

Corporate Social Responsibility in the Niger Delta: Past, Present and Future Challenges

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ABSTRACT

Multinational oil companies adopted corporate social responsibility as a means of addressing the challenges of their relationship with the Niger Delta communities, which had been turbulent for several decades as a result of the ecological devastation of the Niger Delta region. This article analyses the challenges of implementing corporate social responsibility in the Niger Delta, from the inception of the Nigerian oil industry to the present day. Using the experiences of multinational oil companies in the Niger Delta as a case study, the article explores the extent to which multinational oil companies operating in developing countries are increasingly assuming roles that are not traditional corporate roles, to compensate for the bad governance and poor regulatory standards in these countries. The article also provides recommendations for what the Nigerian government can do to develop corporate social responsibility and make it more effective.

Keywords

Corporate social responsibility, Niger Delta, environmental devastation, human rights, community participation

INTRODUCTION

The Niger Delta describes the lowlands in the southern part of Nigeria.¹ The 2006 census recorded the region's population at 30 million.² The significance of the Niger Delta region to the Nigerian economy lies in the fact that Nigeria had an estimated 37 billion barrels of proven oil reserves as at 2017,³ the majority of which are in the Niger River Delta region and offshore in the

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1 KS Ebeku "Oil and the Niger Delta people in international law: Resource rights, environmental and equity issues" (2006) 1 *Oil and Gas Energy Law Intelligence* 1 at 25.
2 *Report of the Technical Committee on the Niger Delta* (2008, Government of Nigeria) at 102.
3 "As Nigeria oil reserves rise to 37 billion barrels ..." (1 January 2017) *This Day* (Nigeria), available at: <<https://www.thisdaylive.com/index.php/2017/01/01/as-nigerias-oil-reserves-rise-to-37-billion-barrels/>> (last accessed 15 February 2022).

Bight of Benin, the Gulf of Guinea and the Bight of Bonny.⁴ Since the 1970s, crude oil exports from the Niger Delta region have accounted for the bulk of Nigeria's federal government revenue.⁵ Oil exploitation in the Niger Delta region has brought enormous revenue to Nigeria, but it has also brought environmental hazards. A 2006 study reports that:

"An estimated 9 million - 13 million barrels (1.5 million tons) of oil has spilled in the Niger Delta ecosystem over the past 50 years, representing about 50 times the estimated volume spilled in the Exxon Valdez Oil Spill in Alaska in 1989. This amount is equivalent to about one 'Exxon Valdez' spill in the Niger Delta each year."⁶

This report is supported by the UN statement that "6,817 spills were recorded by the Nigerian Department of Petroleum Resources (DPR) between 1976 and 2001 with a loss of approximately 3 million barrels of oil".⁷ This could be regarded as a significant understatement, as the DPR (the regulatory arm of the Nigerian Ministry of Petroleum and the main oil industry regulator) is widely perceived as inefficient with respect to its regulatory function.⁸ The massive ecological devastation in the region has resulted in a series of conflicts between Niger Delta communities, the government and the multinational oil companies (MNOCs).

In recent years, MNOCs have increased their corporate social responsibility (CSR) activities in the region, partly in conformity with the growing international business culture of corporate responsibility and partly as a means of pacifying local communities. There is no universally accepted definition of the concept of CSR.⁹ This article adopts the widely accepted definition of

4 "Nigeria" (25 June 2020, US Energy Information Administration), available at: <<https://www.eia.gov/beta/international/analysis.cfm?iso=NGA>> (last accessed 15 February 2022).

5 From 1975 to 2010, oil accounted for between 70% and 80% of Nigeria's total government revenue: CI Obi "Oil extraction, dispossession, resistance, and conflict in Nigeria's oil rich Niger Delta" (2010) 30 *Canadian Journal of Developmental Studies* 219 at 223. In 2014, crude oil accounted for 95% of Nigeria's total exports and 58% of total government revenue: "Nigeria", *ibid.*

6 "Niger Delta natural resources damage assessment and restoration project: Phase I scoping report" (May 2006, Federal Ministry of Environment, Nigerian Conservation Foundation, WWF UK and International Union for Conservation of Nature) at 1, available at: <http://www.iucn.org/sites/dev/files/import/downloads/niger_delta_natural_resource_damage_assessment_and_restoration_project_recommendation.doc> (last accessed 15 February 2022).

7 *Niger Delta Human Development Report* (2006, UN Development Programme) at 76.

8 The DPR has been criticized as comprising personnel who lack technical skills and resources. DPR personnel often had to rely on MNOCs for logistic support in planning visits to pollution sites: *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (2009, Amnesty International) at 12.

9 It is beyond the scope of this article to analyse the various CSR definitions. For such an analysis, see A Okoye "Theorising corporate social responsibility as an essentially contested concept: Is a definition necessary?" (2009) 89/4 *Journal of Business Ethics* 613. For

CSR provided by the European Commission (EC),¹⁰ which defines CSR as a “concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis”.¹¹ The EC’s definition of CSR is particularly applicable to the Niger Delta because the EC states further that CSR is “intrinsically linked” to sustainable development¹² because “it promotes good company practices that complement public effort for sustainable development”.¹³ This is underscored by the fact that African scholars argue that CSR in Africa should focus on four areas: the environment; social and community development; employment and labour; and human rights.¹⁴

This article analyses the challenges of implementing CSR in the Niger Delta region and argues that the MNOCs’ CSR efforts have been significantly hampered by the absence of an adequate legal and regulatory framework to guide the relationship between MNOCs and oil producing communities, particularly concerning CSR.

COMPLICITY OF MNOCS IN THE ABUSE OF HUMAN RIGHTS

The current emphasis on CSR arises partly from alleged cases of complicity by MNOCs in human rights abuses in host states. Since the 1990s, there have been widespread concerns about the alleged complicity of MNOCs in acts of human rights violations and the destruction of the environment in which oil production takes place.¹⁵ Concern about MNOCs and state complicity arises because “the brunt of this complicity is unfortunately, borne by the hapless communities living in the corridors of resources, whose livelihood and rights are mortgaged in the name of oil and mineral

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the purposes of this article, Hamidu et al’s features of a good definition of CSR will suffice. They argue that a good definition of CSR must highlight the fact that it is voluntary, aligns economic profit-making responsibilities with social responsibilities towards society and is one of the company’s important values: AA Hamidu, HM Haron and A Amran “Corporate social responsibility: A review on definitions, core characteristics and theoretical perspectives” (2015) 6/4 *Mediterranean Journal of Social Sciences* 83 at 85.

10 The EC’s definition of CSR encapsulates the features identified by Hamidu et al discussed in “Corporate social responsibility”, *ibid*.

11 “Communication from the Commission concerning corporate social responsibility: A business contribution to sustainable development” (2002, EC) COM at 3.

12 *Ibid*.

13 *Id* at 8.

14 See generally, TK Cheruiyot and P Osando “Corporate social responsibility in Africa: Context, paradoxes, stakeholder orientations, contestation and reflections” in A Stachowicz-Stanusch (ed) *Corporate Social Performance in the Age of Irresponsibility: Cross National Perspective* (2016, Information Age Publishers) 89; R Rampersad and C Skinner “Examining the practice of corporate social responsibility (CSR) in sub-Saharan Africa” (2014) 12/1 *Corporate Ownership & Control* 723.

15 AFM Maniruzzaman “Global business and human rights” (2006) 67 *Amicus Curiae Journal* 11.

extraction”.¹⁶ Several categories of corporate complicity have been recognized internationally. Complicity may arise in situations where a company benefits from human rights abuses and also in situations where a company directly contributes to human rights abuses.¹⁷ Generally, a company is said to be complicit in human rights abuse when, as a result of its knowledge, acts or omission, it contributes to human rights violations or participates in, assists or encourages human rights violations.¹⁸

Concern about MNOCs’ complicity inspired the UN Committee on Economic, Social and Cultural Rights to produce a Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises. This commentary states:

“Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No 169). They shall particularly respect the rights of indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property. They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects.”¹⁹

This soft law commentary is reinforced by arguments by institutions such as the World Bank that, in addition to obtaining a legal licence to operate from host governments, MNOCs also need a social licence from the communities in which they operate.²⁰

The concept of a “social licence” describes the MNOCs’ obligation towards communities in whose territories natural resources are found.²¹ Although

16 C Ochieze “Corporate complicity in the extractive industry: Where does legal liability stand?” (2007) 5/2 *Oil and Gas Energy Law Intelligence* 1 at 8.

