Indian framework appears to have adopted a CSR which focuses on corporate charity and community development (as evidenced in the 7th Schedule) and it must be noted that this is a disservice to modern conception of CSR.[132] As shown above, even within the EU, the least favourable jurisdiction for effective CSR regulation, such a narrow definition and conception

[131] Activities which may be included by companies in their Corporate Social Responsibility Policies Activities relating to:— (*i*) eradicating extreme hunger and poverty; (*ii*) promotion of education; (*iii*) promoting gender equality and empowering women; (*iv*) reducing child mortality and improving maternal health; (*v*) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; (*vi*) ensuring environmental sustainability; (*vii*) employment enhancing vocational skills; (*viii*) social business projects; (*ix*) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and (*x*) such other matters as may be prescribed.

[132] McBarnet *supra* note 22 at 1 and 18.

of the CSR phenomenon has been discarded and improved upon.[133] Within the Indian corporate law system, it is equally interesting to note the supposed mandatory[134] requirement and compulsory expenditure of some 2% of the company profit on some charity. Following recent international trends, one would expect that the Indian CSR initiative, having adopted a narrow conception of CSR, would only justify CSR within the Indian business community using the *business case* argument. That is to say that CSR is voluntary and should be strategically shown to have some positive value, benefits and other company-success-related attributes before it may be embraced by the business community. Therefore, mandating CSR on one hand and insisting its practice to be based on corporate charity appears incoherent and out of tune with modern conception of the CSR concept. It is also noteworthy that, in spite of the supposed compulsory 2% spent on CSR, the Indian regime in the proviso to sub-section 5 of section 135 of the 2013 Indian Companies Act, gave an escape route for non-compliance. Therefore, the 'comply or explain' approach is accommodated as well within the system. The above noted incoherence has largely informed the researcher's conclusion that the Indian CSR regulatory and enforcement is rather filled with inconsistencies and probably in a confused state. The regime is relatively new and yet to be properly tested for success in promoting sustainable development and effective corporate responsibility practice in India.

Very important, it must be noted from the above that the Indian CSR regulatory approach has a similarity with regulatory approach under the aborted Nigerian CSR Bill; they both specify that a certain percentage of the corporate revenue be spent on CSR activities. However, there are a few differences: first, the Nigerian CSR Bill had sought to establish a CSR Commission

133 See the 2011 communication of the EU.

134 Another mandatory CSR regime can be found in the Indonesian Investment Law No.25 of 2007 and the Limited Liability Company Law No. 40 of 2007.

to regulate CSR activities. The Indian regime however seeks some form of self-regulatory approach to CSR by creating a CSR Committee from the company's Board of Directors. Secondly, the Indian regime creates a form of internalised self-regulatory regulator (in the CSR Committee of the Board of Directors), the Nigerian system rather chose an externalised regulator in the CSR Commission to monitor corporate responsibility from outside the business community.

In concluding discussions under the legal assessment of the Nigerian CSR Bill, it is instructive to reiterate the fundamental flaws of the Bill: (i) it reduced CSR to corporate donation and corporate tax; (ii) it proposed to establish a CSR Commission, an externalised CSR regulator with little knowledge of or access to the internal workings of individual companies together with attendant CSR regulatory inefficiency.[135]

4.4.2 *Companies and Allied Matters Act 1990*

CSR conception under the Companies and Allied Matters Act[136] (CAMA) has perhaps been of tremendous influence on the nature of CSR practices in Nigeria. The earlier noted restrictive CSR conception amongst Nigerian corporate managers in terms of gifting or philanthropy is probably directly attributable to CAMA provisions. Whereas, as clarified earlier in this thesis, while CSR may sometime entail some elements of corporate charity or philanthropy, it is certainly not all about charity.[137] It is also necessary to clarify that the position of corporate gift and charity had since been settled in judicial cases and eventually codified in company legislations. A business is usually permitted to engage in charity and philanthropy only if same would benefit the company in the long run and towards promoting the interests and success of

135 Dine *supra* note 15 at 131 and 149.
136 Cap C20 Laws of the Federation of Nigeria, 2004.
137 See Literature on CSR Conception at 2.2 of Chapter 2 of this thesis.

the shareholders as a whole.[138] Otherwise, corporate law abhors corporate gifting which is taken as undue depletion of capital and monies which will be otherwise available as profits for shareholders. Bowen L. J. in *Hutton v. West Cork Railway Co*. put it succinctly as follows:

> … the law does not say that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company … charity has no business to sit at the board of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb … charity may sit at the board, but for no other purpose.[139]

Further, by virtue of section 38 of CAMA, all companies are said to have the powers of a natural person of full capacity including powers to make donations. Section 38 (1) and (2) provides:

> (1) Except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorized business or objects, have all the powers of a natural person of full capacity.
>
> (2) A company shall not have or exercise power either directly or indirectly to make a donation or gift of any of its property or funds to a political party or political association, or for any political purpose; and if any company, in breach of this subsection makes any donation or gift of its property to a political party or political association, or for any political purpose, the officers in default and any member who voted for the breach shall be jointly and severally liable to refund to the company the sum or value of the donation or gift and in addition, the company and every such officer or member shall be guilty of an offence and liable to a fine equal to the amount or value of the donation or gift.

---

138 The English Companies Act, 2006, section 172. The provisions of the American Sarbanes Oxley Act of 2002 have also confirmed the shareholder-oriented corporate culture of corporate America; see, Armour, J., Hansmann, H., and Kraakman, R., 'The Essential Elements of Corporate Law: What is Corporate Law?' Harvard John M. Olin Discussion Paper Series, No. 63, 7/2009 available at http://www.law.harvard.edu/programs/olin_center/ last accessed on 28th October 2016 at 10-11; see also section 181 of the Australian Corporations Act, 2001; see generally *supra* note 19. In the Nigerian corporate law system, a similar shareholder-oriented approach is enshrined in the legislation. Companies and Allied Matters Act, Cap C20 Laws of the Federation of Nigeria, 2004, sections 279, 314 and 315 are all to the effect that the interests of shareholders should be held paramount by directors and state regulators with little or no regard for societal or community concerns from companies' activities. *cf*: section 279 (4).

139 Dictum per Bowen L.J in Hutton's case, *supra* note 31 at 672.

From the above, it logically follows that, having the powers of a natural person portends that any incorporated business will therefore be able to engage in corporate gifting provided no contrary provisions exist in its memorandum and articles of association. Further, sub-section (2) only contains a prohibition of corporate gifts to political parties or to fund political associations or towards any other political purposes. This, again, can only mean that if such corporate donation is not towards any political ends or purposes and provided not otherwise prohibited by the company's constitution (memorandum and articles of association), such corporate gifts will be *intra vires*, lawful and legitimate.[140]

However, although it will be lawful for corporate managers to engage in such corporate gifting from corporate funds, but where such is done randomly purely in the name of corporate charity or philanthropy and not under an efficient and effective CSR regime, such is likely to constitute a disservice to the true meaning and imports of CSR; it will provide justifications for commentators who claim that CSR is just another detraction from serious business, a ridiculous idea and undue depletion of capital and monies which would otherwise have been available to shareholders as profits.[141]

Again, as observed in Chapter 2, CAMA appears not to provide sufficiently conducive ideological support for effective CSR practices in Nigeria. CAMA adopts the traditional shareholder primacy model of corporate governance whereby corporate responsibility towards

140 Okon *supra* note 5 at 201 and 202.

141 Smerdon *supra* note 88 at 470; see also Wolf, M., 'Sleep-walking with the Enemy: Corporate Social Responsibility distorts the Market by Deflecting Business from its Primary Role of Profit Generation', *Financial Times,* (May 16th 2001); see also, Owen, G., 'Time to Promote Trust, Inside the Company and Out" *Financial Times, (*August 30th, 2002); see also, Lambooy *supra* note 13 at 17.

stakeholder group such as the employees, creditors, local communities, suppliers is afforded very limited chance.[142] It is for instance statutorily codified that:

> Directors are trustees of the company's moneys, properties and their powers and as such must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interests.[143]

Furthermore, the combined effects of the provisions of section 279 (4) and (9) of CAMA also buttress the assertion of very limited support for CSR in Nigeria especially in terms of employee rights. The sub-sections provide:

> (4) The matters to which the director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members.
>
> (9) Any duty imposed on a director under this section shall be enforceable against the director by the company.

From the above provisions, sub-section 4 appears to enjoin corporate managers to consider, have regard for and balance employee related issues and interests in making corporate decisions. However, sub-section 9 makes it abundantly clear that while these employees may believe that their interests are being taken into account in the promotion of the success of the company, they should not however attempt enforcing this right because they will fail since only the company (that is the shareholders) can sue if this right is violated or perceived to have been violated by corporate managers. This statutory provision is not strange at all as it is only a

[142] CAMA, sections 279, 314 and 315; *cf*: section 279 (4). See generally discussions in part 2.5.3 of Chapter 2 and part 3.3.1 of Chapter 3.

[143] CAMA section 283 (1). (Emphasis mine); see also Haston (Nig) Ltd v. A.C.B. Plc (2002) 12 NWLR (Pt.7820) at 623.

confirmation of section 299 of CAMA and codification of the long standing common law principle established in the case of *Foss v. Harbottle*.[144]

What's more, in terms of corporate statement reporting and disclosures, CAMA strictly focuses on the shareholder primacy model with no provisions for consideration of important stakeholder interests (such as local communities or suppliers) nor any provisions for corporate disclosures/reports on non-financial (social and environmental) matters.[145] Everything towards accountability, transparency and corporate responsibility under CAMA has been geared towards shareholder protection with little or no protection afforded other constituents such as the local community, suppliers, employees, contractors, the government, the environments and other relevant stakeholders. There are two sets of challenges with this approach to accountability or disclosure: (i) in the first set, such transparency and disclosure attempts are only effective when the shareholders are sufficiently knowledgeable to understand the information disclosed, have requisite shareholding to influence decisions and the shareholders not only willing but also able to resort to litigation if necessary;[146] (ii) the second problem is the conspicuous exclusion of the earlier noted other crucial stakeholder interests. These stakeholders also have credible stakes in the company worthy of protection and thus requiring proper disclosure.

It is interesting to note that both CAMA and the UK 2006 Companies Act share the similarity of not providing sufficiently conducive corporate law ideological model for effective CSR. Just

144 (1943) 2 Hare 461, 69 E. R. 199 Ch; see also generally, Edwards *v.* Halliwell (1950)2 All E.R. 1064; Alex Oladele Elufioye & Ors v. Ibrahim Halilu & Ors (1990) LPELR-20126(CA); Abubakari v. Smith (1973) 6 S.C. 24; see similar criticisms for similar provisions in the UK companies legislation by Pennington in Pennington R.R., *Company Law* (6th edn, London Butterworths, 1990) 584 to 585.

145 CAMA sections 331, 332 *et seq*. and schedule 2.

146 Okon *supra* note 5 at 83; See also Gower, L.C.B., *Gower's Principles of Modern Company Law* (6th edn Sweet & Maxwell, 1997) 67.

like in Nigeria, the UK corporate governance system styled as 'Enlightened Shareholder Value'[147] - where extraneous competing interests of certain stakeholders are supposedly balanced but for the long term benefits of the shareholders[148] - has its ideological foundation deeply rooted in the shareholder primacy model. To start with, corporate managers are statutorily required to '… promote the success of the company for the benefit of its members as a whole …'[149] By way of other examples, shareholders still retain the ultimate control of the corporate managers,[150] the business owners have several participatory rights in corporate governance,[151] the investors are specifically promised returns and benefits from the company's profits,[152] the stockholders who may find themselves in minority are also assured of some protection,[153] the legislative and regulatory framework for mergers and takeovers of companies still largely prioritizes shareholders' interests as opposed to other stakeholders such as employees.[154]

Notwithstanding the above similarities, the UK CSR regulatory regime is still markedly different largely due to her membership[155] of the EU where companies are encouraged to disclose and report on non-financial matters by virtue of the Accounts Modernisation

147 ESV is similar to the Australian 'Business Approach to Corporate Responsibility' model which also enjoins corporate managers to consider Stakeholder interests so long it is in the best interest of shareholders as a whole.

148 Armour *et al supra* note 138 at 7.

149 The English Companies Act, 2006, section 172. The provisions of the American Sarbanes Oxley Act of 2002 have also confirmed the shareholder-oriented corporate culture of corporate America; see Armour *et al supra* note 138 at 10 and11; see also section 181 of the Australian Corporations Act, 2001.

150 The shareholders may remove directors with unsatisfactory performance. English Companies Act 2006, section 168 thereof.

151 This includes voting rights at general meetings. Going by the pages of the September 2014 UK Corporate Governance Code now published by the Financial Reporting Council, particularly, points 5 and 7 of the Preface, it is rather evident that the code is shareholder-oriented. See https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf, last accessed 7th January, 2016.

152 English Companies Act 2006, section 581.

153 There are provisions for derivative claims and petitions for unfairly prejudicial conducts. See the English Companies Act, 2006, sections 260 and 994.

154 Armour *et al supra* note 138 at 7 to 16.

155 It will be interesting to know the implication of UK decision to leave the EU (in the wake of its so-called 'BREXIT' vote) on its eventual CSR regulation and enforcement regime.

Directive.[156] UK companies by virtue of section 417 (5) of the 2006 UK Companies Act which implemented the EU Directive are required to disclose and report on non-financial matters. There are no such statutory requirements for annual reports on CSR non-financial matters like the environment, social and employee issues under CAMA. It is interesting to add that even the Corporate Responsibility Part VIII of the Nigerian 2007 Investments and Securities Act (ISA) which established the Securities and Exchange Commission (SEC) and regulating the activities of public liability and quoted companies in Nigeria fails to also provide for corporate reporting on non-financial matters.[157]

4.5 CSR Regulation and Enforcement in the Nigerian Extractive Industry

An assessment of the Nigerian business community without consideration of its extractive industry is probably incomplete and is one of the reasons why this thesis focuses on the industry. According to the IMF, the Nigerian extractive (especially the oil and gas sector) industry accounts for over 95% of Nigeria's foreign export earnings and 65% of the government revenue.[158] However, corruption in the industry appears legendary whereby tens of billions of United States Dollars get missing.[159] In spite of the huge derivable revenue from the industry, host communities usually have nothing to show for it making a few come to the conclusion that the oil in the Niger-Delta region of Nigeria, for instance, is more of a curse

156 Council Directive, 2003/51/EC, 18th June, 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003; see also The Directive 2014/95/EU on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095 last accessed 28th October, 2016.

157 See the Corporate Responsibility provisions of the Investments and Securities Act, 2007 (ISA), Section 60 to 65 of ISA, 2007, available at www.sec.gov.ng/laws.html last accessed 28th October, 2016.

158 Ekhator, E. O., 'Corporate Social Responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: An Appraisal' (2014) 28 *Cadernos de Estudos Africanos* 119, 127.

159 See for instance Udo, B., 'Missing $20bn: Sanusi faults Alison-Madueke, says audit report proves at least $18.5bn lost' (Premium Times 14th May, 2015) available at www.premiumtimesng.com/news/182926-missing-20-bn-sanusi-faults-alison-madueke-says-audit-report-proves-at-least-18-5bn-lost.html last accessed 28th October, 2016.

than blessing. There are therefore many articles and research works across different disciplines on the question of corporate accountability, transparency and responsibility in the Nigerian extractive industry.[160] The usual tales of human right abuses and abundant instances of foul cries of corporate irresponsibility in many of the above noted articles and works are deliberately limitedly discussed in this thesis. This is to give room for focus on the legal assessment and appraisal of applicable regulatory framework and CSR enforcement mechanisms.

Away from the hydrocarbon oil and gas sector of the extractive industry, the solid minerals sector is also examined. While mining in Nigeria is said to be over 2,400 years old involving exploratory activities of ancient civilizations such as the Nok Culture (340 BC), the Igbo Ukwu bronze civilization (705 AD), the Ife bronze works (between 1163–1200 AD) and Benin Bronze works (between 1630–1648 AD), organized mining did not start until around 1903 following the commissioning of the minerals surveys of the Southern and Northern protectorates in that year.[161] Organized mining of cassiterite and its associated minerals like tantalite and columbite started in 1905 by the Royal Niger Company in Jos, Plateau State while Coal exploration and mining commenced in 1906.[162] The Mineral Ordinance of 1946, the Coal

---

160 Akinsulore, A., 'The Effects of Legislation on Corporate Social Responsibility in the Minerals and Mines Sector of Nigeria' [2016] 1 (7) *Afe Babalola University Journal of Sustainable Development Law and Policy* 97 – 115; Ihugba, B. U., 'Compulsory Regulation of CSR: A Case Study of Nigeria', [2012] 5 (2) *Journal of Politics and Law*,68 – 81; Ekhator *supra* note 158 at 119 to 140; Emeseh, E., Ako, R., Okonmah, P., and Ogechukwu, L., 'Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?' (2010) II *German Law Journal* 230; Nwete, B., 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?' [2007] 4 (8) *German Law Journal* 324, citing at ffn 66 Stevens, P., 'Resource Impact: A Curse or Blessing?' Draft Working Paper, CEPMLP, University of Dundee, April 2003; see also, Peel, M., and Shaxson, N., 'Curse of Oil Highlights the Fragility of African States', *Financial Times*, March 24, 2004; Tuodolo, F., 'Corporate Social Responsibility: Between Civil Society and Oil Industry in the Developing World', *ACME: (2009) 8 International E-Journal for Critical Geographies*, 530-541, 531; Amao *supra* note 105 at 89 to 113; Idemudia, U., and Ite, U. E., 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (2006) 13 *Corp Soc Resp Environ Mgmt* 194, 195; , Ijaiya, H., 'Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria' [2014] 3 (1) *Journal of Sustainable Development Law and Policy* 60 to 71.

161 Geological Survey of Denmark and Greenland (GEUS), *Scoping Study on the Nigerian Mining Sector* (Final Report, NEITI Secretariat, 2011) 12.

162 *Id*.

Ordinance of 1950, the Explosives Act of 1964 and the Explosives Regulations of 1967 provided the legal framework for mining and solid mineral development in Nigeria before the enactment of the Minerals and Mining Act, No. 34 of 1999. As a result of overdependence on the hydrocarbons sector and the need to diversify towards a revitalised mining and solid minerals sector, the government enacted the Nigerian Minerals and Mining Act, No. 20 of 2007 replacing the 1999 Act. As part of the legal framework and towards more coordinated solid minerals sector, the National Minerals and Metals Policy of 2008 and the Nigerian Minerals and Mining Regulations of 2011 were produced to aid smooth operationalization of the 2007 Act. Individual legal regimes within the extractive industry are examined in turn below in relation to effective CSR regulation.

4.5.1 *Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007*

In order to ensure accountability, transparency and towards more efficient corporate responsibility regime in the extractive industry, the Nigerian government bought into the idea of a UK-led Extractive Industries Transparency Initiative (EITI) which is targeted at creating accountability and transparency in the management of oil, gas and mining resources in resource rich countries such as Nigeria. A diverse group of countries, companies and civil society organisations attended a Lancaster House Conference in London (in 2003) hosted by the UK government at which certain Statement of Principles for transparency over payments in the extractive industry were agreed.[163]

The Nigerian Extractive Industries Transparency Initiative (NEITI) was inaugurated in February 2004 by former President Olusegun Obasanjo when he set up the National

[163] See the EITI Standard, Revised Version 1.1.2015 available at https://eiti.org/document/standard last accessed 28th October, 2016 (EITI Standards).

Stakeholders Working Group (NSWG) under the leadership of Mrs Obiageli Ezekwesili.[164] The NSWG oversees the activities of NEITI and has representatives from the government, extractive companies and civil society. In order to give legal backing to the work of NEITI, a bill was introduced to the National Assembly in December 2004. The NEITI Bill was eventually passed and harmonized by the two chambers of the National Assembly and subsequently signed into law by former President Obasanjo on the eve of the last day of his administration, May 28, 2007.[165] With this, Nigeria became the first EITI-implementing country with a statutory backing for its operations.[166]

NEITI introduced the framework for transparency and accountability in the reporting and disclosure by all extractive companies of revenue due to or paid to the Federal Government of Nigeria[167] and its governing body (NSWG) was to ensure compliance with due process, monitor and ensure accountability, eliminate corrupt practices, and ensure conformity with the global principles of EITI'.[168] NEITI's cardinal functionality is complementary of the requirements to prepare and report on financial matters under CAMA. It is to ensure the transparency through publication of company accounts and through regular audits and tax returns on payments. NEITI commissioned the first comprehensive audit of Nigeria's petroleum industry for the period 1999 to 2004 and has been working with various stakeholders to build national consensus on the need for extractive revenue transparency in Nigeria.[169]

---

164 See the NEITI website http://neiti.org.ng/index.php?q=pages/about-neiti last accessed 28th October, 2016.

165 *Id.*

166 http://www.neiti.org.ng/sites/default/files/documents/uploads/neitiact.pdf last accessed 28th October, 2016. The EITI Board designated Nigeria as EITI complaint on 1st day of March, 2011; see also Ekhator *supra* note 158 at 129. Other countries who have also implemented EITI Standards by legislation include Liberia, Tanzania, Ukraine and Peru.

167 Explanatory memorandum to the 2007 NEITI Act.

168 Section 2, 2007 NEITI Act.

169 See the NEITI website http://neiti.org.ng/index.php?q=pages/about-neiti last accessed 21st July, 2015.

The NSWG as the governing body of NEITI ensures that requisite framework through which NEITI's mandate can be achieved is developed.[170] The president of Nigeria has the powers to appoint not more than 14 persons as representatives of relevant stakeholder groups (labour groups, civil society, and extractive industries experts) into the NSWG.[171]

Despite all optimism, the NEITI regime has, however, not lived up to expectations in affording effective regulatory or enforcement framework for corporate accountability and responsibility. This is due to many reasons, a few of which are mentioned below.

First, the absolute power of the Nigerian President to appoint into NSWG for policy direction without any recourse to the National Assembly has been criticised as such is said to undermine the independence of NEITI and disrupt its integrity as a genuine stakeholder engagement platform.[172] The appointment framework is also criticised as faulty as it gives rise to political cronies and sometimes clueless individuals into such sensitive positions.[173]

Secondly, NEITI appears to merely have powers to monitor payments to the government from the companies and publicise defaults *without more*. It is generally lamented that it has had to rely on other government agencies such as the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practices Commission (ICPC) and the office of the Attorney General of the Federation to enforce any defaults or violations of its mandate.[174] Ihugba records a member of the NSWG saying:

> I can tell you that up to this moment I am still trying to find out of what use we are to the society. I cannot see corruption and simply report it without doing anything about it. But this is what we are doing.[175]

170 Section 5, NEITI Act.
171 Section 6, NEITI Act.
172 Ihugba *supra* note 160 at 74. It appears arguable though that the calibre of representatives at the National Assembly will determine whether or not recourse to them undermines the independence of NEITI.
173 *Ibid* 75.
174 *Id*.
175 *Id*.

Against the background of the above statements, some scholars say NEITI is increasingly becoming toothless and institutionally moribund[176] and that the NEITI Act only succeeded in transforming NEITI into a toothless bulldog.[177]

Further, there are other inherent clogs in the wheel of success within the NEITI Act itself as contained in sections 3 (d), (e) and 14 (1) of NEITI Act.

Section 3 (d) provides:

> Obtain, as may be deemed necessary, from any extractive industry company an accurate record of the cost of production and volume of state of oil, gas or other minerals extracted by the company at any period, provided that such information shall not be used **in any manner *prejudicial* to the *contractual obligation* or proprietary interests of the extractive industry company**. (Emphasis mine).

Section 3 (e):

> Request from any company in the extractive industry or from any relevant organ of the Federal, State or Local Government, an accurate account of any money paid by and received from the company at any period, as revenue accruing to the Federal Government from such company for that period, provided that such information shall not be used **in a manner *prejudicial* to *contractual obligations* or proprietary interests of the extractive industry company or sovereign obligations of Government**.(Emphasis mine).

Section 14 (1):

> The NEITI shall cause the account of total revenue which accrued to the Federal Government from all extractive industry accompanies, its receipts, payments, assets and liabilities to be audited ... the independent auditor shall submit the report with comments of the audited entity to the NEITI which shall cause same to be published for the information of the public, **provided that the contents of such report shall not be published in a manner *prejudicial* to the *contractual obligations* or proprietary interests of the audited entity**. (Emphasis mine).

[176] Ekhator *supra* note 158 at 130.
[177] Amao *supra* note 105 at 99.

The above provisions especially in the underlined and italicised portions show that NEITI is inherently and fundamentally hindered in its transparency, accountability and responsibility mandate as it cannot utilize or otherwise publish reports considered *prejudicial* to a company's contractual obligations or proprietary interests (as there is no clear definition of what is *prejudicial* or highlighting its indicia). These provisions would appear to have precluded any hope of successful realisation of NEITI's mandate from the onset. In the researcher's thinking, this development is highly despicable and probably bordering on legislative rascality that intentions of private parties to contracts in the extractive industry – however crooked or dodgy such intentions might be – should be made to override the national interest (captured in the legislation). One wonders if this can be attributed to the fact that NEITI Act was not assented to until the very last day of the former President Obasanjo's administration.

