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Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?

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Abstract: *Corporate Social Responsibility (CSR) has today become the rhetoric of every Business Enterprise, especially those engaged in Natural Resource Development. This is in recognition of its intrinsic value to the business bottom line and its ability to stave off social and reputation risks that may not only affect a project's rate of return, but also subject to questioning, its 'social licence' to operate. But the 'free rider', 'green wash' and 'blue wash' problems that result from self-regulation inherent in the practical implementation of CSR initiatives, has led to questions as to whether self regulation as exemplified in the 'soft law' approach to CSR and transparency, is really the answer to the problem of using CSR and Transparency initiatives, to ensure that Mineral Resource Development benefits all parties on the Mineral Development Triangle. Is government regulation a better option or should industry driven self-regulation be allowed to continue? This paper reviews the above issues using examples from a few countries to show the way forward.*

A. Introduction

The last decade has witnessed a tremendous agitation for embracing Corporate Social Responsibility (CSR), and Transparency (absence of corruption), in the development of energy and mining projects especially in emerging markets. This is seen as a way of not only encouraging sustainable development, but also mitigating social risks that have profound impact on a project's bankability (acceptance for funding) and its rate of return.[1] It has also been seen on a wider scope, as a way around the age long problem of infrastructure decay, environmental degradation,

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[1] Bede Nwete, *The Equator Principles: How Far will it Affect Project Financing*? 2 INTERNATIONAL BUSINESS LAW JOURNALS 173-188 (2005). For example, political and social unrest in the Niger Delta region of Nigeria has been known to hamper production activities of oil companies, depressing crude oil exports by up to 40%, *see Clashes in Oil Rich Nigerian Area*, BBC NEWS, 4 August 2003, available at: http://news.bbc.co.uk/2/hi/africa/3123939.stm.

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human right abuses, corruption and stagnated development that have become synonymous with resource rich emerging economies.

The World Bank defines CSR as the "*commitment* of business to contribute to sustainable economic development, working with employees, their families, local community and society at large to improve the quality of life, in ways that are both good for business and good for development"[2] [emphasis added]. The fact however is that business is not under any obligation to do this, no matter how noble such acts may appear, as these do not directly enhance profit which many argue is the primary motive of business.[3]

The recognition however, of the intrinsic value of CSR and Transparency to the business bottom line, coupled with the clamour by the international media and civil society, for a much more regulated and controlled business environment, especially in relation to human and environmental rights, and corruption, seems to have witnessed certain changes in this respect. These have led to the emergence of several CSR voluntary codes of corporate conduct, declarations, Memoranda of Understanding (MoU), Good Neighbour Agreements (GNAs), Norms, like the norms on the responsibilities of transnational corporations and other business enterprises with respect to human rights[4], etc, which are at best *soft law* that has little or no binding effect, and therefore attracts no sanction when breached.

On the transparency side, this led to the emergence of the Publish What You Pay (PWYP) campaign; and the Extractive Industries Transparency Initiative (EITI), - the latter being embraced by many governments and industries due to its non-penal and voluntary nature.[5] The UN Global Compact,[6] which encapsulates a broader framework of CSR and transparency principles, represents the most current and serious international non-penal attempt, at bringing business in line with international human rights, labour rights, transparency and environmental

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[2] H. Ward, *Public Sector roles in strengthening Corporate Social Responsibility: Taking Stock*, working paper prepared for the World Bank (2004), available at: http://rru.worldbank.org/PapersLinks/Open.aspx?id=3504.

[3] It is sometimes argued, for example, that the "social responsibility of business is to increase its profits," as cited in Milton Friedman, *Greed is Good, the Social Responsibility of Business is to Increase its Profits*, NEW YORK TIMES, 13 September 1970. *See also* J. Parkinson, *The Social Responsible Company*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, (M. Addo, ed., 1999).

[4] *Infra*, note 7.

[5] *See* Bede Nwete, *Revenue Transparency, National Sovereignty and Authoritative Government: Any way out of the Dilemma*? Paper presentation at the 18th World Petroleum Congress (2005).

[6] For more information on the Global Compact, *see* http://www.globalcompact.org.

concerns.[7] The Kimberly Process (Certification Scheme), aimed at the diamond industry, also represents an international effort at industry self regulation.[8]

Many businesses have however been accused of lining up behind the global compact, in an effort to "hide their social and environmental sins"[9] under the blue cover of the UN logo[10] - the blue wash problem. Added to this is the fact that, the bandwagon effect of an industry driven CSR and Transparency practice has also created a free rider and 'green wash' problem (the efforts at giving a positive public image to accepted environmentally unsound practices). CSR and Transparency, as presently practised in the extractive industries, have failed to deliver measurable and sustainable benefit to both the people living along project corridors, and natural resource producing communities as a whole. This has provided a leeway for corporate and government neglect and abuses. Being non-binding in nature, it has left little or no legal plank through which the victims of corporate and government abuse resulting from natural resource extraction, can ventilate their rights (through the institution of legal actions for instance).

Industry driven self-regulation, manifested through CSR initiatives, has created a widening gulf between expectations and results, and has obfuscated the difference between Corporate Philanthropy (exemplified by gifts, monetary donations, and building of things like schools and clinics), and CSR.[11] The EITI being voluntary in nature has also led to the abdication of government's responsibility to its citizens, through the enactment of anti-corruption laws that are targeted at the extractive industries. This responsibility has been replaced with peer pressure-driven transparency (EITI) in natural resource extraction and development. There has as a result, been little or nothing to show for all these efforts, in terms of improvement in the quality of life and economic growth, as the educational and health systems in the emerging economies still remain in a state of decay, and social services and

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[7] C. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Businesses With Regard to Human Rights*, 4 GERMAN LAW JOURNAL 10 (2003). *See also* C. Hanley, *Can New Issues Be Raised Without Discussion Of The Old? A Review of Stephan Hobbe (ed.), "Kooperation oder Konkurrenz internationaler Organisationen"*, 3 GERMAN LAW JOURNAL 4 (2002).

[8] For more information on the Kimberly process, *see* http://www.kimberleyprocess.com:8080/site/?name=faq.

[9] D. KORTEN, WHEN CORPORATIONS RULE THE WORLD, 2nd ed. (2001).

[10] *Id.*

[11] For the difference between "Corporate Philanthropy" and CSR, *see* A. Dias & B. Nwete, *Good Governance, Business and Human Rights in Energy Exporting Developing Countries: A Supreme Challenge for Corporate Social Responsibility and Accountability*, 2 OIL, GAS, AND ENERGY LAW INTELLIGENCE (OGEL) 4 (2004).

access to fresh water supplies remain poor,[12] while revenue from these resources remain unaccounted for. For instance, Angola, Congo Democratic Republic, Nigeria and Zambia listed as some of the 'least liveable countries' in the world in the United Nations Human Development Report, 2005 have huge mineral and petroleum wealth. On the contrary, allegations of human right abuses and environmental degradation have not abated.[13]

The result on the primary level, has been the galvanisation of efforts on the part of the International Media and NGOs for a regulated CSR (codifying and making the accepted norms and standards more stringent and uniform), and the adoption of the PWYP principles; and the resort to 'mobilisation of shame' in some cases.[14] The PWYP campaign and its principles were initiated by a coalition of NGOs in June 2002,[15] and argue unlike the EITI, for compulsory disclosure of oil and gas revenues paid by industries to government. These it is hoped will remedy the bad sides of the *soft law* approach to CSR and the EITI principles; On the secondary level, project affected communities have resorted at times to the 'law of the jungle' by shutting down operations[16], seizing mine sites, flow stations and platforms, blowing up of pipelines[17] and the kidnapping of industry personnel, to assuage the pains and losses associated with mineral development. Is regulated CSR, and Transparency

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[12] *See*, *supra,* note 5.