17 “Guiding principles on business and human rights” (2011, UN) at 18–19.

18 *Corporate Complicity & Legal Accountability: Volume 1 Facing the Facts and Charting a Legal Path* (report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes), available at: <<https://www.icj.org/report-of-the-icj-expert-legal-panel-on-corporate-complicity-in-international-crimes/>> (last accessed 15 February 2022). It is beyond the scope of this work to analyse the various forms of complicity.

19 UN Economic and Social Council E/CN.4/Sub.2/2003/38/Rev.2, para 10(c). These norms have been superseded by the UN Guiding Principles on Business and Human Rights 2011. However, they are useful in tracing the history of the international response to business complicity in human rights violations.

20 See generally, R Goodland “Free, prior, informed consent and the World Bank Group” (2004) 4/2 *Sustainable Development Law and Policy* 66.

21 Scholars have described social licences as informal contracts between companies and the communities in which they operate, aimed at shaping the communities’ perception of the acceptability of the companies and their local operations: RG Boutilier and I

no international statute provides for this social licence, it is becoming universally accepted that companies need a social licence. The activities involved in obtaining this social licence have been described by the phrase “corporate social responsibility”.²²

THE CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY

There are many conceptual debates and complexities associated with CSR. Mindful of the need to avoid oversimplifying complex realities, this section provides an abridged analysis of some of the theories that have evolved with the concept. The most prominent theory on the concept of CSR is Carroll's Pyramid on CSR. The uniqueness of Carroll's Pyramid lies in his critical examination of what he described as the key components of CSR. According to Carroll, “four kinds of social responsibilities constitute total CSR: economic, legal, ethical, and philanthropic”.²³

“Economic responsibility” implies that businesses should be profitable and sustainable.²⁴ Carroll argued that economic responsibilities are the first and most important component of CSR because all other business responsibilities and philanthropic activities are predicated upon the company's economic responsibility.²⁵ In essence, only profitable companies can apply for social licences. Carroll's Pyramid has been widely accepted as applicable to the USA.²⁶ However, others argue that the pyramid is also applicable to other jurisdictions, subject to some variations.²⁷ In the African context, there is a dearth of comparative empirical studies on the four categories of CSR identified by Carroll. Nevertheless, Visser has argued that economic responsibilities are also the most significant in Africa.²⁸ Research in sub-Saharan Africa verifies this assertion.²⁹ Africa's prioritization of the economic responsibility

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Thomson “Modelling and measuring the social license to operate: Fruits of a dialogue between theory and practice”, available at: <http://sociallicense.com/publications/Modelling_and_Measuring_the_SLO.pdf> (last accessed 15 February 2022).

- 22 The term CSR is believed to have been coined by HR Bowen in 1953: “What's wrong with corporate social responsibility” (2006, Corporate Watch) at 6, available at: <<https://corporatewatch.org/wp-content/uploads/2017/09/CSRreport.pdf>> (last accessed 1 March 2022).
- 23 AB Carroll “The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders” (1991) *Business Horizons* 34 at 37.
- 24 Ibid.
- 25 Ibid.
- 26 NA Nalband and SA Kelabi “Redesigning Carroll's CSR pyramid model” (2014) 2/3 *Journal of Advanced Management Sciences* 236.
- 27 W Visser “Revisiting Carroll's CSR pyramid: An African perspective” in ER Pedersen and M Hünich (eds) *Corporate Citizenship in a Development Perspective* (2005, Copenhagen Business School Press) 29 at 30.
- 28 Ibid.
- 29 See generally, Y Omorogbe “The legal framework for public participation in decision-making on mining and energy development in Nigeria: Giving voices to the voiceless”

component of CSR is by no means fortuitous. Apart from suffering from a shortage of direct foreign investment, many African countries suffer from fluctuating trade, a high unemployment rate, poor balance of trade, high rates of inflation, increasing food prices and widespread poverty.³⁰ Economic responsibilities in the USA are focused on profitability and shareholder returns. Economic responsibilities in Africa are construed in terms of the economic impact of businesses on the public sector and include businesses' direct and indirect economic contributions to the economy of the state, such as: economic returns to the government; creation of employment for skilled and unskilled labour; stimulation of the national economy through partnership with local firms; technology transfer from international corporations to local firms; and investment in staff development. This is particularly the case for those African states whose economies are primarily dependent on the exploitation and exportation of mineral resources.

Carroll identifies "legal responsibility" as being next to economic responsibility in terms of significance. Legal responsibility implies that companies must comply with the laws and regulations of the society in which they function. According to Carroll, "legal responsibilities reflect a view of 'codified ethics' in the sense that they embody basic notions of fair operations as established by our lawmakers".³¹ In essence, Carroll was arguing that obtaining a social licence in no way diminishes the duty to comply with a legal licence. Visser, on the other hand, argues that legal responsibilities are in third place (after economic responsibilities and philanthropic responsibilities).³² He justified this position with the argument that, in Africa, legal responsibilities have a lower priority than in developed countries because businesses in Africa face less pressure to conduct themselves well.³³ Businesses in Africa face less pressure to conduct themselves well, because, in some cases, African states are so heavily dependent on MNOCs for technology and capital that they scale down their legislation as a means of attracting foreign investors into their oil industries.³⁴

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in DN Zillman, AR Lucas and G(R) Pring (eds) *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (2002, Oxford University Press) 549.

30 "Beyond the financial crisis: What next for economic growth and poverty reduction in developing countries" (Panos media brief, 2010) at 3, available at: <https://assets.publishing.service.gov.uk/media/57a08b27e5274a27b20009c3/economic_growth_layout_final_web_loojZV2h.pdf> (last accessed 20 February 2022).

31 Carroll "The pyramid", above at note 23 at 38.

32 Visser "Revisiting Carroll's", above at note 27 at 34.

33 Ibid.

34 Examples of this abound in Nigeria. Omoregbe, for instance, asserts that the Land Use Act 1978 was enacted by the Nigerian government on the insistence of MNOCs to enable them to have unlimited access to community lands for their oil operations: Omoregbe "The legal framework", above at note 29 at 549–50. For an analysis of how Nigeria compromises environmental regulation to encourage investments by MNOCs, see NE

Next, Carroll identified “ethical responsibilities” as third in terms of significance. Ethical responsibilities are defined as following activities and practices that constitute societies’ expectations of businesses that are not codified in law.³⁵ When ethical issues cover subjects such as the environment or human rights, they provide potential subject matter for future legislation.³⁶ Visser argues that, in Africa, ethical responsibilities have the lowest significance in Carroll’s Pyramid.³⁷ He stated that, although Africa has been influenced by the global trend towards improved governance, there is a gap between the generally high ethical stance taken by a minority of industry players and the widespread reality of corruption that remains entrenched in many countries on the continent.³⁸ However, one aspect of ethical responsibility that is of vital importance in Africa is the recognition of communities’ rights to consultation and participation in the MNOCs’ decision making processes. This is because making communities part of the MNOCs’ decision-making process would reduce communities’ allegations of MNOCs’ complicity in crimes against communities.

Lastly, Carroll highlights “philanthropic responsibilities” as being the least significant in terms of the four components of CSR. Philanthropic responsibility means that businesses engage in charitable acts of human welfare and goodwill.³⁹ According to Carroll, philanthropic responsibilities are distinguishable from ethical responsibilities by the fact that they are humanitarian gestures that are not considered moral obligations to society.⁴⁰ Visser argues that, in Africa, philanthropic responsibilities rank second in terms of significance, next only to economic responsibilities.⁴¹ Philanthropic responsibilities are highly prioritized in the African context for a number of reasons. First, owing to the economic challenges in African states and the mismanagement of resources, many rural communities in resource-rich African states, such as the Democratic Republic of Congo, Nigeria and Sierra Leone, rely heavily on corporate philanthropy for the supply of basic needs like potable water, and necessary infrastructure such as tarred roads.⁴² In addition, MNOCs rely on

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Ojukwu-Ogba “Legal and regulatory instrument on environmental pollution in Nigeria: Much talk, less teeth” (2006) 8/9 *International Energy Law and Taxation Review* 208 at 215–17. For an analysis of how gas-flaring prohibition laws have been repeatedly compromised, mostly due to the government’s lack of political will but also in accession to the demands of MNOCs, see PS Tamuno “A sequential analysis of Nigeria’s attempts to end gas-flaring” (2018) *International Energy Law Review* 21.

35 Carroll “The pyramid”, above at note 23 at 38.

36 *Id* at 39.