In summation, there is no gainsaying that the legal transplantation[178] of the EITI Standards into the 2007 NEITI Act is fundamentally faulty. Legal transplantation is a process of moving a rule or a system of law from one system or country to another. It is not a new phenomenon but involves a careful process of copying principles of laws and rules with sufficient understanding of the comparative laws involved and adequate consideration for the local (corporate) culture of the target country. It would appear that the drafters of the NEITI either feigned denial of prevailing domestic systems or had very little consideration for the existing legal, institutional, and socio-economic realities of the recipient Nigerian system in the process of adopting the EITI principles. In my view, the NEITI Act attempts to put a square peg in a round whole. The majority of jurisdictions where transparency and accountability standards or requirements are

[178] A Legal transplant is simply a domestic copy of a foreign law. See generally Watson, A., *Legal Transplants: An Approach to Comparative Law*, (2nd ed. 1993, 1st ed., Edinburgh, 1974); see also Spamann, H., 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' [2010] 2009 (6) *Brigham Young University Law Review* 1813-1878; also see Dine, J., 'Jurisdictional Arbitrage by Multinational Companies: A national Law Solution?' [2012] 3 (1) *Journal of Human Rights and the Environmen*t 44 to 69 at 60.

intended such as the EITI principles; such jurisdictions ensure that the adopted framework fits into the general corporate law model of such countries. To this end for instance, the US adopts hard law mandatory regulations on any of its critical economic issues such as corporate reporting, disclosure and accountability and as such passed laws like the Sarbanes-Oxley Act of 2002 and the Foreign Corrupt Practices Act (FCPA),[179] prohibiting, amongst others, payment of bribes to foreign officials to assist in obtaining or retaining business and it applies to prohibited conduct anywhere in the world and extends to publicly traded companies and their officers, directors, employees, stockholders, and agents.[180] Further, the UK's response is also coherent with its general corporate law model. That is, its CSR regulatory and enforcement regime is dependent on disclosure regime and social reporting on non-financial matters as contained in section 417 (5) of the 2006 English Companies Act and in line with the EU 2003 Accounts Modernisation Directive[181] and the Directive 2014/95/EU[182] of the European Parliament and of the Council of 22nd October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Therefore, there is coherence in the legal instruments through which the UK authorities and agencies facilitate, endorse and encourage effective CSR practices. The relevant question is,

---

179 The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act last accessed 28th October, 2016.

180 *Id*. It was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the wilful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to any person.

181 Council Directive, 2003/51/EC, 18th June, 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003.

182 The Directive 2014/95/EU on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095 last accessed 28th October, 2016.

what is the corporate law model on which the NEITI seeks to enforce CSR in the Nigerian extractive industry? Even CAMA and ISA do not support or contain provisions to facilitate non-financial disclosures on CSR to stakeholders on which principle, *inter alia*, the EITI may be premised.[183]

Consequently, as a result of the sensitivity of NEITI's mandate to a prosperous, accountable and responsible business community in the Nigerian extractive (and by extension, entire corporate Nigeria) industry, proper legal transplantation should be implemented to adapt the EITI Standards together with any other relevant and complementary international best standards and principles such as the Transparency International Promoting Revenue Transparency Project (PRT),[184] United Nations Global Compact (UNGC),[185] and the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGP) [186] to corporate Nigeria. Aside legislative efforts to solve the above noted inherent problems in the NEITI Act, the provisions of CAMA will also require amendment for coherence in order to facilitate the mandate of NEITI.

---

183 See Principle 12 of the EITI Standard, available at https://eiti.org/document/standard last accessed 28th October, 2016.

184 The Promoting Revenue Transparency Project (PRT) is an independent civil society initiative that complements the Extractive Industries Transparency Initiative (EITI) and other efforts to achieve transparency in oil, gas and mining revenues. There are differences and similarities between the PRT project and EITI that make them distinct but complementary, see more at: http://archive.transparency.org/policy_research/surveys_indices/promoting_revenue_transparency/in_english/eiti#sthash.swRkLNdn.dpuf last accessed 28th October, 2016.

185 UN Global Compact website, https://www.unglobalcompact.org/about/governance last accessed 28th October, 2016, (hereinafter simply "UNGC").

186 Ruggie, J., Final Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy ' Framework,' A/HRC/17/31, 21 March 2011 <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> last accessed 28th October, 2016 (hereinafter simply "UNGP").

4.5.2 *Petroleum Industry Bill 2012*

The Petroleum Industry Bill (PIB) has evolved from the year 2000 when the Oil and Gas Sector Reform Implementation Committee was inaugurated by the Federal Government of Nigeria to carry out holistic reforms of the oil and gas industry covering the upstream, midstream and downstream sectors of the industry. PIB has accordingly been touted as the Nigerian oil and gas industry *messiah* legislation and is much awaited by all stakeholders to solve the myriad of problems and challenges in the oil and gas industry including entrenching the principles of good governance, transparency and sustainable development in the petroleum sector. PIB proposes to carry out an overarching regulatory and enforcement reform in the Nigerian upstream, midstream, downstream and natural gas industries. Such reforms include the unbundling of the national oil company, Nigerian National Petroleum Corporation (NNPC) in order to make it more effective, efficient, transparent, accountable and responsible. PIB has 362 sections, of 223 pages and supported by 5 schedules. While there are many versions[187] of PIB and several provisions therein are controversial, this thesis appraises its provisions relating to sustainability, accountability, transparency and other CSR related regulatory framework. For the purpose of this chapter, the version available on the Nigeria-Law website[188] is adopted. In this regard, the following sections 4, 116, 190, and 290 will be examined.

Section 4 provides:

> In achieving their functions and objectives under this Act, the institutions and the companies established in pursuance of this Act shall be bound by the principles of the Nigerian Extractive Industries Transparency Initiative Act LFN 2007.

Section 190 (6) provides:

---

187 For instance see different versions available at http://www.nigeria-law.org and at <http://legaloil.com> both last accessed 28th October, 2016.

188 http://www.nigeria-law.org last accessed 28th October, 2016.

> All bids received based on the bid parameters established in subsection (2) of this section shall be handled in accordance with the published guidelines and monitored by the Nigeria Extractive Industries Transparency Initiative (NEITI).

The above provisions demonstrate that the PIB relies on the accountability, transparency and corporate responsibility regime established under the NEITI Act of 2007. The NNPC's 2009 PIB Inter-Agency Project Team Report confirms this development, of ensuring full compliance with the NEITI Act, 2007 by all the institutions.[189] It is submitted in this thesis that if this is the attitude to CSR adopted by the PIB, then all the criticisms noted under the NEITI discourse are applicable, *mutatis mutandis*, to the PIB.

Further, section 116 of the PIB provides for the establishment of a fund to be known as the Petroleum Host Communities Fund (PHCF). PIB provides that each upstream petroleum company shall remit to the PHCF, on a monthly basis, 10% of its net profit which shall be utilised for the development of the economic and social infrastructure of the communities within the petroleum producing communities.[190] This provision is interesting because it appears to adopt the same CSR conception as did the aborted 2007 CSR Bill demanding contribution of a percentage of corporate revenue to a fund.[191] As a result of its noted qualification, though this extra corporate taxation may not really receive criticisms unlike the 2007 CSR Bill, it is however submitted that the capacity to effectively channel such fund to the local/host community developmental project is suspect. In the researcher's view, the fact that the PIB cannot define how the PHCF shall be effectively administered, managed and by what agency to achieve its objectives provides a recipe for further corrupt practices in the oil and gas

---

189 NNPC 'An overview of the Petroleum Industry Bill' July, 2009 available at http://www.nnpcgroup.com/portals/0/pdf/pibconsultativeforum.pdf last accessed 28th October, 2016.

190 See sections 116 to 118 of the PIB.

191 This is however subject to subsection 2 to the effect that at the end of the fiscal year, each upstream petroleum company shall reconcile its 10% remittance with its actual filed tax return to the Nigerian tax authorities and settle any differences.

operations and its attendant further impoverishment[192] of the same host communities intended to be salvaged; the reasoning here is that oil and gas companies then get under the impression of effective CSR practices once the remittance to the fund has been done without any concomitant efforts to minimise any other negative socio-economic and environmental impacts of business operations.

Based on the above analysis, it is obvious that the relevant accountability and CSR provisions in the PIB actually constitute a disservice to effective CSR regulatory and enforcement framework in the Nigerian extractive industry. The researcher therefore submits that further consultations and stakeholder engagement must be done by the government before passing the PIB. Such engagement will afford proper amendments and redrafts of the relevant sustainability and CSR provisions in the PIB.

4.5.3 *Nigerian Minerals and Mining Act 2007*

The Nigerian Minerals and Mining Act No. 20 of 2007 (hereinafter simply 'the NMMA') repealed the 1999 Minerals and Mining Act and vests the ownership, control and regulation of mineral resources in the extractive industry in the Federal Government of Nigeria.[193] In terms of administration, the NMMA provides for a Mining Cadastre Office[194] (MCO), a Mines Environmental Compliance Department (MECD)[195] and a Mineral Resources and

192 Emeseh *et al supra* note 160 at 243 and 244.

193 Sections 1 and 161 of the NMMA.

194 By virtue of section 5 of the NMMA, the MCO is the central agency at the Federal Capital Territory, Abuja involved in the processing of mineral title applications including exploratory licenses, mining licenses, quarrying licenses and small-scale mining licenses.

195 By the combined effect of sections 16 and 18, the MECD is a department responsible for monitoring and enforcing compliance with environmental requirements and liaising with relevant agencies of government with respect to social and environment issues in mining operations.

Environmental Management Committee (MREMC)[196] amongst others and charges them with complementary regulatory responsibilities in their respective locations, levels and jurisdictions.

In relation to sustainability, environmental and (corporate) social responsibility, NMMA enjoins every holder of mineral title to be responsible by minimising, managing and mitigating any environmental impact resulting from their activities.[197] For instance, section 61 (1) (a) and (b) provide:

> Every holder of an exploration licence shall-
>
> (a) conduct exploration activities in a safe, friendly, skilful, efficient, and workmanlike manner in accordance with the regulations;
>
> (b) conduct exploration activities in an environmentally and socially responsible manner;

Further, section 116 of the NMMA states that holders of mining lease shall not commence development activities within any lease area until they finalise a Community Development Agreement[198] (CDA) with the host communities towards transferring social and economic benefits to the communities. Section 116 (3) provides for matters it envisages the CDA will address as follows:

> (a) educational scholarship, apprenticeship, technical training and employment opportunities for indigenes of the communities;
>
> (b) financial or other forms of contributory support for infrastructural development and maintenance such as education, health or other community services, roads, water and power;
>
> (c) assistance with the creation, development and support for small scale and micro enterprises;
>
> (d) agricultural product marketing; and

196 By section 19 of the NMMA, the MREMC operates at the state levels to consider and advise the Minister on matters affecting pollution and degradation of any land on which any mineral is being extracted and providing guidance to departments on the implementation of social and environmental protection measures.

197 Sections 56, 61, 70 (f) and 118, NMMA.

198 Under section 71 (1) (c), a signed CDA as approved by the MECD is a condition precedent to mining activities. The CDA is subject of review every 5 years. See section 116 (5), NMMA. This concept of CDA is new as it was not contained in the repealed Minerals and Mining Decree No. 34 of 1999.

(e) methods and procedures of environment and socio-economic management and local governance enhancement.

It must be admitted that there are many useful provisions in the NMMA in relation to sustainability and CSR regulation in the solid minerals sector, a few of which has been highlighted above. However, this researcher has some reservations in respect of the said provisions constituting an effective safeguard for stakeholder interest or advancing effective CSR practices in the industry. To start with, issues which the CDA is supposed to resolve between the extractive companies and their host communities appear limited to community development activities with host communities. CSR transcends such projects. It would seem that this development is only another fall out of the general restrictive conceptual problem of CSR in Nigeria. Further, the researcher submits that assuming but not conceding to the efficacy of the CDA *per se*, the host communities cannot be said to constitute the only stakeholder group whose interests require state protection. What happens to the interests of the employees of the companies? What happens to corporate responsibility towards clients, consumers, creditors and even the government? Moreover, in the absence of a definition of 'host communities' in the NMMA, who determines which local groups are entitled to negotiate a CDA with the extractive companies?[199] Will such negotiations with different communities not rather detract such extractive companies from their commercial focus? In the event no agreement is reached and matters to be addressed by the CDA are referred to the Minister, what model will the Minister utilise in his resolution and balancing of conflicting interests (which will not prejudice the companies as profitable ventures nor prejudice effective protection of the legitimate interests of the host communities)? How useful will revocation (or threat thereof) of granted licenses be

[199] Despite the provisions of Regulation 193 of the Minerals and Mining Regulation 2011, it is doubtful if the definition of host community in the Regulation would be able to actually address this issue.

in embedding responsible minerals mining activities? If licenses are constantly revoked for breaches as conceivable under section 151 of the NMMA, what impacts will this have on efforts at encouraging FDI in this sector? What assurances are there that the next grantee of the mining lease or any other holder of licenses will not behave irresponsibly towards relevant stakeholders also? Has the NMMA made the extractive companies instruments and tools of state control? Is the government, through the instrumentality of the NMMA, shirking its primary responsibilities of providing social services and public goods and rather shifting same to the business community? It is the researcher's considered opinion that the uncertainties and issues such as posed above are likely to contribute to, if not result in, the inefficiency of the CDA as a CSR regulatory technique.

In summing up, it is not the argument that the idea behind the CDA is totally worthless as a CSR regulatory technique. But rather than mandating the signing of such CDA or even making it a condition precedent to operations, such a CDA may only be encouraged to be signed and utilised by regulators within the ambits of a regulatory framework called the Responsible Stakeholder Model (RSM) as proposed and delineated in Chapter 5; in other words, the researcher will argue in Chapter 5 that credible answers to the above raised questions surrounding the implementation of the CDA and other related issues bordering on effective CSR regulation and enforcement are perhaps best situated within the RSM. For instance, under the regulatory framework of the RSM, as shall be expatiated in the next chapter, the business community will not necessarily view the CDA as some herculean task to be accomplished before operations (and even after commencement of operations) but will be rather viewed in terms of normal corporate operational requirements towards promoting the success of all relevant interests of the company. Invariably therefore, the ease of doing business in this

industry may be seen to have been improved through the instrumentality of the CDA and further seen in light of encouraging FDI accordingly.

4.6 CSR and Business Codes of Conduct in Nigeria

The bulk of CSR and sustainability practices in Nigeria are largely measured by voluntary[200] self-regulatory initiatives in the form of business codes of corporate governance in different sectors and industries. As earlier mentioned, there are about five[201] of such self-regulatory and soft law initiatives including: the Financial Reporting Council of Nigeria National Code of Corporate Governance 2016; the Central Bank of Nigeria (CBN) Code of Corporate Governance, May 2014; the Nigerian Securities and Exchange Commission (SEC) Code of Corporate Governance for Public Companies, 2011 and the Nigerian Communication Commission (NCC) Code of Corporate Governance for the Telecommunications Industry, 2014, National Pension Commission (PENCOM) Code of Corporate Governance for Licensed Pension Operators, June, 2008, and the National Insurance Commission (NAICOM) Code of Corporate Governance for Insurance Companies 2009.

It is quite commendable that notable Nigerian government institutions and regulatory agencies make attempts to facilitate and encourage corporate accountability, transparency and responsibility through the incorporation of sustainability provisions and transparency sections

---

200 An exception is the mandatory enforcement regime in the recently released Financial Reporting Council's National Code of Corporate Governance (Private Sector). See for general details of the release of the Financial Reporting Council's National Code of Corporate Governance for the Private Sector, 2016, amongst other releases at http://www.financialreportingcouncil.gov.ng/ last accessed 28th October, 2016.

201 It is important to note that these codes used to be five but as mentioned in the footnote above, effective 17th October, 2016, the Financial Reporting Council of Nigeria just released (in the month of October, 2016) the National Code of Corporate Governance, 2016. In spite of the timing of the said code, an attempt is still made in this thesis to analyse its CSR regulatory features. However, this thesis anticipates that it may take some time after the commencement of the said code before the full policy implications of its provisions especially in terms of CSR discourse will become manifest and ripe for more robust discussions.

in their regulatory framework. A few of the accountability and corporate responsibility provisions in the various ethical codes are highlighted below.

For instance, some of the relevant provisions in the Nigerian Securities and Exchange Commission (SEC) Code of Corporate Governance for Public Companies, 2011 are as follows:

Principle 2.2

> The principal objective of the Board is to ensure that the company is properly managed. It is the responsibility of the Board to oversee the effective performance of the Management in order to protect and enhance shareholder value and **to meet the company's obligations to its employees and other stakeholders**. (Emphasis Mine).

Principle 2.8.1

> Companies should **pay adequate attention to the interests of their stakeholders** such as its employees, host community, the consumers and the general public... (Emphasis mine).

Principle 28.3

> The Board should **report annually on the nature and extent of its social, ethical, safety, health and environmental policies** and practices... (Emphasis mine).

Principle 34.1

> In order to foster good corporate governance, companies should engage in increased **disclosure in Nigeria beyond the statutory requirements in the CAMA**. (Emphasis mine).

For the purpose of analysis, it is also important to consider the following provisions of the 2014 NCC Code of Corporate Governance.

Principle 6.6 provides that:

> The Board should ensure that **appropriate consideration of all stakeholders** is a norm in the organisation and that the

> significance of stakeholders in the management of the corporate reputation and reputational risk is appreciated. (Emphasis mine).

Principle 10.1 also provides:

> The Business of the company should be **run in such a way as to balance the interests of the shareholders and other stakeholders**. (Emphasis mine).

Finally, principle 12.0 provides:

> Companies should present a fair, balanced understanding and transparent assessment of the company's position and prospects to external stakeholders' and that …. '**The corporate reporting model should be comprised of a financial reporting model as well as non-financial reporting components**. (Emphasis mine).

From the above highlighted principles, it would seem that accountability to both shareholders and stakeholder groups is encouraged and corporate transparency and responsibility towards sustainable development is not strange to regulatory attempts in the Nigeria business community. Although these, on the surface, appear commendable, however the relevant question is, how effective can they really be? The provisions, most of the time, use the word '*should'* instead of 'shall' demonstrating their lack of hard law bite. In the wake of these soft law approach and voluntary application[202] of these codes, how efficient can the provisions be in enforcing responsible and accountable corporate behaviour in Nigeria? It has been established that soft law regimes are generally only useful against law-abiding corporate entities and will become grossly inadequate and inefficient against rogue corporate entities in the society who are simply within the business community to maximise profits at all costs.[203]

---

202 See Principle 1 of both the SEC Code and the NCC Code.

203 See Broomhill *supra* note 1 at 28. In a rush for profits at all or any costs, many rogue businesses (regardless of where they are domicile anywhere in the world) are willing and ready to do business regardless of elements of unlawfulness and irregularities involved. See for instance, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo, 12 April

Secondly, although it will be incorrect to state that the ethical codes are utterly useless towards embedding effective CSR, these codes, as they are, however are inadequate and inefficient as a result of their faulty legal transplantation premise. While it is evident that some international best practices and codes were adopted in incorporating CSR requirements in many of the Nigerian codes of corporate governance,[204] it is nonetheless arguable that they may be unenforceable against companies because such social reporting or stakeholder provisions therein are not only incoherent with primary legislations but probably also *ultra vires* the powers of the agencies prescribing them. For instance, as earlier noted, throughout the length and breadth of both CAMA and ISA, there is no positive enforceable legal obligation on any company or its directors 'to balance the interests of the shareholders and other stakeholders' as required, for instance, by Principle 10 of the NCC Code. Further, in spite of the copious requirements for CSR reporting in the codes across the industries in corporate Nigeria, there is really nothing in the primary legislations upon which such corporate social reporting on non-financial matters can be founded as otherwise required for instance under Principle 12 of the NCC Code. Therefore, regardless of any provisions in the codes attempting to ensure compliance with such requirement, they may simply just be *unenforceable* as the agencies prescribing would have acted *ultra vires*.[205] In summation, the incoherence between the

2001, S/2001/357 http://www.natural-resources.org/minerals/CD/docs/other/357e.pdf at 42, para.215 last accessed 18th June, 2014 and also at http://www.globalsecurity.org/military/library/report/2001/357e.pdf last accessed 22nd November, 2016.

[204] Peterside, A., *Code of Corporate Governance in Nigeria*, October, 2003 available online at http://www.ecgi.org/codes/documents/cg_code_nigeria_oct2003_en.pdf last accessed 28th October, 2016. See the forward by Mr Atedo Peterside in the 2003 code.

[205] See generally, judgment delivered by Justice O.E. Abang on Friday, 21st day of March, 2014 in Eko Hotels Limited v. Financial Reporting Council of Nigeria (FHC/L/CS/1430/2012); NNPC v. Famfa Oil Ltd (2012) 17 NWLR (Pt. 1328) 148; Bernard Amasike v. The Registrar General of the Corporate Affairs Commission (2010) NWLR (Pt. 1211) 337; Olanrewaju v. Oyeyemi & Ors (2001) 2 NWLR (Pt. 697) 229; Din v. A.G. Federation (1998) 4 NWLR (Pt. 87) 147 at 154; Adene and Ors *v.* Dantubu (1994) 2 NWLR (Part 382) 509; Gov. Oyo State v. Folayan (1995) 8 NWLR (Pt.413) 292 at 327. See also the judgment delivered by Salihu Modibbo Alfa Belgore, C.J.N. (as he then was) on Friday, the 22nd Day of September 2006 in the Attorney General of Lagos State v. Eko Hotels Limited and Oha Limited (2006) NWLR (Pt. 1011) 3782; Noble Drilling Nigeria Limited v. Nigerian Maritime Administration and Safety Agency, (2013) LPELR-22029 (CA).

provisions of the primary corporate law legislations and the ethical codes is the strongest pointer to the argument of faulty legal transplantation of the codes and perhaps some consequence of what Abugu termed 'error in scholarship'[206] in this area.

4.7 National Code of Corporate Governance 2016

Although this is also a code, it is however discussed separately because of the uniqueness of its provisions as shall be shown shortly. The Financial Reporting Council (FRC) of Nigeria is a federal government agency and established by the Financial Reporting Council of Nigeria Act, No. 6, 2011.[207] It is a under the supervision of the Federal Ministry of Industry, Trade and Investment. The FRC is responsible for, among other things, enforcing and approving enforcement of compliance with accounting, auditing, corporate governance and financial reporting standards in Nigeria.[208]

The FRC initiated a process towards drawing up a National Code of Corporate Governance of conduct generally applicable in the Nigerian business community including in the extractive industry. The FRC held public hearings on the draft code receiving comments from stakeholders and recently in the month of October, 2016, has released the National Code of Corporate Governance, 2016 (hereinafter simply 'the Code').[209] Although there are three versions of the code (Private Sector, Public Sector and Not-for-Profit),[210] these comments below are with reference to the Private Sector version. The private sector version is selected

206 Abugu, J., 'Issues and Problems in Corporate Governance in Nigeria' (2015) 6 [3] *The Gravitas Review of Business and Property Law* 1 at 15.
207 FRC Act 2011 http://www.financialreportingcouncil.gov.ng/ last accessed 28th October, 2016.
208 Section 7 (2) (a) FRC Act.
209 See http://www.financialreportingcouncil.gov.ng/ last accessed 28th October, 2016.
210 See http://www.financialreportingcouncil.gov.ng/index.php/9-uncategorised/105-frc-act# last accessed 22nd July, 2015.

for its unique enforcement provision as discussed below. It is important to highlight some portions of the Code to demonstrate its philosophy to CSR.

Principle 32 provides:

> **32.1** Companies **shall pay adequate attention to the interests of their stakeholders** such as employees, creditors, consumers, suppliers, trade unions, host community, government, the general public and future generations. (Emphasis mine).
>
> **32.2** Companies shall recognise corruption as a major threat to business and to national development and therefore as a sustainability issue for businesses in Nigeria. Companies, boards and individual directors must commit themselves to transparent dealings and to the establishment of a culture of integrity and zero tolerance of corruption and corrupt practices.
>
> **32.3** The board shall report annually on the nature and extent of its social, ethical, safety, health and environmental policies and practices. Issues should be categorized into the following levels of reporting…

Employing the word *'shall'* in the Code is unlike the provisions of other ethical codes of conduct discussed above in 4.6 and suggestive of its hard law regulatory approach. It will be interesting, however, how the FRC intends enforcing this hard law regulatory feature together with the complementary provision in Principle 37 of the Code specifically requiring mandatory compliance to the provisions of the Code; the concern expressed by the researcher here is against the backdrop of the general self-regulatory principle-based regulations associated with ethics, CSR non-financial matters and sustainability issues not only in Nigeria but as also demonstrated during above juxtaposition of the regulatory approach of the Nigerian aborted CSR Bill against practices in the UK and the USA.[211] The researcher submits that a few issues are pertinent under the Code and include: first, what provision in the FRC Act empowers the FRC to prescribe mandatory compliance on companies to making ***non-financial disclosures***

[211] See above, 4.4.1.

and ***paying attention to stakeholder interests*** as required by the Code? Second, who, where and how will non-compliance with the sustainability requirements of this subsidiary regulation be enforced without contravention (being *ultra vires*) of extant provisions of the primary legislation of both CAMA and ISA? Finally, considering the nature of CSR generally, does this stark mandatory CSR disclosure regime not amount to over-regulation in corporate governance discourse? In other words, it is the view of this researcher that the regulatory option adopted by the FRC is not appropriate and its efficacy towards promoting effective CSR and sustainability within the Nigerian business community (including its extractive industry) is in doubt.