[13] *See generally*, Human Rights Watch, *The Price of Oil: Corporate Social Responsibility and Human Right Violation in Nigeria's Oil Producing Communities*, available at: http://www.hrw.org/reports/1999/nigeria/; *see also* A. GEDICKS, RESOURCE REBELS: NATIVE CHALLENGES TO MINING AND OIL CORPORATIONS (2001).

[14] Originally used to draw international attention to violations of human rights by governments, "mobilisation of shame" can now be used to draw negative international publicity to extractive industries that engage in negative practices. For example, the Brent Spar incident involving Shell in the UK North Sea, Shell in Nigeria's Niger Delta, BP in Colombia and Texaco in Ecuador.

[15] Publish What You Pay Campaign, available at: http://www.publishwhatyoupay.org/english/background.shtml.

[16] In December 2004, violent clashes between local protesters and military police arising from unequal distribution of oil revenues caused Panafrican Energy to temporarily halt its operations in Gabon. Global Policy, *see Gabon, Unrest forces temporary closure of Canadian Oil sit*e, GLOBAL POLICY (2004), available at: http://www.globalpolicy.org/security/natres/oil/2004/1206gabon.htm.

[17] Restive tribesmen in Yemen have in their demand for a bigger share of the oil revenue have not only lobbied native governments, but have also been implicated in several attacks on oil pipelines. For example, in 1998 they disrupted Yemen's main export pipeline, which carried 150,000 bpd, *see Yemen: a land tormented by tribal strife*, THE TIMES, 30 December 1998. In September 2003, a pipeline operated by the Hunt Oil Company was also disrupted by an attack from tribesmen, *see Tribesmen Blow up Major Yemen Oil Pipeline*, ARAB NEWS, 13 September 2003.

exemplified by a *hard law*[18] approach really the answer to these problems? In other words is government regulation a more credible option than an Industry driven self-regulation? Whichever way, the challenges facing Energy and Mining Industries in Emerging markets in this respect are enormous.

This paper addresses some of the arguments in the debate with a view to finding a middle ground between the two. In doing so, it examines the reasons for embracing CSR and Transparency principles, which hitherto was not on the board level agenda of businesses few decades ago. It further explores the industry arguments against a *hard law* approach to CSR and Transparency, bringing to light the consequences of adopting one approach as against the other. In an attempt to answer the question of whether a *soft law* approach is capable of achieving transparency and making extractive industries socially responsible, it projects the likely scenario in elevating corporate social responsibility to the status of hard law, and suggests ways by which the existing constraints imposed by the *soft law* approach can be overcome, for the benefit of all stakeholders. For a good understanding of the context within which the arguments and analysis in this paper are presented, the paper first gives a concise account of Mineral Development in Emerging Markets, to show why the issue of CSR and Transparency is important in the natural resource industry. It thereafter traces the emergence of CSR and Transparency in Business activities, in an effort to show the link between globalisation, negative business practises and the emergence of CSR and Transparency initiatives. This is followed by an evaluation of the extent to which soft law can ensure that extractive industries in emerging markets, imbibe the principle of transparency in their activities, and become socially responsible in the absence of hard law. A comparative examination of hard and soft law is also done to show the difference between them and why these differences matter in the natural resource industry. The paper then ends with few suggestions, on how to overcome the difficulties posed by the use of soft law to tackle the problem of CSR and Transparency in the development of energy and mining projects in emerging markets.

[18] "Hard law" refers to the traditional notion of law with its binding and penal effect.

B. Mineral Development in Emerging Markets[19]

The world economy today depends to a very great extent on natural resources from the energy and mining industries. This has consequently increased the world's attention to the emerging economies as more than 90% of these resources are in the developing regions of the world.[20] According to Razavi, "international energy companies--investors, equipment suppliers, contractors, and consulting firms--are therefore shifting their attention from Europe and North America to developing countries."[21]

The implication is that the world will continue to depend on the emerging markets for these resources and for a very long time too.[22] This has led to increased investment in the development of energy and mining projects across these regions, with increased opportunities for future investments. It has also brought with it, huge revenue both for the governments of these regions[23] and energy industries operating there. The revenue from these resources most times constitute more than 50% of the Gross Domestic Products (GDP) of these countries, while accounting for more than 60% of government's foreign exchange earnings.[24]

This should naturally guarantee minimum improvement in the standard of living in these countries through poverty reduction and infrastructural development. However, the structural deficiencies in the regulatory and economic framework in these countries provide considerable scope for corruption and opaque accounting, over revenues accruing from these resources. This state of affairs naturally lead to,

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[19] "Emerging markets," which is sometimes used in place of "emerging economies" refers to market and business activities in developing or industrializing regions of the world. It is used in this paper to denote developing regions of the world.

[20] H. Razavi, *Financing Oil and Gas Projects in Developing Countries,* WORLD BANK, available at: http://www.worldbank.org/fandd/english/0696/articles/080696.htm.

[21] *Id.*

[22] Subject to the global use of alternative forms of energy and the discovery of new fields and mines outside the emerging markets.

[23] The World Bank estimates that Nigeria has earned over US $250 billion in Oil revenue to the date of publishing, *see* C. Nwokonko, *Enhancing Local Content in the upstream Oil and Gas Industry in Nigeria: An Appraisal*, 1 OGEL 4, (2003). Angola's new deep-water production is also projected to generate over $7 billion annually, *see* B. Catriona, *Angola: Oil-curse or cure all?,* HUMANITARIAN NEWS AND ANALYSIS, available at: http://www.irinnews.org/print.asp?ReportID=38400.

[24] B. Nwete, *How Can Tax Allowances Promote Investment in the Nigerian Petroleum Industry?* 2 OGEL 3, (2004).

social unrest, wars,[25] agitation for self rule and or resource control (the Niger Delta Region of Nigeria for instance), human right abuses,[26] stagnated development and an impoverished population, all in the midst of abundant revenue from the natural resources. Thus from one resource rich country to the other (with few notable exceptions), the story is the same and the trails are similar; poor governance manifested in the form of poor economic growth, environmental degradation and human rights abuse resulting from the development of oil and mining projects.

Businesses, especially mining companies have been known to move from regions with strict and high regulations to regions with flexible business regulations.[27] Anderson notes in this regard, the fact that the UK based Thor Chemicals Company was heavily criticised by the UK Health and Safety Executive for exposing workers to mercury, made the company to transfer its processes and machinery to South Africa,[28] where industry driven soft laws as in many other developing countries, obviously rank higher than hard law. These countries therefore tend to rely more on the company's goodwill (CSR), rather than law in ensuring that they imbibe internationally accepted practises in their operations. The regulations where present, are often too 'weak' and outdated to checkmate the innovativeness of these companies. The weak regulations are often supported by affirmative actions by governments, triggering off 'the race to the bottom' in the inter-country competition for international investment; thus standards whether for human rights, labour or environmental protection are lowered to the barest minimum. Governments at times also take steps to show the existence of a weak legal regime, and favourable investment climate rooted on the suppression of the people's rights. This is exemplified in the fact that "*to attract companies like yours… we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns….all to make it easier for your*

[25] For a detailed discussion on the correlation between natural resources and conflict and wars, *see* M. Ross, *Natural Resource and Civil War: An Overview,* a study submitted to World Bank Research Observer (2003). *See also* K. Vlassenroot, & H. Romkema, *The Emergence of a New Order? Resources and War in Eastern Congo*, 1 JOURNAL OF HUMANITARIAN ASSISTANCE 111 (2003).

[26] *See*, *supra,* note 13. *See also* Bede Nwete, *Multinational Corporations and the BTC Pipeline Project: Any Hope for Human Rights and Sustainable Development?* 2 OGEL 12 (2004).

