REGULATION VS SELF REGULATION IN EXTRACTIVE INDUSTRIES: A LEVEL PLAYING FIELD

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I INTRODUCTION

Growing concern over negative environmental and social impacts of extractive operations, which are inherent to some extent in the extractive process, has given rise to debates about how to regulate the activities of corporations engaged in such activities to prevent these impacts. In recent times, incidents of human rights violations by extractive companies have been well documented around the world. The growing concerns over the negative impact of extractive operations and alleged human rights abuses of the host community by corporations has necessitated the regulation of corporate activities through appropriate legal instruments. National laws and regulations are often found to be inadequate to control the behaviour of extractive corporations. International legal norms are also nearly non-existent or not well developed to regulate their activities. Against this background, corporate self-regulation has emerged as an important instrument which extractive corporations are adopting voluntarily as an internal code of conduct to regulate their activities.

The objective of this article is to address the question to what extent corporate self-regulation in extractive industries is effective to prevent negative environmental, social impact and human rights abuses by extractive corporations. In addressing this question, the article discusses in brief the environmental and social impacts of extractive industries and human rights violations by extractive corporations. In this regard, it focuses on the concept of corporate social responsibility, which has emerged as one of the main driving forces behind the movement of corporate self-regulation. The article also addresses the problems of regulation of extractive corporations under national and international law and proceeds to analyse the practices of corporate self-regulation in extractive industries, highlighting a number of weaknesses. Finally, some recommendations are proposed for improving environmental, social and human rights performance of extractive corporations.

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A *Environmental and Social Impacts of Extractive Operations*

Operations of extractive industries may have profound negative environmental effects. Such negative environmental effects may be evident at various phases of mineral development such as exploration, extraction and metallurgical processing. The exploration phase in mining usually produces only minor and localised effects such as clearing of trees for drilling sites, access roads, sinking of pits and holes. The extraction phase will usually involve a more massive impact affecting the natural environment of landscape, fauna and vegetation. In the metallurgical stage, the main environmental damage generated by the mining industry is smelting and refining air and water pollution.[1] According to the Joint UNEP/E&P Forum Environmental Management Guidelines, the most likely environmental impacts include: atmospheric impacts from flaring and venting, emissions from installations and vehicles; aquatic impacts from discharges of produced waters, drilling fluids, sewage, process waters, spills and leaks; terrestrial impacts such as physical disturbance from construction, contamination resulting from spillage and leakage or solid waste disposal; ecosystem impacts including changes in air, water and soil/sediment quality as well as disturbance by noise and changes in vegetation cover.[2]

On the other hand, socio-economic and cultural impacts of extractive operations can include: changes in land-use patterns, increase in local population levels resulting from immigration due to new access routes and employment possibilities; impacts on socio-economic systems due to new employment possibilities and income differentials; inflation; impacts on social cohesion and cultural structures; destruction of cultural heritage, practices and beliefs; conflicts between development and protection; natural resource use and associated negative effects of road construction and changes in the transportation infrastructure and associated effects.[3] It may also lead to loss of biological diversity, deforestation, destruction of cultural properties and severe health problems for local and indigenous people. The indigenous people living in remote areas with their different life styles and value systems are the most vulnerable among the diverse communities that can be affected by extractive operations. Indigenous people can be uprooted from their traditional lands, their cultural base destroyed, and their habitat environmentally polluted.

The negative social impact of petroleum operations can partially be attributed to the inevitable consequences of extractive processes and partially to the unsustainable

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1 Thomas Walde, 'Environmental Policies Towards Mining in Developing Countries' (1992) 10 *Journal of Energy and Natural Resources Law* 327, 328-329.

2 Joint E&P Forum/UNEP, 'Environmental management in Oil and Gas exploration and Production-An Overview of Issues and Management Approaches' (UNEP IE/PAC Technical Report 37, 1997) 11.

3 Jay Paul Wagner, 'Environmental Law and the International Oil and Gas Exploration and Production Industry: The Next Decade' (1998) *Oil and Gas Law and Taxation Review* 341.

mining practices and negligence of operating corporations towards local communities.

B *Human Rights Abuses by the Extractive Corporations*

From the human rights perspective, activities of an extractive corporation may have adverse impacts on the enjoyment of economic, social and cultural rights by the local community of the producing area. The growing trend of exploration of petroleum and mineral resources in remote areas which are usually the habitat of indigenous people, enhances the possibility of their human rights violations. Petroleum and mining corporations often search for inexpensive locations in developing countries for exploration investment in order to take advantage of low wages, weak protection of labour rights and a lower standard of health, safety, and environmental standards.[4] On the other hand, a host country may adjust its domestic laws to attract multinational oil and mining corporations to invest in exploration for mineral resources. The host government may simply overlook violations of its domestic law by the corporations.[5] Furthermore, sometimes such corporations can contribute to the violation of civil and political rights in countries with poor human rights records by acting complicitly with human rights violations by governments through maintaining silence and inactivity in relation to such violations. Needless to say, in most circumstances, human rights violations by corporations can affect the self-determination and well being of a group of people or community.[6]

In recent times, human rights violations by extractive corporations have been well documented in many parts of the world. The negative impacts of natural resources development operations such as petroleum and mineral development on the communities can lead to devastating environmental degradation, human rights violations and unsustainable development practices.[7] In Nigeria, Royal Dutch Shell has been sued for alleged complicity in the execution of activists protesting against the company's environmental and developmental policies. It has been alleged that Dutch Shell apparently made no serious effort to keep Nigeria's military regime from executing author Ken Saro-Wiwa and eight other environmental activists in November 1995. In Ecuador, Chevron-Texaco was sued in 2003 for the systematic destruction of the environment and homelands of rainforest people in Oriente region through the dumping of billions of gallons of highly toxic wastewater and crude oil from 1971 to 1992. Moreover, a lawsuit was filed against the Unocal Corporation for its complicity in human rights violations committed by the Burmese military government during the construction of a natural gas pipeline partially funded by the

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4 Elisa Westfield, 'Globalisation, Governance and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century' (2002) 42 *Virginia Journal of International Law* 1085-86.