37 Visser “Revisiting Carroll’s”, above at note 27 at 34.

38 *Ibid*.

39 Carroll “The pyramid”, above at note 23 at 38.

40 *Id* at 39.

41 Visser “Revisiting Carroll’s”, above at note 27 at 33.

42 T Olaniyi, J Azeez and ST Abdusalam “Impact of corporate social responsibility on firms’ profitability: Evidence from Nigeria and Sierra Leone” (2015) 16/2 *Amity Business Review* 1.

philanthropic responsibility because many communities in resource-rich regions in Africa have in recent decades protested their exclusion from the process and proceeds of oil exploration and production in their territories.⁴³ Philanthropy is therefore relied on to pacify these communities.⁴⁴

THE RELATIONSHIP BETWEEN MNOCs AND NIGERIA

Like most developing states, Nigeria relies on MNOCs from developed countries for capital and technology in oil exploitation. Each MNOC was brought into Nigeria by one of the oil exploitation regimes, such as a production sharing or joint venture agreement. These regimes are generally considered to be contracts or to contain the essential elements of a contract and therefore define the parties to the oil exploitation agreements. Usually, the parties are defined as the MNOC and the federal government of Nigeria (through the Nigerian National Petroleum Corporation). The MNOCs therefore correctly perceived themselves as owing obligations only to the government of Nigeria. The Niger Delta people (NDP) were not considered to be stakeholders in the oil industry.⁴⁵ The MNOCs therefore viewed protests by the NDP against their exclusion from the oil industry as unlawful interference with the oil exploitation process, which had to be quelled to protect their massive investments in Nigeria.⁴⁶ This has been a major source of conflict in the region, as MNOCs' reliance on Nigerian security forces to quell these protests resulted in the death of thousands of NDP.⁴⁷ This reliance by MNOCs on government security personnel was the basis of the notorious Ogoni⁴⁸ crisis of the 1990s.

43 Id at 7.

44 Ibid.

45 Ownership of petroleum resources is vested in the federal government of Nigeria (Constitution of Nigeria 1999, sec 44(3) and Petroleum Act 1969, sec 1). Oil exploration adversely affects the NDP's use and enjoyment of their lands. The system of compensation prescribed under Nigerian law is inadequate. Sec 43 of the constitution guarantees the right to own immovable property in Nigeria, while sec 44 guarantees that land shall only be compulsorily acquired under the provisions of a statute that guarantees prompt payment of compensation. Sec 44(2)(M) provides that compensation shall be paid for damage to economic trees, crops, buildings etc. The Land Use Act 1978 and the Petroleum Act 1969, first sched, para 37 provide that this compensation shall only be paid for surface interests.

46 In fairness to the MNOCs, the oil industry in Nigeria has had a turbulent history. In the first decade since the commercial discovery of crude oil, a series of ethnic conflicts in Nigeria degenerated into a civil war that resulted in the destruction of the oil infrastructure existing at the time. Accounts of the destruction of oil facilities during the war can be found in: *Nigeria: Petroleum*, above at note 8 at 16; and KS Wiwa *On a Darkling Plain: An Account of the Nigerian Civil War* (1989, Saros International) at 137.

47 JG Frynas "The oil industry in Nigeria: Conflict between oil companies and local people" in JG Frynas and S Pegg (eds) *Transnational Corporations and Human Rights* (2003, Palgrave Macmillan) 99 at 104.

48 The Ogoni are an agrarian ethnic group in the Niger Delta.

Shell⁴⁹ had been the sole operator in Ogoni since 1959 when oil was discovered in the area. It appears that Shell's operations had a negative impact on the ecology of the area from the outset for, as early as 1970, Ogoni leaders sent a memorandum to Shell and the military government of Rivers State complaining about the adverse effect of oil spills on their farmlands.⁵⁰ Neither Shell nor the military government addressed this or numerous other complaints, and judicial actions by the Ogoni in the Nigerian courts were mostly unsuccessful.⁵¹ Under the leadership of the environmentalist Ken Saro Wiwa, the Ogoni organized several environmental protests, which interfered with Shell's operations in Ogoni.⁵² In a bid to restore Shell's operations in the region, the Nigerian government sent the army into Ogoni territory; this led to the occupation of Ogoni by the army and culminated in the subsequent trial and execution of Ken Saro Wiwa.⁵³

This challenge with communities in whose territories oil is produced is not peculiar to the Niger Delta. There have been frequent allegations by communities in several developing countries that MNOCs, either through deliberate acts or recklessness, violated their human rights and / or devastated their environment. Such allegations abound, as exemplified by the complaints against Exxon Mobil Corporation in Indonesia, Chevron Texaco in Ecuador, Unicoal in Myanmar and Occidental Petroleum Corporation in Columbia, for example.⁵⁴ These allegations have often claimed that MNOCs are responsible for impacts on humans and the environment that fall short of international human rights and environmental standards.⁵⁵

With very limited domestic protection and recognition in their states that are heavily dependent on MNOCs for capital and technology, the affected peoples commonly turn to international law through global agencies (such as the UN) for assistance.⁵⁶ The problem with international law is that the obligation

49 "Shell" is used in this article to describe the Shell Petroleum Development Company of Nigeria. This is a subsidiary of Shell International.

50 KS Wiwa *Genocide in Nigeria: The Ogoni Tragedy* (1988, Saros International) at 85; LS Pyagbara "The Ogoni of Nigeria: Oil and the peoples' struggle" in A Whitmore (ed) *Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries* (2012, International Work Group for Indigenous Affairs / Tebtebba Foundation) 124.

51 For an analysis of judicial actions on the Niger Delta, see PS Tamuno "Negligence versus strict liability: The fight against environmental degradation in the Niger Delta" (2011) 6 *Oil and Gas Energy Law Intelligence* 1.

52 "The Ogoni crisis: A case study of military repression in southeastern Nigeria" (1995) 7/5 *Human Rights Watch* at 8–11, available at: <<https://www.hrw.org/legacy/reports/1995/Nigeria.htm>> (last accessed 15 February 2022).

53 For an analysis of the Ogoni crisis, see A Rowell, J Marriot and L Stockman *The Next Gulf: London Washington and the Oil Conflict in Nigeria* (2005, Constables and Robinsons) at 1.

54 AFM Maniruzzaman "Global business", above at note 15 at 11–12.

55 Ibid.

56 For the NDP, the inability to find remedy in the domestic courts was as a result of the challenges encountered in the Torts Law Grievance Redress Mechanism. It is beyond the scope of this article to provide an analysis of these challenges; for such an analysis,

to protect human rights is widely believed to rest with the state.⁵⁷ International law has only required businesses to protect human rights through soft law instruments that were adopted in the last two decades and are, thus, non-binding.⁵⁸ This exclusion of companies from the responsibility to protect human rights indirectly mirrored Milton Friedman's assertion that the "social responsibility of business is to increase its profit".⁵⁹ However, the extension to business entities of the "soft" law responsibility to protect human rights was necessitated by the fact that developing countries (particularly in Africa) often did not have the skill, experience and resources to counter the influence, resources and drive of MNOCs representing the interests of investors from several of the most developed and powerful states, usually including the former colonizers.

CSR IN THE NIGER DELTA: THE PAST AND THE PRESENT

The MNOCs' approach to community relations has gone through several phases in Nigeria. These phases have been shaped by a combination of factors, including the system of government in Nigeria and the MNOCs' experiences in the Niger Delta. These phases can be categorized into past and present.

The past

For the purposes of this article, the past represents the period from the inception of the Nigerian oil industry until 1999, when the present political dispensation in Nigeria began.⁶⁰ In this era, there were two phases of the community-MNOC relationship: community recognition and corporate philanthropy.⁶¹

The phase of community recognition

This was a brief era at the start of the Nigerian oil industry. In the early 1960s, MNOCs that had obtained mining rights from the government approached

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see PS Tamuno "The tort of negligence and environmental justice in the Niger Delta" (2017) 1 *Oil and Gas Energy Law Intelligence* 1.

57 A Cassese *International Law* (2001, Oxford University Press) at 3; C Warbrick "States and recognition in international law" in MD Evans *International Law* (2006, Oxford University Press) 217.

58 See "The Ogoni crisis", above at note 52.

59 M Friedman "The social responsibility of business is to increase its profit" (13 September 1970) *New York Times Magazine*.

60 The Nigerian oil industry commenced in 1956 when commercial discovery of oil was made in Oloibiri in the Niger Delta: EE Osaghae "Managing multiple minority problems in a divided society: The Nigerian experience" (1988) 36/1 *Journal of Modern African Studies* 1 at 23; Nigeria was mostly under a military regime from independence in 1960 until the democratic elections in 1999.