[27] P. Raynard & M. Forstater, *Corporate Social Responsibility, Implications for Small and Medium Enterprises in Developing Countries*, report prepared for UNIDO (2002).

[28] M. Anderson, *Transnational Corporations and Environmental damage; Is Tort Law the Answer?* 3 WASHBURN LAW JOURNAL 41 (2002); *Sithole & Ors. v. Thor Chemical Holdings Ltd.,* (1999) 96 (9) L.S.G 32.

business to do business here."[29] Some others boast of "*labour costs that are some of the lowest in the world given the productivity and quality of Mexican labour*."[30]

This is further exemplified in the fact that almost all the countries involved in major expansion of the mineral sector taking place in the Asia Pacific region, "*drastically relaxed controls over mining companies, apparently to encourage further investment*."[31] In Papua New Guinea (PNG) and Indonesia for instance, almost all projects were allowed to "*operate under special conditions that impose minimal or no regulation and widespread contamination of the environment, and in some cases major social and human rights impacts*."[32] Exemptions from existing environmental and other laws were provided by Chile, Philippines and PNG.[33] The facts leading to the case of ***Aguinda vs. Texaco***[34] disclose that the Ecuadorian government, had by the Concession Agreement of 1973, released Texaco from all liability derived from any environmental impact that its operations may cause. Though the court per judge Broderick in the Aguinda case recognised the Rio Declaration on Environment and Development as being relevant to the case, its soft law character precluded the court from applying its principles to the case, as it did not come within the contemplation of the Alien Tort Claims Act (ACTA), on which the claims of the plaintiffs was founded. These have weakened the ability of developing countries to hold companies accountable for human rights and environmental abuses, and even for corrupt practices, hence the resort to soft law in the form of CSR and Transparency initiatives.

Again, the environmental degradation and human rights abuse resulting from oil company activities, experienced by communities in Nigeria's Niger Delta has been the cause of agitation for resource control in the region. This has also led to the unparalleled kidnapping of oil workers and attacks on oil and gas infrastructure in the region. According to Dias, the policies of resource rich governments have been unjustifiable in the light of related grave human and environmental costs coupled with the "tragic legacy of the oil industry in Africa, Amazonian and in several other

[29] *See*, *supra*, note 9, 293.

[30] Mexican president Fox stated this in an effort to persuade business leaders to invest in his country, as in Christian Aid, in MARK CURTIS, TRADE FOR LIFE: MAKING TRADE WORK FOR POOR PEOPLE, (2001), available at: http://www.christian-aid.org.uk/indepth/0111trbk/05_Chapter5.pdf.

[31] Mineral Policy Institute, *Foreign Investment in the Asia –Pacific Mining Sector: National Policies, Economic Liberalisation and Environmental and Social Effects*, WWF International (1999).

[32] *Id.*

[33] *Id.*

[34] 142 F. Supp. 2d 534 (S.D.N.Y 2001).

parts of the world."[35] There is for instance a strong feeling in Nigeria's Niger Delta region, that the rate of environmental degradation in the area resulting from oil company activities is gradually pushing the Delta towards ecological disaster.[36]

This is because the high level of oil and gas industry activity in the Niger Delta, which remains poorly regulated and monitored, has exposed the area to the dangers of water, land and air pollution, and has also "*endangered aquatic life as well as the entire ecosystem, topography and surface vegetation. For instance, in 1979, a storage facility at the West Niger Delta Shell operated Forcados terminal collapsed. This spilled an estimated 560,000 barrels into the surrounding land, mangrove swamps and the Atlantic. There was hardly any respite. In January 1980, another major blow-out occurred which spewed out some 200,000 barrels of crude oil into the Atlantic and destroyed some 840 acres of Niger Delta mangrove.*"[37] And in Ecuador, "*oil waste is collected in vast pools often on agricultural land, making further cultivation impossible. Gas is burned off giving the impression of giant Bunsen burners lighting up the sky. And small spills are shovelled up, put in plastic bags and buried. The whole area reeks of oil, and local Farmers talk of how the groundwater is contaminated, large black drops forming on the vegetation when it rains.*"[38]

The non-observance of international standards by companies in the development of energy and mining projects, and the difficulty of imposing sanctions on erring companies by governments in emerging markets, arise from the trade-off between weak regulations (in some cases absence of regulation) and foreign investment. These countries, to a great extent, depend on revenue from these resources for socio-economic development, but lack the financial leverage, infrastructure and human capital, needed to translate the resources from their natural states to cash yielding assets.[39] They are therefore greatly disadvantaged, when bargaining with transnational oil and gas companies that possess the requisite skills and financial power needed in this respect.

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[35] A. Dias, *Oil and Human Rights*, 1 OGEL 2 (2003).

[36] UNDP Nigeria, *Niger Delta Human Development Report* (2006), 178.

[37] R. Okoh & P. Egbon, *Fiscal Federalism and Revenue Allocation: The Poverty of the Niger Delta,* in C. Uche & O. Uche, *Oil and the Politics of Revenue Allocation in Nigeria,* ASC Working Paper (2004), available at: http://www.ascleiden.nl/pdf/workingpaper54.pdf.

[38] T. Mansel, *Ecuador's Oil Pollution Fears,* BBC NEWS, 15 April 2002, available at: http://news.bbc.co.uk/1/hi/world/americas/1930671.stm.

[39] Bede Nwete , *Legal and Policy Framework for Promoting Petroleum Expertise in Africa, 4* OGEL 3 (2006).

The best bargain is therefore to leave issues of transparency and CSR in industry operations, to corporate codes of conduct and voluntary initiatives (soft law), rather than prescribing internationally accepted limitations, in the form of binding regulations on transparency, environmental and human rights issues, which they fear will not translate to the attraction of foreign investment (the race to the bottom syndrome).[40]

Corruption in addition to the above problems, has become endemic is some of these countries. Only recently, a former executive of Houston based Willbross Group Incorporated, pleaded guilty before Judge Sim Lake of the U.S District Court for the Southern District of Texas, over allegations of violating the Foreign Corrupt Practices Act (1977), through illegal payments and bribes paid by its subsidiary to officials of the Nigerian National Petroleum Corporation and other Nigerian government officials, as well as Ecuadorian government officials to secure oil contracts and influence the outcome of litigations.[41]

Another Houston based Oil Company, EHRC Energy is presently undergoing probe by the Federal Bureau of Investigation for oil related bribery allegations in Nigeria, and Sao Tome and Principe.[42] This results from lack of transparency in the tender and bidding processes for petroleum acreages. The implication is that oil contracts are at times undervalued, and revenue accruing from them ends up in wrong hands, and remains unaccounted for. The result is poor or negligible investment in social services and infrastructure. The general population therefore benefits little from an oil and gas development regime that is not transparent. The World Bank in1988 estimated that the cost of providing safe water supplies in Nigeria's rural and urban areas, within 20 years was $4.3 billion. This amount pales into insignificance, when compared to over $400 billion stolen from oil revenue.[43]

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[40] Some writers are, however, of the view that there is no empirical evidence to support the argument on race to the bottom at a macro economic level, including the fact that it is not fair to say that FDI is as highly mobile as the theory of the race to the bottom suggests, neither can it be said that Transnational Companies are more powerful than governments, *see* T. Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 1 BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW 27 (2004).

[41] *$1.5m NNPC Bribe Scandal: Willbros Official Pleads Guilty,* THISDAY NEWSPAPER, 19 January 2006, available at: http://www.thisdayonline.com/nview.php?id=58683.

[42] D. Ivanovich, *Small Houston Oil Company at the Center of Global Drama,* HOUSTON CHRONICLE, 9 January 2007, available at: http://www.freerepublic.com/focus/f-news/1703885/posts.

[43] Y. Adebowale, *Globacom: EFCC Arrests Babaginda's Son,* THIS DAY NEWSPAPER, 1 August 2006.