5 Steven R Ratner, 'Corporation and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 434,460.

6 Claire Moore Dickerson, 'Human Rights: The Emerging Norm of Corporate Social Responsibility' (2002) 76 *Tulane Law Review* 1431.

7 Ayesa Dias, *Oil and Human Rights* (2003) vol 1, issue 2, Oil and Gas Intelligence, www.gasandoil/ogel/articles/article_32.htm.

oil company. These incidents clearly demonstrate that extractive corporations should be held accountable and responsible to the host states or affected community for violation of human rights through appropriate legal regimes and mechanisms.

II CORPORATE SOCIAL RESPONSIBILITY: AN EMERGING PARADIGM

The concept of corporate social responsibility (CSR) has emerged as central to the discourse of the social role of corporations in view of the fact that the impacts of their operations are increasingly being felt by the wider society. Sometimes, the term CSR is also expressed in terminologies such as corporate good citizenship, ethical or social responsibility of corporations and so on. In essence, the idea of CSR connotes a social and ethical dimension of business, which requires that corporations should observe some social and ethical standards in conducting their business. Thus, it implies that corporations through their business should also promote social betterment and fulfil societal expectations of proper business. CSR also requires that corporations should not only be accountable to shareholders, bankers, lenders and creditors, but also to employees, trade unions, consumers, governments and the general public for the implications of their actions.[8]

There is neither a universally accepted standard nor definition of CSR. However, there have been some attempts to define it. For example, the World Business Council for Sustainable Development defines CSR in the following way:

> Corporate social responsibility is 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.[9]

The boundaries of CSR are not easy to determine. To a large extent, it depends on the purpose of a corporation, the extent of its impact, and the values of contemporary society.[10] The social responsibility of corporations now encompasses a wide range of issues including global environmental sustainability, accountability and transparency, respect for human rights, developmental responsibilities, employment and labour relations, ensuring competition, refraining from restrictive business practices, consumer protection, corporate good governance and prevention of corruption.[11] In many countries, corporate responsibilities are incorporated into domestic laws such as antitrust, consumer protection, labour, or environmental laws. These laws often confer positive obligations upon corporations to comply with defined standards in relation to their conduct.

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8 Peter Muchlinski, *Multinational Enterprises and the Law* (1999) 346.

9 WBCSD, Stakeholder Dialogue on Corporate Social Responsibility (CSR, The Netherlands, 6-8 September 1998).

10 Sir Geoffrey Chandler, 'The Responsibilities of Oil Companies' in Asbjorn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer (ed), *Human Rights and the Oil Industry* (2000) 5.

11 *World Investment Report 2003*, United Nations, New York and Geneva, 164.

According to Commission of the European Communities, 'Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment'.[12] Discharging CSR is not only a desirable public good, it also can confer many benefits on corporations and investors. Indeed, CSR practices can enhance competitiveness, quality of productivity, and business reputation, which is regarded as a core asset of a corporation.[13] A sound business reputation can increase the market opportunities of a corporation. Conversely, criticism of business practices can produce negative impact on a corporation's reputation.[14]

A *Problems of Regulation of Extractive Corporations*

Although many extractive corporations are alleged to violate human rights, they are rarely held accountable as they operate almost in legal vacuum.[15] Although States have legal and moral authority to regulate corporate activities by legislation and regulation, in a practical sense it is very difficult for nation states to control and regulate the activities of corporations. According to one author,

> The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals.[16]

Another difficulty is that multinational enterprises can take on many national identities, and maintain relatively autonomous production and sales facilities in individual countries while operating on a global scale.[17] The multilayered and multinational division of labour of such enterprises, (including extractive corporations) which may wield economic and political power, also render them a difficult regulatory target.[18]

The extractive corporations are also virtually unrestricted by international law as there is no universal treaty or legal framework to hold them responsible. They are not bound by domestic laws of the home countries in which they operate. For example, many petroleum and mining corporations are not generally required to abide by the labour laws, environmental laws or health and safety regulations of the

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12 Commission of the European Communities, Green Paper: Promoting a European Framework for Corporate Social Responsibility (COM (2001) 366 final, 18.7.2001, para.8).

13 Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in: Philip Alston (ed., *Non-State Actors and Human Rights* (2005) 260.

14 Commission of the European Communities, Green Paper: Promoting a European Framework for Corporate Social Responsibility (COM (2001) 366 final, 18.7.2001, 7.

15 Jassie Cassels, 'Outlaws : Multinational Corporations and Catastrophic Law' (2001) 31 *Cumberland Law Review* 314.

16 Ibid 314.

17 David C Korten, *When Corporations Rule the World* (1995) 28.

18 Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) *Berkeley Journal of International Law* 54.

home states in which they are based.[19] Many developing host countries are reluctant to directly regulate corporate activities. It is worth noting that the intense competition among developing countries to attract foreign investment in the extractive sector often results in a lower level of regulation of extractive corporations. Moreover, extractive corporations with huge resources often have higher bargaining power than the many poor developing countries in which they operate.

