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Corporate Social Responsibility, Juridification and Globalization: 'Inventive Interventionism' for a 'Paradox'

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Abstract:

This article proposes 'inventive interventionism' as a regulatory approach to incorporate substantive outcomes, stakeholder empowerment, effective disclosure and a global multi-stakeholder and multidimensional view of corporate social responsibility (CSR) and social disclosure. Inventive interventionism also applies new paradigms of regulation that recognize CSR as one of the proximate engineers of efficient public governance and ultimate sources of socioeconomic development. The article adopts a transnational and comparative approach to regulatory CSR and situates the voluntary and prescriptive approaches in the wider regulation debate. It draws on reflexive law, responsive regulation, institutional and other theories to demonstrate that existing CSR regulations in several jurisdictions are not representative of the law's multidimensional and multidirectional nature. Inventive interventionism reflects a functional approach to the law-CSR dialectic relationship and contributes to the development of an analytical framework for CSR and reforming its national and global regulatory environment.

Keywords: Corporate social responsibility, development, governance, juridification, social reporting, regulation

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Corporate Social Responsibility, Juridification and Globalization: 'Inventive Interventionism' for a 'Paradox'

1. Introduction

Within the nascent debate on regulatory corporate social responsibility (CSR), this article proposes 'inventive interventionism' to incorporate substantive outcomes, stakeholder empowerment, effective disclosure and a global multi-stakeholder and multidimensional view of CSR and social disclosure. Inventive interventionism also applies new paradigms of regulation that recognize CSR as one of the proximate engineers of efficient public governance and ultimate sources of socioeconomic development. It is specifically designed for regulatory CSR unlike the more general regulation theories which, although can be adapted for CSR, may not suit the peculiar features of regulatory CSR as a dynamic tool that can be exploited by state and non-state actors for both national and transnational governance. As a result, stakeholder empowerment through enforcement, verification and other rights is a distinguishing factor between inventive interventionism and alternative approaches to regulatory CSR.

The imperativeness of stakeholder empowerment to the success of regulatory CSR is illustrated by the conflict minerals provisions in section 1502 of the US Dodd-Frank Act 2010, which are acclaimed as an advanced mandatory and global-focused CSR-related disclosure scheme. Amnesty and Global Witness (2015) very recently reported that more than 80 percent of filings by companies contained little useful information and did not meet the minimum due diligence requirements. The statute, however, does not provide for sanctions and neither does it permit other public or private enforcement measures. Unlike other regulation theories and contributions to the regulatory CSR debate, inventive interventionism therefore benefits from the experiences and analysis of actual legislative and other recent

developments pertaining to regulatory CSR in a number of jurisdictions, making it a more evidence-based approach that acknowledges that institutional and socioeconomic conditions in particular jurisdictions are integral to both the need for and viability of regulatory CSR.

The regulatory CSR debate is actually grounded in the broader regulation discourse centred on what de Burca (2010:227) aptly described as 'the phenomenon of "new" and "experimentalist" governance and its relationship to law.' That debate has demonstrated that regulation can exist in a continuum between the extremes of prescriptive regulation and pure voluntarism. Similarly, the complex and multifarious relationship of law and CSR has been recognized in literature in contrast to the facile regulation-versus-voluntarism polemics (Buhmann, 2011; McBarnett, 2007; Parker, 2007). The 'soft' and 'hard' law dichotomy is increasingly acknowledged as too simplistic considering, firstly, the blurred boundaries between the two at national (McBarnet, 2007) and international (Zerk, 2006:69-72) levels. The orthodox 'beyond regulation' view of CSR as a market/private sector (business, consumer and civil society) driven concept is gradually giving way as a result of the twin recognition of the limited effect of pure private self-regulation and governmental roles in promoting CSR (Fox et al, 2002; Ho, 2013; McBarnet, 2007:45-54; Vogel, 2005:16). The recognition of governmental roles in CSR occurs within the wider governance discourse and the acknowledgement of varieties of alternative regulation strategies to the limitedly effective prescriptive national regulation (Ho, 2013: 375-376; Lozano et al, 2008: 25-26) and international law (Abbott and Snidal, 2009; Zerk, 2006: 69-72). Secondly, the voluntary-mandatory distinction is 'confusing and unhelpful' when legal compliance is acknowledged as a basic component of CSR. Thirdly, the incorporation of CSR policies in regulations demonstrate an 'intertwined and mutually influencing' relationship between CSR and law (Ho, 2013:384). Consequently, the World Bank's classification of governmental CSR roles

as ‘mandating, facilitating, partnering and endorsing’ (Fox et al, 2002:iii) seems to be popular (Ho, 2013:386-387; Lozano et al, 2008:42).