Equally important in this respect is the fact that investments in minerals remain the only source of foreign exchange earnings for some of these countries.[44] Again deregulation and trade free zones (special investment zones) and export processing zones in developing countries, despite the laudable economic objectives behind their establishment,[45] appear to have led to a weakening of regulation at the national level and a declining tax base for the government. Export processing zones (EPZ) have been held to, provide fewer jobs than anticipated, and diminish government revenue,[46] while threatening labour standards through the control of labour unions. For instance the EPZ in Namibia is said to have provided 400 jobs rather than the 25,000 anticipated in its first 3 years and granted heavy investment incentives to oil, mining and textile companies, which have reduced the government's tax base. The trade free zones are virtually tax and rule free zones, which breed child labour, poor wages, poor conditions of employment and environmental degradation.[47]

Thus Companies including extractive industries by their activities seek a rule free market in which to operate, and this also presents a challenge to government- the urge to attract foreign investment and diversify the economy has become difficult to balance with the need for monitoring and enforcing extant laws on human rights and environmental protection. From the first Export Processing Zone (EPZ) established with a World Bank loan in Kenya in 1990, there are about 5 EPZs in the country, but these have also brought about problems of low wages, and human rights abuse by the Companies, leading to complaints by the Kenyan Human Right Commission in 2004.[48]

The fact that the problems associated with the development of energy and mining projects in emerging markets affect more than 3.5 billion people, who in these

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[44] *See*, *supra*, note 23; *supra*, note 24.

[45] H. Jauch, *Export Processing Zones and the Quest for Sustainable Development: A Southern African Perspective,* 1 ENVIRONMENT AND URBANIZATION 14 (2002).

[46] The Onne Oil and Gas Free Zone with its incentives is sure to reduce government's tax earning coupled with its potential for human, environmental and labour rights abuse as has been witnessed in some other places. For the numerous incentives, *see:* http://www.onnefreezone.com/incentives.

[47] *See*, *supra*, note 45.

[48] D. Taylor, *In a Situation Like This Who Cares About Human Rights?* GLOBAL POLICY FORUM (2005), available at: http://www.globalpolicy.org/socecon/bwi-wto/wbank/2005/1010carepz.htm. *See also* K. Opala, *Investor Dollars Versus Workers' Rights?* GLOBAL POLICY FORUM (2003), available at: http://www.globalpolicy.org/socecon/inequal/labor/2003/0221investor.htm.

regions, depend on their natural resource wealth for improving standard of living,[49] makes it an issue worthy of current discourse. Again the countries that constitute emerging markets together represent a larger percentage of the world's population, while at the same time accounting for a smaller percentage of the world's economic growth, and infrastructural development. This makes a redress of these problems highly imperative. Sadly enough, the fiscal arrangement for sharing revenues accruing from the energy and mining projects in most countries in these regions, excludes the resource owning communities[50] who suffer most from the negative sides of mineral development. They are therefore left at the mercy of industry goodwill in the form of CSR and EITI.

Furthermore, economic and social growth in many resource rich emerging markets has been quite dismal[51] largely due to the fact that lack of transparency of the revenue encourages its mismanagement. Thus most of these countries suffer high level of economic hardship and poverty with low GDP, and are in the low and lower-middle-income countries group by World Bank (WB) ranking.[52] The educational and health systems in these countries, especially in communities within the vicinity of the energy and mining projects remain in a state of decay, while social services like electricity and access to fresh water supplies are either poor or non existent. Unemployment remains at its highest peak in the project affected communities.[53] The case of Angola, Congo Democratic Republic, Nigeria and Zambia had earlier been mentioned in the introductory part of this work.

These factors have contributed to a decline in GNP and economic growth. There is a strong correlation between greater dependence on these resources and higher

[49] T. Blair, speech at the EITI London Conference, 17 June 2003, available at: http://www.dfid.gov.uk/pubs/files/eitidraftreportspeech.pdf.

[50] The term "Resource Owning Communities" appears to be a misnomer, as most constitutions vest ownership of the resources on the government or treat the resources as a patrimonial inheritance belonging to the entire citizenry, *see*, *supra*, note 5.

[51] *See*, *supra*, note 25.

[52] *Data and Statistics*, WORLD BANK, available at: http://www.worldbank.org/data/country-class/classgroups.htm#Low_income.

[53] This arises from the fact that the communities are agrarian in nature and energy and mining projects take up large portions of their farmlands, coupled with the consequences of environmental pollution to their fishing ponds, rivers, creeks and the remainder of the farmlands. These combine to keep them unemployed for considerable length of time. And as they are not equipped with any other training or job skill, they remain unemployed for the rest of their life. A well articulated CSR programme can remedy the situation.

than normal child mortality rates. For instance, each increase in mineral dependence of 5 points in these states raises the mortality rate for children under the age of five by 12.7% per thousand of the population, while that for oil is raised by 3.8% per thousand of population.[54] This is also worse in the project affected communities.

With this scenario on the development of energy and mining projects in emerging markets, is it still excusable to leave the people at the mercy of industry driven CSR or peer driven transparency, for redressing the environmental and human rights abuses, and lack of basic necessities of life? Can a *hard law* approach to the issue of CSR and Transparency hold hope for a better future? To answer these questions it is necessary at this juncture to consider why CSR and Transparency has become important for businesses.

C. The Emergence of CSR and Transparency in Business Activities

Milton Friedman's assertion that the "social responsibility of business is to increase its profits,"[55] has had many followers who have continued to insist that the proper business of Business is business,[56] and that the role of well run corporations is to make profit and not to save the planet.[57] Furthermore governments were recognised as having the sole power, authority and capacity to deal with issues of governance, human and environmental rights,[58] despite arguments that the Universal Declaration of Human Rights' (UDHR) requirement, that every organ of society should promote respect for human rights and fundamental freedoms is applicable to businesses.[59]

As a result, the issue of CSR and Transparency occupied no place on the board-level agenda of businesses, until about a decade ago. Businesses were more concerned with priorities that seemed to be more important than issues

[54] *See*, *supra,* note 25.

[55] *See*, *supra*, note 3.

[56] *The Good Company, a Sceptical Look at Corporate Social Responsibility*, THE ECONOMIST, 28 January 2005, 18.

[57] M. Wolf, *Sleep-walking with the Enemy: Corporate Social Responsibility distorts the market by deflecting business from its primary role of profit generation*, FINANCIAL TIMES, 16 May 2001.

[58] The rights here are treated as part of the wider issue of Corporate Social Responsibility.

[59] *See* L. Henkin, *The Universal Declarations at 50 and the challenge of global markets,* 1 BROOKLYN JOURNAL OF INTERNATIONAL LAW 25 (1999).

encapsulated in the broader framework of CSR, which include maximisation of shareholder value and profit, risk management, transfer pricing, mergers and acquisitions, and senior management selection and remuneration, etc. and for oil companies, the additional concern about reserve replacement. Added to this was the fact that the Company Law and other legislations that primarily regulate the activities of these businesses do not impose any CSR obligations on them.[60] The board of directors and management were therefore at liberty to ignore the demand by civil society to integrate CSR standards in their activities.

These notwithstanding, the context of the debates about globalisation and corporate power and emerging human rights and sustainable development concerns and priorities, now cuts across all areas of board interest and responsibility, especially as they increasingly define a company's reputation risks and its 'social licence' to operate.[61] This is coupled as said earlier on, with the galvanisation of efforts on the part of civil societies and the international media, and the unsustainable operating environments to which corporations were being subjected for non-observance of the principles of CSR and Transparency in their activities- recent kidnapping of oil workers in the Niger Delta region of Nigeria, and the consequent shutting down of operations by oil companies is a manifestation of the unsustainable operating environment to which companies are being subjected in this respect.