61 The phrase "corporate philanthropy" was derived from U Idemudia "Corporate partnership and community development in the Nigerian oil industry: Strength and limitations" (2007, UN Research Institute for Social Development) at 8–9.

communities for access to community land for exploration purposes.⁶² This gave communities a sense of participation in oil operations, as they received compensation for granting access and for damage to their lands.⁶³ This created a relationship of mutual respect and confidence between the MNOCs and these communities.⁶⁴ This era coincided with the early brief phase of democratic government in Nigeria in the first five years of independence. This was not necessarily a manifestation of Carroll's ethical responsibility, as the customary land tenure prevalent at that time created an obligation for communities to be consulted before their land was accessed. The phase of community recognition ended with the advent of military regimes in Nigeria in 1966. These military regimes enacted the Petroleum Act of 1969 and the Land Use Act of 1978, which removed MNOCs' obligation to consult the NDP for access to their lands.⁶⁵ Frynas's summary is apt: "the relationship between oil companies and local communities was cooperative in the 1960s".⁶⁶ However, "compulsory land acquisition and subsequent inadequate compensation payments could be responsible for destroying this peaceful relationship between companies and communities".⁶⁷

The phase of corporate philanthropy

This phase covers the period of mostly military rule in Nigeria from 1966 to 1999. This phase witnessed increased reliance by the MNOCs on Nigeria's military government for three reasons. First, the Nigerian Constitution's centralization of the control of crude oil resources in the federal government and the federal government's participation in joint ventures with the MNOCs ensured closer ties between the military governments and the MNOCs, and isolated the Niger Delta communities from the oil exploitation process.⁶⁸ Secondly, the military regimes' ability to enact oil regulations without them having to pass through the debate processes, which characterized Nigeria's complex and protracted democratic parliamentary process, endeared these military regimes to the MNOCs. Finally, military regimes were more successful at creating political stability in Nigeria and peace in the Niger Delta as a result of their authoritarian approach. This phase was characterized by the domination of all facets of Nigerian society by military decrees. Military rule was

62 KSA Ebeku "Oil and the Niger Delta people: The injustice of the Land Use Act" (2004) 9 *Centre for Energy Petroleum Mineral Law and Policy* 7.

63 Ibid.

64 Ibid.

65 Petroleum Act 1969, sec 1 vested the entire ownership and control of petroleum in the federal government. Land Use Act 1978, secs 1 and 2 vested ownership of all Nigerian lands in the government and gave private and community land owners a right of possession for 99 years.

66 JG Frynas "Corporate and state responses to anti-oil protest in the Niger Delta" (2001) 100 *African Affairs* 27 at 31.

67 Ibid.

68 Nigerian Constitution, sec 44(3) and Petroleum Act, sec 1 vested ownership of petroleum in the federal government: Frynas, id at 32.

so entrenched that, in the 1984 case of *Wang Ching Yao and Others v Chief of Army Staff, Supreme Head Quarters, Lagos*,⁶⁹ an application was brought to the Federal High Court of Nigeria to order the release of four Taiwanese nationals who had been detained by the Nigerian military government for weeks without trial. In refusing to grant the application, Ademola J stated that, “[m]y view is that the combined effect of Decree Number 2⁷⁰ and Decree Number 13⁷¹ of 1984 is that on the question of civil liberties, the law courts of Nigeria must as for now blow muted trumpets”.⁷² The courts in this era interpreted the rules of tort strictly in litigation between the NDP and MNOCs.⁷³ This was so even in cases that did not directly involve the Nigerian military government. This is illustrated by the case of *Allar Irou v Shell BP Development Company Limited*.⁷⁴ The complainant brought this action as a representative of his community, applying for compensation for existing pollution and an injunction to restrain the defendant from polluting the community’s lands, creeks and fish ponds further. The court refused to grant the injunction on the grounds that, if granted, the injunction could stop the defendant’s trade and render many unemployed and even affect the country’s revenue, since oil was Nigeria’s main income generator. The court therefore only granted the compensation. In this era, the relationship between the Niger Delta communities and MNOCs was hostile, as the MNOCs were perceived as being in partnership with the military dictators.⁷⁵

A key component of CSR is the willingness of an MNOC to engage in ethical and philanthropic responsibilities by creating opportunities for community participation in the process and proceeds of oil production. Opportunity for community participation was almost completely absent in this era.⁷⁶ In 1996, an action was filed on behalf of the Ogoni at the African Commission on Human and Peoples’ Rights (the African Commission). This was the case of *Social Economic Rights Action Centre (SERAC) v Nigeria*.⁷⁷ In this action,

69 Suit no CA/L/25/85.

70 This decree empowered the military government to detain anyone who was a threat to security for a renewable period of three months without trial.

71 This decree exempted the court from requiring jurisdiction to examine the validity of any action taken by the military government.

72 Suit no CA/L/25/85, para 14.

73 Tamuno “Negligence versus strict liability”, above at note 51.

74 Suit no W/89/71 (unreported), High Court, Warri, 26 November 1973.

75 Wiwa described the ecological devastation of the Niger Delta as “genocide” on the NDP, perpetrated by the Nigerian military government in partnership with the MNOCs: *Wiwa Genocide in Nigeria*, above at note 50 at 103. See also Rowell, Marriot and Stockman *The Next Gulf*, above at note 53 at 38.

76 The Oil Mineral Producing Areas Development Commission was established in 1993 to provide infrastructure in oil producing communities. This agency has been widely criticized as failing to engender communities’ participation. See S Omotola “From OMPADEC to NDDC: An assessment of state responses” (2007) 54/1 *Africa Today* 73; PS Tamuno “The rights to participation and consultation and the conflict in the Niger Delta” (2015) 13/6 *Oil and Gas Energy Law Intelligence* 1.

77 Comm no 155/96.

SERAC claimed *inter alia* that the uncontrolled exploitation of crude oil in Ogoniland, the consequential degradation of the environment and the use of state security to repress the Ogoni people violated, *inter alia*, the rights of the Ogoni people to life,⁷⁸ a general satisfactory environment⁷⁹ and to dispose of their resources.⁸⁰ SERAC argued that the non-inclusion of the Ogoni in decision-making concerning oil development in their territory should be seen as a violation of the Ogoni's rights to dispose their resources under article 21 of the African Charter on Human and Peoples' Rights.⁸¹ The African Commission upheld this argument, stating "the destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21".⁸²

The MNOCs therefore adopted the strategy of corporate philanthropy as a means of pacifying these communities because, even though community protests in this era were ruthlessly dealt with by the Nigerian army, they often caused delays to the MNOCs' operations; it was therefore in the MNOCs' interest to minimize the protests.⁸³ Corporate philanthropy involved giving "one time gifts" to communities.⁸⁴ Shell led this approach (and probably initiated it) because, in contrast to other MNOCs, most of Shell's operations were onshore and it therefore encountered the communities in its day to day operations.⁸⁵

This corporate philanthropy (akin to Carroll's philanthropic responsibility) involved two strategies. The first witnessed MNOCs building and donating community infrastructure such as school buildings, health centres and pipe-borne water projects.⁸⁶ Idemudia notes that this approach was unsuccessful because the MNOCs were often not backed by the government.⁸⁷ Therefore, many of the school buildings and community health centres built by these MNOCs were neither staffed nor equipped by the Nigerian government and were therefore never used by the Niger Delta communities.⁸⁸ The second approach involved MNOCs giving cash gifts to communities.⁸⁹ Shell states that these cash gifts fuelled inter-community conflict in the

78 African Charter on Human and Peoples' Rights, art 4.

79 *Id.*, art 24.

80 *Id.*, art 21.

81 Comm no 155/96, above at note 77, para 55.

82 *Ibid.*

83 JG Fynas "The false developmental promise of corporate social responsibility: Evidence from multinational oil companies" (2005) 81/3 *International Affairs* 581 at 584–85.

84 Idemudia "Corporate partnership", above at note 61 at 9.

85 *Ibid.*

86 *Id.* at 8–9.

87 *Ibid.*

88 *Ibid.*

89 U Idemudia and U Ite "Corporate-community relations in Nigeria's oil industry: Challenges and imperatives" (2006) 13 *Corporate Social Responsibility and Environmental Management* 194 at 199.