It should also be said that it is customary for regulators to release regulations but postpone the effective date just so as to give relevant actors and players in the business community the opportunity to adjust and ensure effective compliance when the regulation becomes operational without any sudden or unwarranted interferences in the smooth running of business. The FRC in this instance simply released and made this Code applicable and effective immediately. This is not an indication of a regulator[212] who understands the workings of the industry it seeks to regulate. In any event, it will be interesting to see how, when submitted for judicial adjudication, these issues will be decided in court.

[212] Together with Professor Abugu, the researcher has an article recently published showing the FRC constituting itself as an outsider regulator which regulatory technique has been shown not to be very effective in the business community. See generally, Abugu, J. and Amodu, N., 'Regulating Corporate Reporting in Nigeria: The Uncharitable Perception of an Outsider (External) Regulator' (2016) 2 *The Commercial and Industrial Law Review* 64. *Cf:* It is noteworthy nonetheless that as aftermath of this new National Code of Corporate Governance (especially that applicable to non-for –profit organizations), some religious leaders have started complying with the code having stayed beyond the 20-year period recommended by the code. See https://www.thecable.ng/just-in-fg-suspends-frn-code-that-forced-adeboye-out-of-rccg-nigeria-post last accessed 1st July, 2017.

4.8 Reformatory Agenda for Effective CSR Regulation and Enforcement in the Nigerian Extractive Industry

The discussions in the chapter are testamentary that effective CSR practice together with its values of corporate transparency, accountability and responsibility for sustainability issues and effective disclosure on non-financial matters in the Nigerian extractive industry is almost non-existent at the level of primary hard law legislations (CAMA, ISA, NEITI *et cetera*) and not only grossly inadequate but also underpinned by a faulty legal transplantation premise and incoherence at the level of soft law subsidiary regulations (such as the SEC Code of Corporate Governance, FRC National Code of Corporate Governance, amongst others).

This non-existence, gross inadequacy and incoherence in the Nigerian CSR framework is usually taken advantage of by industrialized societies and their MNEs who sometimes irresponsibly export potentially liability-attractive activities from their societies to the less developed systems (such as Nigeria) which are considered as safe havens for double standard irresponsible corporate behaviour.[213] Further, making matters worse, where these weak systems make efforts to strengthen their enforcement regime and hold companies (especially the high-profile MNEs) legally accountable and responsible, the companies either bargain away effective accountability and efficient corporate responsibility regimes before investing in such a country[214] or if after investment and seeing that the national government has awaken to its responsibilities, they may just altogether liquidate and practically move their investment to another weaker jurisdiction.[215]

[213] Dine, Jurisdictional Arbitrage *supra* note 178 at 49; see also Hadden *supra* note 45 at 486-7 and 506.
[214] See discussions in 2.5.2 of Chapter 2 of this thesis.
[215] Id. This latter development is known as regulatory jurisdictional arbitrage.

Consequently, from this rather delicate situation, this thesis submits that solutions for effective CSR practices in the Nigerian extractive industry appear bifurcated. The first option is that Nigeria may work towards the harmonization of the different and incoherent hard and soft law regulatory and enforcement framework visible within its primary and secondary legislation to secure a better CSR disclosure and corporate accountability framework as already prevailing in the industrialized systems such as in the UK. The harmonization in this option should also involve a smart-mix of different regulatory methods and features especially the principle-based and insider self-regulatory mechanisms. This should promote ready acceptability within businesses and the ease of enforcement. Invariably, the option is not likely to be perceived as being drastic and therefore unlikely to cause regulatory jurisdictional arbitrage in Nigeria.

As an alternative however, against the backdrop of the perception that soft law voluntary regulatory regimes are generally inadequate and inefficient, Nigeria, just like the US, may rather opt for a hard law rule based mandatory approach within the theoretical and operational ambits of the proposed RSM. Proper formulation, delineation and elucidation of the normative framework of this model and its regulatory consequences are outside the scope of this Chapter and accordingly addressed in Chapter 5. The first option is however discussed below.

4.9 Harmonization of Soft Law Self-Regulatory Shareholder Primacy Framework

This option leverages the shareholder primacy regulatory and enforcement model currently underpinning corporate law and CSR practices in many systems including the UK and Nigeria. It proposes that corporate managers and directors in the Nigerian extractive industry must not only manage the companies in the interests of shareholders as a whole but also *with adequate and measurable regard* to stakeholder interests. This requirement will mean an adoption of the

ESV in the UK corporate governance system.[216] In Nigeria, CAMA already contains provisions towards shareholder primacy model but still lags behind on CSR matters especially in respect of stakeholder interests such as the effective protection of employee, consumer and local community's interests. Therefore, in order to adopt this approach, the first step to be taken will be to amend relevant provisions of CAMA to expand its requirements on financial statements and annual report to include *corporate social reporting* and disclosures beyond strict financial matters which are arguably only beneficial to shareholders. This will also not be strange at all and will be modelled after section 417 of the 2006 UK English Companies Act. It may also be necessary to amend the relevant reporting or disclosure provisions in the ISA to also include non-financial CSR issues of the environment, employees, social matters *et cetera* for public liability and quoted companies.

Further, the provisions of NEITI also require amendments to secure the independence and integrity of the NSWG such that NEITI's mandate of ensuring transparency, monitoring, accountability, eliminating corrupt practices, and ensuring conformity with the global standards of the EITI is achieved. The draftsmen which shall be involved in the amendments must demonstrate proper appreciation of comparative law issues in the jurisdictions involved and ensure that proper legal transplantation of relevant international best standards such as the UNGC, UNGP, PRT, and OECD MNE Guidelines amongst other international best practices relevant to CSR are done domestically. Further, the provisions of sections 3 and 14 of the NEITI Act undermining the ability of NEITI to use or publish audited reports considered *prejudicial* to some signed contracts of the extractive industries companies or the government must be revisited. If such sections cannot be deleted from the NEITI Act, then, a clause must

[216] Section 172, 2006 UK Companies Act.

be introduced clearly stating what may be considered *prejudicial*, which in any event, should not override the national interests of the Nigeria State for transparent and efficient allocation of resources and wealth distribution in the extractive industry.

Once the first and second issues above are addressed, the risk of the *ultra vires* argument and leading to non-compliance with the disclosure regime on non-financial and sustainability matters in the ethical codes of conducts and in the FRC National Code of Corporate Governance would have also been addressed. Very importantly also, the regulatory regime for effective CSR practices would have also been enhanced through the adoption of the smart mix of formal, insider, principle based and soft law regulatory features.

4.10 Conclusion

In this chapter, the thesis reiterates that there is no such thing as a uniquely restrictive Nigerian CSR doctrine. It assessed the prospects and challenges of CSR regulation and enforcement generally and within the Nigerian business community especially in its extractive industry. While the Nigerian extractive industry is usually assumed to have sufficient legislative solutions to many of her problems and that the challenge has been that of weak or lackadaisical enforcement, this assumption was queried and the thesis clarified that the challenge is actually a function of (i) faulty legislations grossly undermined by a fallacious legal transplantation process (ii) restrictive CSR conception and (iii) incoherence and policy disparity between CSR provisions in primary legislations on the one hand and their subsidiary laws on the other. In other words, unlike the popular perception, CSR regulatory challenges in the Nigerian extractive industry may not be the lack of enforcement *per se;* it is submitted in this thesis that the challenge is, instead of enforcement, the case of wide-spread extant faulty legislations or proposed laws hinged on improperly transplanted corporate law models.

A very good case in point was demonstrated in discussions under NEITI and the proposed PIB.

In other to strike a balance between preventing double operational CSR standards of MNEs within the Nigerian extractive industry on the one hand and allaying the fears of capital flight or jurisdictional arbitrage from perceived over-regulation, this chapter sets the agenda for a bifurcated streams of arguments for addressing CSR regulatory and enforcement challenges in Nigeria. As the first option, the chapter recommended the adoption of the ESV corporate governance and CSR model in Nigeria. The ESV was developed in the UK and appears to only constitute a variant of the shareholder primacy model of corporate law. Further to the adoption of the ESV in Nigeria, it was also advocated that the provisions of the primary corporate law legislation (CAMA) should also be amended towards promoting corporate reporting and disclosure on non-financial matters (employee rights protection, environmental protection, and other non-financial social matters) which should engender efficient embedding of effective CSR practices in the Nigerian extractive industry.

The other option involves the adoption of a different normative undercurrent within a framework called the RSM. The theoretical formulations, delineation and CSR regulatory consequences of the RSM are reckoned to be beyond the scope of this chapter. This alternative solution is therefore developed and advocated in the following Chapter 5.

CHAPTER FIVE

RESPONSIBLE STAKEHOLDER MODEL: AN ALTERNATIVE CSR MODEL FOR COMPANIES IN THE NIGERIAN EXTRACTIVE INDUSTRY

5 Introduction

In Chapter three, this thesis analysed different corporate law theoretical approaches and models in the course of deciphering the corporate objective or the purpose of corporate actions and their CSR practices. As the question of determining corporate purpose is a varied, inclusive and open-ended discourse,[1] many theoretical models were analysed. It was noted that amongst the theoretical approaches examined, there were two central ones namely: the shareholder primacy model and the stakeholder model.

These two dominant models have their respective strong and weak assumptions. While it is imperative to recognise and adopt some of their respective assumptions, some other arguments embedded in these theories have been simply found to be unacceptable. In fact, Professor Andrew Keay, in establishing the need for a new corporate law model, had noted that many of the existing traditional and dominant corporate law theories were devised in old societal contexts and that new ones are required in response to the ever changing nature of the firm and commerce.[2] He further noted that:

> Arguably, shareholder primacy is not as attractive from a normative perspective, although it might be regarded as more pragmatic and workable. While stakeholder theory has attractions, normatively speaking, it is not practical, and it has been argued that stakeholder theory, while solving the

[1] Keay, A., 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *Modern Law Review* 663 electronically available at http://ssrn.com/abstract=1889236 last accessed 20th November, 2016 (electronic copy is referenced and hereinafter simply 'Keay Ascertaining Corporate Objective') at 1.

[2] Keay Ascertaining Corporate Objective *supra* note 1 at 5.

> problem of shareholder opportunism, leads to a more serious problem of stakeholder opportunism ….
> (footnotes excluded)

In other words, as shown in Chapter 3, while the shareholder primacy model appears both normatively indefensible and morally untenable, the stakeholder theory in trying to provide solutions to the criticisms of the shareholder primacy model presents an unworkable and impractical framework. Put differently, in spite of the attraction of the stakeholder theory in not discounting the important contributions of other constituents in the promotion of the success of the company in the long run, it is nonetheless criticised for amongst others: its lack of clarity on who stakeholders are; its normative basis in morality; lack of clarity in implementation and enforcement formula to effectively balance the stakeholder stakes or interests.[3] In fact, while Andrew Keay had described the enforcement challenges with the stakeholder theory in respect of how to effectively balance competing stakeholder interests as a 'tricky issue,'[4] John Parkinson concluded that it is tantamount to imposition on directors and courts a near-impossible task.[5]

Further, the dominant theoretical models analysed have underpinned CSR regulatory and enforcement techniques as were discussed in the preceding Chapter 4. Aside noting the effects of the shortcomings of these models in regulatory gap in the Nigerian extractive industry, other related challenges including: instances of faulty legal transplantation of foreign laws in Nigeria;

---

3 Keay, A., 'Stakeholder Theory in Corporate Law: Has It Got What It Takes?' [2010] 3 (9) *Rich. J. Global L. & Bus*. 249, 270 to 298. *Balancing* of stakeholder interest means assessing, weighing and addressing the competing claims of those who have a stake in the actions of the organization while *stake* means an asserted or real interest, claim or right, whether legal or moral or an ownership share in an undertaking. See Reynolds, S., *et al* 'Stakeholder Theory as Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests' (2006) 64 *J. Bus. Ethics* 285, 286; and Ryan, L. V., 'The Evolution of Stakeholder Management: Challenges at Potential Conflict' (1990) *3 Int'l J. Value Based Mgmt*. 105, 108 respectively for these definitions.

4 Keay Stakeholder Theory *supra* note 3 at 300.

5 Parkinson, J. E., *Corporate Power and Responsibility* (Clarendon Press, Oxford, 1993) 86.

incoherence in primary and secondary legislations in the area of CSR enforcement; and an unwarranted restrictive conceptualization of the CSR construct within the Nigerian business community were also observed.

Having identified in the last chapter that addressing the noticed regulatory gaps may involve a bifurcated remedial approach, the first option which is underpinned by the shareholder primacy theoretical model was canvassed while the second option was suspended to this chapter as a result of the need to not only formulate a normative and theoretical foundation for the approach, but to also delineate its operational, regulatory and enforcement ramifications towards effective CSR practices in the Nigerian extractive industry.

Therefore, the objective of this chapter is to develop and canvass arguments for a new model of corporate law as a normative theoretical underpinning for an alternative CSR regulatory and enforcement framework in the Nigerian extractive industry.

5.1 The Proposed Synthesis – Responsible Stakeholder Model (RSM)

Sifting through the analysed corporate theories and ideological models, one important point seems settled; in as much as it is part of corporate law objective to seek the simplification and reduction in the shareholders' costs of organization and management of businesses using the corporate form, corporate law cannot feasibly be all about businesses being managed for the sole and exclusive benefit of the incorporators. This will probably defeat another corporate objective: the pursuit of overall social efficiency; for instance, what will become the lots of genuinely aggrieved employees (present and past), customers, local communities and many others who may be out of contract with the corporation at a given time of injury? By way of emphasis, as advocated by economic contractualism, the notions of rational actors and efficiency needs revisiting and re-theorizing in such a way that the corporate form would

adequately advance the aggregate welfare of all whose *legitimate* stakes may be *genuinely* affected by corporate activities. The overall welfare to be guaranteed by the state will extend to shareholders, employees, suppliers, creditors, customers, local communities and the natural environment. The need therefore to balance the varying interests of all constituents/stakeholders including the shareholders' interests in corporate decision making becomes only a logical conclusion as another important target of corporate law.

But then, how exactly and under what suitable assumptions and principles of corporate law are corporate managers to be guided in effectively balancing the interests of the corporation together with those of the shareholders and other stakeholders? Following the inability of existing theories (especially the stakeholder model) to provide a workable formula to achieving such effective balancing of stakeholder interests, scholars have called for reforms in corporate law policies. Frynas summarized that:

> Policy makers should make a concerted effort to re-write company law and other regulatory instruments to increase the power of 'non-traditional stakeholders' and to require companies to become more transparent about all of their activities. Corporate governance reforms will help companies to make better social and environmental choices in front of shareholders.[6]

In light of the above, this thesis submits that simply prescribing external regulatory minimum standards or drawing up voluntary guidelines and codes of conduct under a CSR framework and expecting corporate managers to fall in line in balancing the varying stakeholder interests

[6] Okoye, A. C., 'Re-defining Corporate Social Responsibility as a Legitimizing Force for Corporate Power: To what extent can law and a law-jobs perspective contribute to Corporate Social Responsibility?' (Unpublished) PhD Thesis submitted to the School of Law, University of Hull, 2012 available at https://hydra.hull.ac.uk/resources/hull:7077 last accessed 3rd November, 2016 at 208 citing Frynas, J. G., *Beyond Corporate Social Responsibility* (CUP, Cambridge, 2009) 175-176. See similar call for alternative corporate law policies by Professors Margaret Blair, Lynn Stout and Andrew Keay in Blair, M. and Stout, L., 'A Team Production Theory of Corporate Law' [1999] 2 (85) *Virginia Law Review* 247 and Keay Ascertaining Corporate Objective *supra* note 1 respectively.

and demonstrating responsibility would probably be an exercise in futility;[7] indeed many efforts have been committed to this in the past - at national, regional or multinational levels - but with very little success.[8] Every company seeks economic gains, growth and development; the manner in which each company seeks to achieve such gains, growth and development (through its operations) will differ, depending on the line of business involved and the management idiosyncrasies of the corporate managers (board of directors) involved. Therefore, in order to safeguard the commercial focus of corporations and guarantee economic efficiency, this thesis concurs that corporate law may not necessarily descend into the arena to prescribe specific internal corporate governance rules for businesses to adopt with a view to ensuring a balanced and responsible consideration of stakeholder interests by corporate managers; such attempt would actually constitute a tall order. It may be asked, how will corporate law even come by such comprehensive fit-for-all (or one-size-fits-all) corporate governance rules which will guide every company, small and big, domestic and multinational on the issue of responsibility? Therefore, with a view to avoiding falling prey of having a corporate model where CSR practices would only constitute undue detraction from serious corporate activities, this thesis proposes a corporate law model which assumes the need to enhance shareholder value (wealth creation for shareholders) but conjunctively, ensures social efficiency through

---

7 Parkinson, J. E., 'Models of the Company and the Employment Relationship' (2003) *British Journal of Industrial Relations* 481 to 509, 494 (hereinafter simply 'Parkinson Models of Company').

8 See *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, (2003) UN Doc. E/CN.4/Sub.2/2003/12 Rev.; 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/ 38/Rev.2 (2003); Sub-Commission Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11, 52, 2003; OECD, *Guidelines for Multinational Enterprises*; *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session, Geneva, November 2000; the 2000 *UN Global Compact*; see also UN Human Rights Council (General Assembly), Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the right to Development. Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, "Protect, Respect and Remedy: A Framework for Business and Human Rights", 7th April, 2008, UN Doc. A/HRC/8/5. These amongst others are individually examined and discussed in detail in Chapter 5.

the employment of the principles of corporate law to advance the aggregate welfare of stakeholders; these stakeholders may be without contract with the company but may have stakes genuinely affected by corporate decisions and relevant to the long term survival of the company. This proposed model is called the Responsible Stakeholder Model (RSM).

Further to discussions in Chapter 3, the stakeholder theorists already confirmed the importance of the recognition, interaction and concession of both the state and society for smooth operations and survival of businesses in the long run. Accordingly, in recognition of this crucial contribution of other constituents to the long term success or survival of the business, this thesis proposes a corporate law theory which assigns extra corporate governance *presumptive duty on companies to self-develop appropriate and suitable technique towards responsibly balancing stakeholder interests*. Further to the prevalence of soft law enforcement and self-regulatory CSR regime (shortly to be addressed in 5. 3 below), this proposed theoretical model assumes that companies exist for shareholders' wealth maximization but to be fundamentally conditioned by another assumption that the legitimate stakes of other constituents must be safeguarded in the course of the said wealth maximisation for shareholders. The understanding of a conditional assumption for shareholder wealth maximisation informs the proposal for a default obligation to ensure the safeguard of relevant stakes in the company.

Whenever any qualified[9] stakeholder with legitimate interest (be it, employees, creditors, financiers, suppliers, contractors, customers, local communities *et cetera*) alleges oppression,

[9] Under this proposed corporate model, a stakeholder capable of maintaining a petition has to be qualified to avoid needless open-ended floodgate of litigations by meddlesome interlopers and busy-bodies. Such qualified stakeholder will have a *genuine and legitimate* interest which shall be important to the *success and long term survival of the company*. While determination should be on case-by-case basis, stakeholders like shareholders, employees, creditors and host communities are likely to easily establish their legitimate interests. Despite the pointers suggested in this study, the researcher however appreciates the anticipated difficulty that may be encountered by the judiciary in determining *legitimacy* or genuineness in stakeholders' interests to the long term survival of the company in view of the decisions in O'Neill & Anor v. Phillips & Anor (1999) 2 B.C.L.C. 1 HL, Re Saul D Harrison & Sons Plc (1995) 1 B.C.L.C. 14 at 19 and Ebrahimi v. Westbourne Galleries (1973) AC 360

injury, maltreatment, violation or disregard to its stake/interests as relevant to the success of the corporation, (e.g. disregard to employee rights for instance, in takeover bids or in the process of dividend declaration or in the determination of directors remuneration or in cases of environmental degradation of local community infrastructure in business operations or violations of executed agreements with local communities) then, in addition to (or as an alternative to) any other remedy or respite afforded in other aspect of the law, recourse should be had to this corporate law *presumptive duty to balance interests* for redress. It is important to note that in measuring the relevance and legitimacy of a stakeholder's interest as against a particular corporate decision or action, the success of the corporation from such corporate action would be interpreted in terms of the survival of the company as a whole (shareholders and stakeholders alike) in the long run and not the myopic interests of the residual claimants (shareholders).

It is instructive to clarify that this is an obligation on the corporate form itself - the business or company - as opposed to an obligation owed by the corporate managers or directors or the shareholders as for instance appearing under section 172 of the English Companies Act 2006 and section 279 (4) of the Nigerian Companies and Allied Matters Act, 1990 (as amended) which were discussed in Chapter 4. Under this model, all a particular stakeholder – who may not have a binding or subsisting and enforceable contract (whether originating contract or operational contract) with the company – needs to show is a resultant *verifiable* damage or injury to its established (legitimate) stake. The major hurdle to cross (which will prevent

at 379 amongst others showing that the determination of *legitimacy* or otherwise of interests are wide or vague considerations which may be very difficult to assess even using the objective test of a hypothetical reasonable bystander. Professors Gower and Davies had noticed similar difficulties in determining *fairness* or otherwise of directors' actions in cases of unfair prejudice remedy. See Davies, P.L., *Gower and Davies' Principles of Modern Company Law* (8th edn Sweet & Maxwell, 2008) 691.

unnecessary opening of floodgates to meddlesome interlopers) by a stakeholder is the establishment (to the reasonable satisfaction of the judicial authority involved) of its qualification as a legitimate stakeholder *relevant to the long term survival* of the company involved. This is better explained. This proposed model appreciates the important contribution of individual stakes from respective stakeholders and therefore safeguards the fulfilment of the reasonable and legitimate expectations of these stakeholders at the time of making such contribution for the long term survival of the company.

As a corollary to the foregoing and in terms of CSR regulation and enforcement, this thesis also proposes a policy imposition by corporate law of a presumption of corporate irresponsibility on companies such that whenever an infringement of the duty to balance interests is alleged by a stakeholder which had resulted in some verifiable damage or injury to the established stake or interest, the onus should lie on the company to prove, on a scale of probability, that it acted responsibly in due regard to the stakeholder and having effectively balanced all other relevant stakeholder's interest in the circumstance. Again, in contrast to a mandatory or permissive rule, this is a default and presumptive[10] rule which automatically applies to companies regardless of the contents of their memorandum or articles of association and may only be avoided by discharging the duty to the reasonable satisfaction of the court.

From the foregoing, this proposed theory labelled RSM embodies these two key notions: (i) *default legal duty to balance stakeholder interests and* (ii) *presumption of verifiable corporate irresponsibility whenever alleged by a qualified stakeholder*.

[10] For detailed discussions on the three forms of corporate rules, see generally, Cheffins, B. R., *Company Law: Theory, Structure and Operation* (Clarendon Press, Oxford, 1997) 218, 219 *et seq*.; see also Farrar, J. H., *et al, Farrar's Company Law* (3rd edn, Butterworths, 1991) 96.

It should be noted that RSM does not really see anything intrinsically wrong in the wealth maximization drive for shareholders *simpliciter*. RSM however draws a distinction between arguing that companies *exist* for the sole purpose of shareholders on one hand; and that companies should be *managed* for the sole purpose of the shareholders on the other hand. The shareholders bring the entity into existence, give it life in reality as some scholars would argue (or at least provided the platform on which the state/crown could grant concession to exist, as the *state concession* theorists may argue), they have obviously sown seeds and should fairly and legitimately be allowed to reap therefrom by participating in the final profit/assets sharing (as residual claimants) in the final hours of the entity. Therefore, it seems not totally incorrect to maintain that the company exists *but for* their investments and conscious efforts can be deployed by the corporate managers towards maximizing shareholders' wealth. However, away from corporate existence, and into corporate governance and management, it appears fair and legitimate to assert that *but for* the *constant recognition, interaction and concession of the state and society* – comprising of other constituents of the company such as the creditors, financiers, employees, customers, host communities and even the natural environment – the company may be unable to survive, operate, function or otherwise achieve any economic gains. Therefore, while profit creation may be encouraged, however such drive for wealth maximization for shareholders cannot justifiably be done at all costs (for instance treating corporate compliance with laws as a mere cost element or otherwise engaging in externalising[11]) at the expense of the key constituents of the company. Finally therefore, the notion that business organizations *exist* for the sole purpose of their incorporators and shareholder may after all be unassailable. However, the same cannot be said that corporations

[11] Externalizing is said to be the practice of directors holding the interests of the shareholders to be paramount as against the interests of other constituents. An instance of this externalizing was given by Keay citing that Shell in late 2009, despite fall in corporate profits, decided to increase dividend value by simply axing 5,000 jobs. See Keay Stakeholder Theory *supra* note 3 at 256.

ought to be *managed* for the sole purpose and exclusive benefits of the shareholders. In other words, in balancing competing interests, where ranking (consideration of) shareholder interests higher may result in injury to other stakeholders (from which the corporate entity may be affected in the long run), only then should such interest be reviewed, reconsidered and balanced to avoid such injury to the company (stakeholders) as a whole. By way of example, using the facts of the popular American case of Shlensky v. Wrigley[12] where directors of a company running a baseball team refused to install lights at the stadium to permit night games (which would ordinarily translate to more profits available to the shareholders) because of the deleterious effect of such light on the lives of local people in the surrounding community. The shareholders had brought a claim to enforce shareholder primacy. While the directors' actions were held valid, it is clear the RSM will probably provide a workable normative impetus for holding such director's acts valid. It is a clear instance of situations where although the shareholders' interests may be ranked important in day to day corporate activities, but there should be instances where such must be conditioned against non-violation of any relevant and legitimate constituent interests. Another instance is where corporate managers are desirous of declaring dividends to shareholders as a result of high profits secured on a project in a particular financial year, but there are outstanding terminal benefits of dead former employees remaining unpaid as a result of delays in securing proper probate for same, it will be commercially unreasonable and unfair to so declare such dividend. The interests of the shareholders on such occasion may be down-played otherwise the other stakeholders (and indeed the company as an entity) may suffer an injury to its financials (wasting corporate time and financial resources defending resulting litigations) or reputational damage for insensitivity and irresponsibility towards an important stakeholder group such as dead former employees.