B *Human Rights Obligations of Extractive Corporations*

Given the heightened public awareness concerning human rights violations committed abroad by extractive corporations, pressure is mounting on them to adhere to human rights norms. Campaigning and criticism by civil society and stakeholders are also putting considerable pressure on extractive corporations to adopt socially responsible behaviour.[20] It is now taken for granted that multinational corporations including extractive corporations have an ethical and moral duty to respect human rights in the countries in which they operate. This ethical or moral obligation is generally premised on following three grounds:

Firstly, the 'expediency principle' which suggests that certain human rights practices are simply good business practices as well – there is substantial evidence to support the proposition that continuing violation of human rights by multinational corporations will increasingly provoke international condemnation. On the other hand, respect of human rights increases the reputation of such corporations as a whole.[21]

Secondly, the 'societal principle' which has two components: 'reciprocity' and 'compensation'. Reciprocity is the idea that the corporation should give something back to society, generally in proportion to what it gains. 'Compensation' is the idea of recompense to society for the disturbance caused to it by the activities associated with business.

Thirdly, the 'ethical principle' which requires that multinational corporations, including extractive corporations, often have greater power and influence in an area than the government itself and a more stable and lasting presence than a government. By virtue of this power and influence, ethical obligations would dictate that the corporation incurs an equivalent responsibility for the people of that area.[22]

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19 Mark Gibney and R David Emerick, 'The Extra-Territorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards' (1996) 10 *Temple International and Comparative Law Journal* 123.

20 Westfield, above n 4, 1101.

21 See Chandler, above n 10, 5-19.

22 Margaret Jungk, 'A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad' in: Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 178-181.

However, the issue of the legal responsibility of multinational enterprises to protect and promote human rights is still controversial as there is no clear legal obligation in the absence of any multilateral or regional agreement to that effect. The argument has been advanced that the current structure of international law is not fully suited to address the wide range of human rights concerns applicable to multinational enterprises, because the present framework of international human rights and its enforcement mechanisms is essentially state-centric. In traditional human rights discourse, individuals are regarded as bearers of human rights, while the state is the main protector of these rights.

Nonetheless, there is growing evidence that multinational enterprises can be recognised as subjects of international law. This is evident from the fact that international law has already recognised the human rights duties of non-state actors through international humanitarian law and the corpus of international criminal law for human rights atrocities.[23] The normative implication of this legal development suggests that extractive corporations should be subject to international law and governed by many, if not all, of the same duties to which nation states are bound, such as respect for and promotion of human rights.[24]

It is now widely recognised that corporate human rights responsibility is twofold. Firstly, human rights responsibility extends to internal stakeholders such as shareholders, employees, financial partners, customers and suppliers. This means a corporation must ensure the protection of human rights in its own operations.

Secondly, corporations have broad human rights responsibilities towards the local community, governments, NGOs and other social groups who may be affected by their actions.[25] This responsibility is a logical extension of the notion of CSR. Multinational corporations should ensure that their affiliates and subcontractors respect human rights norms. They can also contribute to the improvement of overall human rights conditions of a country by exerting positive influence on its human rights policy. Multinational corporations' active adherence to human rights can satisfy consumer concerns; promote stable legal environments; build corporate community goodwill; and produce a predictable, stable, and productive business environment.[26] According to one author,

> If human rights norms for business enterprises become widely accepted, business will enjoy greater predictability and consistency with regard to their responsibilities for protecting human rights. An authoritative set of human rights norms for

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23 Ratner, above n 5, 466-67.

24 See Christina Baez, Mchele Dearing, Margaret Delatour, and Christine Dixon, 'Multinaitonal Enterprises and Human Rights' (1999/2000) 8 *University of Miami International and Comparative Law Review* 183.

25 Jens Schierbeck, 'Operational measures for Identifying and Implementing Human Rights Issues in Corporate Operations' in Asbjorn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer (eds), *Human Rights and the Oil Industry* (2000) 167-168.

26 See United Nations High Commissioner for Human Rights, Business and Human Rights, http://www.unhchr.ch/global.htm

> businesses would thus ensure that these responsibilities are clear, accessible and unambiguous. A widely accepted set of human rights responsibilities articulated by the international community will help establish a level playing field for business competition.[27]

III THE ROLE OF CORPORATE SELF-REGULATION IN EXTRACTIVE INDUSTRIES

The concept of corporate self-regulation refers to a corporation's policy statements that define ethical standards for its conduct. Such self-regulation acknowledges the trend of acceptance of ethical, social and human rights responsibility by corporations that they should promote the public good. The movement toward self-regulation is mainly driven by the perceived moral high ground of human rights and environmental protection. Some authors have gone further and argue that growing trends of observation of human rights norms by corporations through self-imposed codes of conduct and other private initiatives may give rise to a 'second revolution' of human rights. The first revolution of human rights has already been achieved through the acceptance by nation states of international human rights responsibilities within the framework of UN charter and international law.[28]

The codes of conduct reflect a corporate societal view and are used as a device for corporations' efforts to increase public approval for their actions.[29] Self-regulation is justified mainly on three bases: economic, political and social. The economic goal of self-regulation is efficiency as it reduces the cost of regulation. The political goal of self-regulation is concerned with citizen participation in government. The social goal of self-regulation is that it coordinates economic goals with social and political goals.[30]

The corporate response to social and human rights issues has largely been driven by mounting pressure from the community and civil society (including NGOs) on corporations to discharge social obligations, fear of publicity of human rights abuses, and the desire to improve their image in the public sphere. Many corporations now consider socially responsible behaviour as an essential element of good business practice and a means to fulfil societal expectations of the corporation, which can eventually enhance the prospects of gaining access to new licences for exploration of mineral resources.