Niger Delta.⁹⁰ Niger Delta communities often resorted to armed confrontation with each other to resolve the issue of who was rightfully entitled to payment when oil wells crossed the boundaries of several communities.⁹¹

However, the biggest challenge with the corporate philanthropy approach is that it did not take cognizance of the sustainable development of the region in a holistic manner. Prior to the oil era, the NDP's livelihood was based on subsistence farming and fishing.⁹² The ecological devastation of the region largely jeopardized this means of livelihood and pushed many inhabitants of oil producing communities further below the poverty line. Rather than address this situation in anticipation of a post-oil era (especially as it would enable members of the affected communities to fend for themselves and improve their economic status), corporate philanthropy focused mainly on temporarily pacifying the NDP, albeit in an inadequate manner.

The present

This era commenced in 1999. It ushered in a new phase of partnership in the relationship between MNOCs and communities. The ineffectiveness of the corporate philanthropy approach inspired MNOCs to adopt partnership. Partnership embraces all processes in which MNOCs create a working relationship with the NDP, primarily for the purpose of improving their standard of living or developing the region. Partnership is a higher form of CSR, because effective partnership operates by recognizing local communities' traditional institutions and consulting these institutions to obtain their input and consent before embarking on any project on their lands.⁹³ In this regard, it may be argued that this partnership is akin to a combination of Carroll's philanthropic and ethical responsibilities.

The MNOCs have adopted several different types of partnership schemes. It is not within the scope of this article to provide detailed analysis of the approach of the various MNOCs to partnership. However, one approach is worth mentioning. This involved funding a non-governmental organization (NGO) for the purpose of partnering with the communities. This was the approach of Statoil, which came to the Niger Delta in 1997 and funded the NGO Pro Natura International (PNI) to partner with the Akassa community in whose territory it operates.⁹⁴ PNI's partnership approach involved four

90 *Shell Petroleum Development Company 2004 People and the Environment* (2003 annual report, Shell Petroleum Development Company), cited in Idemudia "Corporate partnership", above at note 61 at 9.

91 SO Aghalinno "Oil exploitation and the accentuation of intergroup conflicts in the Niger Delta, Nigeria" (2009) 28/3 *Journal of Human Ecology* 153 at 156.

92 R Ako "Resource exploitation and environmental justice: The Nigerian experience" in FN Botchway (ed) *Natural Resource Investment and Africa's Development* (2011, Edward Elgar) 72.

93 Tamuno "The rights to participation", above at note 76 at 1–2.

94 K Mate *Communities, Civil Society Organizations and the Management of Mineral Wealth* (2002, International Institute for Environment and Development and World Business Council for Sustainable Development) at 8.

steps. The first step involved the PNI team living within the communities.⁹⁵ The second involved the PNI team identifying the different interest groups in the community.⁹⁶ The third step involved the PNI team organizing community interest groups into those that participate at the village level and those that participate at the clan level, and planning collaboration between both groups.⁹⁷ The fourth step involved evolving programmes of intervention on the basis of consultation with the interest groups. These programmes were mainly targeted at: poverty alleviation, human resources management, natural resources management and infrastructure development.⁹⁸ The success of this arrangement was documented by Mate in the following words: “[t]he project appears to have generated a new governance culture in the community in which concepts like democracy, responsibility, transparency, accountability and equity have become important. Its success is evidenced by the fact that neighbouring communities have asked to join”.⁹⁹ The merit of this is that it incorporates the traditional institutions through its process of consultation with the communities.

From the late 1990s, Shell changed its approach from corporate philanthropy to community development partnership. This partnership took several forms. The first approach involved signing a memorandum of understanding (MOU) with a community.¹⁰⁰ Shell also adopted direct partnership, in which projects were determined by the communities and implemented by project management committees from the community that had been taken on board by Shell.¹⁰¹ This approach has attained only partial success in the Niger Delta. Shell identified two problems it encountered in its community development partnership: “growing community expectations” and “sustainability of existing intervention”.¹⁰² On the one hand, the problem of “growing expectation” arises because communities tend to substitute Shell for the government and expect Shell to take full responsibility for providing their infrastructural needs.¹⁰³ On the other hand, the problem of “sustainability of existing intervention” arises because government departments do not support the facilities that Shell built.¹⁰⁴ The communities often expected Shell to fund the staffing and maintenance of these projects, whereas Shell in its “business

95 Id at 9.

96 Ibid.

97 Ibid.

98 Ibid.

99 Id at 10.

100 For instance, in 1998 Shell, Mobil and the Nigerian Liquefied Natural Gas Company signed an MOU with the traditional heads of Bonny Kingdom: JG Frynas *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (2000, Lit Verlag) at 52.

101 Idemudia “Corporate partnership”, above at note 61 at 9.

102 Ibid.

103 Ibid.

104 Ibid.

case logic” “considered itself to have finished its assignment on the building of these projects”.¹⁰⁵

THE ROLE OF THE GOVERNMENT IN CSR IN NIGERIA

Carroll examined CSR from the perspective of businesses. However, the government of each state has an important role to play in CSR. Although CSR is widely acknowledged to be a private company initiative, host-state governance structures are indispensable in improving the capacity of CSR to enhance sustainable development.¹⁰⁶ According to Ward, “[b]usinesses face substantial difficulties in finding and maintaining appropriate boundaries for their CSR interventions if there are no government regulations on minimum environmental and social standards”.¹⁰⁷

The Nigerian government did not provide parameters for the partnership between communities and MNOs. No comprehensive policy has been designed to regulate and encourage CSR. MNOs have had to rely on intuition and apply discretion. This has resulted in some communities receiving more than is ordinarily expected from CSR and others receiving far less than is to be reasonably anticipated from their circumstances. It has been aptly observed that “CSR practices of private enterprises cannot provide an effective substitute for good governance”.¹⁰⁸ Therefore, for CSR to be successful in the Niger Delta, the Nigerian government must fulfil its host-state governance roles. Fox and Ward identify four roles a government should play to create an enabling environment for CSR.¹⁰⁹

A mandating role

This involves laying down the minimum standards, for business operations within the legal framework, usually through laws, regulations and penalties for MNOs’ operations.¹¹⁰ In states like India, CSR has been made mandatory through legislation.¹¹¹ This approach creates challenges for MNOs because

105 Ibid.

106 J Sagebie “The corporate social responsibilities of Canadian mining companies in Latin America: A systems perspective.” (2008) 14/3 *Canadian Foreign Policy* 103 at 112; B Horrigan *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Governments Law and Business* (2010, Edward Elgar) at 153.

107 H Ward *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock* (2004, World Bank and International Finance Corporation) at 7, available at: <<http://pubs.iied.org/pdfs/16014IIED.pdf>> (last accessed 15 February 2022).

108 Ibid.

109 T Fox, H Ward and B Howard *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (2002, World Bank) at 3, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf>> (last accessed 15 February 2022).

110 Ibid. Ward *Public Sector Roles*, above at note 107 at 5.

111 For instance, the Companies Act of India 2013, sec 135 provides that any company with a net value of at least INR 500 Crore or at least INR 1,000 Crore in turnover in any financial year is bound to apply 2% of its turnover to CSR. Secs 260(7) and 450 provide that failure

CSR laws vary from country to country, making it difficult for MNOs to devise a uniform universal approach to CSR for all the countries in which they operate.¹¹² Given the fact that CSR-mandating laws are typically local, and CSR principles are global, they work better when regulated by international soft law principles. There are two dominant schools of thought on mandating CSR through the tool of national legislation.

The first school argues that mandating CSR through legislation is wrong from both practical and political perspectives. From a practical perspective, CSR are voluntary in nature and CSR regulations are an attempt to “mandate companies to act voluntarily”.¹¹³ Attempting to enforce laws that require companies to act voluntarily creates challenges.¹¹⁴ From a political angle, critics argue that all mandatory expenditure imposed by a government on companies (irrespective of the nomenclature) is a tax.¹¹⁵ In other words, mandatory CSR constitutes an additional tax burden on a company’s net profit. Critics argue that mandatory CSR is a back door way “to increase corporate taxes without a transparent political debate”.¹¹⁶ Such mandatory contributions exist in Nigeria. For instance, section 14 of the Niger Delta Development Commission (Establishment etc) Act 2000 provides that the Niger Delta Development Commission¹¹⁷ will be funded by, inter alia, 3 per cent of the annual budget of each MNO operating in Nigeria. Similarly, sections 1 and 2 of the Tertiary Education Trust Fund (Establishment etc) Act 2011 provide that 2 per cent of the assessable profits of companies registered in Nigeria shall be charged as an annual tertiary education tax. Such deductions have been criticized as constituting an onerous burden on investors in Nigeria.¹¹⁸

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to comply with any of the provisions of the act (including provisions on CSR) shall attract a fine at the first instance and, subsequently, imprisonment of the directors.