The understanding that ‘positive’ changes in corporate behaviour are either adopted voluntarily or through the coercive process of law (Russell, 2011; Rivoli and Waddock, 2011) has increased attention on CSR regulation (Buhmann, 2011; McBarnet, 2007; Parker, 2007; Scott, 2008). However, aspects of existing literature suggest the existence of broadly parallel voluntary and prescriptive approaches to CSR regulation while some of the largely process-based CSR and law analyses focus mainly on corporate compliance. This provides little room for ethical CSR and macro-climate and governance analysis of CSR and such issues as empowerment, especially of stakeholders, CSR as socioeconomic development tool and translation of debates to transnational and global source and effect situations. The need for a fresh conceptual analysis of the law-CSR relationship and the implications of diverse regulatory forms in different national and global contexts has become increasingly crucial following developments in jurisdictions like Indonesia, India, the Philippines, United States and European Union (EU) demonstrating variegated regulatory approaches ranging from mandatory reporting to different levels of prescriptive regulation. The comparative country studies highlight the complexity of the law-CSR relationship and variations in regulatory properties and objectives undertaken. An inescapable theoretical and practical dilemma from the regulatory controversy is that even if CSR is accepted as ‘beyond law/compliance’ a further question is ‘how is it possible for the law to make companies accountable for going beyond the law?’ (Parker, 2007). Put differently, ‘the question of the state’s role in advancing CSR is not *whether* governments will this new policy arena but why, how, and with what effect’ (Ho, 2013:428). An overarching task is ‘to review the increasingly complex cross-connects between the rapidly mutating governance agenda and the burgeoning world of corporate responsibility’ (Elkington, 2006). Nevertheless, the conceptual and practical

challenges to the competing voluntary and prescriptive models and the relative strengths and weaknesses of CSR regulations trigger the need for inventive interventionism.

This article therefore examines national and transnational concepts and approaches for regulating CSR at the backdrop of the need to satisfy a functionality test in relation to the social issue they address (Xanthaki, 2008). The article assesses on a fundamental level whether prescriptive CSR is prototypical or deviant and advances the orthodox and governance schools' disputation in a new direction by situating CSR in the wider law-regulation debate. Using examples from the oil industry, the article demonstrates how the law can prop CSR through inventive interventionism, which reflects a functional approach to juridification that can enhance CSR's role in filling national and global corporate regulation and addressing public governance challenges, particularly in emerging and developing economies. Inventive interventionism builds on legal transplant theories, Deakin and Hobbs' (2007), McBarnet (2007) and Parker's (2007) acknowledgement of regulatory perspectives of CSR, systems theoretical approaches to responsiveness inspired by Nonet and Selznick (1978) which consider how regulations, regulators and regulatees can respond to their environment, Teubner's (1983, 1996) reflexive law theory and Ayres and Braithwaite's (1992) responsive regulation theory to underline the role inventive interventionism can play in CSR.

The rest of this article, firstly, reviews CSR models to highlight voluntary and governance approaches to CSR and places them in the wider regulation debate that underline alternative strategies, such as CSR, to pure prescriptive regulation. Secondly, it scrutinizes regulatory CSR perspectives, reflexive law and responsive regulation and the paradoxical law-CSR relationship and demonstrates that existing theoretic approaches may not suit the peculiarities of CSR in different contexts. Thirdly, the article considers fresh insights from inventive interventionism and the solutions it propounds for national and transnational CSR

regulation. It discusses the substance of inventive interventionism for national and broader transnational/extraterritorial regulation types that are vital for the success of regulation at either level.

2. CSR models

This article focuses on the extractive sector because of evidenced public support for greater regulation of the industry for environmental impact and other reasons (Spangler and Pompper, 2011:218). Whilst the sector's environmental visibility often compels voluntary CSR reports, its environmental disclosures are increasingly regulated by governments. Examples include the European Commission's (2001a)) Recommendation on environmental issues in companies' annual accounts and mandatory reporting in several EU Member States (Buhmann, 2011:142) and the growing influence of social reputation in oil contracts and concessions awards (Frynas, 2005). Owing to its concurrent local and global existence, the environment presents stakeholder and regulatory concerns at both levels, particularly in relation to multinational enterprises (MNEs) (Gill, 2012:24; Kolk and Pinkse, 2008; Sagooff, 2013). Following the definition of a stakeholder as 'any group or individual who can affect, or is affected by, the achievement of a corporation's purpose' (Freeman, 1984:vi; Freeman and Phipps, 2002), the environment is considered a non-social CSR stakeholder requiring natural persons to advance its interests (Bradshaw, 2013; Driscoll and Starik, 2004; Fassin, 2009; Haigh and Griffiths, 2009; Norton, 2007). The interests of other stakeholders and the environment can coincide, for instance, when communities live in and derive livelihood from oil producing locations, making CSR in environmentally sensitive operations to include community concerns. This is why various aspects of 'environmental stewardship' are considered part of CSR (Metcalf, 2010:151).