The contexts in which these voluntary codes have been introduced vary depending upon the circumstances. There are two particular circumstances in which these codes have been initiated: firstly, some are adopted in response to a particularly

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27 David Weissbrodt and Muria Kruger, 'Human Rights Responsibilities of Business as Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) 335-336.

28 Douglass Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?' (1996) 19 *Fordham International Law Journal* (1996) 1963, 64 .

29 John Christopher Anderson, 'Respecting Human Rights: Multinational Corporations Strikes Out' (2000) 2 *University of Pennsylvania Journal of Labour and Employment Law* 486.

30 Eric Bregman and Arthur Jacobson, 'Environmental Performance Review: Self-Regulation in Environmental Law' (1994) 16 *Cardozo Law Review* 465, 469.

damaging event and can be seen as a means of preventing the occurrence of similar events. For instance, in response to the fierce criticism and public condemnation of its complicity in human rights abuses in Nigeria, and for the Brent Spar incident, Dutch-Shell reviewed its business strategy and introduced changes in corporate management by undertaking various steps to mitigate the impacts of its actions, including a public consultation process, the adoption of a voluntary code of conduct for respecting human rights obligations and making an explicit commitment in its mission statement to sustainable development and the promotion of human rights in the sphere of its operations. Shell also formulated a comprehensive guideline on Social Impact Assessment in June 1996. The guideline not only deals with the management of social risks in the petroleum industry, it was also intended to raise managers' awareness of the potential social impacts of the operation.[31]

Secondly, sometimes corporations have adopted codes of conduct because of their commercial importance in setting out guidelines for staff and, in particular management, as to how to respond to situations not covered by existing policies.[32] For example, British Petroleum (BP) has made explicit reference to human rights in its business principles. Its health, safety and environmental performance policy places particular emphasis on consultation with local communities and public interest groups. Rio Tinto sets out a communities policy in its Social and Environmental Report of 1998 which is premised on good relationships with neighbouring communities as fundamental to its long-term success.[33]

However, these codes do not impose legal obligations upon a corporation to comply with human rights and environmental treaties. Such codes are implemented by corporations as a means of protecting themselves from civil and criminal liability. However, by adding principles of human rights to its internal code of conduct and putting in place an effective means of enforcing the code, 'a corporation can take large steps toward respecting human rights wherever it operates'.[34]

These codes can also provide an opportunity to develop an internal human rights and best practice culture within the corporation. According to some authors, a good voluntary code can be useful in several ways: first, it will communicate to management, employees, and the public that the corporation intends to obey both national and international law. Second, it will encourage those employees inclined

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31 See, *The Shell Report 1999: People, Planet and Profits: An Act of Commitment*, London, Shell, 1; See also, Kristian Tangen, Kare Rudsar and Helge Ole Bergesen, 'Confronting the Ghost: Shell's Human Rights Strategy' in Asbjorn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer (ed), *Human Rights and the Oil Industry* (2000) 185-198.

32 Simon Webley, 'The Nature and Value of Internal Codes of Ethics' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 108-109.

33 BP Amoco, Environment and Social report, 1998 (1999). Similarly, Rio Tinto, Social and Environment Report, 1998 (1999). Website: http://www.riotinto.com/library/reports/SEReports/1998/aspx See also, Rio Tinto, 2000, Community and Environment, http://www.riotinto,com/community/default.asp.

34 See Baez *et al*, above n 24.

to 'do the right thing' to intervene or report violations. Finally, a code can help goodwill and discourage some litigation.[35] The adoption of self-regulation can facilitate shareholder activism within shareholder companies through influencing corporate policies by means of shareholder resolutions at corporate meetings.[36] Such shareholder activism can ultimately promote CSR as adoption of a voluntary code of conduct may require the Board of Directors to inform and respond to issues raised by shareholders at annual meetings. Non-compliance with such obligations by the Board of Directors can lead to legal challenge under relevant domestic corporations law.[37]

The main advantage of corporate self-regulation is that it is a flexible device which can respond to the dynamic commercial needs of the market and to the size of the corporation. This means that compared to command and control regulation, self-regulation recognises that different corporations need different regulatory frameworks.[38]

Although the codes of conduct for corporate self-regulation are not legally binding, they are not entirely devoid of legal significance. Widespread practice of corporate self-regulation can lay the foundation for international standards in the area of CSR. To quote one author,

> Where codes are clearly worded, they can also have legal significance because they set out the values, ethical standards, and expectations of the company concerned, and might be used as evidence in legal proceedings with suppliers, employees or consumers.[39]

A *Forms of Corporate Self-Regulation*

In recent years, a wave of voluntary codes of conduct or guidelines has emerged in a response to the global demand for CSR. These include corporate business principles, industry-wide voluntary codes of conduct, or the voluntary adoption of international standards. Sometimes corporate social commitments are expressed through a variety of company statements. Some codes contain specific commitments about the corporation's conduct towards internal stakeholders such as employees, sub-contractors, suppliers and host governments. Many codes refer to core issues of human rights such as specific commitments in areas of non-discrimination, labour rights, and in some cases, freedom of association, stakeholder consultation, and the prohibition of corrupt practices.[40]

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35 Baez, *et al*, above n 24.