Furthermore, the power shift from the traditional state actors to non- state actors (businesses), resulting from the globalisation of the world economy, which have vested corporations with enormous financial and economic power, and made them the new engines of economic growth and development especially in the emerging markets, strengthened the argument that corporations should alongside profit generation, be made to integrate CSR and Transparency standards in their activities, and be made accountable where they fail to do so. For instance the top 200 companies today represent a quarter of the world's gross domestic product,[62] while Exxon Mobil's turnover in 1999 was more than 4 times Nigeria's GDP and more than 100 times that of Chad.[63]

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[60] Some Jurisdictions notably the UK however impose some social disclosure requirement on Companies. These though are limited. *See* Modern Company Law for a Competitive Economy: The Strategic Framework, (London, 1999).

[61] *See*, *supra* note 11. *See also* T. Walde, *The Role of International Soft Law in Natural Resource and Energy Investment*, 2 OGEL 4, (2004).

[62] *See* M. Robinson, *Human Rights, Development and Business-An Introduction*, available at http://www.novartisfoundation.com/en/articles/human/symposium_human_rights/speeches/speech_robinson.htm#governments.

[63] *See*, *supra* note 27.

A typical Concession Contract for mineral exploration and development is normally silent on the issues of CSR and transparency. Aside certain 'crypto' obligations[64] it imposes on the concessionaire, little is said on the need to make the project beneficial to local communities. Coupled with this is the fact that other regulations dealing with issues of environmental degradation and labour if any are lax. This results in an operating environment that is anti-people. To attract business, especially in the face of lower extraction cost elsewhere, and to ensure the steady flow of revenue from these resources, governments in emerging markets often lower human right and environmental standards or turn a blind eye to abuses and other forms of 'Corporate Social Irresponsibility.' O'Reilly acknowledges in this respect, the fact that "*security of onshore installations in the US, or UK is a vital but essentially technical issue with few CSR implications. But in Colombia, Burma or Nigeria, the structure and practices of security regimes have generated huge international controversies and inflicted grievous damage to company reputations.*"[65]

These have been the lot of most developing countries. And no where are these problems more endemic, than in energy and mining projects due to their high profile nature and the grave environmental consequences and abuses that accompany its development; this has often made people to regard natural resources especially in the realm of energy and mining projects as a curse rather than a blessing.[66]

These necessitated the emergence of corporate philanthropy or 'first generation'[67] CSR, often manifested in one form of monetary donation or the other, and was done to assuage the feelings of the local populace and to keep the company's 'nose clean'[68] But the beginning of the modern concept of CSR seems to have evolved through the UN's initiation of the Draft International Code of Conduct on Transnational Corporations,[69] responding to much outcry from NGOs and the international media. The 1992 Earth summit in Rio de Janeiro dwelt on these issues,

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[64] These include contribution to education fund, training of local project personnel and other Domestic Market Obligations (DMO) which may require the concessionaire to supply products below international prices.

[65] J. O'Reilly, *CSR and the Oil Industry- a Worm's Eye View*, 2 OGEL 4 (2004).

[66] *See for instance*, P. Stevens, *Resource Impact: A Curse or Blessing?* Draft Working Paper, CEPMLP, University of Dundee, (2003). *See also* M. Peel, and N. Shaxson, *Curse of Oil Highlights the Fragility of African States,* FINANCIAL TIMES (2004).

[67] This is sometimes known as paternalistic philanthropy. *See*, *supra* note 27.

[68] *Id*, at 11.

[69] U.N. Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984).

but the proposal for a globally regulated business environment, as a panacea for curtailing the unguarded assault on human, environmental and social rights of the populace by big business, resulting from its international economic and financial leverage in the face of pliable and economically weak national governments, was not acceptable to business.

To overcome the issue of being tied to regulations with its consequences,[70] and at the same time wade off reputation and image risks, business through the World Business Council on Sustainable Development (WBCSD), and the support of some western states notably the USA and Britain, began to voluntarily adopt an industry driven CSR in their practices.[71] It actually took reputational disasters, for Shell in Nigeria, BP in Colombia and Texaco in Ecuador for instance, to bring about change.[72] For oil and gas corporations, these were the catalyst for a crucial change of approach, "*stimulating explicit recognition of corporate responsibility for human rights*,"[73] and acknowledgement of the applicability of international norms to company operations.

Thus began the development of a body of *soft laws* rather than *hard law* for businesses, aimed at holding corporations minimally accountable, for failure to promote and protect human rights, and the broader issues of corporate social responsibility, even by affirmative actions. The result was a plethora of national,[74] regional and international norms, guidelines, codes, covenants and declarations. The Non- Governmental Organisations were not left out.[75] Companies were also not left out of the rush to adopt self regulatory ethical policies. Project lenders initiated with the support of the IFC, the Equator Principles, which required companies to undertake some risk mitigating measures and adherence, in respect of Environmental and Social Impact Assessments for projects whose cost are $50

[70] *Infra,* note 91.

[71] *See Communication from the Commission of European Communities,* COM (2002) 347 final, Brussels, 2nd July 2002. CSR was defined here (p.3) as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a *voluntary basis"* It is this voluntary nature concept of CSR by business that is at the heart of the debate. The EU however went further to state that CSR means "not only fulfilling legal expectations, but also going beyond compliance and investing more into human capital, the environment and relations with stakeholders" This does not however make CSR binding on companies.

[72] C. Geoffrey, *Oil and Human Rights,* 2 OGEL 4 (2004).

[73] *Id*.

[74] *See for instance*, the Australian Corporate Codes of Conduct Bill 2000.

[75] *See* the Amnesty International's Human Rights guidelines for Companies.

million and above, as a way of balancing the requirement for a regulated industry. It is also seen as a way of mitigating the negative impacts of social and environmental risks, on the Special Purpose Vehicle's (SPV) rate of return, and its ability to honour repayment schedules.[76] But these measures have not in the least yielded the expected dividend in the emerging markets, hence the call for a *hard law* approach to business rather than industry driven CSR in the form of soft laws.

D – *I.* CSR and Transparency- Is Soft Law the Answer?

It is not the intention of this paper to go into the polemics surrounding what *soft law* means,[77] which has arisen due to the disagreement over whether soft law is actually law, coupled with the problem of "defining the parameters of soft law and hard law."[78] 'Soft Law' refers to quasi-legal instruments, which do not have any penal and binding force, or whose binding force is weaker than the binding force of traditional law. It is used in the context of this paper to also include some voluntary principles that have acquired recognition among businesses, international financial institutions, multilateral agencies and the civil society at large. Soft law can also be enthroned where "legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation."[79] The issue however remains on the effectiveness of soft law, whether in the form of industry driven self-regulation, or as globally re-enforcing norms that have received multi-lateral and international acceptance. For any regulation to be effective, it must involve: [80]

- rule making
- monitoring and imposing sanctions for violations
- opportunity for redress by victims

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[76] *See*, *supra* note 1.

[77] *See* D. Trubek, et al., "*Soft Law*", "*Hard Law*" *and European Integration: Toward a Theory of Hybridity*, available at http://www.eucenter.wisc.edu/OMC/Papers?EUC/trubeketal.pdf. For the role of soft law in economic globalisation see *C. Redgwell*, *International Soft Law and Globalization*, in REGULATING ENERGY AND NATURAL RESOURCES, (B. Barry, et. al., eds., 2006).

[78] *Id*, at 6.

[79] *See* K. Abbot, and D. Snidal, *Hard and Soft Law in International Governance,* available at http://www.people.fas.harvard.edu/~olau/ir/archive/abb2.pdf.

[80] *See* the National Consumer Council, *Soft Law in European Union,* a discussion paper, PD 027/2001, April, 2001.