[12] Shlensky *v.* Wrigley 237 N. E. 2d 776 (ill. App. 1968).

Despite the foregoing, it is important to clarify, unlike the stakeholder theorists contend, that other constituents of businesses such as employees, creditors and customers should not legitimately claim to be on the same pedestal as the shareholders of the business on certain issues in a corporation. The shareholders are the investors; without the shareholders who took the huge risks of setting up the company which could collapse and be tragically wound up shortly after commencement, there may not really be other constituents. Therefore, rather than see shareholders as merely part of the stakeholder group (constituents) of the business, the interest of the shareholders may need to be ranked important in balancing competing interests in a company. We must add that while such shareholder interest may be upheld crucial enough as to legitimize corporate behaviour which enhances shareholder value but never crucial enough to be upheld inalienable and exclusive to the detriment of other constituents.

At this juncture, it is important to distinguish the policy ramifications of RSM from some similar propositions of the team production theory of Professors Margaret Blair and Lynn Stout.[13] The team production theorists perceive the company as a nexus of investments where several groups contribute unique and essential resources to the corporate enterprise and each of whom defines its contribution through explicit contract.[14] The RSM also takes the corporation as a web (in a very limited guise[15]) of investment requiring the contribution of stakeholders for its survival and smooth running. However, unlike the team production theorists,[16] RSM does not discuss corporations in terms of a contract (whether legally originating contracts or operational contracts) and to this extent so deviates from the team

13 Blair and Stout *supra* note 6 at 247.

14 Bolodeoku, I. O., 'Contractarianism and Corporate Law: Alternative Explanations to the Law's Mandatory and Enabling/Default Contents' [2005] 2 (13) *Cardozo Journal of International and Comparative Law* 426, 437, 438 *et seq.* (Hereinafter simply 'Bolodeoku Contractarianism'*)*.

15 Parkinson Models of the Company *supra* 7 at 489.

16 Blair and Stout *supra* note 6 at 254.

production theorists. RSM is discussed in terms of a corporation being an entity enjoying *inter alia*, state privileges for its existence and survival. Further, the team production theory does not only take issue with maximising shareholder wealth, but also describes an independent board of directors in terms of a 'mediating hierarchy' which is insulated from the control of shareholders in the course of balancing competing interests of team members.[17] On the other hand, RSM does not only assume the need to enhance shareholder value (maximising shareholder wealth, subject to the condition of corporate law presumption of corporate irresponsibility) but also subjects the board of directors to the control of the shareholders (as far as possible) in the course of balancing competing stakeholder interests. RSM sticks to the traditional conception viewing directors as agents of the shareholders and as such, maintaining that the ultimate power of control resides in the principal.

It is also necessary to distinguish the RSM from the Entity Maximisation and Sustainability Model (EMS)[18] of Professor Andrew Keay. The EMS assumes the need to foster the wealth of the entity (business or company itself, as opposed to maximising shareholder wealth), which will entail directors endeavouring to increase the overall long-run market value of the company as a whole, taking into account the investment made by various people and groups.[19] In other words, while the EMS may be beneficial to shareholders and stakeholders alike, the emphasis is on the success and sustainability of company (the entity) towards enhancing its position in the long run. Again, EMS enjoins balancing of 'courses of action' by directors towards enhancing entity wealth as opposed to shareholder wealth.[20] From the foregoing, both RSM and EMS appear to share certain similarities: both appear to build on the stakeholder model by

17 Blair and Stout *supra* note 6 at 255; see also Keay Ascertaining Corporate Objective *supra* note 1at 46.
18 See generally, Keay Ascertaining Corporate Objective *supra* note 1.
19 Keay Ascertaining Corporate Objective *supra* note 1 at 30.
20 *Ibid* 33.

the recognition of the important contribution of different 'investors' or stakeholders in the overall long term survival of the firm and both seem favourably disposed to respecting the fulfilment of the reasonable and legitimate expectations of stakeholders at the time of making contributions to the firm.

However, RSM is distinguishable from the EMS on the following grounds. First, while the goal prescribed by the EMS to directors in the course of balancing competing stakes in the company is entity wealth maximisation, RSM on the other hand prescribes the target of ensuring non-violation of relevant legitimate interests of other constituents in the course of enhancing shareholder wealth maximisation. Secondly, the notion of Entity under the EMS appears to assume that the shareholders do not control directors, hence treating shareholders just like other stakeholders like the employees, creditors or financiers who are all categorised as 'investors'. RSM differs; while shareholders are also taken as part of the stakeholder group, RSM assumes shareholders may not be treated equally as other 'investors'. Slight elevation is afforded the shareholders to, for instance, appoint directors or remove non-performing ones. Thirdly, RSM may also be distinguished in light of some 'hard decisions'[21] noted by Keay whereby some long term reasonable and legitimate expectations of certain stakeholders may be sacrificed for the good of entity maximisation. This is perhaps explained better in terms of CSR and painting a similar scenario as used by Keay in his analysis of the EMS. For instance under EMS, a corporate action to relocate the business to another jurisdiction (probably with weaker regulatory framework) to enable more profits for the entity is accommodated even though such corporate decision may violate the reasonable and legitimate expectation of some stakeholders such as employees and host communities. Under the RSM however, such a corporate action is likely to be deemed as corporate social irresponsible being deleterious to

[21] Keay Ascertaining Corporate Objective *supra* note 1at 37.

the stakes of employees who, having contributed and invested important skills towards the enhancement of both the entity and the shareholder wealth, simply gets his expectations of a continued employment (all things being equal) simply dashed. RSM therefore does not accommodate such corporate action and adopting the assumptions of the RSM, such act would be considered irresponsible.

Further, Dine has suggested that the promotion of CSR and its principles such as accountability is probably best served at the national level rather than at the international law.[22] This thesis aligns with this view and against this background, it is recommended that the RSM be adapted and codified with variations to suit individual national legislations. It is important to reiterate that the RSM, in its explanation of the nature and purpose of corporations in the society, is a synthesis of existing assumptions, drawing insights from shareholder primacy model, the stakeholder model, state concession theory, and Elisabet and Mêlé's integrative theory. Within the RSM framework, *the business of business may still be business*, only that the meaning of *business* itself will have to be redefined and qualified by the need to strategically implant CSR values in the business community; the business of business has to now be *responsible business!*

For some time now, corporate law has imposed a duty on corporate managers to promote the financial interests and assets of the corporations (using their discretion and expanding business judgment rule as far as possible) without specifying how exactly they should do this. Similarly, it is submitted in this thesis that, against prevailing modern socio-economic, political and environmental realities, corporate law can justifiably impose a duty on corporations for their directors to act responsibly exercise their discretions and balance competing interests of constituents without specifying guidelines or codes through which these may be achieved.

22 Dine, J., *The Governance of Corporate Groups* (New York, Cambridge University Press, 2000) 44 to 69.

Therefore, RSM recognizes that corporations may be managed for the ultimate benefit of the shareholders only in the sense that they constitute the residual risk bearers or claimants. For such residual risk, shareholders have the privilege of appointing competent and responsible managers who shall ensure that the business of the business is a responsible business and not involved in opportunism or shirking performance.

It is perhaps pertinent to note that the above analysis only describes the formulation and delineation of the theoretical and policy ramifications of the RSM at this stage. The meta-regulatory, operational and enforcement features of the RSM as an alternative CSR regulatory framework will be further espoused in the later part of this chapter. The diagram below summarizes the key elements of the RSM in terms of its theoretical formulation and policy components.

Figure 5.1 *Illustration of RSM formulation and features.*

5.2 RSM and CSR International Regulatory Dialogues

This part seeks to show the connection between the RSM and a few international regulatory dialogues in the CSR domain. In summary, RSM does not only confirm the importance of these international regulatory attempts but seeks to also fill the regulatory challenges inherent in these dialogues. For instance, while social reporting, corporate disclosures and stakeholder rhetoric appear to have increased and appearing to have been encouraged by the adoption or membership of international regulatory attempts (such as the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines for MNEs), the Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework (UNGP) or the UN Global Compact (UNGC) and without corresponding increase in the level of responsibility of companies, RSM together with its regulatory and enforcement features (as shall be espoused below) may be an important tool in making such social reporting more useful not only to shareholders but also to other stakeholders who may now effectively rely on such corporate disclosures. Before making further analysis under this head, these international regulatory initiatives in the CSR domain are examined. They include: Draft Code of the UN Commission on Transnational Corporations (Draft Code); UN Sub-Commission on the Protection and Promotion of Human Rights' Norms (Sub-Commission Norms); United Nations Global Compact; Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises; Global Reporting Initiative; Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework; ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; International Standard Organisation 26000 Social Responsibility Standard; Voluntary Principles on Security and Human Rights; Transparency International's Anti-Corruption Handbook; CSR regulatory

initiatives and directives at the European Union level; United Nations Principles for Responsible Investment.[23]

It is should be noted that the above listed international regulatory attempts only constitute a few; a myriad of other initiatives exist or are currently in the process of being developed.[24] Some of these initiatives address general issues of labour rights, human rights, anti-bribery and corruption, deforestation amongst other issues[25] and others are rather one-issue-specific.[26] However, for the purpose of this chapter and in order to keep within its objectives, only the UN Global Compact (UNGC), the Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework (UNGP) and the OECD Guidelines for MNEs are discussed. The UNGC and OECD Guidelines are singled out and examined because, having encouraged social reporting and corporate disclosures, they are relevant to CSR regulation and enforcement under the RSM framework (as shall be espoused later) since membership or demonstrated compliance with their principles constitute either *prima facie* evidence of effective CSR practices or (in instances where a company is adjudged to have acted irresponsibly in the circumstance) as a mitigating factor in determining punishment to be meted to such company. The UNGP is on the other hand examined both in itself as CSR international regulatory initiative and towards situating certain assumptions of the RSM within its framework.

---

23 Available online at www.unpri.org last accessed 26th October, 2016.

24 Lambooy, T., *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000-2010 and Case Studies* (Kluwer, 2010) 246.

25 For instance, the UN Global Compact and the OECD Guidelines for MNEs.

26 For instance, Voluntary Principles on Security and Human Rights.

5.2.1 *United Nations Global Compact (UNGC)*

The UNGC is one of the UN's Galaxy of agencies with direct interest in the activities of transnational or multinational business actors.[27] UNGC is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the area of human rights, labour, environment and anti-corruption.[28] The principles are as follows:

(i) Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence;

(ii) Make sure that they are not complicit in human rights abuses;

(iii) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

(iv) The elimination of all forms of forced and compulsory labour;

(v) The effective abolition of child labour;

(vi) Elimination of discrimination in respect of employment and occupation;

(vii) Businesses should support a precautionary approach to environmental challenges;

(viii) Undertake initiatives to promote greater environmental responsibility;

(ix) Encourage the development and diffusion of environmentally friendly technologies;

---

27 Sagafi-nejad, T., and Dunning, J. H., *The UN and Transnational Corporations*, (Indiana University Press: Bloomington, 2008) 175; see also Smerdon, R., *A Practical Guide to Corporate Governance* (3rd edn, Sweet & Maxwell, London, 2007) 464.

28 See generally United Nations Global Compact available online at http://www.unglobalcompact.org last accessed 27th October, 2016 cited in Fauchald, O. K., and Stigen, J., 'Corporate Responsibility before International Institutions' (2009) 40 *The Geo. Wash. Int'l L. Rev*. 1025, 1092.

(x) Business should work against corruption in all its forms, including extortion and bribery.

The above listed ten (10) UNGC principles are traceable to the speech of the then Secretary-General of the United Nations, Kofi Annan addressing the Davos World Economic Forum in January, 2009 where he challenged the business community 'to give a human face to the global market'[29] and join a 'global compact of shared values and principles' in response to global economic unease as a result of increasingly borderless nature of doing business, that is, globalisation. Annan argued that shared values provide a stable environment for a world market and that without these explicit values; business could expect backlashes from protectionism, populism, fanaticism and terrorism.[30] Following the 1999 Davos meeting, Annan and a group of business leaders formulated nine (9) principles, which have come to be known as the UN Global Compact. After lengthy consultation, a tenth (10th) principle against corruption was added in June 2004.[31] These principles of the Global Compact focus on human rights, labour rights, concern for the environment and corruption and are taken directly from commitments made by governments at the UN: the Universal Declaration of Human Rights (1948); the Rio Declaration on Environment and Development (1992); the International Labour Organization's Fundamental Principles and Rights at Work (1998); and the UN Convention Against Corruption (2003).[32]

---

29 UN Press Release SG/SM/6881, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, Text of Speech by Kofi Annan, 1 February 1999, at 1 available online at http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html last accessed 27th October, 2016. (Hereinafter simply 'UN Release').

30 Annan, K., 'Business and the UN: A Global Compact of Shared Values and Principles' 31 January 1999, World Economic Forum, Davos, Switzerland, Reprinted in *Vital Speeches of the Day* 65(9) (15 February 1999) 260–61; see also Tester, S., and Kell, G., *The United Nations and Business* (New York: St. Martin's Press, 2000) 51 as cited in Williams, O. F., The UN Global Compact: The Challenge and the Promise [2004] 4 (14) *Business Ethics Quarterly* 755, 755.

31 Annan *supra* note 30 at 260 and 261.

32 *Id*.

Therefore, the UNGC principles originated as 'social safety nets'[33] in reaction to the socio-economic and political imbalances underpinning 'the new global economy'[34].

Unlike earlier UN attempts at regulating corporate behaviour such as the Draft Code and the Sub-Commission Norms which were said to be rather confrontational in their approach – and probably the cause of their collapse[35] - the UNGC represents a shift that emphasizes *cooperation* as opposed to *confrontation* by reflecting a 'global public policy network ... bringing together UN agencies, corporations, NGOs, and labour representatives from all over the world.'[36] Following the expulsion of 2,048 participants in 2011 for non-compliance with the UNGC rules, the total number of active business participants in the UNGC as at 2011, was 6,066 companies in 132 countries.[37] As of 26th October, 2016, there are about 9,000 business and 4,000 non-business participants in the UNGC.[38] Therefore, UNGC provides the largest international regulatory platform for corporate responsibility in the world.

The UNGC principles are a voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals.[39] The UNGC principles require participating businesses to communicate every year with stakeholders on their progress in integrating the ten principles. Companies that do not issue a Communication on Progress (COP) for two consecutive years face expulsion and must reapply for participation

---

33 *Ibid* 1.

34 *Ibid* 1 and 2.

35 MacLeod, S., 'Towards Normative Transformation: Re-conceptualising Business and Human Rights', (Unpublished) PhD Thesis submitted to the School of Law, University of Glasgow, 2012 at 120 – 140 available at http://theses.gla.ac.uk/3714/1/2012macleodphd.pdf last accessed 3rd November, 2016.

36 Rasche, A., 'Toward a Model to Compare and Analyze Accountability Standards – The Case of the UN Global Compact' (2009) 16 *Corp. Soc. Responsib. Environ. Mgmt*. 192–205, 200.

37 UNGC 'Number of Expelled Companies Reaches 2,000 as Global Compact Strengthens Disclosure Framework' (New York, 20 January 2011) available at https://www.unglobalcompact.org/news/95-01-20-2011 last accessed 27th October, 2016.

38 https://www.unglobalcompact.org/what-is-gc/participants last accessed 27th October, 2016.

39 UNGC website, https://www.unglobalcompact.org/about/governance last accessed 26th October, 2016.

in the initiative.[40] The intention is that, through leading by the power of good example, member companies will set a high moral tone operating throughout the world.[41]

Interestingly, the drafters of the UNGC principles cautioned that the principles are neither a 'regulatory instrument' nor do they 'police, enforce or measure the behavior or actions of companies.'[42]

Therefore, perhaps, the major argument for the UNGC is its creation of a platform for consensus on what the moral and corporate responsibility should be and participation by any corporate entity would definitely expose such business to added criticism and perhaps legal action from critics in the event of non-compliance.

An irresistible criticism of the UNGC lies in its so-called *cooperative* approach with the business community without any concrete verifiable mechanism of measuring actual compliance with the principles.[43] Although others have argued that one should not criticise the UNGC for something it never pretended or intended to be (i.e. a compliance-based regulatory mechanism,[44]) it is nonetheless arguable that the UNGC is tantamount to hobnobbing with corporate actors some of which are only rogue companies with little or no intention for responsibility but only motivated by profit maximization and self-interest. [45]

---

40 *Supra* note 37.

41 Williams *supra* note 30 at 756.

42 UN Global Compact, 'The UN Global Compact Operational Guide for Medium-Scale Enterprises,' July 2007 http://www.unglobalcompact.org/docs/news_events/8.1/Operational_guide_ME.pdf at 3, last accessed 27th October, 2016; see also Deen, T., 'Q & A: 'Bluewashing Has Become a Very Risky Business' Inter Press Service, 3 June 2010; Thalif Deen interviews the Executive Director of UNGC, Georg Kell http://www.unglobalcompact.org/docs/news_events/in_the_media/IPS_3.6.10.pdf last accessed 27th October, 2016.

43 MacLeod *supra* note 35 at 194.

44 Rasche, A., 'A Necessary Supplement: What the United Nations Global Compact Is and Is Not' (2009) 48 *Business & Society* 511-537, 524.

45 Nader, R., "Corporations and The UN: Nike And Others 'Bluewash' Their Images" *San Francisco Bay Guardian*, 18 September, 2000, cited in MacLeod *supra* note 35 at 190.

Further, the voluntary compliance and self-regulatory and self-policing nature of the UNGC without concrete mechanisms of external monitoring, verification or sanctioning[46] in its structure has also rendered the UNGC an 'exercise in futility' which 'provides a venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions'.[47] These opportunistic rogue[48] companies (willing and ready to do business regardless of elements of unlawfulness and irregularities involved) are only involved in mere participation or implementation of voluntary CSR initiatives and framework for public relations and marketing purposes as opposed to more altruistic reasons and are therefore said to be engaged in not only greenwashing but also bluewashing.[49] Therefore, this kind of voluntary or self-regulatory initiative to address corporate irresponsibility will definitely provide the nest for the nefarious activities of many a rogue company who will likely fly below the radar of self-regulation. It will be no surprise therefore that this regime will constitute mere brush-stroking and surface scratching regulatory initiatives and at best, good enough only against Thomas McInerney's Group A or B businesses as analysed below:

> Many regulatory scholars recognize that there are four types of companies with which regulators have to deal. These four types include: those who know the law and are willing to follow it (Group A); those who do not know the law but would like to be law abiding (Group

46 MacLeod *supra* note 35 at 262.

47 Sethi, S. P., 'Global Compact Is Another Exercise In Futility' *Financial Express*, 7 September 2003, available online at http://www.financialexpress.com/archive/global-compact-is-another-exercise-in-futility/91447/0/ (last accessed 8th November, 2016); see also William *supra* note 30 at 758; see also Villiers, C., 'Corporate law, Corporate Power and Corporate Social Responsibility' in *Perspectives on Corporate Social Responsibility*, Boeger, N., Murray, R., and Villiers, C., (eds) (Edward Elgar, Cheltenham, 2008) 101.

48 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo, 12 April 2001, S/2001/357 http://www.natural-resources.org/minerals/CD/docs/other/357e.pdf at 42, para.215, last accessed 18th June, 2014 and also at http://www.globalsecurity.org/military/library/report/2001/357e.pdf last accessed 22nd November, 2016.

49 MacLeod *supra* note 35 at 64; see also Smerdon, R., *A Practical Guide to Corporate Governance* (3rd edn, Sweet & Maxwell, London, 2007) 441. To this end, Richard anticipated that in the near future relevant organizations and governments will eventually impose on companies concrete and verifiable action which matches many of their publicized words.

> B); those who know the law and do not want to follow it (Group C); and those who do not know the law and do not wish to be law abiding (Group D). Most CSR literature does not even reflect these basics. As this analysis suggests, Group A firms are willing to comply on intrinsic grounds.[50]

It is obvious from the above that voluntary self-regulatory initiatives as the UNGC may not be very effective and efficient against the Groups C and D businesses. In truth, however convincing the argument for voluntary CSR approach and free market forces regulation may seem, they may simply never be strong enough to secure responsible corporate behaviour in the business community.[51]The fact that the UNGC is expelling companies for non-compliance is an empirical testament that a lot of rogue companies are only interested in hiding behind the blue logo of the UN and wallow in irresponsible corporate behaviour. This indeed is the definition of bluewash.[52] Therefore, as a result of its wholly voluntary regime at the moment, it is not totally out of place to describe the UNGC as another mere *talking shop* and with no capacity to provide real remedy or redress in cases of violations of stakeholder rights arising from corporate irresponsibility.[53] The promoters of the UNGC should consider more seriously the advice of prominent scholars and NGO leaders contained in a letter dated 20th of July, 2010 to Mr Annan:

> We recognize that corporate-driven globalization has significant support among governments and business. However, that support is far from universal. Your support for this ideology, as official UN policy, has the effect of delegitimizing the work and aspirations of those sectors that believe that an unregulated market is incompatible with equity and environmental sustainability … Many do not agree with the assumption

50 McInerney, T., 'Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2007) 40 *Cornell Int'l L.J*. 171, 185.
51 de Schutter, O., 'Corporate Social Responsibility European Style' (2008) 14 *European Law Journal* 203, 236.
52 MacLeod *supra* note 35 at 64, 65 and 190.
53 *Ibid* 202.

> of the Global Compact that globalization in its current form can be made sustainable and equitable, even if accompanied by the implementation of standards for human rights, labor, and the environment …We are well aware that many corporations would like nothing better than to wrap themselves in the flag of the United Nations in order to "bluewash" their public image, while at the same time avoiding significant changes to their behaviour… Without monitoring, the public will be no better able to assess the behavior, as opposed to the rhetoric, of corporations.[54]

Finally, as earlier noted, notwithstanding the shortcomings of the UNGC especially when viewed as a regulatory framework, it is argued in this thesis that it could constitute a more effective instrument in CSR regulation and enforcement within the business community if subjected to the use as recommended within the RSM framework as will be shown in 5.3 below.

5.2.2 *The United Nations 'Protect, Respect and Remedy' Framework*

In 2005, as a result of the shortcomings of other initiatives such as of the UNGC which was deemed unsatisfactory by the then UN Secretary-General, Mr Kofi Annan appointed Professor John Ruggie of Harvard University as the Secretary-General's Special Representative on Business and Human Rights with a mandate to identify the issues and come up with some

[54] Letter to Kofi Annan, Secretary-General, United Nations, 20 July 2000, from: Upendra Baxi, Professor of Law, University of Warwick, UK, and former Vice Chancellor University of Delhi (India): Roberto Bissio, Third World Institute (Uruguay): Thilo Bode, Executive Director, Greenpeace International (Netherlands); Walden Bello, Director, Focus on the Global South (Thailand); John Cavanach, Director, Institute for Policy Studies (U.S.); Susan George, Associate Director, Transnational Institute (Netherlands); Oliver Hoedeman, Corporate Europe Observatory (Netherlands); Joshua Karliner, Executive Director, Transnational Resources and Action Center (U.S.); Martin Khor, Director, Third World Network (Malaysia); Miloon Kothari, Coordinator International NGO Committee on Human Rights in Trade and Investment (India); Smitu Kothari, President, International Group for Grassroots Initiatives (India); Sara Larrain, Coordinator, Chile Sustentable (Chile); Jerry Mander, Director, International Forum on Globalization (U.S.); Ward Morehouse, Director, Program on Corporations, Law and Democracy (U.S.); Atila Roque, Programme Coordinator, Brazilian Institute of Economic and Social Analysis (Brazil); Elisabeth Sterken, National Director INFACT Canada/IBFAN North America; Yash Tandon, Director, International South Group Network (Zimbabwe); Vickey Tauli-Corpuz, Coordinator, Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education), and Asia Indigenous Women's Network (Philippines); Etienne Vernet, Food and Agriculture Campaigner Ecoropa (France) as cited in Williams *supra* note 30 at 771, fn 5.

solutions.[55] The present framework as endorsed by the Human Rights Council on June 16, 2011 and titled the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (hereinafter simply called 'UNGP')[56] is the final report of the Special Representative Ruggie to the Human Rights Council.

The 2011 UNGP is a culmination of the works of Ruggie from 2005 to 2011; his work evolved in three phases. Reflecting the mandate's origins in controversy, its initial duration was only two years and it was intended mainly to *"identify and clarify"* existing standards and practices.[57] In 2005, there was little that counted as shared knowledge across different stakeholder groups in the business and human rights domain. Thus the Special Representative began an extensive programme of systematic research that has continued to the present. His research has been actively disseminated, including to the Human Rights Council itself. Marking phase 2, in 2007, the Human Rights Council renewed Ruggie's mandate for an additional year, inviting him to submit recommendations. The Special Representative observed that there were many initiatives, public and private, which touched on business and human rights. But none had reached sufficient scale to truly move markets; they existed as separate fragments that did not add up to a coherent or complementary system. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Marking the third phase, in its resolution 8/7, welcoming the *Protect, Respect and Remedy Framework*, the Human Rights Council also extended

---

55 Human Rights Council Resolution 2005/69, Human rights and transnational corporations and other business enterprises, 20th April 2005.