Nevertheless, CSR lacks an exact and uncontroversial meaning (Dahlsrud, 2008; Garriga and Melé, 2004), although its scholarship has shifted from the analysis of responsibility to evaluation tools (Scalet and Kelly, 2010:70). At the core of this movement is CSR's relationship to law, which is the basis of the regulatory polarity debate (Lederer, 2012; O'Laughlin, 2008). One view is that CSR is a set of purely voluntary undertakings regulated, if at all, by market forces. This 'traditional' school argues that '[CSR] actions basically are voluntary, that is they go beyond what is legally required' (Dam and Scholtens, 2012). Barnett (2007:807) accordingly defines CSR as 'a discretionary allocation of corporate resources toward improving social welfare that serves as a means of enhancing relationships with key stakeholders.' This is a voluntary 'separation model' that favours a firm and supply chain-focused CSR (Harrington, 2011:491-497; Rahman and Post, 2012), and a micro-analysis of individual company responses and performance.

Until recently, the voluntary model was dominant in EU policy which refrained from prescriptive CSR (Buhmann, 2011:142; Voiculescu, 2007). CSR was consequently described by the European Commission (2001b) as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis.' This approach was reflected in the EU model code for international standards on human rights, environment and labour standards by MNEs operating in developing and transitional countries (European Parliament, 1999). Similarly, the 2001 EU Green Paper encouraged voluntary practices in international operations and global supply chain relationships (European Commission, 2001c:2.2.3) while the 2002 CSR Communication urged corporations to apply international best standards in developing countries (European Commission, 2002:5.1). However, a difficulty with the voluntary model is the false assumption that law and CSR are mutually exclusive mechanisms for social

control when they can, in fact, have common theoretical foundations, follow similar objectives and share regulatory tools (Buhmann, 2011).

The 'governance' approach, in contrast, not only avoids the orthodoxy of formal rules and hierarchical enforcement by governmental agencies but also considers institutions, including informal rules and arrangements by nongovernmental and private organizations, that perform horizontal and vertical regulatory roles (Aßländer and Curbach, 2014; Saurwein, 2011:335-336). It consequently views CSR as a complement or alternative to law, particularly where laws and public institutions are weak (Johnston, 2011). A highly persuasive institutional theoretic explanation of the governance perspective is the concept of 'relational state'. Relational state conveys the idea of shared regulatory responsibility ('co-responsibility') between public and private spheres of society (Gunningham, 2008:118; Ho, 2013:393-395). In emphasising the need for cooperation between public and private regulators, theorists argue 'that only if responsibilities are shared in areas of common interest, assuming the active collaboration of all social actors, society itself and enterprise, in collaboration with the state, can today's social and environmental challenges be met' (Lozano et al, 2008:35-36). The governance model is subtly reflected in the European Commission's 2011 revised CSR policy. The Commission's (2011:6) redefinition of CSR as 'the responsibility of enterprises for their impacts on society' reflects a shift from pure voluntarism to tacit acknowledgement of some roles for regulation.

A version of the governance approach is the prescriptive model which suggests that the substance of CSR can be constituted by compulsory obligations or a mix of legal constraints and voluntary undertakings. Prescriptive CSR, embraced by some scholars and developing and emerging economies (Gjølberg, 2010; Shamir, 2004; Parker, 2007), is an interventionist 'unity model'. It implicitly recognizes certain governance roles for CSR

usually following a macro-level analysis and attempts to demonstrate that CSR needs not be ideologically neutral (Blowfield and Frynas, 2005; Frynas, 2010; Merino and Valor, 2011).

However, existing beyond the confines of CSR scholarship are theories such as reflexive law and responsive regulation (Ayres and Braithwaite, 1992; Baldwin and Black, 2008; Baldwin and Black, 2010; Fairman and Yapp, 2005; Saurwein, 2011; Tombs and Whyte, 2013) that have been applied in areas such as labour protection, consumer protection, business taxation, and financial regulation but have received little attention in CSR (see Affolder, 2011; Braithwaite et al, 2007; Smith, 2011). Even when CSR is linked to regulation the theoretical insights seem modest as relatively few scholars have tackled the theoretical framework of the law-CSR relationship and its impact on national and international regulatory policy. For example, Barnard et al (2005) support for 'enhanced competiveness' promotes instrumental CSR but assumes that CSR can be a tool of reflexive law by virtue of the expressed policies of EU institutions. Other authors (Amao, 2007:56-57; Deakin and Hobbs, 2007:70-75; Johnson, 2011:236-241) support using reflexive law in CSR without investigating in-depth the conceptual framework and other bases for the linkage. Buhmann's (2011) attempt to link reflexive law and CSR largely explains the 'Multi-Stakeholder Forum' and 'CSR Alliance' initiatives of the European Commission. Her conclusion that CSR can be 'through non-enforceable responsibility based on law' (Buhmann, 2011:171) has a limited scope for omitting possible 'enforceable responsibilities' for regulatory CSR.