But the soft laws in place for dealing with CSR and Transparency issues, for instance the Global Compact, the Norms,[81] the EITI and other voluntary codes of conduct adopted either by individual companies, or specific industry sectors, do not involve the above three stages of normative regulation. This means that it is not illegal to ignore them because no retribution is attached to them. This explains why it has become fanciful for business to adopt a soft law approach to the issue of transparency and CSR. Thus, it is difficult today, to find any annual report of any big international company that attributes the company's growth or existence to profits alone, it must include services to the community.[82] This is however the best those companies can offer given that the issue of Transparency and CSR in general, and in the development of energy and mining projects in particular, are primary issues of governance which rests with government. Added to this is the fact that government alone posses the machinery for enforcing these rights and claims. Any other thing founded on hard law will amount to mandating companies to take over the roles of government, failing which they will be penalised or sanctioned.

Governments are meant to provide the enabling environment in the form of infrastructure development and regulations, for business to thrive, and not the other way round. And business remains a private pursuit removed from the public realm. Examine for instance the fact that "*community engagement initiatives in Aberdeen or Houston will often complement programmes of local government or other agencies. But in the barely subsistence hamlets of Ecuador or West Papua the inexorable pressure is on the company to effectively become the government in health, education, sanitation and other basic services because of the inability of state authorities to discharge these responsibilities*."[83] The companies should therefore be seen at best, to be offering a helping hand to government in what naturally is its responsibility. This represents the trend of argument on why companies can only undertake CSR on voluntary basis, guided by soft laws which creates no opportunity for redress, where for instance, the company fails to live up to its codes of conduct, and this inevitably affects people living along project corridors.

But on the other side of the argument is the fact that private pursuit such as business ultimately affects public good.[84] This is more so when the pursuit of business leads to the erosion of people's rights, deprivation, pollution of creeks and

[81] The Norms on the Responsibilities of Transnational Corporations and other Business with Regard to Human Rights

[82] *See The Good Company*, THE ECONOMIST, 22 January 2005.

[83] *See*, *supra* note 65.

[84] *The Good Company, supra* note 82, at 10.

farmlands, acquisition of lands for mining and oil exploration at minimal value, and general environmental degradation. Again, private pursuit clashes with public good, when energy and mining projects are covered by confidentiality clauses, that prohibit public disclosure of revenue and payments made to government in respect of these resources. This enables public money to sip into private pockets.[85]

It is this corruption tendency on the part of most countries that encourages opacity of energy and mining revenues. This has made the PWYP campaign which requires Oil, Gas and Mining Companies to publish net payments made to resource owning governments, as a condition for being listed on international stock exchanges and financial markets, and for attracting funding for energy and mining projects from IFIs and other Multi-lateral Credit Agencies, to receive little or no support. It is only regulation in the form of *hard law* that can check this.

It is agreed also that the realm of business is profit maximisation. But the enormous economic and financial power[86] that, has resulted from this profit accumulation, has enabled companies to now "*dictate the decisions of their supposed overseers in government and control domains of society once firmly embedded in the public sphere*."[87] The argument often paraded on why CSR should be voluntary, which is to the effect that companies act within the parameters of the investment laws in these economies, does not hold much ground here when weighed against the fact that, these laws are already weakened by the need to attract investment- the race to the bottom theory.

But another issue is whether the management of any company will impress shareholders where in implementing CSR principles, they act beyond the provision of the extant laws, bearing in mind that this may erode the company's profits and the dividend that may be declared at the end of the financial year?[88] The management will certainly like to keep their jobs.

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[85] According to Peter Eigen of Transparency International, "in these countries, public contracting in the oil sector is plagued by revenues vanishing into the pockets of western oil executives, middlemen and local officials." *See* Transparency International Corruption Perceptions Index, 2004 available at http://www.transparency.org.

[86] *See, supra* note 27, and note 62.

[87] *See* J. Balkan, *The Pathological Pursuit of Profit and Power*, in THE ECONOMIST *supra*, note 56, at 11.

[88] This may arise from investing in new forms of technology that may reduce environmental pollution, and economically and steadily empowering local communities through skill acquisition and other sundry programmes, especially the provision of scholarships for tertiary education. These, where vigorously pursued can affect a company's turnover especially in a year of low product prices and for marginal fields. But provision of scholarships may no longer be seen as an issue of CSR especially in

Furthermore, a soft law approach to CSR and transparency has created a free rider and green wash problem as said earlier on. Some of the companies want to be seen as environmentally friendly- washed in green. They also want to be associated with the noble principles of transparency and CSR but will not be seen implementing them in their activities. So a lot of companies attract some benefits to their business bottom line by being associated with CSR and transparency principles, without actually putting them into practice. It becomes a public relations gimmick that serves no good to the public. This is because the companies are not held accountable by any one including their shareholders for not doing what they preach. There is no law mandating them to do so.[89] For the companies that genuinely decide to embark on CSR, there is the absence of uniformity of approach and yardstick for measuring success. The system for initiating and implementing CSR programmes are often very weak and not continuous, and at best amounts to a scratch at a very big problem.

Despite the non binding nature of soft law it appears however that, companies, their consultants and legal advisers, may choose to ignore these issues at their peril. The international community seems to be gradually persuaded, to recognise the importance of soft law, especially in relation to litigations arising from energy and mining projects, and which have as their bench mark human right and environmental abuses.[90] For instance, US Mining Companies are reluctant in signing the Global Compact despite its voluntary and sanction-free nature. The fear is that it may metamorphose with time, into rules that will become legally relevant.[91] Thus, the failure of hard law to address issues of environmental and social concerns in Emerging Markets, tends to be somewhat addressed by soft law and its social sanctions in the developed world.

This in a sense blurs the distinction between hard and soft law, especially when considered against the background of the fact that, soft law encourages the use of

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Nigeria because of the deductibility of such expenses. *See Shell Petroleum v. FBIR* [1996] 8 NWLR (Pt. 466), 256.

[89] The UK legislation referred to in note 60 appears not to have a penal provision where the companies fail to adhere to the limited social disclosure bordering on employment of disabled persons, arrangement for securing the health, safety and welfare of the company's employees etc. Nigeria and most other emerging markets do not appear to have any social disclosure requirement in their company law or other legislations. Companies on their own tend to have embarked on the duty of environmental disclosure but are found to disclose only good environmental practices, *see* J. Parkinson, *supra* note 3.

[90] *See Doe v. UNOCAL*, D.C No. CV-96-06959-RSWL and *Aguinda v. Texaco Inc.*, 945 F. Supp. 625 (S.D.N.Y 1966).

[91] T. Walde, *supra* note 61.

social and economic sanctions, which to some extent are no less effective than hard law. Take for instance the fact that energy and mining projects that do not integrate environmental and social risks concerns, into project execution and operations, will not attract funding from the Equator Principle Banks.[92] Energy companies that also ignore ethical considerations in its operations will, easily be exposed to unsustainable operating environment in the host state, by project communities, while the international media and NGOs, will ordinarily resort to mobilisation of shame in the Western Press, and this may affect the fortunes of such companies and projects. The recent kidnapping of oil workers and 'pipeline vandalization' in Nigeria's Niger Delta, appear to be a fall out of years of environmental and social neglect by both industry and government, of the oil and gas producing communities.

A lot of Western energy companies were forced out of Sudan, in the wake of the international outcry that greeted the human carnage that accompanied mineral development in that country. It did not take hard law to achieve this- hard law could have even failed in this instance. Again companies from OECD countries, operating in emerging markets are held to a greater degree of accountability by their home states in respect of CSR and Transparency issues. The ACTA[93] and the Foreign Corrupt Practices Act, 1977 are employed in the USA, to checkmate US companies and its officers involved in human rights abuses and corruption[94] in foreign countries. The OECD Guidelines for Multinational Enterprises and, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[95], are also geared towards holding companies to a greater degree of accountability on issues of CSR and Transparency. Despite these, the shortcomings of soft law cannot be ignored in this respect, especially as it does not clothe individuals in emerging markets, affected by environmental and social abuse by corporations, with any legal right. This in effect makes access to courts a difficult problem. It is therefore important in this respect to see if a case for CSR and Transparency can be founded on Public Interest Litigations (PIL),[96] which has

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[92] *See*, *supra* note 1.