56 Ruggie, J., Final Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy ' Framework,' A/HRC/17/31, 21 March 2011 <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> last accessed 27th October, 2016 (hereinafter simply "UNGP").

57 OECD, OECD Guidelines for Multinational Enterprises, OECD Publishing 2011; see also Introduction to the UNGP, para 4.

Ruggie's mandate until June 2011, asking him to '*operationalize'* the Framework – through concrete and practical implementation of recommendations and leading to the 2011 UNGP.[58]

Beyond the Human Rights Council, the UNGP has been endorsed or employed by individual governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization (ISO) and the Organization for Economic Cooperation and Development (OECD) in developing their own initiatives in the business and human rights domain.[59]

Apart from the intrinsic utility of the UNGP, the large number and inclusive character of stakeholder consultations convened by and for the mandate no doubt have contributed to its widespread positive reception. Indeed, by January 2011 the mandate had held 47 international consultations, on all continents, and the Special Representative and his team had made site visits to business operations and their local stakeholders in more than 20 countries.[60]

A succinct background of the framework is contained in the Introduction to the Guiding Principles in the 2011 final report while the actual UNGP is annexed to the report and contains 31 principles divided into 3 pillars which are explained below.

The regulatory framework of the UNGP is embedded in and rests on the three pillars of '*Protect, Respect and Remedy'*. These pillars appear to contribute to the debate in terms of who has what roles in the society. As intended in paragraph 4 of the Introduction, the UNGP actually

58 Introduction to UNGP para 9.
59 Introduction to the UNGP, para 7.
60 Introduction to UNGP para 8.

identified and clarified the different roles and duties which the business community and the state authorities have in the society. These are examined in turn below:

(i) ***State Duty to Protect***

The first principle under the first pillar is that *states must protect* against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[61] Hence, regardless of where the injury to any stakeholder occurred, whether domestically or abroad, state must enact policies and rules to hold violators accountable. Further, as part of the operational principles of the UNGP and in meeting their duty to protect, States should ensure that other laws and policies governing the creation and ongoing operation of business enterprises, *such as corporate law*, do not constrain but enable business respect for human rights.

A logical deduction from the above is that, the UNGP clarified that there is no basis for the continued insulation of corporate law from the legal benefits derivable from other aspects of the law.

(ii) ***Corporate Responsibility to Respect***

The second pillar states that *the business community should respect* human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Very importantly, the UNGP clarified that the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context,

61 UNGP Principle 1.

ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.[62]

(iii) Victim's Access to Remedy

The third pillar provides that as part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.[63] The remedies to be provided may be judicial or non-judicial and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Very importantly, the UNGP also provides that with a view to making it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.[64] This aspect of the third pillar is crucial because such establishment or participation in grievance mechanisms is demonstration of stakeholder engagement which is an important element of CSR management.

The UNGP said to have been 'road-tested'[65] and are intended to constitute a 'single, logically coherent and comprehensive template' to guide the operations and activities of both the state

62 UNGP Principle 14.
63 UNGP Principle 25.
64 UNGP Principle 29.
65 Introduction to the UNGP para 11.

and the business community.[66] The framework appreciates that 'one size does not fit all'[67] and therefore expects states to adopt a 'smart-mix of measures'[68] in adapting the initiatives and a due diligence exercise from the business community whereby they, on individual basis, 'identify, prevent, mitigate and account for how'[69] they address the adverse impacts of their operations.

In summary, the first pillar is the *state duty to protect* against human rights abuses by third parties, including business enterprises**,** the second is the *corporate responsibility to respect* human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved and the third is the need for greater and improved *access by victims to effective remedy*, whether judicial, non-judicial, administrative or legislative.[70] According to Ruggie all of these three principles together form a complementary whole in that each supports the others in achieving sustainable progress.[71]

The UNGP is an overarching regulatory initiative; but it has tactically stayed away from constituting a binding international regulatory mechanism and therefore will not, at least by itself, bring corporate irresponsibility to an end.[72] For this, Sorcha MacLeod reduced the UNGP to a 'weak and disappointing culmination' of eight (8) years of extensive research and wide multi-stakeholder consultation which may only just constitute a 'useful template'.[73] The weak nature of the UNGP using words like 'should respect', 'should avoid' or 'should address' was

66 Introduction to UNGP para 14.
67 Introduction to UNGP para 15.
68 Commentary to Principle 3 of the UNGP.
69 UNGP Principle 17.
70 Introduction to the 2011 UNGP para 6; see also UNGP Principle 25.
71 See generally s*upra* note 56.
72 General Principles UNGP at 5 para. 13.
73 MacLeod *supra* note 35 at 142; see also Fauchald and Stigen *supra* note 28 at 1027.

berated in strong words by Amnesty International's Senior Director for International Law and Policy, Widney Brown:

> We do not believe the draft guiding principles effectively protect victims' rights or ensure their access to reparations...Let's be frank - the real opposition to effective guiding principles does not come from Amnesty International but from business interests. The draft guiding principles enjoy broad support from business, precisely because they require little meaningful action by business.[74]

The UNGP may also be criticised for its categorical statement that states actually owe the primary duty to *protect* rights and not the business community which is only *enjoined to respect* them. The statement is said to have fallen short in reality having proceeded on a faulty assumption that all states can actually protect. It is now a notorious fact that, in recent times, many companies have become more powerful and influential than some group of states put together and advantage is usually taken by the large companies to influence and lobby weak CSR regulations in such states.[75] There are different factors responsible for the inability or reluctance of state authorities to actually protect stakeholder rights. It could be complicity of the government such as in Burma/Myanmar where the government was instrumental in the provision of forced labour for the construction of infrastructure for a gas pipeline;[76] or in Ecuador, where a state-owned company had further compounded human right abuses after some oil concessions were granted to US oil companies such as Texaco whose operations ravaged the environment as a result of sub-standard technology which caused untold damage

---

74 See the robust exchange between Ruggie and Widney Brown: Ruggie, J. G., Letter to the Financial Times, 'Bizarre Response by Human Rights Groups to UN Framework Plan,' *Financial Times*, 19 January, 2011; Widney Brown, Letter to the Financial Times, 'Stronger UN draft on human rights abuses needed,' *Financial Times*, 20 January, 2011.

75 MacLeod *supra* note 35 at 166; see also Fauchald and Stigen *supra* note 28 at 1057.

76 UNOCAL litigation, California, USA: John Doe et al. *v*. Unocal Corp *et al*. 963 F. Supp. 880 (March 25 1997); 27 F. Supp. 2d 1174 (November 18 1998); Doe *v*. Unocal 963 F.Supp. 880 (C.D. Cal. 1997) (Unocal I), 110 F.Supp. 2d 1294 (C.D. Cal 2000) (Unocal II), on appeal, 2002 WL 31063976 (9th Cir. 2002).

to the indigenous population.[77]A similar scenario played out in Nigeria over the involvement of Shell in human right abuses in the oil rich Niger-Delta region of Nigeria.[78] Especially in less industrialised economies, antipathy towards implementing what is considered 'western ideas' and economic pressures and fear[79] of losing out on foreign investments are also responsible for state's reluctance sometimes.[80] In reality however, the fear and predictions of capital flight do not always come true. Jennifer Zerk gave an example in the fear and predictions trailing the introduction of the 2002 US Sarbanes Oxley Act where people had thought such will lead to massive avoidance of the US capital market but instead, investors were quoted to just 'grit our teeth and get on with it'. It appears therefore that the seemingly wide adoption of the UNGP by many companies within the business community, the OECD or even the EU should not be considered as any positive signal as a successful CSR regulatory initiative. It simply probably confirms early fears that businesses will readily associate their businesses with such largely voluntary soft law framework while in deeds they continue with reckless business operations with an eye on profit maximization at all costs.

Very importantly however, despite the perceived challenges associated with the UNGP, its framework is still useful to the RSM. It appears to provide justification for the corporate law imposition of the obligation on companies to effectively balance competing stakeholder interests (using state legislation). This is because such is only a confirmation of the primary duty imposed on states to PROTECT rights. On the side of business community, the UNGP

---

77 MacLeod, S., 'Maria Aguinda v. Texaco Inc.: Defining the Limits of Liability for Human Rights Violations Resulting from Environmental Degradation' [1999] 4(2) *Contemporary Issues in Law* 189 to 209.

78 McBarnet *supra* note 22 at 7, 8, 9 *et seq;* see also Wiwa v. Royal Dutch Petroleum Company 226 F.3d 88 (2d cir 2000), 532US 941(2001).

79 Zerk, J., 'Extraterritorial Jurisdiction: Lessons for Business and Human Rights Sphere from Six Regulatory Areas' (2010) Corporate Social Responsibility Initiative Working Paper No. 59 Cambridge, MA: John F. Kennedy School of Government, Harvard University at 88 citing Giles, A., 'SOX: What does it mean for UK companies?' quoting the Chairman of UK telecommunications firm BT.

80 MacLeod *supra* note 35 at 167; see also Lambooy *supra* note24 at 233.

also provides justification for companies to RESPECT such stakeholder interests further to the state legal obligation. It is interesting to also note that the regulatory features of the RSM (as shall be shown in 5.3 below) offers effective REMEDY to victims whose reasonable and legitimate stakes in the company may have been violated. The remedy offered within the RSM appears very effective in line with the UNGP as it affords victim stakeholders to only allege violation of such legitimate interest coupled with a verifiable injury to such stake. This is because the burden of establishing corporate responsibility and denying effective remedy to such victim stakeholders automatically shifts to the businesses under the RSM. This will be expatiated below.

5.2.3 *OECD Guidelines for Multinational Enterprises*

The Guidelines for Multinational Enterprises by the Organisation for Economic Cooperation and Development (hereinafter simply called 'the OECD Guidelines') is an overarching cooperative agreement amongst adhering states and set out principles of globally acceptable behaviour for transnational business actors in the social and environmental sphere (such as abstaining from any improper local politics, or bribery and corruption) with a view to facilitating transnational business.[81] Under the Guidelines, MNEs should fully take into account established policies in the countries in which they operate, and consider the views of other stakeholders,[82] and in this regard, should strive for sustainable development, encourage employment creation in the local community where they operate, uphold good governance principles, engage in stakeholder management and develop self-regulatory policies to foster

[81] Organization for Economic Co-operation and Development, Declaration on International Investment and Multinational Enterprises (1979), Cmnd. 6525 cited in Hadden, T., *Company Law and Capitalism* (2nd edn, Weidenfeld and Nicolson, London, 1972) 511.

[82] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing (hereinafter simply 'OECD Guidelines').

good relations with stakeholders and ensure they, their supply chain, contractors and sub-contractors comply with the Guidelines.[83]

It is an interestingly unique regulatory and enforcement initiative and can be differentiated on a number of grounds from others at the UN level. Before further details are given, a cursory look at its background is contained below.

The Guidelines were originally drafted in 1976 with two revisions first in 2000 and then the latest in 2011 in 'response to strategic challenges for enterprises and their stakeholders'.[84] It was reported that one major reason for the OECD Ministers creating the Guidelines was to hinder the development of stronger regulation by the developing nations and a few developed member governments - such as Canada, the Netherlands and the Scandinavian nations - and in this regard, the OECD Ministers were successful, given the subsequent failure of the UN Draft Code to deliver a universally agreed binding regulatory initiative.[85]

The Guidelines in its most current form is part of the OECD Declaration on International Investment and Multinational Enterprises.[86] The Guidelines are unique in different respects to the UN initiatives one of such difference being that it adopts a top-down and at the same time bottom-up approach. Unlike the UNGC for instance, which can be reduced to a mere international regulatory dialogue not requiring state participation, the Guidelines operate as a

83 OECD Guidelines II (1-15).

84 OECD Guidelines, Preface at para.5.

85 Muchlinski, P., Corporate Social Responsibility and International Law: the Case of Human Rights and Multinational Enterprises' in McBarnet, D., Voiculescu, A., and Campbell, T., (eds), *The New Corporate Accountability: Corporate Social Responsibility and The Law* (Cambridge University Press, Cambridge, 2007) 578.

86 OECD, OECD Declaration on International Investment and Multinational Enterprises, of 21 June 1976, C (76) 99 (Final) (OECD, Paris, 1976) as amended in 2000: The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications DAFFE/IME/WPG (2000)15/FINAL, 31st October 2001; as amended in 2011: OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011 cited in MacLeod *supra* note 35 at 18.

cooperative document between and amongst subscribing (adhering) states at the international level, hence top-bottom but at the same time, also encouraging and enabling domestic measures as regulatory initiatives, therefore, bottom-up approach.[87]

It is also unique because although the Guidelines are addressed to the business community, it is however the responsibility of the adhering states and governments to comply with them and therefore 'observance ... by the enterprises is voluntary and not legally enforceable'.[88] Therefore, the Guidelines are recommendations addressed by governments to multinational enterprises.[89] The Guidelines are 'to ensure that the operation of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development.'[90]

It is important to note that although the Guidelines are said to be addressed to multinational enterprises (MNEs), the term 'MNE' was however carefully not given a specific definition and would thus generally include private, state or mixed enterprises established in more than one country and so linked that they may co- ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.[91]

87 MacLeod *supra* note 35 at 207.
88 OECD Guidelines *supra* note 82, Guideline I (1).
89 OECD Guidelines *supra* note 82 Preface at 13.
90 *Id*.
91 *Ibid* Guideline I (4).

Further, a unique procedural form of enforcement and accountability is observed in the Guidelines in terms of the National Contact Points (NCPs) and the Specific Instance Procedure. Following the 2000 revision, each member state is required to create an NCP for the purpose of, *inter alia*, monitoring the implementation of the Guidelines, promoting the Guidelines among all MNEs operating in or from its territory and contributing to the resolution of complaints. It is important to note, however, that an NCP cannot initiate an investigation, but may only mediate a resolution in response to a complaint, and may only make recommendations.[92]

In addition to their monitoring function, the NCPs play a crucial role in contributing to the 'resolution of issues that arise relating to implementation of the Guidelines in specific instances'[93] and this 'specific instance' grievance mechanism of the Guidelines is where their unique added value lies and a key determinant of the positive impact they can have.[94] Hence, unlike the other initiatives, the Guidelines appear to have some predictable enforcement mechanism.

The very first criticism appears in its so-called unique style. As earlier noted, the Guidelines operate within member (adhering) states whereas the entirety of the directives and guidelines - covering varying issues including labour issues, environmental protection, taxation and human rights – as vaguely couched as they are, are directed at the business community who are non-members. [95]

---

92 MacLeod *supra* note 35 at 213.

93 OECD Guidelines *supra* note 87 at 68 para.1.

94 OECD Watch, '10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct,' OECD Watch, June 2010 at 6 http://oecdwatch.org/publicationsen/Publication_3550 (last accessed 1st July, 2015) at 21.

95 Tully, S., 'The 2000 Review of the OECD Guidelines for Multinational Enterprises' (2001) 50 *ICLQ* 394-404, 403.

Secondly although the Guidelines might be promising in enforcement as it encourages domestic legislations to protect stakeholder rights, however, the reality is that many member states have only not lived up to the expectations of the Guidelines by passing national laws with enforceable provisions to punish corporate irresponsibility,[96] but even where they have, the local NCPs and the SIP are grossly deficient[97] as the SIP decisions are unenforceable against defaulting companies. Therefore, the real CSR enforcement mechanism of the Guidelines is to probably embarrass the defaulting company (naming and shaming it) before its customers and other stakeholders.[98]

Finally, just like the initiatives at the UN level, the OECD Guidelines constitute another soft law, self-regulatory and voluntary regulatory and enforcement initiative. The same criticism afforded under the previous headings of the UNGC and the UNGP are thus applicable here. When compared to the attempts of the UN and the EU, the Guidelines seem to provide a measure of public accountability. However, the bottom line is just that the current soft law regime is simply ineffective in view of resistant and recalcitrant business actors; without the requisite stick which the RSM regulatory framework seeks to offer, it may be difficult to imagine rogue companies voluntarily demonstrating and genuinely adhering to the non-legally binding directives of the Guidelines. As earlier noted, state membership or adoption of the above discussed international regulatory attempts have engendered domestic governments such

96 MacLeod *supra* note 35 at 213.

97 Further criticisms of the NCPs and the SIP were given by Sorcha MacLeod, see MacLeod *supra* note 35 at 5.4, 5.5 and 5.6 of chapter 5; see also Hadden *supra* note 81 at 511.

98 See generally, McCorquodale, R., 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 *Journal of Business Ethics* 385 to 400.

as Denmark,[99] Sweden,[100] and France[101] to enact local legislations towards requiring non-financial reporting on CSR and sustainability matters. However, it is observed that although these are domestic measures towards regulating CSR by positive local laws, the legislatures in these countries in line with the intergovernmental regulatory dialogues rather used general, loose and vague terms without any concrete or mandatory enforcement or other mechanisms to keep companies bound by anything disclosed by way of social reporting.[102] Therefore, whilst the quantity of CSR narrative[103] in annual reports may have increased, the quality and usefulness of information disclosed is in doubt as most companies tailor their disclosures towards enhancing shareholder value and do not demonstrate how CSR is actually an integral part of their businesses. Further, the majority of the CSR reporting have become *boilerplate* disclosures which do not provide a meaningful discussion of potential impacts or mitigation

---

99 2008 Danish Financial Statements Act effective on 1st January, 2009. The aim of the law is to inspire businesses to take an active position on CSR and communicate this to the outside world. The statutory requirement is part of the first National Action Plan for Corporate Social Responsibility (May 2008) and is intended to improve the international competitiveness of Danish businesses. The law requires large businesses in Denmark to account for their work on Corporate Social Responsibility (CSR). In 2013 a new requirement was introduced into the law making it mandatory for businesses to also expressly account for their policies for respecting human rights and for reducing their climate impact. Danish businesses are free to choose whether or not they wish to work on CSR. However, the statutory requirement means that the businesses must account for their policies on CSR, or state that they do not have any (comply or explain principle); see, http://csrgov.dk/legislation last accessed 27th October, 2016; see also, GRI, New Danish law requires CSR Disclosures' available at <http://www.globalreporting.org/News-EventsPress/LatestNews/2009/NewsJanuary09DanishLaw.html; P. Hohnen, Non-Financial Reporting: Denmark Ups the Ante', Ethical Corporation, 13 January 2009 cited in Lambooy *supra* note 24 at footnote 38.

100 See Swedish Annual Reports Act available at http://ec.europa.eu/enterprise/policies/sme/business environment/files/annexes_accounting_report_2011/sweden_en.pdf> last accessed on 3rd July, 2015.

101 See the *Nouvelles Regulations Economiques* adopted by Parliament in 2001, cited in Lambooy *supra* note 24 at 237.

102 McBarnet, D., Corporate Social Responsibility beyond Law, through Law, for Law, *Edinburgh School of Law Research Paper 03/* 2009 available online at http://www.research.ed.ac.uk/portal/files/14183638/SSRN_id1369305.pdf last accessed 3rd November, 2016 at 31 and 32.

103 Research confirmed that social reporting in terms of CSR matters and stakeholder rhetoric has increased in documents and communications published by large corporations especially in the USA. See, Thomsen, S., 'The Convergence of Corporate Governance Systems and European and Anglo-American Standards' (2003) 4 *EUR. BUS. ORG. L. REV.* 31; Fairfax, L. M., 'The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms' (2006) 31 *J. Corp. L.* 675, 676; and Fairfax, L. M., 'Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric' (2007) 59 *FLA. L. REV.* 771.

strategies and that most companies still approach the way they communicate on governance as a box ticking exercise.[104]

It is instructive to reiterate that these disclosure regimes in many jurisdictions largely rely on the 'comply or explain' principle of regulation. It seeks to provide incentive for businesses to comply with rules voluntarily and avoid making up explanations and stories why rules and regulations are not complied with which may harm relations with crucial stakeholders. The regulatory regime as hinged on corporate disclosure[105] on CSR matters relies on the 'naming and shaming' philosophy where identification of disparity between *what is disclosed* and *what is actually practised* may lead to being shamed in the public domain and such risk of reputational damage is expected to pressurise companies to behave responsibly. For instance, this soft law disclosure regime may also be useful in the rare cases of *established false statements and/or omissions of facts* under the disclosure regime as in the case of *Marc Kasky v. Nike*[106] where Nike was held accountable for infringements on its own published reports.

---

104 Financial Reporting Council, *Effective Company Stewardship: Enhancing Corporate Reporting and Audit* https://www.frc.org.uk/Our-Work/Publications/FRC-Board/Effective-Company-Stewardship-Enhancing-Corporate-File.pdf last accessed 27th October, 2016.

105 Cherry, M., and Sneirson, J. F., 'Chevron, Greenwashing, and the Myth of "Green Oil Companies"' (2012) 3 *WASH. & LEE J. ENERGY, CLIMATE & EVN'T* 133, 141.

106 See Branson, D. M., 'Corporate Governance "Reform" and the New Corporate Social Responsibility', (2001) 62 *University of Pittsburgh Law Review* 605, 646 giving a few instances of such established cases of false representations such as in the 1990 suit by six US states against Mobil Oil for marketing Hefty trash bags as bio-degradable despite knowledge that the bags would not degrade in landfill; see also Nike Inc. *v.* Marc Kasky, 539 US 654 (2003); and, Kasky *v.* Nike, Inc. 45 P.3d 243 (Cal. 2002) where Kasky filed a lawsuit in California regarding newspaper advertisements and several letters Nike distributed in response to criticisms of labor conditions in its factories. Kasky claimed that the company made representations that constituted false advertising. Nike responded that the false advertising laws did not cover the company's expression of its views on a public issue, and that these were entitled to First Amendment protection (free-speech defense). The local court agreed with Nike's lawyers, but the California Supreme Court overturned this ruling, claiming that the corporation's communications were commercial speech and therefore subject to false advertising laws. The United States Supreme Court agreed to review the case (Nike v. Kasky) but sent the case back to trial court without issuing a substantive ruling on whether Nike's commercial speech were true or false. The California Supreme Court had stated at 247 that: *Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully*. The parties subsequently settled out of court before any finding on the accuracy of Nike's statements, leaving the California Supreme Court's denial of Nike's immunity claim as precedent. The case drew a great deal of attention from groups concerned with

But fundamentally speaking, this regime of voluntarism where governments try to endorse, facilitate and encourage CSR appears only effective against companies in Thomas McInerney's Groups A and B[107] and will be difficult to appreciate how effective or efficient such regulatory and enforcement regime can be against real rogue companies who are all out for self-interests and profit maximisation at all costs.

In final analysis under this Part, CSR regulatory and enforcement initiatives on the global scene appear to only brushstroke the problems and not really doing requisite justice to the subject largely due to three major interconnected factors: An undue voluntarist approach to CSR, undue[108] state-centeredness[109] of international law (that is, application of international rules traditionally and vertically to state actors as opposed to modern day horizontal application and extension to non-state actors such as the business community) and finally, the absence of a global consensus[110] on an appropriate regulatory and suitable framework for effective CSR practices. The last mentioned factor appears in turn due to other reasons including but not limited to: conflicting national interests displayed by different countries which factor is exacerbated by the doctrine of state sovereignty; sometimes state complicity in violations also informs inability to align with even road-tested regulatory initiatives; antipathy by less developed countries for western ideas; and finally economic pressures on less industrialised

civil liberties, as well as anti-sweatshop activists. See also generally, McCorquodale, R., 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 *Journal of Business Ethics* 385, 104; and United Nations Conference on Trade and Development, *Guidance on Good Practices in Corporate Governance Disclosures* (United Nations, New York and Geneva, 2006).

107 McInerney *supra* note 50. Even Margaret Hodge, the then Industry Minister, noted that the current CSR regulatory regime is at best, a '*first step'* and tougher standards may be required. See *Financial Times*, 25 October, 2006.

108 Fauchald and Stigen *supra* note 28 at 1029 and 1030, footnotes 7-12 and accompanying texts.

109 Esther Kiobel et al *v.* Royal Dutch Petroleum Company, Shell Transport and Trading Company US Court of Appeal (2nd Circuit) 06-4800-cv, 06-4876-cv (September 17 2010).

110 Villiers, C., 'Enforcement of CSR Standards with Incentives or Sanctions' Conference Paper (HiiL Law of the Future Conference, 'Globalisation, Non-State and Private Actors: Rethinking Public-Private Cooperation in Shaping Law and Governance' The Hague, 8 and 9 October, 2009). Conference Report available at www.hiil.org last accessed 27th October, 2016.

countries not to enact *strong* regulatory and enforcement framework because of the fear[111] that such might compromise the competitiveness of their economy.[112] All these factors contribute to and naturally reduce the extent of cooperation of such countries in the global quest for regulatory and policy solutions to corporate irresponsibility. As a result of all these issues therefore, an answer to the regulatory questions of CSR at the international level seems not in sight nor achievable anytime soon.[113] The foregoing challenges may also make the adoption of the RSM at an intergovernmental level very difficult. Early realisation of this situation has probably compelled a few scholars to the inevitable conclusion that the singular regulatory and enforcement challenge affecting world cooperation in respect of the control of corporate behaviour towards better and effective corporate responsibility practices probably just lies in lack of political will to really make the business community more corporate social responsible.[114]

Therefore, the logical question then is, if the principles of the law of nations and the challenges (in terms of the central theme of voluntarism) identified above in international regulatory dialogue will equally make the adoption of RSM or its regulatory framework a tall order at the intergovernmental level, what are the prospects of the adoption of the RSM as an alternative CSR regulatory and enforcement framework within a domestic jurisdiction, for instance, within the Nigerian extractive industry? This point is addressed below.