36 Koen De Feyter, *World Development Law: Sharing Responsibility for Development* (2001) 201.

37 Ibid 202.

38 Giles Proctor and Lilian Miles, *Corporate Governance* (2002) 78.

39 Report: *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (International Council on Human Rights Policy, 2002) 70.

40 Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, International Council on Human Rights Policy (2002) 70.

According to Christopher McCrudden, three types of self-regulating code can be identified. Some relate to minimum standards regulating conditions of work by the corporation and its associates. Some codes support increased involvement by the corporation in human rights in the larger community in which it operates. Finally, some codes establish ethical criteria by which a corporation's investment should be guided.[41]

B *Weaknesses of Corporate Self-Regulation*

Each corporation develops a code of self-regulation according to its specific needs. Most codes express broader ethical values and obligations relating to the responsible operation of the business. Self-regulation has no enforcement mechanisms and there is no sanction for non-compliance. Monitoring of compliance with self-regulation rests with the corporation, and is not subject to external verification. Voluntary codes provide only recommendations, suggestions, and guidelines. Thus, the function and effectiveness of such self-regulation is limited. While the tendency to adopt corporate codes is increasing, their effectiveness is questionable. The UN Sub-Commission on the Promotion and Protection of Human Rights,[42] stated:

> The use of an entirely voluntary system of adoption and implementation of human rights codes of conduct, however, is not enough. Voluntary principles have no enforcement mechanisms, they may be adopted by transnational corporations and other businesses enterprises for public relations purposes and have no real impact on the business behaviour, and they may reinforce corporate self-governance and hinder efforts to create outside checks and balances.[43]

According to Steven Ratner, the overall impact of such codes on corporate behaviour is unclear, with different corporations and industries adopting stronger or weaker codes, each of which is observed with varying degrees of seriousness.[44] These codes are mainly adopted to respond to criticisms against corporations or when their reputation is at stake through litigation or consumer boycotts. Codes also lack uniformity as to the level of obligations imposed. While some contain high standards, others have set extremely low standards (particularly in poor areas). However, it should be noted that currently such self-regulation appears to be limited to a few 'leading edge' companies. The lack of agreed human rights performance

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41 Christopher Mc Crudden, 'Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?' (1999) 19 *Oxford Journal of Legal Studies* 169.

42 Sessional Working Group on the working methods and activities of trans-national corporations, Transnational Corporation and Other Business Enterprises.

43 UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, Transnational Corporation and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1, May 2002.

44 Steven and Ratner, above n 5, 532.

indicators and the complexity of human rights issues precludes many companies from adopting self regulation.[45]

IV REGULATION: A LEVEL PLAYING FIELD?

As noted above, even well crafted self regulation cannot ensure the accountability of multinational enterprises. Host government domestic statutory regulation in health, employment practices, environmental protection, and consumer protection can impact upon accountability. Statutory regulation has many advantages over self-regulation as it enjoys more legitimacy through the democratic process of legislative approval. Moreover, regulation is openly and independently enforced by the courts and there is clear accountability for non-enforcement.[46] The regulatory approach is preferable as a means to levelling the playing field and rendering all corporations equally accountable.

The regulatory mandate on the social responsibility of corporations has significant advantages. The voluntary approach can create the problem of competitive disadvantage for a corporation that adopts such self-regulation as other corporations may gain a competitive advantage in obtaining an exploration license and not adopting similar standards of self-regulation. A regulatory approach that would apply equally to all corporations can negate the problem of competitive disadvantage and establish a minimum standard of obligations.[47]

However, the main disadvantage of statutory regulation is its rigidity and inflexibility in coping with rapid technological changes.[48] The dynamic adjustment capacity of self-regulation can promptly address the changing needs of CSR.[49] Enforcement of regulation also involves substantial costs and in many cases, laws are formulated to respond to a crisis situation.[50] Self-regulation may well avoid the costs that are involved in the creation of governmental agencies and the setting up of appropriate facilities and officers that will be in charge of monitoring compliance with the legislation. There are also costs involved for the corporations that would be subject to new legislation, particularly, the cost of hiring appropriate employees and external or internal legal advisors so that such corporations can comply with the newly enacted legislation, in a timely and appropriate manner.

Finally, it is important to recall the overall failure of the State as an entrepreneur. To let the State intervene in each and every one of a corporations's affairs may be

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45 Rory Sullivan, 'Moving Forwards' in Rory Sullivan (ed), *Business and Human Rights: Dilemmas and Solutions* (2003) 286.

46 Proctor and Miles, above n 37 79.

47 Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, International Council on Human Rights Policy (2002) 18-19.

48 Proctor and Miles, above n 37, 79.

49 G Rachadell de Delgado and N Vojvodic, 'Corporate Responsibility : A New Challenge' (2004) 2(4) *Oil, Gas and Energy Law Intelligence*, www.gasandoil.com/ogel/.

50 Elaine Sternberg, 'Corporate Governance: Accountability in the Market Place' in *The Institute of Economic Affairs* (2nd ed, 2004) 158.

disastrous, as has been the case when the State has taken on the role of entrepreneur.[51] Moreover, it cannot be claimed that self-regulation is entirely devoid of enforcement mechanisms. Indeed, market forces have a very important role in this regard. This is particularly the case in relation to corporations with publicly traded shares, where investors expect such corporations to comply with the practices and guidelines established in codes of conduct and any other self-regulatory instruments.[52] Statutory regulation may be formulated in a way to serve political purposes or may contain weak enforcement mechanisms. Therefore, a balance should be struck between the necessity of regulation and self-regulation.