Parker (2002; 2007) applies 'meta-regulation' as a shorthand for 'regulation of self-regulation' to highlight ways, including penalty-linked compliance systems, stakeholder consultation, licensing requirements, management accreditation and auditing schemes, contracting, fiscal incentives and public procurement, the law can push companies towards desirable goals such as CSR by requiring appropriate corporate governance structures, management practices and corporate cultures. However, Parker's strong contribution does not

give sufficient attention to stakeholder empowerment at national and global levels. Whilst inventive interventionism proposed in this article also demonstrates that regulatory CSR can involve a variety of enforceable substantive and procedural requirements it also incorporates stakeholder enforcement and other empowerment provisions for national and transnational regulatory spaces and the application of CSR as a governance tool for socioeconomic development.

The voluntary-prescriptive CSR discourse mirrors the classical regulation-deregulation debate rejected by reflexive law and responsive regulation theories as being inadequate reflection of the true nature of regulation. Teubner (1983:245, 249, 270, 1996:3-38), for instance, rejected the nature of law debate of positivist and critical theories formulated on the basis of regulation as a matter of 'external' law versus 'internal' deregulation. In reality, the diversity of regulatory approaches in theory and practice suggests that regulation is not simply a question of either a command-and-control state regulation versus deregulation, as demonstrated by expressions such as 'tacitly supported self-regulation' (Bartle and Vass, 2007:894), 'enforced self-regulation' (Fairman and Yapp, 2005) and 'hybrid regulatory constellations involving public and private actors' (Saurwein, 2011:336).

In any case, Deakin and Hobbs (2007:69-71) argue that CSR is 'a set of related mechanisms for aligning corporate behaviour with wider social and environmental goals, in which managerial, financial and regulatory aspects are combined in a mutually reinforcing way' as 'a mechanism for stimulating organizational change.' While the managerial conception is linked to reputation and competitiveness, the financial perspective relates to capital market pressures and shareholder activism in response to social expectations. The regulatory perspective, which complements the managerial and financial aspects, establishes 'a certain functional relationship…between a "core" or possibly a "framework" of legal

controls, on the one hand, and voluntary action by companies on the other.' The regulatory conception regards CSR as 'mechanisms which respond to the negative externalities caused by corporate activities' and, for example, encourages 'an incentive structure' to reward socially responsible behaviour. This juxtaposition of managerial/organizational, financial and regulatory conceptions of CSR is particularly significant, although a drawback is the omission of ethical CSR dimensions. It is likely the case that CSR can encompass instrumental and ethical goals, and even if 'ethical' is lacking in the managerial and financial conceptions, the regulatory perspective can incorporate ethical foundations and goals. Whilst the managerial and financial perspectives concern managerial awareness of and response to market-related pressures and essentially reflect a business case for CSR and the shareholder primacy corporate governance model, CSR deviates from the shareholder-centred view at the conceptual level and proposes a pluralist framework recognizing a range of internal and external stakeholders including shareholders, employees, customers, suppliers and the local community.

Johnston (2011:222-224, 226-227, 233, 241) rightly argued that the business case is anti-regulatory, market-oriented and limits the law to facilitating 'the bargaining between the creator and victim of the externality.' The 'widespread assumption' of business case excludes the role of a law-steered CSR in enabling corporate identification and internalization of externalities, even when the law's direct intervention is considered an inefficient solution. Arguing that CSR 'should be reserved for the process by which corporations identify and voluntarily correct the externalities which arise from their core activities' Johnston distinguished it from 'voluntary measures by which corporate managers attempt to make the world a better place' or 'the brand-building exercises that are commonly termed [CSR].' The flexible externality-linked CSR does not rely on the market and government to determine or anticipate its boundaries and is 'embedded within a regulatory framework' that requires

'significant legal intervention' to operate effectively because of market-imposed constraints on social responsibility. This unity model's explicit recognition of the law's role in promoting CSR contrasts with, for example, Mazurkiewicz's (2004:2) definition of environmental CSR. The definition, which includes a range of actions and omissions directly affecting the environment and host communities, expresses CSR as a 'duty' but does not indicate whether the source of that duty is law or extra-legal. This is a significant omission since the source of duties may determine rights of claimants and legal liability for duty-holders.

The separation model (Lyon and Maxwell, 2008; Portney, 2008) takes the reverse extreme position and implicitly discourages interventionism. It does not acknowledge the law as the source of duties and consequently disguises the complex CSR-law relationship (Osuji, 2011; Shum and Yam, 2011). Its implied support for 'beyond legal requirement' and CSR as extra-legal friendly actions (Gainet, 2011:197; Lyon and Maxwell, 2008; Portney, 2008) suggests that CSR is entirely distinct from and exclusive of law. The separation model does not recognize legal compliance as part of CSR, particularly in developing countries, the normative link between CSR and law, and the growing recourse to mandatory social disclosure (Buhmann, 2011:150). These factors show that CSR has social imperativeness and consequences conceptions that depend on the legal environment. Thus, implicit CSR is usually mandatory regulations and customary rules for existence in society while its explicit counterpart is voluntary corporate initiatives essentially driven by self-interest, particularly where the implicit does not exist (Matten and Moon, 2008). As Ward (2008:10) similarly noted, '[t]he extent to which a business fulfils its societal obligations must be both a function of what it is legally required to do, and what it chooses to do.' The legal environment therefore clarifies the scope of corporate responsibility and implies the freedom to act one way or the other in undefined areas. How this sits with general regulation theories is examined next.