---

111 Jennifer Zerk noted that decisions regarding where to incorporate, where, when, and how to invest, and from where to seek investment, are affected by many factors. These obviously differ from sector to sector and from company to company. The regulatory environment is one of these factors, but by no means the only consideration. This is demonstrated by the reaction to the Sarbanes-Oxley Act by non-US companies. Despite initial expressions of dismay, and predictions that many companies would leave the US and seek listings in the UK instead, most companies decided, in the end, that the US stock markets were simply too important to walk away from. Zerk, J., 'Extraterritorial Jurisdiction: Lessons for Business and Human Rights Sphere from Six Regulatory Areas' (2010) Corporate Social Responsibility Initiative Working Paper No. 59 Cambridge, MA: John F. Kennedy School of Government, Harvard University at 88. This was discussed in some detail in Chapter 2 under 2.5.2.

112 MacLeod *supra* at 35 at 123 and 178; see also Lambooy *supra* note 24 at 233.

113 A similar apprehension was expressed by Jennifer in terms of international efforts at securities regulation. See Zerk *supra* note 111 at 75.

114 MacLeod *supra* note 35 at 178.

5.3 RSM: Alternative CSR Regulation and Enforcement in the Nigerian Extractive Industry

Following the appraisal of CSR regulatory and enforcement regime in both the Nigerian extractive industry (earlier undertaken in Chapter 4) and in the international regulatory dialogues, (discussed in 5.2 above), evidence abound of undue reliance and focus on shareholder rights with weak measures (if any) towards safeguarding stakeholder concerns.

Further to earlier discussions, it is reiterated that although soft law CSR disclosure regime is ultimately targeted at encouraging changes in business culture and practices towards better CSR practices, little progress has however been recorded especially against opportunistic greenwashing companies who choose to fly under the radar of regulation. Therefore, the focus on CSR business case argument and reliance on shareholder primacy together with the attendant weak, soft law and self-regulatory CSR disclosure regime at the global and domestic level need some changes.[115] These requisite changes appear to have informed Drutman and Cray's conclusion that:

> … the most effective way to control corporations will be to restore citizen democracy and to reclaim the once widely accepted principle that corporations are but creatures of the state, chartered under the premise that they will serve the public good, and entitled to only those rights and privileges granted by citizen-controlled governments… (and ensuring a) … just and sustainable economy … driven by the values of human life … instead of the current suicide economy driven only by the relentless pursuit of financial profit at any cost.[116] (Words in parenthesis mine).

[115] McBarnet *supra* note 102 at 20.

[116] Drutman, L., and Cray, C., *The Peoples Business: Controlling Corporations and Restoring Democracy*, (Citizen Works Corporate Reform Commission, San Francisco, Berrett-Koehler Publishers, 2004) 280.

In line with the corporate law perspective adopted in this thesis and upon a critical review of the challenges bedevilling the CSR regulatory and enforcement framework, this thesis submits that effective solutions to corporate irresponsibility are within the domestic jurisdiction of corporate law. This aligns with the views of Kent Greenfield that:

> Corporate law is a big deal… The largest corporations in the world have economic power of nations. By establishing the obligations and priorities of companies and their management, corporate law affects everything from employees' wages rates (whether in Silicon Valley or Bangladesh), to whether companies will try to skirt environmental laws, to whether they will tend to look the other way when doing business with governments that violate human rights.[117]

Greenfield continued that:

> Only after we recognise the place of corporate law as one small element of a larger political landscape can we then craft a bundle of legal rules and regulatory programs that are likely to move us toward our collective goals.

From the above, it is clear that the values and interests of a good society do and should underlie corporate law as much as they underlie other areas of the law and there is no longer the need to keep isolating corporate law from other benefits available in other aspects of the law. This researcher has no question in his mind therefore, that once the field of corporate law and practice is set on proper reformatory pattern towards corporate responsibility, the corporate world will more likely witness better disciplined and responsible business community. By this proper reformatory agenda, the researcher argues for domestic amendment to the local corporate law legislations of countries underpinned by the RSM as formulated in 5.1 above.

---

[117] Greenfield, K., *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, Chicago, 2006) 4 to 5.

It should be noted that the operational application of the RSM is suggested to originate from the domestic level as it is the primary obligation of municipal jurisdictions to regulate and it is only upon the notorious failure or inadequacies of national legal regimes to so do that recourse is had to international law.[118] Besides, as already demonstrated above in 5.2, there are already various regulatory challenges[119] at the international law and intergovernmental levels to achieving a global consensus or getting a legally binding regulatory and enforcement CSR regime. Therefore, while some had expressed hope that voluntary self-regulatory CSR regime especially at the international level can become hardened eventually,[120] many other prominent experts (against the backdrop of the mentioned challenges) rather maintain that solution to corporate abuses at the global level seems almost *inconceivable*[121] or at least remotely far and not possible in the near or foreseeable future.[122]

Noting the assertion of John Ruggie that one size (or style or feature) of regulation may not fit all types of companies,[123] this thesis therefore advocates the need for individual countries to study the peculiarities of their jurisdictions, their history, culture and socio-economic dimensions in fashioning an effective CSR regulatory and enforcement framework within the

---

118 Fauchald and Stigen *supra* note 28 at 1027 and 1028.

119 For instance, earlier CSR regulatory attempts by the United Nations with the aim of producing an international legally binding treaty through the instrumentality of the UN Draft Code and the UN Sub-Commission Norms both resulted in a failure to agree on a unified approach to CSR standards and ultimately the two projects collapsed, although for different reasons. The Draft Code was said to have collapsed for political reasons as developing countries played the card of their fledging sovereignty while the UN Sub-Commission Norms were said to have proposed a regulatory regime contrary to international law. For better details, see MacLeod *supra* note 35, chapter 3 thereof.

120 Professor Tineke Lambooy, around 2011, had predicted that in five years' time, we will be getting such results. Lambooy *supra* note 24 at 273. Her predictions will hold very little water in the face of today's realities.

121 Ruggie, J., The Construction of the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist' (2011) *European Human Rights Law Review* 127 at 128.

122 Horrigan, B., *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham, UK, 2010) 344; see also Zerk, J., *Corporate Abuse in 2007: A Discussion Paper on What Changes in the Law Need to Happen*, (The Corporate Responsibility (CORE) Coalition, 2007) 31, cited in Horrigan *id*; MacLeod *supra* note 35.

123 UNGP General Principles *supra* note 56 at 5 para. 15.

RSM as already discussed in 5.1 above. For the purpose of emphasis, and having assessed the various international regulatory dialogues, this thesis submits that effective regime of CSR will more likely be better fostered, enhanced and facilitated within the RSM which presumes corporate social irresponsibility whenever a complaint is raised by a relevant stakeholder and places positive legal duty on the company involved to demonstrate responsibility in its operations. This onus of demonstrating responsibility can be discharged reasonably by showing on a scale that such complained corporate behaviour, decision, action or inaction has been taken or occurred in the best interest of the company (which should not just be the myopic interests of all members of the company as a whole,[124] but rather in the interest of all relevant stakeholder such as the employees, the local community, the creditors, the customers, the environment and even the government.[125]

It is important to underscore the relevance of the international regulatory dialogues discussed in 5.2 above to the domestic panacea to corporate irresponsibility as proposed within the RSM framework. Such intergovernmental CSR policy responses are useful as the demonstration by a company of self-implementation of internalised corporate responsibility framework which complies with international policy responses and guidelines (such as the UNGC, UNGP, OECD Guidelines or other similar self-regulatory initiatives; or demonstrating membership of an international certification or global reporting scheme for responsible business conduct such

---

124 This has been the restricted definition of the interest or success of the company, taken as the interests or success of the shareholders. See generally See generally, Hutton *v.* West Cork Railway Co. (1883) 23 Ch.D., 654; Percival *v.* Wright (1902) 2 Ch 421; Dodge *v.* Ford Motor Co. (1919) 204 Mich. 459, 170 N.W. 668*;* Evans *v.* Brunner, Mond & Co. (1921) 1 Ch. 359, Re Lee, Behrens & Co Ltd (1932) Ch 46; Rogers *v*. Hill 289 U.S. 582 (1933); McQuillen *v*. National Cash Register Co., 27 F. Supp. 639 (D. Md. 1939); Greenhalgh *v.* Arderne Cinemas Ltd (1951) Ch. 286, 291; Gottlieb *v*. Heyden Chemical Corp., 90 A. 2d 660 (Del. 1952); Parke *v.* Daily News Ltd (1962) 3 WLR 566; Amalgamated Society of Woodworkers of South Africa *v.* Die *1963* AmbagsaaWereniging (1967) 1 SA 586 (T); Michelson *v*. Duncan 407 A. 2d 211 (Del 1979). This restricted and narrow definition of the success of the company being the success of the shareholders as a whole enjoys statutory codification under section 172 of the UK Companies Act, 2006 and section 283 (1) CAMA.

125 Pennington, R. R., 'Terminal Compensation for Employees of Companies in Liquidation' (1962) 25 *Modern Law Review* 715, 719.

as the GRI, ISO 26000 and others; or verifiable stakeholder engagement practices demonstrating effective and efficient consideration and balancing of stakeholder and shareholder rights et cetera) would constitute necessary first step and *prima facie* evidence towards discharging the RSM-imposed presumption of corporate irresponsibility on the company. As shown in 5.2 above, the RSM framework also accords with John Ruggie's three differentiated but complementary responsibilities of Protect, Respect and Remedy under the UNGP framework. It is an affirmation of the primary responsibility of the state's duty to *protect*. Further, it also confirms corporate responsibility to *respect* stakeholder rights by internalising effective self-regulatory framework to prevent corporate abuses. This proposed CSR policy under the RSM appreciates these differences in roles of the government and the business community but at the same time, underscores their complementary nature by subjecting self-regulatory initiatives developed internally within businesses to external verification of the government through a judicial authority acting judicially and judiciously. The framework would also likely align with domestic constitutional duty imposed on government of individual states to protect and safeguard lives and economic properties.[126]

The much touted RSM as an alternative approach to CSR regulation in the Nigerian extractive industry and which is not only preferred by the researcher to the recommendations offered in Chapter 4 but also constituting the major contribution of this thesis is again illustrated below for easy reference.

[126] For instance see sections 4, 5, 6, and 16 (2) (c) of the 1999 Constitution of the Federal Republic of Nigeria as amended, Cap C23 Laws of the Federation of Nigeria, 2004; all to the combined effect that the Nigerian government shall make, enforce and interpret laws for the peace, order and good governance of the Nigerian society and ensure that the economy does not foster profits at all costs and concentrated in the hands of few individuals or group.

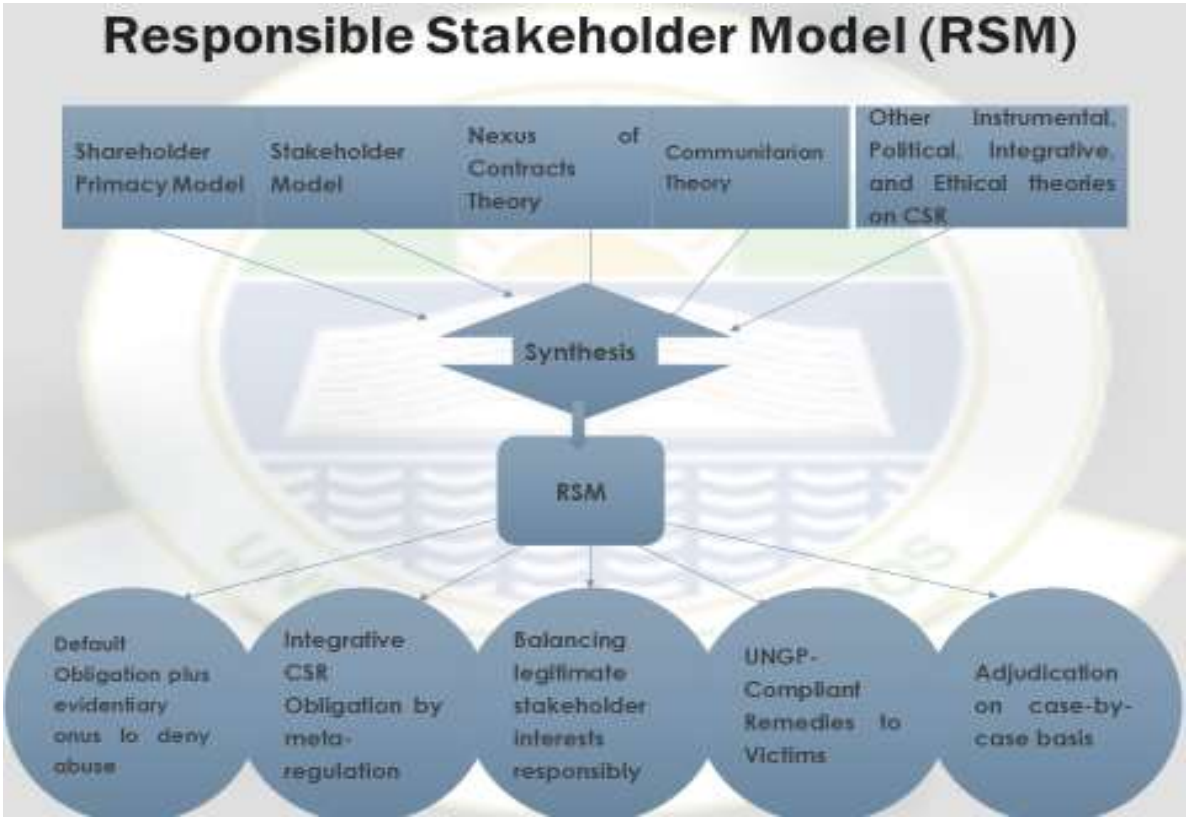

Figure 5.2. Illustrating RSM formulation and regulatory features.

As a regulatory technique in the Nigerian extractive industry, it is important to reiterate that RSM will not involve an imposition of corporate tax unlike as attempted by the aborted 2007 Nigerian CSR Bill nor does it introduce some highly prescriptive external hard law initiatives which may scare off investment opportunities and result in regulatory jurisdictional arbitrage such as the potentials of the mandatory CDA under section 116 of the Nigerian Minerals and Mining Act, 2007 (earlier discussed in Chapter 4). RSM identifies with keeping the commercial focus of companies and therefore enjoins every company to self-develop and self-implement an effective CSR framework whereby all relevant competing stakeholder interests are duly recognized and balanced in the course of enhancing shareholder value; under the RSM, the latitude given to companies to self-develop and self-implement CSR regulatory framework is underpinned by a justiciable positive legal duty on these companies to demonstrate

responsibility to stakeholders. Whenever a relevant and qualified stakeholder – be it, employees, creditors, suppliers, contractors, customers, local communiti.es *et cetera* - alleges injury or violation of its stake or interests in the company which is relevant to the survival of the company in the long run, redress should be sought in corporate law which should presume irresponsibility on the part of the company involved.

With RSM therefore, corporate law simply imposes a presumptive duty to demonstrate responsibility on companies. Whenever an infringement of the positive duty to balance *interests* is alleged by a qualified stakeholder which had resulted in verifiable damage/injury to established legitimate interest, (e.g. disregard to employee rights for instance, in takeover bids or in the process of dividend declaration or in the determination of directors remuneration or in cases of environmental degradation of local community infrastructure in business operations or violations of a CDA with local communities), then, in addition to (or as an alternative to) any other remedy or respite afforded in other aspects of the law, the onus should lie on the company to establish, on a scale of probability, that it acted responsibly in due regard to and has effectively balanced relevant stakeholders' interests.

The proposed CSR framework is a default[127] (presumptive) rule, as opposed to a mandatory[128] or permissive rule and it automatically applies to companies regardless of the contents of their Memorandum or Articles of Association and may only be avoided by discharging the duty to the reasonable satisfaction of adjudicatory bodies. The demonstration may be by way of an internalised company procedure or framework which complies with: international best CSR standards, requirements, practices; and/or guidelines contained in the UNGC, UNGP, OECD

[127] For detailed discussions on the three forms of corporate rules, see generally, Cheffins *supra* note 10 at 218, 219 *et seq*.

[128] See for instance, mandatory CSR regime in the Indonesian Investment Law No.25 of 2007 and the Limited Liability Company Law No. 40 of 2007.

Guidelines or other similar soft law and self-regulatory initiatives; or by membership of an international certification or global reporting scheme for responsible business conduct such as the GRI, ISO 26000 and others; or by verifiable effective stakeholder engagement practices (for instance, implementing of agreements signed with relevant stakeholder group such as the CDA under section 116 of the NMMA, 2007). As earlier noted, compliance with these international best practices, international certification or effective stakeholder engagement and management only constitute a rebuttable presumption and *prima facie* evidence and in no way conclusive proof that such a company has acted or behaved responsibly in any particular circumstance. The conclusiveness of such actions will have to be determined, on a scale of probabilities, by judicial authorities (probably regular courts) acting both judiciously and judicially on a case-by-case basis depending on circumstances of time, facts or even based on industry peculiarities.

If a company is found in contravention of this default rule, remediation orders including any one or combination of the following: published apology, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition may be applied.

Very central to the regulatory features of the RSM is its attribute of being meta-regulatory;[129] it adopts more subtle, lighter principles, instead of purely mandatory mechanism, to demand compliance. Its principles are anticipated to be acceptable within the business community as companies are generally enjoined to voluntarily self-regulate their CSR practices. However, stakeholders are also afforded the opportunity to simply allege violations and show resultant

[129] Amao, O., 'Mandating Corporate Social Responsibility: Emerging Trends in Nigeria', [2008] 1 (6) *Journal of Commonwealth Law and Legal Education* 75, 79.

injury. The onus of discharging the burden of proving violation or otherwise is on companies. It is anticipated that greenwashing, free riding, and opportunistic rogue[130] companies (willing and ready to do business regardless of elements of unlawfulness and irregularities involved) will find it more difficult to reasonably discharge this onus. By this incidence, this thesis reckons that greenwashing may thus become reduced to the barest minimum.

RSM is hinged on the principles of law and regulation and as law and regulation have their limitations as possibly not constituting the best way to regulate behaviour,[131] RSM may not be without a few flaws. It may be criticized (as other propositions have been in Australia[132]) to have the implication of undue expansion of directors' duties without necessarily guaranteeing stakeholder interest protection. It may also be contended that since it is the shareholders' investment that creates the company, directors' duties should be designed to protect that investment without more.[133]

While the above may be true and that without shareholders' investment, there may not be companies in the first place, however, even if the shareholders have *created* the company risking their investment, does that investment exist or operate in isolation? Can it be concluded that only the shareholders contribute to the *maintenance*, *maximization*, *safeguard* and *protection* of that (capital) investment in view of the modern methods of doing business? This thesis submits that but for the cooperation, recognition, interaction and concession of the state,

130 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo, 12 April 2001, S/2001/357 http://www.natural-resources.org/minerals/CD/docs/other/357e.pdf at 42, para.215 last accessed 18th June, 2014 and also at http://www.globalsecurity.org/military/library/report/2001/357e.pdf last accessed 22nd November, 2016.

131 Eijsbouts, J., *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* (Inaugural Lecture, Maastrict University, 2011) 45.

132 Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Parliament of Australia, 1989) 83.

133 *Ibid* 98.

the employees, creditors and the local communities amongst other stakeholders, such (capital) investment may be nugatory in yielding expected returns for the shareholders. On the strength of the above, a presumptive duty on corporations to reasonably balance out stakeholder interests appears appropriate.

RSM also appears to have its limitations in combating cross-border corporate abuse. Further, jurisdictional arbitrage and forum shopping may likely become the order of the day whereby companies move around scouting for favourable jurisdictions and countries with weak CSR regulatory framework to invest in.[134] Although exterritorial application of the RSM by a country runs the usual[135] risk of interstate friction, it is however presumed that such extraterritorial application will better facilitate checks on the powers, influences and threats of the large corporations to constitute engines of conflict in conflict zones.

This thesis appreciates that the regulatory approach of the RSM seems to have raised the bar as a tough corporate governance regime; this is by no means strange actually. The USA successfully raised the bar in corporate governance discourse also when the Sarbanes-Oxley Act of 2002 was introduced in corporate America after the Enron collapse and without any undue negative impact on investment opportunities flowing to the USA. Although the business community criticised the introduced legal regime as 'over-regulation', companies nonetheless just *gritted their teeth and got along with* the extraterritorial legislation.[136] A similar stance may be taken by any state with the intention to adopt and implement the RSM.

134 McBarnet *supra* note 102 at 49; see also Fauchald and Stigen *supra* note 28 at 1028 and 1057.
135 Fauchald and Stigen *supra* note 28 at 1028.
136 Zerk *supra* note 111 at 88.

Following identified challenges in respect of CSR international regulatory dialogues which are likely to inhibit the adoption of the RSM at the intergovernmental level, RSM has been accordingly commended for implementation at domestic jurisdictions. A model CSR regulation and enforcement underpinned by RSM within the ambits of the Nigerian corporate law and practice is provided below:

(i) *Every company organized for profit shall be managed in such a way as to demonstrate accountability, transparency and responsibility towards the stakeholders of such a company*; *such a company shall be Corporate Social Responsibility (CSR) efficient by the demonstration of a balanced and responsible consideration of all relevant stakeholder interests in its operations;*

(ii) *The stakeholders of a company may include its shareholders, employees, creditors, customers, consumers, local communities or any other qualified constituent in the society who may not have a subsisting or enforceable contract but with legitimate interest in the company's long term survival;*

(iii) *For the purposes of this section, upon the presentation of a petition for alleged violation of (i) above any time before any winding up or liquidation proceeding involving the company, such company may be presumed irresponsible and shall therefore establish its responsibility towards the aggrieved stakeholder on the scale of probability;*

(iv) *If a company is found in contravention of (i) above, a remediation order may include any one or combination of: published apology, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition;*

(v) *The obligation imposed on the company under this provision shall be enforceable by petition at the Federal High Court by any qualified stakeholder, including a shareholder, having established a verifiable injury to its legitimate interests in the long term survival of the company*;

(vi) *The Minister assigned with the responsibilities of trade and investment matters shall have powers to publish supplementary rules, subsidiary regulations or guidelines published in the Federal Gazette for the proper implementation and administration of this section*.

In concluding on the CSR regulatory and enforcement features within the RSM framework, the model is hereby subjected to some standards and tests. The Hague Institute for the Internationalisation of Law (HiiL)[137] provides some guidance. HiiL identified four (4) pillars in assessing the appropriateness (success) or otherwise of regulatory regimes. These pillars include: (i) Quality (ii) Enforcement (iii) Legitimacy and (iv) Effectiveness and they are said to be interrelated as one may be used to explain the other.[138] The Quality element of a framework relates to the question, how practicable and workable is it?[139] Enforcement relates to the question: are there legal or non-legal mechanisms to monitor or ensure compliance with the framework?[140] Legitimacy relates to whether the basic underlying goals or ideals for the introduction of the regulation are accepted by the addressees (business community) and others.[141] And finally, Effectiveness is more of an empirical test monitoring impact on compliance and the degree to which the framework has succeeded in regulating the intended conducts or misconducts.[142] Upon an assessment of the RSM against the first three pillars, the thesis posits that it sufficiently passes the tests in the circumstance. In respect of the last pillar of Effectiveness, while this is a regime not already tested, it is argued that it is likely to be successful as its contours are expected to be further developed over time by judicial authorities just as many procedural requirements of other traditional legal doctrines in the past have been developed by the judicial precedents.

Finally, the thesis is hinged on the optimism that the RSM together with its proposed regulatory and enforcement framework addresses the regulatory jurisdictional arbitrage question. If

[137] Lambooy, T., and Rancourt, M. E., 'The Added Value of Private Regulation in an Internationalised World? Towards a Model of the Legitimacy, Effectiveness, Enforcement and Quality of Private Regulation' (HiiL's Concept Paper, 2008) (hereinafter Lambooy HiiL Report) cited in Lambooy *supra* note 24 at 250 fn 91.
[138] Lambooy HiiL Report *supra* note 50 at 4 to 7.
[139] Lambooy *supra* note 137 at 252.
[140] *Ibid* 260.
[141] *Ibid* 256.
[142] *Ibid* 265 to 266.

companies (even the rogue greenwashing companies) are in business for profit (essentially), the relevant question is, why will they want to conduct business in another jurisdiction (presumably with weaker regulations) but with very low prospects of profits? It is believed that the decision to invest in any economy including in the Nigerian extractive industry is informed by various factors such as where, when, how, with whom to invest and answers to which questions are in turn underpinned by different and varying factors also. Therefore, as Jennifer Zerk maintained in respect of the 2002 Sarbanes-Oxley Act in the USA, the regulatory environment constitutes only one factor and by no means the only factor for companies to consider when making investments. Consequently, despite this hard law prescriptive regulatory technique in the RSM, companies are still likely to fall in line (as long as the Nigerian extractive industry is perceived buoyant enough and with sufficient market prospects for legitimate businesses to profitably provide goods and services) and probably only also grit their teeth and get on with it as they did in the USA with the Sarbanes-Oxley Act.