- 112 R Knuutinen “Corporate social responsibility, taxation and aggressive tax planning” (2014) 1 *Nordic Tax Journal* 36 at 39.
- 113 A Karnani “Mandatory CSR in India: A bad proposal” (May 2013) *Stanford Social Innovation Review*, available at: <https://ssir.org/articles/entry/mandatory_csr_in_india_a_bad_proposal> (last accessed 15 February 2022).
- 114 Perhaps in recognition of this challenge, the Indian Companies Act 2013, sec 135 provides further that, if the 2% CSR allocation is not made by a company in a given year, the company must provide an explanation to avoid being penalized. This provision has rendered the mandatory regulation of CSR in India ineffective, as many companies use this loophole to avoid engaging in CSR: “The Companies Act 2013: Road to CSR non-compliance” (20 May 2016) *The Financial Express*, available at: <<https://www.financialexpress.com/opinion/column-the-companies-act-2013-road-to-csr-non-compliance/260467/>> (last accessed 1 March 2022).
- 115 Karnani “Mandatory CSR in India”, above at note 113.
- 116 *Ibid.*
- 117 The commission was established in 2000 to address the absence of infrastructure in the region: Omotola “From OMPADEC to NDDC”, above at note 76 at 73.
- 118 See generally, I Usa *Doing Business and Investing in Nigeria Guide* (2009, International Business). However, in the case of *Shell Petroleum Development Company of Nigeria Limited v Federal Board of Inland Revenue* (1996) 8 NWLR (pt 466) 256, the Nigerian

On the other hand, those supporting mandatory CSR argue that government intervention is necessary to “prevent CSR from becoming pure corporate propaganda” or “a pointless marketing tool”.¹¹⁹ They insist that such state intervention would ensure a level playing field between the companies and communities, and ensure that companies comply effectively with CSR standards.¹²⁰

A facilitating role

This involves incentivizing companies to engage in CSR through the government playing a catalytic or secondary role.¹²¹ This is accomplished by setting an overall policy framework to guide business investment in CSR, developing non-binding CSR guidance and providing tax incentives for companies carrying out CSR, for example.¹²² This role is necessary to inspire MNOCs to be involved in recognizing communities’ fundamental human rights. This role is lacking in Nigeria, as the Nigerian government has provided no incentives for CSR practices by MNOCs. This is not peculiar to Nigeria. The reality is that there is scarcely any regional standard for CSR on the African continent.

An endorsement role

This involves showing public validation and political support for particular kinds of CSR practices.¹²³ While such endorsements are aimed at encouraging positive CSR practices, there is an inherent risk in this role. The risk is that acts of public endorsement may become tools in the hands of MNOCs.¹²⁴ The reality is that MNOCs often adopt CSR not because of domestic pressures in the developing countries in which they operate, but as a result of the fear of the impact of such local conflicts on their international reputation. MNOCs may therefore publicize endorsements from their host state in a manner that silences other voices in these states that raise genuine grievances against

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Supreme Court noted that MNOCs’ expenses on scholarships, exchange rate losses (due to the payment of profit tax) and the Central Bank’s commission for payment of profit tax were all allowable deductions from MNOCs’ tax.

119 P Nieto “Why regulating corporate social responsibility is a conceptual error and implies a dead weight for competitiveness” (2014) *The European Enterprise Journal* 25.

120 Ibid.

121 Fox, Ward and Howard *Public Sector Roles*, above at note 109 at 3–5.

122 Ward *Public Sector Roles*, above at note 107 at 5.

123 Fox, Ward and Howard *Public Sector Roles*, above at note 109 at 6.

124 For analysis of how MNOCs use CSR in their favour in developing countries, see: JG Frynas “The false developmental promises of corporate social responsibility: Evidence from the experiences of multinational oil companies” (2005) 81/3 *International Affairs* 581; K Amaeshi et al “Corporate social responsibility in Nigeria: Western mimicry or indigenous influences” (2006) 24 *Journal of Corporate Citizenship* 83; JG Frynas “Corporate social responsibility in the oil and gas sector” (2009) 2/3 *Journal of World Energy Law & Business* 178.

them. Furthermore, in relying on MNOCs, developing African states may be prone to give a quick endorsement to MNOCs.

CSR practices have therefore been criticized as representing “success for corporations in resurrecting their public image and colonising the issue space around the social and environmental impacts of business”.¹²⁵ It has been pointed out that MNOCs in international fora have “exploited feel-good stories about ‘voluntary action’, ‘corporate philanthropy’ and ‘partnerships’ with ‘stakeholders’ in the last few years”.¹²⁶ The issue is that the endorsement role may be reduced to a public relations campaign “to boost the image of transnational corporations through highlighting isolated examples of social environmental or human rights initiatives as ‘proof’ of corporate commitment to sustainable development”.¹²⁷ Frynas provides an illustration of the adverse impact of CSR in the Niger Delta. In the late 1990s, Shell announced that it had invested over USD 7 million on roads in the Niger Delta in its 40 years of operation in the region, but failed to disclose that the roads were required for oil operations and therefore the bulk of these roads linked oil installations, bypassing the Niger Delta communities.¹²⁸

If properly conducted, CSR has great potential to advance the rights of people in developing countries experiencing poor governance. However, the oil industry, notorious for its sense of urgency, may adopt CSR as a public relations exercise to mask deep rooted issues of social, economic, political and environmental injustice occasioned by its operations, without addressing the root cause of such issues. This is particularly likely in the Niger Delta. Idemudia asserts that the problem with the endorsement role in the Niger Delta is rooted in the fact that the Nigerian government’s tendency to resort to force in disputes between communities and MNOCs has caused the government to lose its legitimacy in the eyes of the NDP, and the fact that the Nigerian government and the MNOCs have both traditionally used each other’s failure “as a means of absolving itself of any wrong doing in the region”.¹²⁹ Therefore, any acts of endorsement by the Nigerian government would in these circumstances be viewed with suspicion.

A partnership role

This role involves combining public inputs, such as skills and resources, with input from businesses to tackle issues within the CSR agenda.¹³⁰ This is

125 “What’s wrong with corporate social responsibility”, above at note 22.

126 “Industry’s Rio +10 strategy: Banking on feelgood PR” (December 2001) *Corporate Europe Observer*, available at: <<http://archive.corporateeurope.org/observer10/basd.html>> (last accessed 15 February 2022).

127 Ibid.

128 Frynas *Oil in Nigeria*, above at note 100 at 51–52.

129 U Idemudia “Corporate social responsibility and the rentier Nigerian state: Rethinking the role of government and the possibility of corporate social development in the Niger Delta” (2010) 30/1–2 *Canadian Journal of Development Studies* 131 at 143.

130 Fox, Ward and Howard *Public Sector Roles*, above at note 109 at 5; Ward *Public Sector Roles*, above at note 107 at 5.

indispensable in advancing the rights of the NDP, as it assigns roles to all stakeholders in the oil industry: the Nigerian government, the MNOCs and the oil communities. Oil operations in Nigeria are typically run through joint ventures between the Nigerian federal government (through the Nigerian National Petroleum Corporation) and MNOCs. This joint venture structure implies that the Nigerian government is a partner in all acts of environmental degradation in the Niger Delta. Therefore, MNOCs' partnership with communities should necessarily also include the Nigerian government.

The weakness of the partnership role is that it may compromise the position of the state by causing the state to descend from regulator to player in the exploitation of resources in her territory.¹³¹ In addition, partnership carries the risk of raising situations in which government apparatus, like the army, is transformed into a security agent for MNOCs, as is the case in the Niger Delta. In spite of these weaknesses in the partnership role, it has proved to be the most successful model for addressing the NDP's needs. Some MNOCs have adopted this approach by partnering with the NDP through development agencies such as the Niger Delta Development Commission (NDDC) established by the government. Shell has also adopted the approach of partnering with the NDDC to provide vocational training to thousands of youths and women in the Niger Delta,¹³² who, together with children, have been the worst hit by the poverty occasioned by the ecological devastation of the region.