3. Regulation

Regulation theories emerged from the recognition that factors such as complexity, competing cultural values and social diversity constrain positive law to a limited form of social control that relies on alternative sources of norms for effectiveness (Schuck, 2000:419-455). From the earliest days of corporations, prescriptive regulations have often instigated creative compliance measures that ultimately defeat the regulatory goals. For example, the prohibition of corporations by the Bubble Act 1720 simply led to the establishment of companies in all but name through deeds of settlement of investors' funds (Sheehy, 2008:129). The problem of substance and enforcement limits of law is further exacerbated by the globalization-associated complications in economic and social relations, information, technology, capital flows, and operations of MNEs (Abbott and Snidal, 2009; Elhauge, 2005:803-804; Ho, 2013:385; Parker, 2006; Wlliams, 2002; Zerk, 2006:243-283).

Regulation is therefore regarded as involving the interaction of regulators, regulatees and regulatory environments, taking 'place on a continuum between pure state regulation, on the one hand, and pure self-regulation, on the other, and can generally be understood as a combination of state/public and societal/private contributions, which are closely linked' (Saurwein, 2011:336). Self-regulation, co-regulation and other alternative regulation modes can exist in similar platforms as law notwithstanding differences in degree of legality and formality. Unlike pure state regulation, co-regulation may be 'carried out by private actors that operate on an explicit unilateral legal basis...which explicitly *delegates* regulatory powers from government to non-governmental actors'(Saurwein, 2011:351). Similarly, there may be two forms of self-regulation: 'self-regulation in a narrow sense, which operates without any formal state involvement, and self-regulation in the wide sense, which is characterized by other forms of state involvement in self-regulatory institutions apart from a legal basis' (Saurwein, 2011:351). The concepts of self-regulation and co-regulation therefore recognize

the possibility of the state's indirect regulatory involvement in CSR through a variety of methods and instruments.

Nevertheless, a regulatory CSR perspective ought to recognize the limited scope of prescriptive regulation (Carr, 2007; Deakin and Hobbs, 2007:69) and acknowledge the relative strengths of prescriptive regulation and self-regulation. Reflexive law, for example, argues that rigidity makes centralized top-down formal law and materialized substantive laws inadequate for complex and challenging issues in competing subsystems and therefore requires a 'limiting' role that 'searches for regulated autonomy' and 'retreats from taking full responsibility for substantive outcomes' (Teubner 1983:254, 274, 280). It proposes organizational and procedural norms necessary for decentralized self-regulation in subsystems but does not specify 'concrete social results' (Teubner 1983:251, 255-256) or outcomes of 'regulated self-regulation' and relies on 'softer and more indirect legislative devices' (Scheuerman, 2001:84). Originally conceived from responsive law, reflexive law recognizes the diversity of methods for defining the 'spheres of action for the autonomous [or regulated] pursuit of private interests' by 'private actors' and, therefore, a supplemental 'metaparadigm' indicative of different forms of regulatory intervention and of their selection criteria (Teubner 1983:253, 256, 263-264).

Reflexive law is based on the existence of formal, substantive and reflexive forms of state intervention, and promotes 'a system for the coordination of action within and between semi-autonomous social sub-systems' (Teubner 1983:241). It distinguishes the rule-based generally and deductively applied classical formal law from materialized 'purposive, goal-oriented' substantive law 'implemented through regulations, standards, and principles' (Teubner 1983:240, 254). Substantive law, which is present in welfare systems, involve state interventions through norms, principles and standards directed at achieving particular goals. A reflexive law approach focuses legal attention 'on creating, shaping, correcting, and

redesigning social institutions that function as self-regulating systems' while laws which 'are directed toward organization, procedure, and competence' are 'restricted to restructuring mechanisms for self-regulation such as negotiation, decentralization, planning, and organized conflict' (Teubner 1983:251). Thus, the law can be designed to play directing, facilitative and supporting roles for self-regulation. For instance, Dorf's (2003:400) multidirectional view of reflexivity recognizes that 'norms move in both directions between the centre and the periphery', suggesting that self-regulated CSR and imposed regulations can shape each other. The reflexive law basis of soft law in CSR is manifested, for example, in procedural processes for compliance, legal liability rules, and minimum standards for corporate codes of conduct (Amao, 2007:57).