A statutory regulatory approach is strongly needed when there has been a failure of self-regulation and its enforcement. In most cases, self regulation has not been stringent enough to stop corporate abuse. According to the Commission of the European Communities:

> Corporate social responsibility should …not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed.[53]

Thus, given that corporate self-regulation has limited ability to regulate corporations' behaviour, it should be supplemented by host state regulation through legal and contractual means.

V INTERNATIONAL SOFT-LAW STANDARDS

The enormous economic and political leverage of big extractive corporations can often allow them to evade applicable national regulations. It is against this background that the need for international standards is increasingly being felt.[54]

The first effort of the international community in setting CSR standards is the Tripartite Declaration of Principles concerning Multinational Enterprises and Social

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51 Ibid.

52 de Delgado and Vojvodic, above n 47.

53 Commission of the European Communities, Green Paper: Promoting a European Framework for Corporate Social Responsibility (COM (2001) 366 final, 18.7.2001, 7.

54 See, Grossman and Bradlow, 'Are We Being Propelled Towards a People-Centred Transnational Legal Order?' (1993) 9 *American University Journal of International Law and Policy* 8 (stating that 'The fact that they have multiple production facilities means that transnational corporations can evade state power and constraints of national regulatory schemes by moving their operations between their different facilities around the world.'). Stephens Stefans, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45 (stating that: 'international norms enforced through international mechanisms or coordinated domestic approaches are essential to the effective regulation of corporate human rights abuses').

Policy adopted by the ILO in 1977.[55] The standards incorporated in the Declaration are intended to encourage the positive contribution which multinational corporations can make to economic and social progress. The preamble to the Declaration proclaims:

> All the parties concerned by this Declaration should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organisation and its principles according to which freedom of expression and association are essential to sustained progress.[56]

The Declaration provides guidance to governments, corporations, and worker organisations in such areas as equal opportunities and treatment, working conditions, safety and health and freedom of association. However, the Declaration is non-binding and its implementation has been constrained by 'its dependency on domestic incorporation by states and on promotion and publication campaigns by non-governmental entities'.[57] The 1977 Tripartite Declaration has been supplemented by the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The 1998 ILO Declaration addresses the labour rights that should be observed by member countries of the ILO. It also offers a list of core standards that should be observed by multinational corporations in their operations.

The United Nations (UN) has made several attempts to formulate codes of conduct for regulation of multi-national corporations (MNCs) by laying down international standards. The UN adopted the Draft Code of Conduct on Transnational Corporations (TNC) in 1983[58] and subsequently it was revised in 1988[59] and 1990.[60]

The first UN Draft Code of conduct addressed two issues: firstly, host countries should abide by certain standards concerning treatment of foreign investors. Secondly, a demand for international standards of behaviour emerged from concerns that MNCs were interfering with the traditional social and cultural objectives of their host countries.

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55 ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1978) 17 *International Legal Materials* 422.

56 ILO Tripartite Declaration of Principles, par. 8, Official Bulletin (Geneva, ILO), 1978, Vol LXI, Series A, No 1.

57 Ralph G Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria' in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) 204.

58 Draft United Nations Code of Conduct on Transnational Corporations, UN Center on Transnational Corporations, Special Session (7-18 March 1983 and 9-20 May 1983) UN Doc.E/C.10/1982/6(1986).

59 Code of Conduct on Transnational Corporations, UN ESCOR, Organisational Session for 1988, Provisional Agenda Item 2, at 4, UN Doc. E/1988 (39(Add.1) (1988).

60 Development and International Economic Cooperation: Transnational Corporations, UN ESCOR, 2d See, Agenda Item 7(d), para. 13, UN Doc E/1990/94(1990).

The first Draft Code indirectly made reference to the human rights obligations of MNCs. The United Nations Draft Code of Conduct on Transnational Corporations of 1990, which has a wider mandate than earlier Codes, addressed many issues including good faith negotiations of contract and respect for tradition, fundamental freedoms, and international standards of human rights. Paragraph 14 of the Draft Code states that

> transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate … and shall not discriminate on the basis of race, color, sex, religion, language, social, national and ethnic origin or political or other opinion.[61]

According to the preamble to the 1990 Draft Code, one of its principal purposes is to minimise the harmful effects of MNCs' activities. However, the Draft Code was not made legally enforceable by the UN General Assembly. The main reasons for this failure could be attributed to disagreement between developing and developed countries on many issues of transnational investment. Another reason advanced is that international agreement on human rights standards by MNCs can lead to lowest-common-denominator standards and will be of little help in holding MNCs responsible for widespread human rights violations.

It is widely believed that a comprehensive, legally binding and universal code of conduct for MNCs based on at least minimum human rights requirements is imperative in the present context. It would pave the way for equal treatment among all MNCs regarding human rights and social obligations as well as ensure predictability and stability regarding compliance with well defined human rights norms. It would also help to ensure observance of human rights by MNCs regardless of host countries' willingness or ability to enforce them.