ATTEMPTS TO REGULATE CSR IN NIGERIA

The Nigerian government has made two attempts to regulate CSR. In 2007, a Corporate Social Responsibility Bill was proposed in Nigeria's National Assembly.¹³³ This bill was a pioneering attempt to regulate CSR practices in Nigeria. It established the Nigerian Corporate Social Responsibility Commission (CSR Commission),¹³⁴ which was saddled with the responsibility of formulating, implementing and monitoring CSR practices by companies operating in Nigeria.¹³⁵ The CSR Commission was required to formulate policies that would provide incentives for companies wishing to undertake CSR and to sanction companies that default in their CSR.¹³⁶ Mirroring Carroll's philanthropic responsibilities, the bill proposed that companies' CSR initiatives would cover the social, cultural and educational needs of host

131 B Campbell "Corporate social responsibility and development in Africa: Redefining the roles and responsibilities of public and private actors in the mining sector" (2011) *Resource Policy Journal* 2.

132 "Shell, NDDC and Niger Delta women support" (3 April 2012) *The Nigerian Tide* at 6–7.

133 This bill was titled the Corporate Social Responsibility Commission (Establishment, etc) Bill 2007.

134 *Id.*, sec 1(1).

135 *Id.*, sec 5(1).

136 *Id.*, sec 5(1)(l).

communities.¹³⁷ In addition, companies were required as part of their CSR initiatives to address environmental issues and to implement local content in terms of employment and the sourcing of raw materials.¹³⁸ The bill proposed a 3.5 per cent charge on the annual gross profits of companies as the source for funding CSR practices in Nigeria.¹³⁹

However, the bill was marred by several flaws. The first was that the bill was not targeted specifically at the MNOCs operating in the Niger Delta but applied to all companies registered in Nigeria. The bill placed the same penalty for non-compliance with CSR obligations on large corporations and small enterprises. The bill should have been more lenient on small enterprises, which are usually economically vulnerable. Another flaw was seen in the fact that, even though the bill plays a facilitating role by providing incentives for CSR practices, it places greater emphasis on its mandating role. The bill's mandating role is seen in the fact it also adopts a sanctions-based approach by prescribing severe penalties for non-compliance. The bill recommended that the CSR Commission be authorized to shut down and suspend the operations of any company, corporation or organization temporarily, for a minimum of 30 days, as a penalty for non-compliance with the proposed law.¹⁴⁰ It further provided that first offenders of the statutory provisions of this proposed law would be liable to a fine of not less than 2 per cent of the offending organization's or corporation's gross annual profit, in addition to the statutory CSR contribution that was not expended.¹⁴¹ For subsequent non-compliance, the penalty would be a fine of not less than 3.5 per cent, in addition to mandatory compliance with the statutory CSR obligations of the company or organization for the period under consideration.¹⁴² The bill made it a criminal offence punishable by six months imprisonment for any person deliberately to obstruct the CSR Commission or its staff in the exercise of any of its powers.¹⁴³

Other approaches to regulation could be adopted for more effective regulation of a subject as delicate as CSR in Nigeria. Scholars have proposed several alternative models for ensuring effective regulation in any area of society. These include incentive-based approaches and consensus-driven approaches.¹⁴⁴ This sanctions-based approach may be ineffective in creating

137 *Id.*, sec 5(1)(i).

138 *Id.*, sec 5(1)(f)(m)(n).

139 *Id.*, sec 5(1)(i).

140 *Id.*, sec 7(2).

141 *Id.*, sec 7(3).

142 *Ibid.*

143 *Id.*, sec 7(4).

144 For detailed discussions on these approaches, see generally: R Baldwin, M Cave and M Lodge *Understanding Regulation Theory, Strategy and Practice* (2012, Oxford University Press); and T Oyewunmi "Examining the role of regulation in restructuring and development of gas supply markets in the United States and Europe" (2017) 40/1 *Houston Journal of International Law* 191.

an enabling environment for CSR.¹⁴⁵ The third flaw in the CSR Bill was the lack of public consultation at the time of its drafting; this led to it not being widely accepted.¹⁴⁶ Civil society organizations and MNOCs thus criticized the bill as being too punitive.¹⁴⁷ The Niger Delta communities criticized the 3.5 per cent CSR fund as being too paltry, considering the poor infrastructure in the region.¹⁴⁸ The CSR Bill has not passed into law. This has been attributed to the fact that it never had government backing.¹⁴⁹ There were unsuccessful attempts to re-introduce the bill in 2012.¹⁵⁰

Another attempt to regulate CSR practices in Nigeria was made in 2018 when the Nigerian House of Representatives passed a bill to amend the Financial Reporting Council Act 2011 with the aim, inter alia, of including provisions that require companies to adopt CSR in their individual corporate policies.¹⁵¹ The bill was titled: A Bill for an Act to Amend the Financial Reporting Council of Nigeria Act 2011 No 6 and to Prescribe Social Corporate Responsibility Requirement by Companies and Other Related Matters.¹⁵² Specifically, this short bill sought merely to amend section 49(h) of the act to include a provision that companies that earned an average of at least NGN 50,000¹⁵³ in profits in three successive years must apply a percentage of their profits to CSR.¹⁵⁴ This bill (in contrast to the 2007 bill) did not provide specific details of the CSR required. The Senate is still considering this bill.¹⁵⁵ If passed into law, this bill would be inadequate for providing an environment for CSR in Nigeria as it makes no provisions for minimum CSR standards and may not be enforceable.

145 Indeed, Nigeria has successfully adopted the incentive-based approach in other sectors of the Nigerian oil industry. For instance, the incentives provided under the Nigeria Liquefied Natural Gas (Fiscal Incentives Guarantees and Assurances) Act 1990 were instrumental to the establishment of associated gas utilization projects in Nigeria, such as the Nigerian Liquefied Natural Gas Project and the Oso Condensate Project. See PS Tamuno "A sequential analysis of Nigeria's attempts to end gas flaring" (2018) 1 *International Energy Law Review* 17.

146 C Mordi et al "Corporate social responsibility and the legal regulation in Nigeria" (2012) LXIV/1 *Economic Insights - Trends and Challenges* 1.

147 L Raimi et al "Survey on the adequacy and effectiveness of regulations on corporate social responsibility and social reporting: Evidence from the Nigerian telecommunication industry" (2014) 2/2 *Net Journal of Business Management* 18 at 22.

148 Ibid.

149 Mordi et al "Corporate social responsibility", above at note 146 at 6.

150 Ibid.

151 JS Olatunji "Reps pass bill for companies to adopt corporate social responsibility" (5 July 2018) *Nigerian Tribune*, available at: <<https://tribuneonline.ng.com/reps-pass-bill-for-companies-to-adopt-corporate-social-responsibility/>> (last accessed 1 March 2022).

152 See Financial Reporting Council of Nigeria Act (Amendment) Bill 2018, preamble.

153 Approximately USD 139.

154 Financial Reporting Council of Nigeria Act (Amendment) Bill, sec 1.

155 Olatunji "Reps pass bill", above at note 151.

CSR IN THE NIGER DELTA: THE FUTURE

Several international soft law instruments recognize CSR. These soft law instruments are traceable back to 1976 when the Organisation for Economic Co-operation and Development (OECD)¹⁵⁶ produced a set of Guidelines for Multinational Enterprises. These guidelines were not specifically targeted at CSR. However, as regards CSR, the guidelines provide, inter alia, that multinational enterprises should respect the human rights standards of those affected by their activities, in conformity with the host government's international obligations and commitments.¹⁵⁷ These guidelines were not applicable to Nigeria because Nigeria was not a member of the OECD.

A giant leap for the global recognition of CSR was recorded in 2011 when the UN published the Guiding Principles on Business and Human Rights (UNGP). The UNGP are grounded in recognition of: "[t]he role of business enterprises as specialized organs of society performing specialized functions required to comply with all applicable laws and to respect human rights".¹⁵⁸ The UNGP has 31 sections defining the role of companies in protecting human rights. Of particular interest is section 14, which provides: "[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure". The UNGP was the first comprehensive international framework for corporate human rights. Led by Shell, MNOCs in Nigeria responded to the UNGP by issuing statements of commitment to human rights.¹⁵⁹ However no mechanisms were put in place by the Nigerian government or international organizations for ensuring MNOCs' compliance with their commitments to human rights. In addition, implementation of the UNGP in Nigeria was limited by the absence of laws for enforcing compliance with human rights by companies and the government's lack of political will.¹⁶⁰

The UNGP was shortly followed by the UN Global Compact (UNGC), a policy designed by the UN in 2013 to promote business participation in protecting human rights and the environment.¹⁶¹ The UNGC provides, inter alia, that businesses are to advance human rights through "core business activities, strategic social investments, philanthropy, advocacy and public policy

156 The OECD is an intergovernmental economic organization founded to stimulate global economic growth: "Who we are", available at: <<https://www.oecd.org/about/>> (last accessed 15 February 2022).