Similarly, responsive regulation is a meta-regulatory theory that advocates a hierarchical mix of persuasion and contingent sanctions 'of regulatory strategies of varying degrees of interventionism' with persuasion at the base (Ayres and Braithwaite, 1992:6, 35-40). The effectiveness of self-regulation determines the application of greater levels of sanctions including warnings, civil penalties, criminal penalties, suspension and revocation of licences at the top. Responsive regulation is a 'tit-for-tat' model based on the game theory and aimed at rewarding compliance and recognizing different behaviour, history, culture and motivations of regulatees. It favours regulatory roles for private and public interest groups in supporting bilateral 'symbiosis between state regulation and self-regulation' (Ayres and Braithwaite, 2007:3). Although it shares similar goals of flexibility, purposive focus on regulatory competence, participation and negotiation with Nonet and Selznick's development-based responsive law theory (Nonet and Selznick, 1978), responsive regulation is a narrowly focused problem-solving 'enforced self-regulation' model designed to highlight the existence of regulatory flux and an intricate and interdependent relationship between state/government regulation and self-regulation/deregulation to private persons.

At the heart of responsive regulation is regulatory capacity supported with abundant regulatory tools. The state's role in correcting market failure is ensured through escalating and de-escalating sanctions for self-regulation, and 'the bigger and the more various are the sticks, the greater the success regulators will achieve by speaking softly' (Ayres and Braithwaite, 1992:19). Responsive regulation favours tripartite strategies of state and non-state regulation by empowering public and private interest groups such as citizen associations, competitors and regulatees, a tripartism that can prevent regulatory capture, improve regulatory processes, and provide opportunities for participation (Ayres and Braithwaite, 1992:17-18, 54-59). It therefore promotes business self-regulation facilitated by law.

Although responsive regulation seems to focus on single regulatees, Ayres and Braithwaite (1992:38-39) have also proposed a 'pyramid of regulatory strategies' for industry/sector-level regulation. The pyramid can include pure industry self-regulation at the base and depending on compliance with regulatory objectives can be escalated to enforced self-regulation, command-and-control regulation associated with discretionary punishment and ultimately command-and-control regulation incorporating non-discretionary punishment. Braithwaite (2006, 2011) later amplified the original responsive regulation model to include notions of deliberative democracy and restorative justice. Although responsive regulation is designed for jurisdictions where regulatory agencies have sufficient capacity and access to information and a range of sanctions, Braithwaite (2006) envisaged the emergence of 'regulatory societies' in developing countries with regulation capacity deficits if responsive regulation is applied and the vital roles of social pressure and nongovernmental organizations in tripartite regulation are recognized.

Baldwin and Black's (2008, 2010) 'really responsive regulation' offers a model for reassessing and redesigning the overall regulatory strategy, rather than looking at the

application of a regulatory strategy for particular domains. It is performance sensitive but solely focused on compliance. It extends to the existence of and changes in corporate attitudinal settings, broader institutional regulatory environments, and regulatory tools, strategies and performance, and may involve, for example, examining the need for resorting to taxation or trading regimes instead of a command-and-control strategy.

Underlying responsive regulation and reflexive law is the notion of law as both a 'medium' for communicating norms and an 'institution' for facilitating self-regulation (Teubner, 1983:270). The theories therefore suggest that CSR can be a flexible moniker for a range of regulatory strategies including pure self-regulation, enforced self-regulation and co-regulation. For example, an industry self-regulatory code backed by law or enforced through law can be considered a tool of reflexive law or responsive regulation. Nevertheless, the next part of this article demonstrates that regulation of CSR is not a simple question of compelling behaviour but includes other complex issues and relationships, including the scope of corporate responsibilities and the instrumental-ethical CSR chasm, that have not been considered by mainstream regulation theories.

4. Disambiguation: flux or obfuscation?

The law can designate facilitative, regulatory and constitutive environments for corporate responsibilities (Edelman and Suchman, 1997:482). It provides procedural tools for accomplishing goals in facilitative environments, seeks to control and modify behaviour in regulatory environments, and defines organizational forms and relationships in constitutive environments. Facilitative, regulatory and constitutive legal support for CSR include: mandatory reporting; company law and corporate governance provisions; contractual commitments; litigation; guidelines; codes of conduct and other soft laws; delimitation of duty of care by non-binding standards; international law norms; and private actors'

implementation of international agreements (IOB, 2013:11, 13; van Tulder and van der Zwart, 2006; Ward, 2007:8, 10, 18-22).