Therefore, rather than nurse the fear of capital flight or jurisdictional arbitrage, developing and less industrialized economies such as Nigeria only need to make their economies profitable for businesses as the implementation of this proposed RSM framework will not only guarantee profit for the business community but also ensure accountability, transparency and responsibility to stakeholders. It is also submitted that rather than for the host communities or any other stakeholder groups to demand from the business community to assume government responsibilities of providing public goods and/or social services to them, they should channel their lobby and agitations towards pressurising the government to carry out the legislative amendments proposals in this thesis

5.4 Conclusion

Consequent upon the investigations, assessments and appraisals of theoretical models carried out in Chapter 3, the ambits of a synthesized theory labelled RSM was delineated and described as an alternative ideological foundation on which the true nature, objective and purpose of companies may be understood and upon which efficient CSR practices may be embedded in the business community. RSM perceives a company as a hub or web of investments (not a contractual web or hub) requiring the different relevant stakes and contribution of other constituents for its survival in the long run. The constituents constitute the stakeholder group but which group has been carefully qualified and limited to only accommodate legitimate interests in order to forestall meddlesome interlopers from interfering with smooth day to day operations of companies or distracting corporate managers with frivolous claims. The thesis submits that the proposed RSM provides an effective CSR policy framework through which businesses must accept and take responsibility for established negative consequences directly arising from their operations. Within the framework of RSM, the challenges encountered by many local communities (including in Nigeria) or any other constituent(s) of the company in enforcing claims (such as environmental degradation as a result of negative impact of corporate acts) may become largely mitigated. A company found culpable under the default duty should be made, amongst any other necessary remedies, to restore the particular stakeholder in a position which such stakeholder would have been had the company acted responsibly by seeking wealth maximization for its shareholders in a responsible manner.

Following the formulation of the extant faulty shareholder primacy and stakeholder theories within what can be called ‘old societal contexts’, RSM has been proposed against the recognition of the constant evolution of the society and societal expectations from corporations on the basis of the values of CSR. Within the ambits of the RSM, policy proposals were also

canvassed in this chapter towards a rethink of the ideological foundations of corporations and possibly engendering amendments of corporate law rules and regulations to accommodate public interests and social welfare.

Although most of the international regulatory dialogues were found wanting in terms of providing effective CSR regulation and enforcement, their significance within the RSM discourse was also shown in this chapter. For instance, the most comprehensive corporate responsibility framework in the world (the UNGC) together with specific regulatory attempts (such as the UNGP, and the OECD Guidelines) was reviewed and appraised; the recurring theme of voluntary, self-regulatory and soft law approach to CSR regulation was lamented in the chapter. Many of the international policy responses ended up being either kindly described as useful *first steps* in regulatory discourse, or rather bluntly referred to as exercises *in futility*, *mere talking shops* or just *avoidable business templates*. It was explained that the prevalent voluntary CSR regulatory and enforcement framework appears only effective against enlightened businesses as categorised by Thomas McInerney. In the end, the deplorable absence of credible convergent self-regulatory and external regulatory initiatives was attributed, amongst other reasons, to the absence of sincere political will for consensus on issues of global concern. Having lamented their weaknesses but not before highlighting the usefulness of the international regulatory dialogues to effective CSR regulation discourse within the RSM framework the thesis argued that effective solutions to corporate irresponsibility should be sought at domestic corporate law (as against other aspects of the law, such as human rights law, labour law, environmental law or international law) since corporations usually responsible for these corporate abuses were created in the first instance through the instrumentality of corporate law at the domestic law level.

In the end, the chapter delineates the regulatory features of the RSM for corporate practice as to be applicable in the Nigerian extractive industry. The proposed CSR regulatory and enforcement model is meta-regulatory and not only is it *in tandem* with international best practices but also achieves the delicate balance between statutory government obligation to provide a safe environment for efficient allocation of resources in the society on one hand and the protection of legitimate interest of the business community for profitable ventures using the corporate form.

CHAPTER SIX

SUMMARY, FINDINGS AND CONCLUSION

6 Summary

6.1 Conceptual Clarifications of CSR

This thesis investigated the historical perspectives of the CSR conception and confirmed that CSR actually originated from the USA as the concept was virtually non-existent in the UK before 1970 and that it was not until 1973 that the Confederation of British Industry accorded some recognition and made a statement on CSR. By contrast, in the USA, Howard R. Bowen in his book, *Social Responsibilities of the Business*[1] was the first to use the term 'CSR'.

However, the modern conception of CSR as used in this thesis only began in the 1970s when legal academics (as opposed to economists) started suggesting government interventionist methods towards checking the raw exercise of corporate power by large companies and making them accountable not just to their investors but to the society.

This thesis conceptually clarifies CSR as being beyond philanthropic gestures. Although it might have evolved from charity, however, it seems to have metamorphosed into embodying concepts such as: the triple bottom line of planet, people and profit; the green movement; the advocacy for sustainable development in business and society amongst others. Further, CSR also evolved into incorporating values such as human rights protection, employee rights, environmental protection, community development, accountability and transparency amongst others.

[1] Bowen, H. R., *Social Responsibilities of the Businessman*, (Harper and Row, New York, 1953) 6.

After a few corporate scandals had revealed marked differences between CSR claims of some so-called champions of CSR and their eventual irresponsible business conducts, it became clear that CSR can no longer be understood just in terms of some corporate charity, gifting or community developments projects.[2] Therefore, in more recent times, CSR has become the exercise of social responsibility in how corporate profits are made. In other words, it is now a comprehensive business philosophy which appreciates the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time.

This thesis further clarifies that CSR is a neutral construct which seeks to check raw exercise of corporate power by broadening the responsibilities of businesses beyond the traditional focus of enhancing shareholder value and making businesses conscious of the environmental, social and legal consequences of their operations. The researcher therefore posits that there is nothing intrinsically voluntary or mandatory about CSR. The business community and practitioners may choose to adopt CSR on a voluntary or mandatory basis depending on the significance or priority attached to its values within any given system.

The interconnectedness of CSR and corporate governance was also discussed in this thesis. CSR is an integral part of sound corporate governance practices. Therefore, CSR may be simply seen, especially from historical perspectives, as one of the modern constructs or devices used in addressing the age-long concept of Separation of Ownership from Control and the resulting Agency Problems; that is to say, with CSR, companies are being reconceptualised as

[2] Farrar, J., *Corporate Governance: Theories, Principles and Practice*, (3rd edn, Oxford University Press, Melbourne, 2008) 502. Aside the popular corporate scandal involving Enron in the US, in Nigeria also, despite winning awards for its so-called effective CSR operations in 2008, Cadbury Nigeria Plc was later discovered to be involved in corporate accounting scandals. Although relevant corporate governance or CSR matters were not directly considered, the facts of Christopher Okeke v. Securities and Exchange Commission & 2 Ors *(2013) All FWLR Pt 687, 731* capture the highlighted disparity between a company's responsibility claims and its true practices; see also Christopher N. Okeke v. Cadbury Nigeria Plc (2015) 5 *CLRN* 22 and *http://www.thenationonlineng.net/archive2/tblnews_Detail.php?id=27137* last accessed 7th January, 2016.

social institutions with proposals over the years to broaden the corporate duties (and by implication directors' duties), and ensuring that corporate managers do not only enhance shareholder value but also effectively balance competing interests of a larger group now popularly referred to as stakeholders.

6.2 Interrogation of CSR conception in Nigeria

The thesis confirms that the narrow conception of CSR as corporate charity and giving back to the society is popular in Nigeria. It was noted that while a few leading Nigerian corporate law academics appear silent on the subject, other scholars seem to have given impetus to the restrictive CSR approach. It was particularly observed in Chapter 4 that the restrictive notion of CSR almost received a legislative backing when a Nigerian CSR bill intended to provide relief to host communities suffering from the negative consequences of the corporate commercial activities in their areas was introduced to the Nigerian National Assembly in 2007. Judicial precedents and the provisions of sections 38, 279, 283, 314, 315 and 331 of the principal corporate law legislation in Nigeria, CAMA, were also shown as contributory to the popular restrictive CSR conception beyond the requirements of the law.

This thesis rejects this restrictive CSR conception and criticised its tendencies to introduce another form of corporate tax and doubts its usefulness in achieving the goals of effectively embedding CSR practices within the Nigerian business climate. Thus, it argues for a reconceptualization and expansion of the CSR notion in Nigeria in terms of the exercise of social responsibility by ensuring all necessary stakeholder interests are safeguarded in the course of enhancing shareholder wealth.

6.3 Fundamental Assumptions of Corporate Law and CSR Practices

In Chapter 3, the thesis observed that the assumptions of the shareholder primacy and the nexus of contracts theories have so dominated corporate practices that some - such as Henry Hansmann and Reinier Kraakman in their landmark essay, *The End of History for Corporate Law* - came to the conclusion that there could not be any serious competitor to challenge the view that corporate law should principally strive to increase long-term shareholder value.[3] Accordingly, almost all corporate governance mechanisms and activisms in the Anglo-American jurisdiction have been geared towards only enhancing returns on investment for shareholders. In the UK, despite the conscious effort at promoting the ESV (a corporate governance system where extraneous competing interests of certain stakeholders are supposedly balanced but for the long term benefits of the shareholders), there are still genuine concerns that the ideological foundation of the ESV is deeply rooted in the contractarian shareholder primacy model having not given the stakeholders any real justiciable rights enforceable in courts.

6.4 Re-theorizing Corporate Law Assumptions and Rejecting Isolationism

The need to re-theorize the prevailing assumptions of corporate law was identified in this thesis. For instance, the assumptions under the shareholder primary model are said to be normatively defective and fallacious in assuming that the interest of the shareholders is always at variance with the interest of relevant stakeholders. Sometimes, pluralist views regarding a CSR decision may just align. A corporate decision, increase in the wages of employees for instance, may not only be beneficial to the company (increased productivity), or to the employees but also to the

[3] Hansmann, H. and Kraakman, R., 'The End of History for Corporate Law' in Gordon, J. and Roe, M., (eds), *Convergence and Persistence in Corporate Governance*, (Cambridge University Press, Cambridge, 2004) 68.

shareholders in the long term (as residual claimants of corporate assets generated from hard but fruitful labour of employees).

Further, the thesis also submits that the insulation of corporate law under its prevailing assumptions encourages a company's non-compliance with legal obligations, if such may in the long term for instance, enhance shareholder value. Therefore, corporate managers may simply deliberately evade tax obligations if by some permutations, the penalty for such evasion is lesser than the tax obligation itself and thereby saving some corporate funds to be made available for distribution amongst shareholders as dividends. There is simply no reason to keep insulating corporate law from complementing the principles of other disciplines or areas of law. All areas of law, including corporate law, should be instrumental towards moving the society closer to sustainable development.

It was observed in this thesis that the assumption that the shareholders own[4] the company does not sit well with the concept that the company is a separate legal entity. Shareholders are said to actually own 'shares' as their private properties and should not lay claim to the ownership of the company *per se*; if the shareholders can claim ownership based on their investment in the company by way of capital, so can other constituents claim to have invested skill, time, financing *et cetera* in the company. Indeed, corporate properties belong to the company itself as a separate legal personality. Consequently, the conclusion is reached in this thesis that it would be sheer surrealism to insist that for some economic efficiency to be guaranteed, shareholders shall own and operate their absolute private properties (companies) freely under some invisible free hand of a perfect market.

[4] John Parkinson characterised such as a technical error and invincibly circular as it assumes the very point it seeks to prove. See generally, Parkinson, J. E., 'Models of the Company and the Employment Relationship', [2003] 41 (3) *British Journal of Industrial Relations* 481,483 and 484.

It was also explained in this thesis that the stakeholder theory which tried to provide such solutions to a few problems associated with the shareholder primacy model also turned out replete with so many conceptual and enforcement issues. In fact, it was found that the theoretical model was simply unworkable in providing a normative foundation towards embedding effective CSR practices in the business community.

6.5 CSR Regulatory Features: Voluntary versus Mandatory

Further, the thesis explained that the initial reaction of the business community to regulatory and enforcement attempts towards societal concerns was probably cooperative only on the surface, but rather antagonistic in reality. However, upon realisation of the non-sustainability of such antagonism or probably in fear or anticipation of hard law mandatory government interventionist regulations, the business community adjusted to accepting minimalist voluntary regulations by way of self-regulation. The thesis espoused that these voluntary, self-regulatory and soft law CSR enforcement mechanisms have dominated intergovernmental regulatory initiatives at the UN and OECD. It was also confirmed that CSR regulation and enforcement is largely hinged on corporate reporting (disclosure) of non-financial (CSR) matters of labour, environment or other social issues and essentially relies on associated risks of reputational damage (naming and shaming) in the estimation of stakeholder as in the occasional instances of established false statements and/or omissions of facts.[5] Such CSR reporting is also usually premised on the 'comply or explain' (rather than 'comply or else') technique and therefore without a concomitant mechanism towards ensuring the accuracy of information disclosed. In other words, the majority of CSR reporting have become lists of *boilerplate* disclosures to stakeholders which do not provide a meaningful discussion of potential impacts or mitigation

[5] Cherry, M. and Sneirson, J. F., 'Chevron, Greenwashing and the Myth of "Green Oil Companies"' (2012) 3 *WASH. & LEE J. ENERGY, CLIMATE & EVN'T* 133, 142 and 143; see also Nike Inc. *v.* Marc Kasky, 539 US 654 (2003); and, Kasky *v.* Nike, Inc. 45 P.3d 243 (Cal. 2002).

strategies and that most companies still approach the way they communicate on governance as a box ticking exercise.

It was therefore explained in Chapter 5 that while the quantity of CSR narrative in annual reports have increased, the quality and usefulness of information disclosed remain in doubt as most companies tailor their disclosures towards enhancing shareholder value and do not demonstrate how CSR is actually an integral part of their businesses. In view of the foregoing, the thesis noted that simply prescribing external regulatory minimum standards or drawing up voluntary guidelines and codes of conduct under a CSR regulatory framework and expecting corporate managers to automatically fall in line in balancing the varying stakeholder interests and demonstrating responsibility may after all be another exercise in futility.[6] Consequently, despite the shortcomings of the extant international regulatory dialogues in terms of the central theme of soft law self-regulatory framework, the thesis nonetheless noted their usefulness within the RSM framework. In other words, while the UNGC, UNGP and the OECD Guidelines were noted as lacking necessary hard law and monitoring techniques in confirming the accuracy of CSR non-financial disclosures in social reporting to stakeholders, the regulatory features of the RSM were formulated to fill this lacuna; with RSM, as shall be illustrated below, corporations are imposed with a positive legal obligation to discharge a corporate law presumption of irresponsibility. Active participation, membership and compliance with the soft law principles of the international regulatory dialogues are made prima facie evidence towards a discharge of this presumption.

6 Parkinson *supra* note 4 at 494.

6.6 CSR Legal and Regulatory Framework in Nigeria

CSR legal, regulatory and enforcement mechanisms in the Nigerian extractive industry were examined and pertinent laws such as CAMA, ISA, NEITI Act, PIB and NMMA were reviewed. The thesis noted that embedding effective CSR practices in companies in the extractive industry appears to have, so far, been undermined by: the restrictive conception of CSR; instances of faulty legal transplantation; and lack of coherence between relevant primary legislations and applicable subsidiary instruments such as codes of corporate governance. For instance, the Extractive Industries Transparency Initiative (EITI) which is targeted at creating accountability and transparency in the management of oil, gas and mining resources in resource rich countries was wrongly transplanted into Nigeria as the NEITI Act. The NEITI Act adopted a faulty disclosure regime as a tool in embedding responsible corporate practices as companies are exempted from disclosing and the NEITI agency is precluded from utilizing or otherwise publishing reports considered *prejudicial* to a company's contractual obligations or proprietary interests.[7] This thesis wondered, how and why disclosure on responsible corporate practices can be subjected to protection of corporate proprietary interests (enhancing shareholders value)? Further, although section 116 of NMMA states that holders of mining lease shall not commence development activities within any lease area until they finalise the CDA with the host communities towards transferring social and economic benefits to the communities, this thesis expressed certain reservations in respect of the CDA and other sustainability provisions of the NMMA as effective safeguards for stakeholder interests. In addition, Principle 32.2 of the recently released 2016 Private Sector National Code of Corporate Governance[8] *mandates* companies to report annually on the nature and extent of their social, ethical, safety, health and

[7] See sections 3 (d), (e) and 14 (1) of the 2007 NEITI Act.
[8] See http://www.financialreportingcouncil.gov.ng/ last accessed 28th October, 2016.

environmental policies and practices which requirement is actually strange to and incompatible with the relevant corporate reporting provisions in both CAMA and ISA. The thesis highlights this incoherence in policies and posits that such development is a recipe for observance of such requirement more in breaches than compliance and thereby undermining effective CSR practices in the business community.

6.7 RSM: Alternative CSR Enforcement Framework in Nigeria

Following the synthesis of the RSM and clarifications of its theoretical and policy underpinnings, Chapter 5 also espoused on its CSR regulatory and enforcement features within the Nigerian extractive industry. It was shown that, despite the defects inherent in many of the theoretical models analysed, RSM nonetheless rides on some of the assumptions of existing theories, especially the stakeholder model. It rejects the assumption that all interests (shareholder value and other stakeholder interests) in companies must be equated as argued under the stakeholder model; instead, RSM assumes that *but for* the shareholders, there may not be a company in the first place and that *but for* the stakeholders, the shareholders' investment may not survive in the long term. Therefore, RSM affords some priority to shareholders' interests by allowing the shareholders' agents (directors and corporate managers) to self-develop and administer an effective CSR framework (with which to balance competing stakeholder interests) but such priority notion is fettered by a *default obligation* to behave responsibly and coupled with an *evidentiary onus* to deny corporate abuse whenever alleged by a qualified stakeholder.

For the purpose of clarity of thoughts, aside explaining the regulatory and enforcement features of the newly formulated RSM, it was also distinguished from previous attempts seeking to explain the purpose and objective of corporate actions and (by implication) their CSR practices. It was compared and contrasted with both the team production theory and the entity

maximisation and sustainability model (EMS) of Professors Margaret Blair and Lynn Stout; and Professor Andrew Keay respectively.

In the end, this thesis argued that the core values of CSR are better effectively embedded within the Nigerian extractive industry by an amendment to the provisions of CAMA to accommodate the alternative regulatory principles of the RSM. The diagram below was accordingly used to illustrate the formulation, regulatory and enforcement features of the RSM.

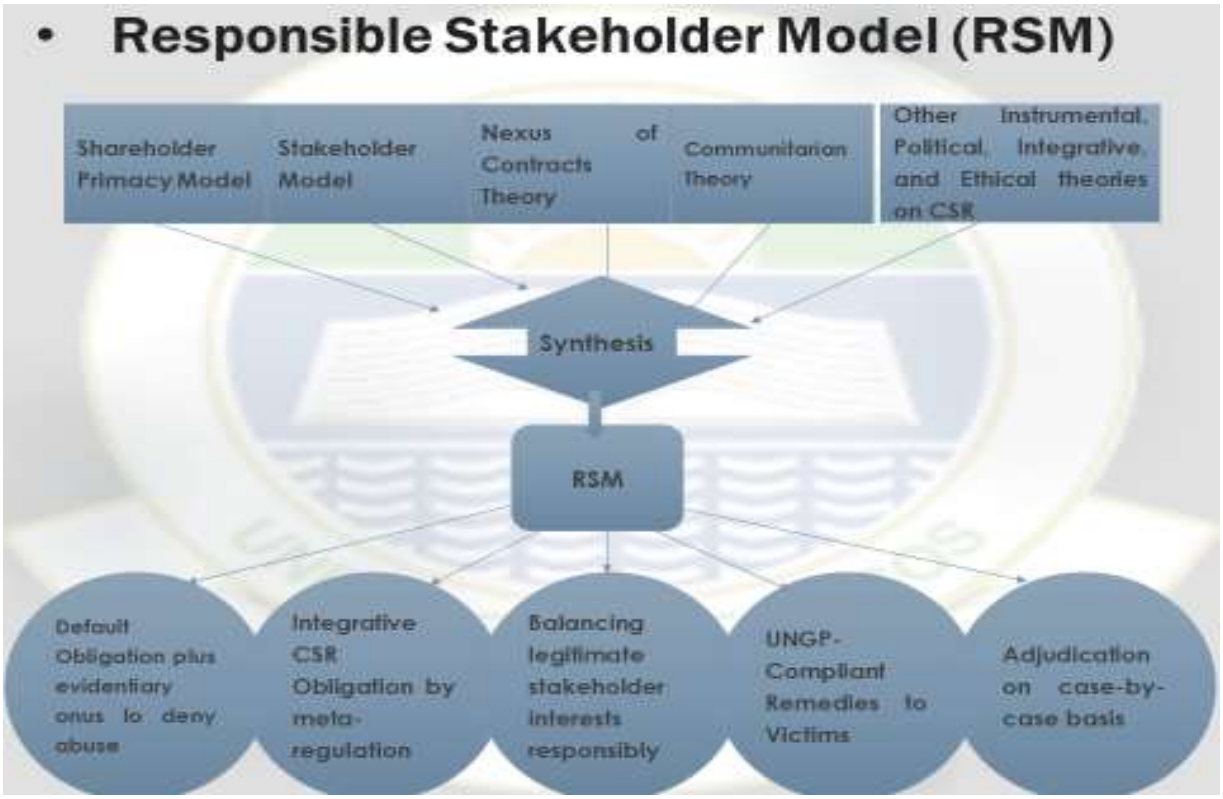

Figure 6.1 *Illustrating RSM formulation and regulatory features*

6.8 Findings

The below summarizes the findings in this thesis:

(i) CSR conceptually transcends community development projects or corporate charity but involves the exercise of social responsibility in how corporate profits

are made. Further, the reduction of CSR to voluntary corporate charity is found prevalent in developing economies including Nigeria and such reduction is fallacious as there is nothing intrinsically voluntary about CSR.

(ii) The fundamental assumptions of the shareholder primacy model and the nexus of contract theories currently underpin corporate behaviour and have not facilitated effective CSR practices. The state concession and the stakeholder theories which underscore the importance of a stakeholder group in the long term survival of the company rather better enhance effective CSR.

(iii) There is a need to re-theorize corporate law and CSR practices in order to develop a corporate law model better suited in embedding CSR within the business community. Further, there is no need to keep insulating or isolating corporate law from other disciplines or law aspects in the provision of effective remedies for economic or human right violations or environmental degradation using the corporate form.

(iv) CSR regulations usually feature (especially at the intergovernmental level) voluntary disclosure initiatives which are largely inadequate and have encouraged some companies to greenwash CSR.

(v) Effective CSR regulation and enforcement in the Nigerian extractive industry has been grossly undermined by the restrictive CSR conception, faulty legal transplantation and incoherent provisions in existing primary and subsidiary legislations.

(vi) RSM affords an alternative enforcement framework under which effective CSR practices can be better embedded in the Nigerian extractive industry.

6.9 Contributions to Knowledge

The research findings in this thesis will enrich extant CSR literature by filing existing gap in the conceptual analysis of the subject especially in Nigeria and will be useful in any CSR regulation and enforcement discourse in the following significant ways:

(i) The study synthesized an alternative corporate law theory labelled the RSM under which effective CSR conception can be embedded in the Nigerian extractive industry.

(ii) This research clarifies CSR in Nigeria from a corporate law perspective and expands its frontiers, for theory and practice, beyond voluntary corporate charity and community development projects.

(iii) The thesis delineates the regulatory consequences of the RSM as an efficient tool towards balancing legitimate but competing stakeholder interests and with which incidence of greenwashing may be reduced within the business community.

6.10 Conclusion and Recommendations

This thesis explained that the continued perception of CSR in light of donations and executing community development projects within the extractive industry have not been very potent in engendering effective CSR practices amongst companies. For instance, host communities where many of these companies operate are still restive over corporate irresponsibility and

perhaps neglect by the government. An obvious case in point would be the on-going agitations of many militant groups from host communities including the popular Niger Delta Avengers; despite the huge amount of money the government has committed over the years into these communities whether by way of granting amnesty or otherwise, and regardless of many community development projects executed by the companies in these communities, complaints of corporate abuses in form of environmental degradation, human and economic rights violations and others have not ceased and so have the agitations continued.

This is why this thesis proposes an alternative approach. Within the regulatory ambits of the RSM, companies in the Nigeria extractive industry are enjoined to self-develop and self-implement mechanisms (internally) and behave responsibly as they will be deemed to have acted irresponsibly whenever a qualified stakeholder alleges violation of any legitimate interest as may be relevant to the survival of the company in the long run. Under the proposed framework, in cases of pollution and environmental degradation of local communities by any company for instance, all the stakeholder (host community) needs to establish will be the fact that its stake - to live in and maintain a safe and conducive environment for the company to operate and make money - has been infringed upon and a verifiable injury or damage to the environment can be shown. They need not establish that the company operating within their community is actually responsible for the damage. The evidentiary burden is passed on to the company who is *prima facie* presumed to have acted irresponsibly in the circumstance to demonstrate that it is not responsible for such violation and that it acted responsibly in the circumstance. This onus of proof should put every company on its toes, including those who pay lip service to be champions of CSR (*greenwashers*) as the internally self-developed CSR policy framework of any individual company involved shall be dispassionately scrutinised (in

the course of determining responsibility or not) by judicial officers based on the principles and assumptions of the RSM as espoused in this thesis.

Essentially, the reasoning of the researcher is that as there is no known limitation to the amount of profits or returns on shareholders' investments, there should also not be a limitation to the amount of liability on the shareholders' investment. The principle of limitation of liability in corporate law only applies to the liability of the shareholders themselves and not on their investment in companies. Therefore, the attitude of always seeking to enhance shareholder value (as enjoined by the shareholder primacy model) at the expense of legitimate stakeholder interests, such as creditors, employees amongst others, must be discouraged. This central idea behind the RSM and its CSR regulatory and enforcement features permeates throughout this thesis.