[93] *Infra*, note 97. *See also* note 90.

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

[95] Available at http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html.

[96] *See S.P. Gupta v. Union of India: 1981 Supp. S.C. 87, 408, and M.C. Mehta v. Union of India*, Air 1987 Sc 1086 (oleum gas leak case). Note that a PIL can only be filed against a government or government entity and not a private party. A private party (company) that has degraded the environment thereby causing a community economic and social losses can however be included in the PIL as a Respondent, after the state authority has been made a party to the suit. Most emerging markets are yet to recognise the intrinsic value of PIL. For instance Nigerian Courts are yet to give their nods to the issue of PIL. The issue of *locus standi* still stands in the way of PIL in Nigeria. *See Adesanya v. President Federal Republic of*

gained popularity in India? Or the Alien Torts Claims Act (ATCA)[97] in American Courts? PIL is based on the court's "epistolatory jurisdiction"[98] and portrays "*an active acceptance of responsibility for the pursuit of objects, well outside the bounds of conventional litigation*."[99]

This in fact gives a practical ambience to the issue of social justice which forms the fulcrum of CSR and Transparency in the development of energy and mining projects. This development does not however render broad issues of transparency and CSR in energy and mining projects within emerging markets, justiciable in most national courts- they rest on the voluntary plank of soft law which are not binding, and may not be entertained by the courts even if PIL becomes acceptable in the national courts. Again, the colouration of economic and social rights upon which CSR and transparency hinge, as 'private rights' and as constituting the "junior branch"[100] of human rights laws have not helped matters. This is where the clarion call for a hard law approach seems to derive its strength from.

D - *II.* CSR and Transparency- Is Hard Law a Better Option?

From the foregoing, a good theory can be postulated, and that is that CSR and Transparency are social responses to regulatory failure. If this theory is accepted, the question that arises is, can the failed law be successful in regulating it? According to Lord Devlin, "*if our business methods were as antiquated as our legal system, we would have become a bankrupt nation long* back"[101] This statement in respect of antiquated legal systems is true of almost all the legal systems in emerging markets. Dixit posits in this respect that emerging markets exhibit a greater degree of weak and inefficient legal regimes.[102] The apparatus of state laws in these

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Nigeria (1981) 5 S.C 112; (1981) All NLR 1 and *Owodunni v. The Registered Trustees of Celestial Church of Christ* (2000) 6 SCNJ 399.

[97] 28 U.S.C. §1350 this is often limited by the doctrine of *forum-non-conveniens, see Gulf Oil Corporation v. Gilbert*, 330 U.S 501(1947) and *Aguinda vs. Texaco Inc*., *supra* note 34.

[98] This is based on Social Justice. PIL is also referred to as Social Action Litigation.

[99] Per Lord Bingham , Law Day address on the occasion of 50 years of the Supreme Court of India, 29 November, 1999.

[100] J. Dine, *Human Rights and Company Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, (M. Addo, ed., 1999).

[101] *Envisioning Justice in the 21st Century*, Keynote address by Justice R. Lahoti, 18 September 2004.

[102] A. Dixit, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE, (2004).

countries, were for much of their history, and still remain, "*very costly, slow, unreliable, biased, corrupt, weak or simply absent*."[103] The backlog of 25 million cases pending in Indian courts, it was noted, will take about 324 years to clear even if no new cases were filed.[104]

If these issues are reflected upon in the light of the fact that CSR is a 'process concept'[105] rather than a specific concept or substantive norm, outlining defined modes of behaviour or corporate conduct for every occasion, then it may be difficult for the law in its outmoded fashion to keep track with it. It has thus been argued in this respect that a hard law approach to the issue of CSR will inhibit innovation since CSR is a changing process.[106] Dixit therefore suggests the creation by groups and societies, of alternative institutions that will provide the needed economic governance as a necessary purveyor of economic activities.[107] This may be where soft law (in the realm of social norms) scores its greatest point, especially with its attendant social sanctions. But the problem here lies in the possibility and practicability of turning soft law into non-state hard law, through the combination of soft-law social norms with social sanctions. The question however is how effective are social sanctions and do they matter to the unethical corporation and business enterprise? It may create further incentive to 'free-ride' and 'green-wash.'

Furthermore fundamental issues like democracy, good governance and the rule of law remain at appalling states in most jurisdictions in the emerging markets. The snail pace of litigation in these courts leaves much to be desired. Take for instance the case of *Shell Petroleum v. FBIR*[108] that lasted for over 25 years in Nigerian Courts. The judiciary, the ultimate interpreter of hard law provisions must also be imbued with a business and commercial mind to effectively adjudicate over these issues. The hard law unfortunately cannot function effectively without these 'handmaids of justice,' especially in the realm of monitoring, prosecuting[109] and enforcement. The costs of effectively doing this in terms of men and materials may be something these countries will rather do without.

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[103] *Id.*, at 3.

[104] *Id*.

[105] K. Goodpaster, *The Concept of Corporate Responsibility*, JOURNAL OF BUSINESS ETHICS, 1983.

[106] N. Gunningham, *Cotton, Health and Environment: A Case Study of Self-Regulation*, 2 THE AUSTRALIAN JOURNAL OF NATURAL RESOURCES LAW AND POLICY 9 (2004).

[107] *See*, *supra* note 102.

[108] *See*, *supra*, note 88.

[109] The term 'prosecuting' here denotes the process of pursuing a matter whether civil or otherwise before the court and has no criminal notion attached to it.

The rent seeking behaviour of the public sector in developing countries, especially in the area of being the pipe through which funds provided by the energy companies for some CSR projects are disbursed, will also stand in the way of effective legislation. The information asymmetry that is bound to exist between the public and private sector, and the conflict of interests that are bound to occur in respect of Joint Venture projects, between the state companies and the private energy companies, will undermine most governments' efforts in this respect. Where regulation is imposed, the issue of vicarious liability may be a difficult one to use in bringing to justice, energy companies that have externalised risks and losses through outsourced jobs, the performance of which may have led to the breach of rules governing CSR.

On the transparency side the PWYP is said to run against efforts towards commercialisation of international relations. It curtails the ability of the emerging markets "*to behave more commercially and to compete in a more business like way for foreign investment, foreign markets and international financial assistance,*"[110] because it diminishes commercial acumen to publish commercial secrets for the benefit of your competitors, especially in a globalized and competitive economy that the world has become. Confidentiality clauses contained in the concession contracts for the exploitation and development of minerals, forbid companies from disclosing such details as payments made to governments. This means that, any such disclosure will lead to a breach of the confidentiality clause.

Again, Companies that devise tax shelters especially in the form of transfer pricing may have reason to go beyond these when faced with hard law on the issue of earnings and payments made to governments- the emerging markets may lack the skills and resources to match the ingenuity of a private enterprise. Governments that cannot effectively deal with issues arising from Resource Revenue Management Laws[111] may find difficult to effectively use legislation, in dealing with sophisticated multinationals. They may be better of in achieving more through compromise and hard bargaining which is the level to which CSR has been reduced.

Finally, a hard law approach to the issue of CSR, coupled with sovereign risks and other anti-investment policies in some of these countries, may drive investment

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[110] M. Mokgotu, Ministerial Conference on EITI, London, 17 June 2003, available at: http://www.dfid.gov.uk/pubs/files/eitidraftreportspeech.pdf.