Nonetheless, some unity model proponents argue against placing CSR 'outside the ambit of the law as law is generally known especially from a positivist perspective' and consider corporate responsibility and CSR as self-same subjects while assuming that the 'legal' is willing and able to accommodate the 'non-legal' in pursuit of 'a workable framework for corporate responsibility' (Amao, 2008:78). This view, however, conflates corporate responsibility with CSR. The juxtaposition of 'legal' and 'non-legal' is flawed since what firms are legally required to do and what they voluntarily choose to do are both questions of 'corporate responsibility'. Whilst the first question is not imperative in CSR the second can incorporate CSR. CSR may therefore be regarded as legal and extra-legal requirements for behaviour and includes economic, ethical and legal responsibilities which occupy dissimilar though not necessarily mutually exclusive spaces (Carroll, 1991; Schwartz and Carroll, 2003). It is not synonymous with corporate responsibility, but constitutes 'an' element of the latter, asking what are or ought to be the extra-legal 'obligations' or, more appropriately, 'concerns' of corporations. Parker (2007) and Johnston (2011:222) are therefore right to insist that legal compliance is not synonymous with CSR.

The 'legal' and 'non-legal' responsibility dichotomy is illustrated by responses to the 2010 Deepwater Horizon oil spill that caused environmental and other problems and demonstrates that social responsibility issues are not easily described as exclusively legal or voluntary (see Table 1 below). Acting under existing laws, the US government conducted safety reviews of offshore installations and drilling rigs and suspended existing and offshore deepwater drilling permits and undertook several other remedial actions (BOEMRE, 2011; Sheldon, 2011). It took enforcement proceedings against BP and other companies for safety violations, to impose unlimited liability and remove the statutory $75 million compensation

cap by proving gross negligence or wilful misconduct. It introduced fresh laws, improved health and safety rules, raised financial penalties for pollution, and reformed inadequate regulatory processes and weak enforcement agencies. Although triggered by the spill, the new legal obligations did not actually affect existing liability. BP therefore exceeded its strict legal obligations and considered social expectations in undertaking immediate clean-up, pledging environmental restoration, allocating US$500 million for environmental and public health research, and expressing commitment to satisfying legitimate compensation claims (BP, 2011a, 2011b, 2011c)**.**

[TABLE 1]

Consequently, prescriptive CSR ought to consider the nature of responsibility required in certain circumstances in addition to recognizing the legal versus non-legal classification of obligations and clarifying the type of legal environment sought. This, for instance, avoids the conflation of the concepts of corporate responsibility, CSR and social reporting which, although related, may not necessarily share identical scope and common goals. There is no conceptual difficulty in discussing corporate responsibility if the legal, instrumental, ethical or other basis is clarified. For example, ethical justifications for business involvement in poverty eradication and development issues (Bardy et al, 2012; Merino and Valor, 2011) are not suggestive of ethical concerns as automatic legal standards or obligations. As a corollary of the components of corporate responsibility, instrumental CSR is part of 'economic' responsibility but could be 'legal' if, for example, the law requires managers to pursue profit in certain situations. Ethical CSR which is 'not-legal' is therefore the antithesis of 'legal' responsibility. The upshot is that the absence of legal compulsion is integral to ethical CSR. At best, an ethical-type CSR encourages good practices and observance of social norms without imposing legal responsibility. It confuses, however, if ethical and legal

responsibilities are assumed to be identical by proposing the legal compulsion of essentially voluntary activities appealing to instrumental, ethical or other considerations.

The ethical-instrumental distinction can support a case for regulating certain CSR issues. Ethical rationales may be more compelling than instrumental justifications by excluding economic efficiency arguments for socially objectionable and 'financially harmless' practices such as bribery of foreign public officials (Osuji, 2011) and insider dealing (Barnes, 2009; McVea, 1995).[1] The instrumental-ethical dichotomy therefore applies a functional approach to the law-CSR relationship by distinguishing private morality from morality with 'public' elements to enable legal protection using criterions such as abuse/misuse of position and power, reasonable expectations of good faith, fulfilment of promises and prevention of opportunistic exploitation of rules and enforcement. Having established that regulatory CSR is conceptually and practically possible within the boundaries of functionality, this article will now scrutinize regulatory approaches in certain jurisdictions.

5 Regulatory CSR models

As Ho (2013:388) argued, CSR regulatory models are 'informed [by] each country's political, economic, and cultural context, as well as by existing relationships between business, government, and civil society.' Lozano et al (2008) are broadly supportive by suggesting that European regulatory models are partnership (Denmark, Finland, Sweden, the Netherlands), business in the community (UK, Ireland), sustainability and citizenship (Austria, Belgium, France, Germany, Luxembourg), and agora (Greece, Italy, Portugal, Spain). Ho (2013:421-423), however, highlights market (USA) and relational (EU) models as recognizing limited 'indirect mediating or reinforcing role' for government, although the former supports market-driven voluntarism whilst the relational model encourages active

[1] See *R v McQuoid* [2009] EWCA Crim 1301, para 8 (Lord Judge CJ).

collaboration between firms, the market and civil society. The state-centric model (China) reflects a socialist direct and extensive government's role.