The Sub-Commission on Human Rights adopted a set of principles governing corporate human rights standards entitled 'Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights'.[62] These 'Norms' oblige corporations to respect and promote economic, social and cultural rights, such as adequate food, health, housing and education. But its implementation is left to the MNCs themselves and is subject to periodic monitoring and verification by the UN and any other existing international and national mechanisms. According to one distinguished commentator,

> The Norms seek to synthesize developments in treaty law which expressly or implicitly expand the scope of human rights obligations to non-state actors such as

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61 See Draft Code of 1990.

62 United Nations Economic and Social Council, Commission on Human Rights, Fifty-Fifth Session of the Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*, E/CN.4/Sub.2/2003/12/Rev.2 (2003).

> businesses, and clarify the extent of the obligations that apply directly to businesses.[63]

The 'Norms' contain several implementation strategies. Firstly, because human rights obligations will be most effective if internalised as a matter of corporate policy and practice, the Norms call upon MNCs to adopt its minimum standards for their own codes of conduct and to further adopt mechanisms for creating accountability within the MNC. The Norms require MNCs to disseminate their adopted rules amongst employees in an intelligible way[64] and encourage corporations to conduct internal monitoring, to establish complaints mechanisms and to undertake periodic reporting and assessment by independent verification so that current practices meet the standards in the Norms.[65] Civil society entities, such as NGOs, trade unions, and business associations, are urged to adopt the standards and use them as benchmarks for measuring performance, while intergovernmental organisations may also use them in the formulation of their own standards. [66]

The UN Global Compact launched by Secretary General Kofi Annan in 1999 invites corporations to commit themselves to a set of nine principles relating to labour rights, internationally proclaimed human rights, and protection of the environment. The Global Compact calls on world business to 'respect the protection of international human rights within their sphere of influence' and 'make sure their own corporations are not complicit in human rights abuses'.[67] The Global Compact urges companies to engage with human rights and environmental issues and to support its principles through adopting 'best practices'. However, the Compact is not a legally binding instrument and it has been criticised due to the absence of a process for monitoring its observance,[68] (although it provides for annual voluntary reporting). The main significance of the Compact lies in the fact that it provides a concrete set of obligations, widespread observance of which can contribute to the realisation of CSR.

The Organisation for Economic Cooperation and Development (OECD) adopted a series of codes of conduct for MNCs from 1976 to 2000. The first OECD Guideline on Multinational Enterprises adopted in 1976 deals with disclosure of information by corporations, improvement of employment and industrial relations through employees' rights to representation, conforming competition rules to avoid restrictive business practices and environmental protection. The OECD Guidelines

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63 Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) 33.

64 David Weissbrodt and Muria Kruger, 'Human Rights Responsibilities of Business as Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) 341.

65 Ibid 342-343.

66 Alston, above n 61, 33.

67 UN Compact for the New Century, at http://unglobalcompact.org/un/gc/unweb.nsf/content/thenine.htm

68 Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, International Council on Human Rights Policy, 2002, 157.

are mainly recommendations by governments to MNCs that operate in or from their territories. The Guidelines impose obligations upon the States to implement and promote compliance with the Guidelines by MNCs.[69] In 2000 the OECD substantially updated and revised the Guidelines to call upon MNCs to act consistently with the host State's international human rights obligations. Detailed implementation procedures such as 'follow-up' soft procedures including consultation, good offices, mediation, conciliation, as well as 'clarifications' of the guidelines themselves have also been incorporated.[70] Implementation necessarily rests on the will of governments through their National Contact Point.[71]

The legal character of these draft codes, declarations and resolutions is that they are not binding instruments and merely contain the commitment of a nation State to regulate MNCs. The implementation of international soft-law standards depends largely on active civil society campaigning. International soft law also sets out global standards which MNCs can hardly ignore due to risk of public criticism for any non-compliance. International soft law standards can also be guidelines for national legislation and action.[72] However, in aggregate analysis, they create a body of norms, albeit non-binding in nature, which contributes to evolving the standard of multinational responsibility towards protection and promotion of human rights.

VI NON-GOVERNMENTAL INITIATIVES ON SOFT LAW STANDARDS

There are also some initiatives on behalf of NGOs and citizen groups to regulate corporate conduct, such as the Sullivan and the Macbride principles. The Sullivan principles were drafted by Rev Sullivan, an African-American Baptist Minister, whilst he was a member of the Board of Directors of General Motors Corporation. In 1977, twelve US based firms doing business in South Africa accepted a pledge, (contained in the Sullivan Principles) to become active in the anti-apartheid movement and adhere to non-discriminatory labour practices in the areas of wages, housing, health, transportation and managerial training.[73] The Macbride principles were developed in 1984 to apply to US firms conducting business in Northern Ireland and to provide protection for discrimination against Catholic workers in the Protestant-dominated society.[74] The Sullivan and Macbride principles influenced the emergence of an elaborate framework of human rights responsibility of MNCs. Trade unions, civil society and pressure groups also made some efforts in this regard. For example, in 1997, the International Confederation of Free Trade Unions proposed its 'Basic Code of Conduct Covering Labour Practices'.[75]

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69 Steinhardt, above n 55, 209.

70 OECD Guidelines for Multinational Enterprises, Revision 2000, at http://www.oecd.org/daf/investment/guidelines/index.htm.

71 Steinhardt, above n 55, 206.

72 Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, International Council on Human Rights Policy (2002) 156.

73 See, the 'Sullivan Statement of Principles (4th amplification) 8 November 1984' 24 (1985) *International Legal Materials* 1496.