[111] This and Resource Revenue Information Law, have been suggested as a way out of the conundrum of corruption and poor economic growth in the midst of abundant revenue from natural resources. *See* Bede Nwete, *supra* note 5.

away from these regions.[112] Energy and Mining investment contribute greatly to government coffers[113] in these regions, and declining investment in this area will weaken these economies that greatly depend on these resources. Does it then mean that hard law cannot be called in aid of the noble principles behind transparency of energy and mining revenues or the broader issues of CSR?

Table 1 Hard Law versus Soft Law in the Realm of Energy and Mineral Development in Emerging Markets

Hard Law	**Soft Law**
Types:	**Types**:
∗ Treaties including BITs; National Laws; Government Regulations; Regional, State and Local Laws, Contracts.	∗Declarations, Covenants, Norms, Corporate Code of Conducts, Memorandum of Understanding (MoUs), Community Participation Agreements (CPA) Good Neighbour Agreements (GNAs) etc
Role:	**Role:**
∗Seeks to balance profit making with well defined social responsibility	∗ Seeks to involve business in social responsibility voluntarily and by mutual understanding, as it sees business as a private enterprise that has as its aim profit maximization with or without voluntary social responsibility
∗Encourages transparency and accountability in the Investment process	∗ Neutral about transparency and accountability in the Investment Process
Effects:	**Effects**:
∗ Binding, non- compliance has penal consequences	∗Not binding, persuasive at most, non-compliance attracts no penal consequences
∗ May affect investment when combined with other factors like sovereign risk and high cost of labour, by necessitating moving investment to regions with weaker regulations	∗ Creates blue wash, green wash and free rider problems which may lead to mobilisation of shame leading to reputation risks; may aggravate the social and political risks of a project.

[112] *See* table 1.

[113] *See supra*, note 23 and note 24.

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* Reduces incidences of complicity in human right abuse, environmental degradation and corruption through the fear of prosecution/penalty	* May lead to complicity in human right abuse, environmental degradation and corruption.
* Increases the cost of investment-implementation is forced. Does not improve business bottom line-companies are just obeying the law	* Increases the social cost of investment when implemented by energy and mining companies but also improves business bottom line
* increases the cost of governance, through monitoring, prosecuting and enforcement	* Encourages weak regulatory framework for business which while undermining human right and environmental sustainability may attract investment
* Capacity to compel change but may be too slow in catching up with corporate ingenuity	* May persuade change but encourages innovation when implemented
* Encourages defined rules for carrying on business which may reduce profit but will ultimately benefit all stake holders	* Ignores the third party in the Mineral development Tripod/triangle as Companies and Governments are the only beneficiary

It has to be admitted that the above issues overlap, as there are no clear distinctions in certain cases between the soft law and the hard law and their effects. Nevertheless the distinction uses criteria based largely on the practical effect of adopting one approach rather than the other.

E. The Way Forward:

It must be recognised that each of the two, hard law and soft law has its merits and demerits. A middle ground between these two approaches seems to have the answer to what is the best way to deal with the issues raised above. A merging of the good side of both the soft law and hard law may offer a better solution.

For instance, the hard law approach carries the traditional moral message of good and wrong, coupled with an excellent international credibility rating.[114] It is also

[114] *See supra*, note 106.

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seen as a way of protecting the weaker members of society, the poor and under privileged. This emanates from the perception of independence in its monitoring, imposition and enforcement. But despite its ability to compel change, there is nothing in hard law that will compel an energy company to build schools, skill acquisition centres, provide fresh water and electricity, and make an input into primary health care in communities within its areas of operation and beyond- such legislation may be difficult to pass and even when passed may be difficulty to monitor and implement.

Outside this, it will actually keep companies away from investing in frontier areas or areas with no proven prospectivity, and therefore has the propensity to discourage exploration which will ultimately affect a country's reserve. This is also a period of global competitiveness in investment- because of this most countries are making their fiscal regimes very competitive especially through tax allowances and other fiscal incentives.[115] Any law requiring energy companies to carry out the above things, will unwittingly increase the cost of doing business in that country, and this will have a negative impact on its fiscal regime.

CSR issues such as the above must be left on the voluntary plank on which they presently stand. The government and its public sector institutions whose role it is in the first place to deal with the above issues, should rather provide the leadership through which it will in conjunction with business, work as mutually reinforcing partners to provide these things not only for project affected communities but the entire citizenry. The communities living along project corridors can be engaged through Participation Agreements and Good Neighbour Agreements, from the conception of the projects to decommissioning. The perception of 'ownership' on the side of the communities will reduce tension in project areas.

The support of IFIs and other Multilateral Credit agencies is needed in this respect. There is no doubt that socio-political risk which trigger project failures in emerging markets, often have their roots in the matters enumerated above. Project failure will definitely affect the structure upon which a project is financed, and will therefore affect both the lenders' and SPV's balance sheet- it is in everyone's interests therefore that these issues are satisfactorily dealt with to ensure that the SPV meets its financial obligation to all the parties.

But other issues such as environmental degradation, human rights abuse and corruption must be dealt with by hard law. These issues affect the very life, existence and humanity of project affected communities, and must be protected at

[115] *See supra*, note 24.

all cost by the law. The courts also have to complement what the law sets to achieve. This is essentially necessary for cases where victims cannot access the courts due to poverty or other causes. This is particularly recommended for cases that border on environmental degradation for which the traditional tort law cannot be used to provide succour to communities, whose social and economic lives are thereby dislocated. For instance pollution related laws which have provided some succour to Indians, has developed more or less entirely through PIL[116] which was invented by the courts.[117]

As the hard law "*sets out well-defined and measurable requirements backed by force of law*"[118] it will actually reduce incidences of environmental pollution and human rights abuse. This is because legislation has been noted to be the single most important reason given by business for improving its health and environmental performance.[119] As for transparency of energy and mining revenues, the confidentiality clauses in these concession agreements need to be modified through the enactment of Resource Revenue Management Laws and Resource Revenue Information Laws. This will encourage monitoring and accountability and ensure that government in emerging economies put the revenues to good use.

As for competitive edge and the protection of business interests which confidentiality clauses are meant to encourage, these will not be lost. The bidding process for mineral concession is understandably confidential whilst underway, but not after the bidding process has been concluded. As revenue disclosure only commences after the bidding process has been concluded and at which time the winners have been selected, there will not necessarily be any on-going commercial benefit that companies and government will get at this stage for non- disclosure, except corruption.

E – *I.* Conclusion:

It has been shown from the above discussions that CSR and Transparency characterised by industry self regulation, through the adoption of soft law in the

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[116] *See Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212. *See generally*, U. Ramanathan, *Business and Human Rights: The Indian Paper*, International Environmental Law Research Centre Working Paper, 2001-2.

[117] *See supra*, note 99.

[118] *See supra*, note 106.

[119] *Id.*

development of energy and mining projects in emerging markets, has not adequately dealt with the myriads of problems associated with mineral development in these countries. It has left some obvious gaps which have arisen as a result of the limitations of soft law. It must be admitted however that the dividing line between soft and hard law are often blurred in certain circumstances but the efficacy of hard law in compelling obedience cannot be ignored especially where the government has in place effective national institutions for monitoring and enforcement. The soft law therefore has its limitations and is not really the answer despite its disposition to encourage innovativeness in industry practices which the hard law cannot do. A balance therefore needs to be created between the two by leaving the 'corporate philanthropy' aspect of CSR to the dictates of Industry driven self-regulation, while core issues of environmental degradation, human rights abuse and corruption should be subjected to the scrutiny of hard law. This is the only way that CSR and Transparency can be achieved in the Development of Energy and Mining Projects in Emerging Markets. It is also the only way by which all the stakeholders can share the benefit of these finite resources.