Finally, in view of the foregoing, the following recommendations are made:

1. The Nigerian government is advised to consider the alternative approach offered by the RSM as an effective instrument towards understanding corporate objective and embedding effective CSR practices in the business community particularly in the extractive industry; a model draft of CAMA provisions amendments through which effective CSR regulation and enforcement may be achieved has accordingly been provided in Chapter 5.

2. In the short term, while the first recommendation is being considered, proper legal transplantation of legislative proposals must be done so that foreign legal principles and mechanisms are carefully imported to benefit and not to complicate extant CSR governance issues;

3. Pursuant to 2 above and more specifically, the relevant provisions of the NEITI Act need to be amended to ensure proper accountability, transparency and responsibility of companies in the Nigerian extractive industry as discussed in Chapter 4;

4. Further consultations on the PIB need to be carried out to, amongst others, ensure that the bill's present sustainability and CSR provisions do not repeat the mistakes of similar past legislations in adopting the assumptions of the shareholder primacy model instead of more progressive model such as the RSM.

5. Since the regulatory feature of the RSM has shifted the onus of establishing responsibility to the business community, it is recommended that relevant stakeholders such as host communities, instead of being involved in economic sabotage, should rather lobby the government to amend relevant laws in Nigeria including the provisions of CAMA to incorporate RSM (as recommended in 1 above) under which framework their competing interest and stakes, this thesis submits, are better safeguarded.

BIBLIOGRAPHY

BOOKS/CHAPTERS IN BOOKS

Abugu, J. E. O., *Foundations of Corporate Law* (University of Lagos Press, 2011).

Abugu, J. E. O., *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers, 2014).

Ajogwu, F., *Corporate Governance in Nigeria: Law and Practice* (CCLD, Lagos, 2007).

Armour, J., *et al*, 'The Essential Elements of Corporate Law: What is Corporate Law?' in *The Anatomy of Corporate Law: A Comparative and Functional Approach,* Kraakman, R., *et al* (eds) (Oxford University Press, 2009).

Barnes, K.D., *Cases and Materials on Nigerian Company Law* (Samadex Printing Works, Ibadan, 1992).

Berle Jr., A. A. and Means, G. C., *The Modern Corporation and Private Property* (The Macmillan Company, New York, 1932).

Black, J., 'Law and Regulation: The Case of Finance' in Parker, C., Scott, C., Lacey, N., and Braithwaite, J., (eds), *Regulating Law*, (Oxford University Press, Oxford, 2004).

Bowen, H. R., *Social Responsibilities of the Businessman* (Harper and Row, New York, 1953).

Campbell, D., 'Why Regulate the Modern Corporation? The Failure of 'Market Failure' in McCahery J, Picciotto S & Scott C (eds), *Corporate Control and Accountability* (Clarendon, 1993).

Campbell, T., 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in McBarnet, D., Voiculescu, A. and Campbell, T., (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP, 2007).

Carroll, A. B., 'The Pyramid of Corporate Social Responsibility – Toward the Moral Management of Organizational Stakeholders' (1991) 34 *Business Horizons* 39 reprinted in Craine, A., Matten, D., and Spence, L.J., eds, *Corporate Social Responsibility: Readings and Cases in a Global Context* (Routledge, Abington 2008).

Cheffins, B. R., *Company Law: Theory, Structure and Operation* (Clarendon Press, Oxford, 1997).

Chianu, E., *Company Law* (LawLords Publications, Lagos, 2012).

Davies, P. L., *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008).

Davies, P. L., *Gower's Principle of Modern Company Law* (6th edn, Sweet and Maxwell, London, 2003).

Davis, K., *et al*, *Business and Society: Concepts and Policy Issues* (4th edn, McGraw-Hill, New York 1980).

Dine, J., *The Governance of Corporate Groups* (CUP, 2006).

Dine, J., *Companies, International Trade and Human Rights* (CUP, Cambridge, 2005)

Easterbrook, F. and Fischel, D., *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, 1991).

Eijsbouts, J., Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate (Inaugural Lecture, Maastricht University, 2011).

Farrar, J. H., *et al*, *Farrar's Company Law*, (3rd edn, Butterworth, London, 1991).

Farrar, J. H., *Corporate Governance: Theories, Principles and Practice*, (3rd edn, Oxford University Press, Melbourne, 2008).

Freeman, E., *Strategic Management: A Stakeholder Approach* (CUP, 2010).

Freeman, E., *et al*, *Stakeholder Theory: The State of the Art* (CUP, 2010).

Friedman, M., 'The Social Responsibility of Business' in *The Essence of Friedman* (Kurt R. Leube ed., 1987).

Friedman, M., *Capitalism and Freedom* (University of Chicago Press, Chicago, 1962).

Gower, L.C.B., *Gower's Principles of Modern Company Law* (4th edn, Stevens & Sons, London, 1979).

Greenfield, K., *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, Chicago, 2006).

Guobadia, A., 'Protecting Minority and Public Interests in Nigeria Company Law: the Corporate Affairs Commission as an Ombudsman' in McMillan, F., (ed) *International Company Law*, Annual Vol. 1, (Hart Publishing, 2000).

Hadden, T., *Company Law and Capitalism* (2nd edn, Weidenfeld and Nicolson, London, 1972).

Hansmann, H., and Kraakman, R., 'The End of History for Corporate Law' in Gordon, J. and Roe, M., (eds), *Convergence and Persistence in Corporate Governance* (CUP, Cambridge, 2004).

Hobbes, T., *Leviathan* (Oxford, Blackwell, 1960).

Horrigan, B., *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham, UK, 2010).

Jones, T. M., *et al*, 'Stakeholder Theory: The State of the Art' in *The Blackwell Guide to Business Ethics*, Bowie, N. E., (ed), (Wiley-Blackwell, 2001).

Lambooy, T., *Corporate Social Responsibility: Legal and Semi-legal Frameworks Supporting CSR Developments 2000-2010 and Case Studies* (Kluwer, 2010).

Lynch-Fannon, I., *Working within Two Kind of Capitalism: Corporate Governance and Employee Stakeholding: US and EU Perspectives* (Hart Publishing, 2003).

Marx, K., *Early Writings* translated and edited, Bottomore, T., (McGraw-Hill, 1963).

McDonald, D., *The Golden Passport: Harvard Business School, the Limits of Capitalism, and the Moral Failure of the MBA Elite* (HarperCollins Publishers, New York, 2017).

Mitchell, L. E., *Progressive Corporate Law* (Lawrence E. Mitchell ed., 1995).

Morgan, T., *Cases and Materials on Economic Regulation of Business* (West Publishing Co., Illinois, 1976).

Monks, R. and Minow N., *Corporate Governance* (Massachusetts: Blackwell Publishers, Cambridge, 1995).

Muchlinski, P., 'Corporate Social Responsibility and International Law: the Case of Human Rights and Multinational Enterprises' in McBarnet, D., Voiculescu, A., and Campbell, T., (eds), *The New Corporate*

Accountability: Corporate Social Responsibility and The Law, CUP, Cambridge, 2007).

Orojo, J. O., *Company Law and Practice in Nigeria* (5th edn, LexisNexis, 2008).

Orojo, J. O., *Company Law in Nigeria* (3rd edn, Mbeyi & Associates, Lagos, 1992).

Parkinson, J. E., 'Corporate Governance and the Regulation of Business Behaviour' in *Global Governance and the Quest for Justice* (Macleod, S., ed.), Volume II, Corporate Governance, (Oxford and Portland, Oregon, 2006).

Parkinson, J. E., *Corporate Power and Responsibility* (Clarendon Press, Oxford, 1993).

Pennington, R. R., *Company Law* (6th edn, Butterworths, London, 1990).

Preston, L. E., and Post, J. E., *Private Management and Public Policy: The Principle of Public Responsibility* (Prentice-Hall, Englewood Cliffs NJ, 1975).

Schwartz, B., and Goodman A. L., *Corporate Governance: Law and Practice* (Vol. 1, LexisNexis, 2005).

Selznick, P., 'Self-Regulation and the Theory of Institutions' in Farmer, G. and Murphy, E. (eds), *Environmental Law and Ecological Responsibility* (Wiley, Chichester 1994).

Shaw, M., *International Law*, (5th edn, Cambridge University Press, Cambridge, 2003).

Sheikh, S., *A Practical Approach to Corporate Governance* (Tottel Publishing, West Sussex, 2006).

Smerdon, R., *A Practical Guide to Corporate Governance* (3rd edn, Sweet & Maxwell, London, 2007).

Smith, A., 'An inquiry into the Nature and Causes of the Wealth of Nations' in *The Essential Adam Smith* Heilbroner, R. L., (ed.), (New York, 1776).

Steiner, J. A., and Steiner, G. A., *Business Government and Society: A Managerial Perspective,* (11th edn, McGraw –Hill, New York, 2006).

Sunstein, C., *Legal Reasoning and Political Conflict* (Oxford University Press, 1996).

Villiers, C., 'Corporate Law, Corporate Power and Corporate Social Responsibility' in *Perspectives on Corporate Social Responsibility*, Boeger, N., Murray, R., and Villiers, C., (eds) (Edward Elgar, Cheltenham, 2008).

Watson, A., *Legal Transplants: An Approach to Comparative Law* (2nd edn, Edinburgh, 1993).

Whitehouse, L., 'Corporate Social Responsibility as Regulation: The Argument from Democracy' in O'Brien J (ed), *Governing the Corporation, Regulation and Corporate Governance in an Age of Scandal and Global Market* (John Wiley & Sons, West Sussex, 2005).

Zadek, S., *The Civil Corporation: the New Economy of Corporate Citizenship* (Earthscan, London, 2001).

Zerk, J., *Multinational and Corporate Social Responsibilities: Limitations and Opportunities in International Law* (CUP, Cambridge, 2006).

JOURNALS/ARTICLES

Aaronson, S. A., 'Corporate Responsibility in the Global Village: The British Role Model and the American Laggard' (2003) 108 *Business and Society Review* 309.

Abugu, J., 'Primacy of Shareholders' Interests and the Relevance of Stakeholder Economic Theories' (2013) 7 *Company Lawyer* 201.

Abugu, J., 'Issues and Problems in Corporate Governance in Nigeria' [2015] 6 (3) *The Gravitas Review of Business and Property Law* 1.

Abugu, J., and Amodu, N., 'Regulating Corporate Reporting in Nigeria: The Uncharitable Perception of an Outsider (External) Regulator' (2016) 2 *The Commercial and Industrial Law Review* 64.

Aigbokhaevbo, V., 'Evaluation of Corporate Governance in Nigeria and Directors Liability' (1997) *Nigerian Contemporary Law Journal Uniben* 82.

Ako, R. T., *et al*, 'Forging Peaceful Relationships between Oil-Companies and Host-Communities in Nigeria's Delta Region: A Stakeholder's Perspective to Corporate Social Responsibility' [2009] 3 (2) *Journal of Enterprising Communities* 205.

Amaeshi, K. M., *et al*, 'Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Influences?' (2006) 24 *JCC* 83.

Amao, O., 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' [2008] 1 (52) *Journal of African Law* 89.

Amao, O., ‘Mandating Corporate Social Responsibility: Emerging Trends in Nigeria’ [2008] 1 (6) *Journal of Commonwealth Law and Legal Education* 75.

Amao, O., ‘Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria’ (2007) 29 *Dublin University Law Journal* 312.

Amodu, N., ‘Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria’ [2017] 1 (61) *Journal of African Law* 105 available at *https://doi.org/10.1017/S0021855317000018* (last accessed 31st January, 2017).

Amodu, N., ‘Theoretical Underpinnings of Corporate Social Responsibility: Victim of Ideological Clashes’ [2014] 6 (3) *Journal of Corporate Governance* 1160.

Berle, A., ‘Corporate Powers as Powers in Trust’ (1931) 44 *Harvard Law Review* 1049.

Bhatta, G., ‘Corporate Governance and Public Management in Post-Crisis Asia’ (2001) 23 *Asian Journal of Public Administration* 1.

Blair, M. and Stout, L., ‘Specific Investment: Explaining Anomalies in Corporate law’ [2006] 1 (31) *Journal of Corporate Law* 719.

Blair, M. and Stout, L., ‘A Team Production Theory of Corporate Law’ [1999] 2 (85) *Virginia Law Review* 247.

Blowfield, M., and Frynas, J. G., ‘Setting New Agendas: Critical Perspective on Corporate Social Responsibility in the Developing World’ [2005] 81 (3) *International Affairs* 499.

Bolodeoku, I. O., ‘Contractarianism and Corporate Law: Alternative Explanations to the Law’s Mandatory and Enabling/Default Contents’ [2005] 13 (2) *Cardozo Journal of International and Comparative Law* 433.

Bolodeoku, I. O., ‘Corporate Governance: The Law’s Response to Agency Costs in Nigeria’ (2007) 32 *Brooklyn Journal of International Law* 467.

Bolodeoku, I. O., ‘Economic Theories of the Corporation and Corporate Governance: A Critique’ (2002) *J.B.L.* 420.

Branson, D. M., ‘Corporate Governance “Reform” and the New Corporate Social Responsibility’, (2001) 62 *University of Pittsburgh Law Review* 605.

Bratton Jr, W. W., 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornel Law Review* 407.

Bratton Jr, W. W., 'The New Economic Theory of the Firm: Critical Perspectives from History' (1989) 41 *Stanford Law Review* 1471.

Bratton, W. W., and Wachter, M. L., 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation' [2008] 34 (1) *Journal of Corporate Law* 99.

Butler, H. N., and Ribstein, L. E., 'Opting out of Fiduciary Duties: A Response to the Anti-Contractarians' (1990) 65 *Wash. L. Rev.* 1.

Carroll, A. B., 'A Three – Dimensional Conceptual Model of Corporate Performances' (1979) 4 *Academy of Management Review* 499.

Carroll A. B., 'Corporate Social Responsibility: Evolution of a Definitional Construct' [1999] 3 (38) *Business & Society* 268.

Cherry, M., 'The Law and Economics of Corporate Social Responsibility and Greenwashing' (2014) 14 *U.C. Davis Bus. L. Journal* 281.

Cherry, M. and Sneirson, J. F., 'Chevron, Greenwashing and the Myth of "Green Oil Companies"' (2012) 3 *Wash. & Lee J. Energy, Climate & Evn't* 133.

Davis, K., 'The Case for and against the Assumption of Social Responsibilities' [1973] 16 (2) *Academy of Management Journal* 312.

Dewey, J., 'The Historic Background of Corporate Legal Personality' (1926) 35 *Yale Law Journal* 655.

Dine, J., 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' [2012] 3 (1) *Journal of Human Rights and the Environment* 44.

Dodd, M., 'For whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145.

Donaldson, T., and Preston, L. E., 'The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications' (1995) 20 *The Academy of Management Review* 65.

Easterbrook, F., and Fischel, D., 'The Corporate Contract' (1989) 89 *Columbia Law Review* 1416.

Ekhator, E. O., 'Corporate Social Responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: An Appraisal' (2014) 28 *Cadernos de Estudos Africanos* 119.

Emeseh, E., *et al*, 'Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?' (2010) II *German Law Journal* 230.

Engel, D., 'An Approach to Corporate Social Responsibility' (1979) 32 *Stanford Law Review* 1.

Fairfax, L. M., 'Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric' (2007) 59 *FLA. L. REV*. 771.

Fairfax, L. M., 'The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms' (2006) 31 *J. Corp. L.* 675.

Geva, A., 'Three Models of Corporate Social Responsibility: Interrelationship between Theory, Research and Practice' (2008) *Business and Society Review* 5.

Fama, E., 'Agency Problems and the Theory of the Firm' (1980) 99 *Journal of Political Economy* 288.

Fischel, D., 'The Corporate Governance Movement' (1982) 35 *Vanderbilt Law Review* 1259.

Foster, N. H. D., 'Company Law Theory in Comparative Perspective: England and France' [2000] 48 (4) *American Journal of Comparative Law* 573.

Freeman, E., *et al*, 'Stakeholder Theory and "The Corporate Objective Revisited"' (2004) 15 *Organization Science* 364.

Garriga, E., and Mele, D., 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) *Journal of Business Ethics* 53.

Geva, A., 'Three Models of Corporate Social Responsibility: Interrelationship between Theory, Research and Practice' (2008) *Business and Society Review* 5.

Greenfield, K., 'Reclaiming Corporate Law in a New Gilded Age' (2008) 2 *Harv. L. & Pol'y Rev*. 1

Hayden, G. M. and Bodie, M. T., 'The Uncorporation and the Unravelling of the "Nexus of Contracts"' Theory (2011) 109 *Michigan Law Review* 1127.

Ho, V. H., ‘Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China’ (2013) 46 *Vanderbilt Journal of Transnational Law* 375.

Idemudia, U. and Ite, U. E., ‘Corporate-Community Relations in Nigeria’s Oil Industry: Challenges and Imperatives’ (2006) 13 *Corp. Soc. Resp. Environ. Mgmt.* 194.

Ihugba, B. U., ‘Compulsory Regulation of CSR: A Case Study of Nigeria’ [2012] 5 (2) *Journal of Politics and Law* 68.

Ijaiya, H., ‘Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria’ [2014] 3 (1) *Journal of Sustainable Development Law and Policy* 60.

Ireland, P., ‘Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality’ (1996) 17 *Journal of Legal History* 40.

Ireland, P., ‘Company Law and the Myth of Shareholder Ownership’ (1999) 62 *Modern Law Review* 32.

Jensen, M. C., and Meckling, W. H., ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305.

Johnson, L., ‘The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law’ (1990) 68 *Texas Law Review* 865.

Johnson, L., and Millon, D., ‘Corporate Takeovers and Corporate Law: Who’s in Control?’ (1993) 61 *Geo. Wash. L. Rev* 1177.

Kaplow, L., ‘Rules versus Standards: An Economic Analysis’ (1992) 42 *Duke Law Review* 557.

Karmel, R. S., ‘Implications of the Stakeholder Model’ (1993) 61 *Geo. Wash. L. Rev*. 1156.

Keay, A., ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s Enlightened Shareholder Value Approach’, (2007) 29 *Sydney Law Review* 577.

Keay, A., ‘Stakeholder Theory in Corporate Law: Has It Got What It Takes?’ [2010] 3 (9) *Rich. J. Global L. & Bus*. 249.

Keay, A., 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *Modern Law Review* 663.

Letza, S., *et al*, 'Shareholding versus Stakeholding: A Critical Review of Corporate Governance' (2004) 12 *Corporate Governance: An Int'l Rev.* 242.

Lesser, B., 'When Government Fails, Will the Market Do Better? The Privatization/Market Liberalization Movement in Developing Countries' (1991) 12 *Canadian Journals of Development Studies* 276.

MacLeod, S., '*Maria Aguinda* v. *Texaco Inc.*: Defining the Limits of Liability for Human Rights Violations Resulting from Environmental Degradation' [1999] 4(2) *Contemporary Issues in Law* 189.

Marks, C. and Miller, P. S., 'Plato, The Prince and Corporate Virtue: Philosophical Approaches to Corporate Social Responsibility' [2010] 45 (1) *University of San Francisco Law Review* 1.

Marks, C. and Rapoport, N. B., 'The Corporate Lawyer's Role in a Contemporary Democracy' (2009) 77 *Fordham Law Review* 1269.

McDonald, D., 'Harvard Business School and the Propagation of Immoral Profit Strategies' *Newsweek* 14th April, 2017 at 1 to 13.

McInerney, T., 'Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2007) 40 *Cornell Int'l L.J.* 171.

Meehan, J., *et al*, 'Corporate Social Responsibility: the 3C-SR Model' (2006) 33 *International Journal of Social Economics* 386.

Miller, R. T., 'The Coasean Dissolution of Corporate Social Responsibility' [2014] 17 (2) *Chapman Law Review* 1.

Mitkidis, K. P., 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirement' (2014) *Nordic Journal of Commercial Law* 1.

Nelson II, W. A., 'Post-Citizens United: Using Shareholder Derivative Claims of Corporate Waste to Challenge Corporate Independent Political Expenditures' [2012] (13) *Nevada Law Journal* 134.

Nwete, B., 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?' [2007] 8 (4) *German Law Journal* 311.

Okon, E., ‘Corporate Social Responsibility by Companies: The Liberal Perspective’ (1997) *Nigerian Current Law Review* 193.

Parkinson, J. E., ‘Models of the Company and the Employment Relationship’ [2003] 41 (3) *British Journal of Industrial Relations* 481.

Pennington, R. R., ‘Terminal Compensation for Employees of Companies in Liquidation’ (1962) 25 *Modern Law Review* 715.

Post, J. E., *et al*, ‘Managing the Extended Enterprise: The New Stakeholder View’ [2002] 45 (1) *California Management Review* 6.

Raimi, L., *et al*, ‘How Adequate and Efficient are Regulations on Corporate Social Responsibility and Social Reporting? Evidence from the Nigeria Telecommunication Industry’ [2014] 4 (6) *Asian Journal of Empirical Research* 315.

Ratner, D., ‘The Government of Business Corporations: Critical Reflections on the Rule of “One Share, One Vote”’ (1970) 56 *Cornell. Law Review* I.

Ribstein, L., ‘Accountability and Responsibility in Corporate Governance’ (2006) 81 *Notre Dame Law Review* 1431.

Rock, E. B., and Wachter, M. L., ‘Islands of Conscious Power: Law, Norms, and Self-Governing Corporation’ (2001) 149 *U. PA. L. Rev.* 1619.

Roe, M. J., ‘The Shareholder Wealth Maximization Norm and Industrial Organisation’ (2001) 149 *U. PA. L. REV*. 2063.

Ruggie, J., ‘Reconstituting the Global Public Domain – Issues, Actors, and Practices’ [2004] 10 (4) *European Journal of International Relations* 499.

Sacco, R., ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 *American Journal of Comparative Law* 10.

Schwartz, H., ‘Governmentally Appointed Directors in a Private Corporation: The Communications Satellite Act of 1962’ (1965) 79 *Harvard Law Review* 350.

Schwarz, H., and Carroll, A. B., ‘Corporate Social Responsibility: A three – Domain Approach’ (2003) 13 *Business Ethics Quarterly* 503.

Smith, I.O., ‘Corporate Social Responsibility towards a Healthier Environment’ [2000] 1 (4) MPJFIL 22.

Sneirson, J. F., ‘Shareholder Primacy and Corporate Compliance’ (2015) 26 *Fordham Environmental Law Journal* 1.

Spamann, H., ‘Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law’ [2010] 2009 (6) *Brigham Young University Law Review* 1813

Stevelman, F., ‘Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie’ (2011) 9 *Santa Clara J. Int'l L.* 101.

Thomsen, S., ‘The Convergence of Corporate Governance Systems and European and Anglo-American Standards’ (2003) 4 *EUR. BUS. ORG. L. REV.* 31

Williams, O. F., ‘The UN Global Compact: The Challenge and the Promise’ [2004] 4 (14) *Business Ethics Quarterly* 755.

Yu, X., ‘Impacts of Corporate Code of Conduct on Labor Standards: A Case Study of Reebok’s Athletic Footwear Supplier Factory in China’ (2008) 81 *Journal of Business Ethics* 513.

MANUALS

2015 United States Sentencing Commission Guidelines Manual.

INTERNET SOURCES

Armour, J. *et al*, Shareholder Primacy and The Trajectory of UK Corporate Governance, University of Cambridge Research Paper 266/ 2003 available at http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp266.pdf last accessed 3rd November, 2016.

.

MacLeod, S., ‘Towards Normative Transformation: Re-conceptualising Business and Human Rights’, (Unpublished) PhD Thesis submitted to the School of Law, University of Glasgow, 2012 available online at http://theses.gla.ac.uk/3714/1/2012macleodphd.pdf last accessed 3rd November, 2016.

McBarnet, D., Corporate Social Responsibility beyond Law, through Law, for Law, *Edinburgh School of Law Research Paper 03/* 2009 available online at http://ssrn.com/abstract=1369305 last accessed 22nd November, 2016.

Okoye, A. C., 'Re-defining Corporate Social Responsibility as a Legitimizing Force for Corporate Power: To what extent can law and a law-jobs perspective contribute to Corporate Social Responsibility?' (Unpublished) PhD Thesis submitted to the School of Law, University of Hull, 2012 available at https://hydra.hull.ac.uk/resources/hull:7077 last accessed 3rd November, 2016.

Williams, C. and Conley, J., 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' University of Carolina Legal Studies Research Paper 04-09 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632347 last accessed 3rd November, 2016.

OFFICIAL DOCUMENTS

EU, Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, Directive 2014/95/EU.

EU, Council Directive, 2003/51/EC, 18th June, 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003.

EU, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Region: *A Renewed European Union Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 Final 6.

ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session, Geneva, November 1977/,/Text/, /Tripartite/Code of Conduct/, /Multinational Enterprise/, /Social Policy/. 03.04.2 ISBN 92-2-111631-X.

OECD, Declaration on International Investment and Multinational Enterprises (1979), Cmnd. 6525.

UN, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, Text of Speech by Kofi Annan, 1 February 1999, UN Press Release SG/SM/6881.

UN, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA/Res/2625/(XXV).

UN, World Commission on Environment and Development, *Our Common Future*, Report of the World Commission on Environment and Development, 1987, annexed to United Nations General Assembly, document A/42/427.

UN, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, (2003) UN Doc. E/CN.4/Sub.2/2003/12 Rev.

UN, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/ 38/Rev.2 (2003); Sub-Commission Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11, 52, 2003.