74 Westfield, above n 4, 1094.

75 Steve Gibbons, *International Labour Rights-New Methods for Enforcement* (1998).

VII THIRD WAY: BRIDGING THE GAP

Given the limitations of each of the above approaches, it is submitted that corporate pro-activeness in the field of environment and human rights can fill the gaps. Such pro-activeness combines compliance with regulatory measures as well as carrying out environmental and social impact assessment, stakeholder consultation, reporting, and addressing human rights concerns in security arrangements. Such steps are viewed as a more effective way to implement CSR. Extractive companies should undertake environmental and social planning and impact assessment, which can identify possible negative impacts and suggest the means of remedying them. Carrying out environmental and social planning to address social, environmental and human rights issues is becoming an important factor for increasing the public acceptability of extractive operations. A social or environmental impact assessment generally includes the study of social, environment, cultural and health impacts of a given operation in a particular area and likely changes in the values and norms of the society resulting from the operation of the project.[76] Environmental and social impact assessments have emerged as effective strategies to assess the potential impact on the operation on environment and human rights as a result of extractive operations. Social or environmental impact assessment can also identify potential areas of conflict between a corporation's business operations and the legitimate interests of local people and recommend ways to mitigate the negative impact.

Moreover, corporations should be engaged with local and indigenous communities to initiate constructive dialogue with them and undertake the development of programmes for the affected community. Stakeholder consultation and the integration of environmental and human rights concerns early in the planning/decision-making process is now considered to be an important means of fulfilling CSR. Stakeholder consultation prevents the tragic consequences of destructive resource development and integrates host communities in extractive resource management decisions which can help improve the social environment of business.[77]

Corporations' proactive efforts to protect human rights within their own operations and to promote human rights where they have the possibility of influencing governments with poor human rights records can be seen as key elements of their compliance with human rights obligations.[78] Corporations should address human rights issues in security arrangements for the protection of their installations in their operating areas. In order to prevent human rights abuses, corporations should ensure that their security arrangements are consistent with international human rights norms and practices.

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76 See, Mining and Environment Research Network Research Bulletin and Newsletter No. 11/12, (1997) special edition, 130.

77 See, Gerald P Neugebauer, 'Indigenous Peoples as Stakeholders: Influencing Resource Management Decisions Affecting Indigenous Community Interests in Latin America' (2003) 78 *New York University Law Review* 1227-1261.

78 See, Jens Scierbeck, above n 25, 168.

Social and environmental reporting, which is usually carried out after the operation of the project to assess the social or environmental impact of an extractive operation, is now considered an important tool to regulate corporate behaviour. Reporting aims to evaluate a corporation's social and environmental performance against a given set of standards or expectations. The social and environmental reporting can achieve the goals of CSR by promoting: (i) improved and informed corporate decisions with full understanding of the implications of any action; (ii) accountability to the public through disclosure; (iii) an understanding of community and stakeholder expectations of business and of the evolution of those expectations; and (iv) measurement of progress towards meeting those expectations.[79]

For an integrated approach to CSR, it is essential that self-regulation and international soft law standards be complemented by the requirement of environmental and social impact assessment, stakeholder consultation, and a reporting process. Indeed, there is a discernible trend towards developing national legal frameworks on such a basis. For instance, the World Commission on the Social Dimension of Globalisation, in its report of 2004, suggests three ways in which the contribution of voluntary initiatives could be strengthened: first, supporting corporations in their efforts to develop credible reporting mechanisms and performance measures both for global business and domestic suppliers in line with internationally accepted principles and standards; second, improving methods of monitoring and verification, taking into account diverse situations and needs; and third, developing more broad-based industry level partnerships with employers' organisations, unions, cooperatives, governments, and civil society organisations.[80]

VIII CONCLUSION

As discussed above, each approach to CSR has its own limitations. Regulation by host States through legal and regulatory measures are considered to be the most effective means of implementing CSR in the extractive and non-extractive manufacturing sectors. The regulatory approach is preferable as a means to level the playing field and to render all corporations equally accountable. However, many developing countries may be reluctant to effectively regulate corporations and the inflexibility of regulation and economic costs involved in the enforcement of regulation are significant limitations.

Corporate self-regulation has emerged as an important way to fulfil CSR. The recent wave of corporate self-regulation through various voluntary codes is articulated partly in response to growing concerns of negative environmental and social impacts of extractive operations and partly in response to the demands of civil society including NGOs and stakeholders. Self-regulation is expediency based and specific to a particular context and accordingly such codes are flexible to adapt to particular context. However, the efficacy of these regulations is very limited in

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79 David Hess, 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1979) 25 *Journal of Corporation Law* 41, 53.

80 WCSDG (2004) para 555.

many respects. Voluntary codes cannot effectively bar extractive corporations from environmental wrongs and human rights abuses because the performance standards are not subject to external verification and often lack credible compliance monitoring mechanisms.

The recently adopted international soft law standards are also shaping norms on CSR. The corpus of international standards clearly indicates an emerging consensus of the international community on global regulation of corporate responsibility. However, international soft law standards are not binding and consequently, they have little impact on the real life scenario of corporate behaviour.

It can be argued that each approach should be seen as complementary to the other. A blend of both binding regulation and voluntary standards can ensure the realisation of social responsibility of extractive corporations.[81] No less importantly, preventive measures including the integration of social and environmental concerns into extractive projects through impact assessment, stakeholder consultation and addressing human rights issues and social provisioning in the affected area can mitigate political risk factors in the extractive industry and can fill gaps in the framework of corporate self-regulation and regulation by a host State.

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[81] Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, International Council on Human Rights Policy (2002) 9.