157 The guidelines have been updated several times. This article refers to the 2011 update of the guidelines. See "Organization for Economic Corporation and Development guidelines for multinational enterprise 2011", chap IV.

158 See UNGP, preamble, para B.

159 O Abe "The feasibility of implementing the United Nations Guiding Principles on Business and Human Rights in the extractive industry in Nigeria" (2016) 7/1 *Afe Babalola University Journal of Sustainable Development, Law & Policy* 137 at 149.

160 *Ibid.*

161 This policy was preceded by the UN Global Compact of 2000 (UNGC 2000), which encouraged businesses to engage in sustainable and social responsibility practices.

engagement, and / or partnership and collective action”.¹⁶² NGOs including the International Organization of Employers and the Global Compact Network publicized the UNGC in Nigeria.¹⁶³ The UNGC adopts the soft law approach by providing guiding principles that companies may adopt voluntarily. However, companies that adopt the principles are required to publicize their compliance to the UNGC.¹⁶⁴ This would give NGOs like the Global Compact Network the opportunity to monitor whether a company is complying with the UNGC. This reflects the fact that “the Compact is not designed as a certification instrument or tool to regulate and sanction its participants, but instead to foster a dialogue among a diverse set of actors in a non-bureaucratic way”.¹⁶⁵ Thus the UNGC not only serves as an inspiration to MNOCs to make further commitments in the social licence they obtained from their host communities, but also provides an environment for an exchange of CSR ideas with NGOs and other interest groups. Shell publicly identified with the UNGC on its website and pledged to promote its values.¹⁶⁶ However, Shell and other MNOCs have listed insecurity and the lack of a yardstick for measuring compliance as challenges in implementing the UNGC.¹⁶⁷ These criticisms of the UNGC by MNOCs do not mean that it has failed. The UNGC is very useful given its persuasive value as a soft law instrument.¹⁶⁸ In addition, given the wide acceptance it enjoys, it is sometimes looked upon as representing international best practice.¹⁶⁹

This article recommends that, in future, CSR regulation in Nigeria should adopt the approach of soft law policies. There should be enabling legislation that empowers the minister for commerce to draft a policy on CSR in Nigeria. Although the CSR policy would govern all industries in Nigeria, it should emphasize the participation and consultation of communities in the oil industry. In doing this, the policy should adopt the model in the dimensions of participation proposed by Cohen and Uphoff (Cohen), which

162 *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (2013, UN Global Compact) at 7.

163 See “The United Nations Global Compact”, available at: <<https://www.ioe-emp.org/international-organisations/united-nations-global-compact>> (last accessed 4 March 2022).

164 *A Business Reference Guide*, above at note 162 at 7.

165 A Rasche *A Necessary Supplement: What the United Nations Global Compact Is and Is Not?* (2007, Helmut Schmidt University) at 18.

166 EG Ekenedirichukwu “Multinationals and adherence to the United Nations Global Compact: A focus on Shell Petroleum Development Company in Nigeria” (2011) 13/3 *Journal of Sustainable Development in Africa* 149 at 160.

167 *Ibid.* This comment was directed at UNGC 2000 and has been carried on to the UNGC 2013.

168 Indeed, several other soft law treaties on CSR exist, such as the ISO 26000 and International Labour Organization frameworks.

169 CM Chinkin “The challenge of soft law: Development and change in international law” (1989) 38/4 *International and Comparative Law Quarterly* 850.

addresses the questions “what kind of participation takes place; who participates and how do they participate?”¹⁷⁰

This article proposes that the CSR policy should require MNOs to address a number of questions. The first question is what kind of social licence is required. In addressing this, the policy should recommend that the required social licence is one that guarantees the NDP’s participation in all projects through the four kinds of participation proposed by Cohen: “in decision making, implementation, benefit sharing and evaluation”.¹⁷¹ The policy would require that the NDP’s participation conforms to Cohen’s typology by ensuring that the NDP participate in both the initial and ongoing decisions.¹⁷² Also, their participation in the implementation stage would entail participation in resource contribution,¹⁷³ administration and coordination.¹⁷⁴ Their participation at the benefit stage entails participation in material, social and personal benefit.¹⁷⁵

The second question is from whom this social licence should be obtained. Again, the policy would recommend Cohen’s typology by demanding a social licence that requires the participation of local community residents and leaders, government personnel and MNO personnel.¹⁷⁶ This would embrace all the players in the oil industry in Nigeria.

Thirdly, how should the social licence be obtained and kept? The policy would also adopt Cohen’s four elements of participation: the basis of participation, form of participation, extent of participation and effect of participation.¹⁷⁷ The basis of participation would require that participation is voluntary and not coerced.¹⁷⁸ The form of participation would require both direct and indirect participation.¹⁷⁹ Direct participation of the entire community should be encouraged in projects such as environmental conservation. Indirect participation through representatives should be adopted in projects that involve decision-making, such as awarding new concessions. The extent of participation would entail both one-off and continuous

170 Cohen and Uphoff recommended a typology of participation that looks into the dimensions of participation: JM Cohen and NT Uphoff “Participation’s place in rural development: Seeking clarity through specificity” (1980) 8 *World Development* 218. Typologies of participation were developed by academics in response to the widespread adoption by NGOs and international institutions of the concept of participation from the 1960s onwards: A Cornwall “Unpacking participation: Models, meanings and practices” (2008) *Community Development Journal* 269.

171 Cohen and Uphoff, *id* at 219.

172 *Id* at 220.

173 Cohen recommends that communities’ resource contribution may take several forms, including provision of labour, information, material goods or even cash: *ibid*.

174 *Id* at 219.

175 *Ibid*.

176 *Id* at 222.

177 *Id* at 219.

178 *Id* at 224.

179 *Ibid*.

participation.¹⁸⁰ One-off participation should be proposed for projects such as oil spill clean-ups. Continuous participation should be proposed for projects such as conservation of the region's wildlife and plants. In addition to participating in the benefits from oil exploitation, the policy should include the following categories of participation: participation in the sustainable management of the environment; participation in decision-making in the oil industry (such as granting new concessions); and participation in the making of any decision that may affect the NDP's interests, such as decisions to relocate them. The social licence must also ensure that the NDP's participation results in a genuine transfer of decision-making power to the NDP.¹⁸¹ The advantage of such a CSR policy over mandatory CSR legislation would be its flexibility to suit local needs and the fact that it would be less formal than CSR statutes and therefore less likely to discourage investment in the region. Furthermore, each MNOC would be given the opportunity to make its own commitment within its resources to CSR in the region.

CONCLUSION

MNOCs are increasingly being required to assume greater roles in activities that are not ordinarily the responsibility of investors, such as the provision of infrastructure in communities in the areas in which they operate. This has been explained as obtaining a "social licence". Scholars argue that, in addition to obtaining a legal licence from the host state government, MNOCs need a "social licence" from the communities in their areas of operation. The activities involved in obtaining this "social licence" have been described by the term CSR. CSR is a concept by which companies engage in activities that address social and environmental concerns in their areas of operation on a voluntary basis. The components of CSR were described by Carroll using a pyramid. Carroll's Pyramid identified four components of CSR: economic, legal, ethical and philanthropic. Visser argued that Carroll's Pyramid is applicable to Africa, but in the order of economic, philanthropic, legal and ethical.

This article has examined how MNOCs in Nigeria have implemented CSR. MNOCs commenced with corporate philanthropy but this approach was unsuccessful as a result of the absence of support from the Nigerian government. Subsequently, MNOCs adopted the partnership approach. This approach only achieved limited success as a result of Nigeria's failure to provide a favourable framework for CSR. While Carroll's Pyramid examined CSR from the perspective of companies, Fox and Ward argue that a government must play mandating, facilitating, endorsing and partnership roles to ensure the effectiveness of CSR measures. These four roles do not exist in Nigeria because CSR legislation has not been successfully enacted.

180 Ibid.

181 Id at 224–25.

The article, therefore, proposed the adoption of a CSR policy that defines the social licence required by MNOs to operate in Nigeria. Using Cohen's Dimensions of Participation, it argued that the most effective CSR approach in the Niger Delta would be one that encourages participation by the NDP by providing for participation in decision-making, implementation, benefit-sharing and evaluation, among others.

CONFLICTS OF INTEREST

None