Ho's three-model approach broadly reflects existing regulatory CSR traditions but does not really display the diversity of tools and intensity levels. The global trend in regulatory CSR appears to favour economic/market instruments and reflexive law tools over prescriptive/command-and-control regulations (Grabosky, 2013; Kingston, 2010, 2013; Richardson, 2009). This 'regulatory capitalism' (Barkay, 2009) prompted the European Commission's (2011:7) position that CSR 'should be led by enterprises themselves.' The Commission (2011:3) acknowledges that '[c]ertain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility' and largely prefers orchestration, which is the state's facilitation of private regulatory arrangements (Schleifer, 2013). This orchestration is chiefly through non-financial disclosure recently confirmed by the 2011 Commission's Communication and 2014 Non-Financial and Diversity Information Directive.[2]

Orchestration is also by using market instruments, particularly the Emissions Trading Scheme[3] and Eco-Management and Audit Scheme (EMAS) in the environment sector. Initially adopted under EEC Regulation 1836/93, the EMAS registration/compliance programme uses mainly financial and reputational incentives for voluntary commitments (Ho, 2013:392-393; Zerk, 2006:39). Its eight-step procedure include environmental policy formulation, review, action programme and management system, audits, objectives, statements, independent verification and reports to national authorities. Credibility concerns

[2] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1 15.11.2014.
[3] Directive 2003/87/EC establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32, as amended.

about EMAS and its role in environmental performance led to its amendment by Regulation EC 761/2001 (Wenk, 2004:65).

The EU and UK disclosure systems are largely reflective of the business case CSR and at best consider ethical concerns to be incidental. Consequently, sections 172 and 417 of UK Companies Act 2006 establish 'attractive' (Stallworthy, 2006) procedural tools for mandatory disclosure that reflects reflexivity to the extent of requiring directors to empirically investigate facts and outcomes beyond statutory descriptive and instrumental justifications (Chiu, 2006:267). It is a limited instrumental business case approach that links CSR and financial performance and can discourage CSR in areas such as environmental protection that are not easily financially measurable (Bradshaw, 2013:156-157). It regards social irresponsibility as a fiscal risk factor and almost automatically leads to support for corporate self-regulation (Hart, 2010; Shamir, 2011:330).

USA largely favours self-regulation and market-based approach to CSR with little room for 'public interest' disclosure (Williams, 1999). However, 'global' disclosure has gained momentum following 'ethical' concerns regarding the 1990s child labour and sweatshop scandals of overseas affiliates of garment companies. For example, section 1502 of Dodd-Frank Act 2010 employs global disclosure by requiring diamond and technology companies to provide annual reports of 'due diligence on the chain and custody of' conflict minerals. As discussed in the introduction, the Act has very limited effectiveness because of the omission of stakeholder empowerment for challenging the adequacy of due diligence and verifying the quality and correctness of information disclosed (Amnesty and Global Witness, 2015). Similarly, California's Transparency in Supply Chains Act 2010 requires 'large retailers and manufacturers' to disclose anti-slavery and human trafficking efforts in their supply chains. This market-based statute assumes that disclosure influences 'purchasing decisions' and enables consumers to avoid 'tainted' supply chains (Section 2(h)) but omits

stakeholder empowerment and enforcement provisions such as that exploited in *Nike v Kasky*.[4]

Although government's actions short of compulsion and sanctions can be 'expressive' of public policy and have communicative effects (Sunstein, 1996), market-based models ignore CSR's governance and socioeconomic development potentials and the role of modern corporate governance in matching corporate resources to the needs of society, particularly in developing countries. De Burca (2010:232) consequently observes that one reason for the emergence of new governance systems is the need to address 'strategic uncertainty –[of] complex policy problems [such as poverty and socioeconomic problems] which have not shown themselves to be readily amenable to resolution whether through hierarchy, market, or otherwise.'

Using CSR as a socioeconomic development tool is apparent in some prescriptive regulations though it is doubtful whether its limitations are appreciated. Ho's (2013) state-centric explanation is reflected in certain common law developing countries with less interventionist legal traditions than civil law systems (Anderson et al, 2012:173-175) and showing lack of awareness of the limited scope of regulatory CSR. Firstly, Indonesia's Investment Law No.25 requires investments to manifest principles of 'openness, accountability, equal treatment without discriminating the country of origin, togetherness, impartial efficiency, sustainability, environmental friendly, and balance of progress and national economic unity' (Article 3(1)). Investment objectives include 'increasing national economic growth; creating job opportunity; improving sustainable economic development; improving competiveness of national business sphere; increasing the capacity and capability of national technology; encouraging people economic development; [and] improving the prosperity of the community' (Article 3(2)). Investors must 'apply principles of good

[4] *Kasky v Nike* 27 Cal 4th 939, 946, 45 P3d 243, 247, 119 Cal Rptr 2d 296 (Cal 2002); *Nike v Kasky* 539 US 654 (2003).

company management, implement the company's social liability, [and] respect the cultural tradition of communities around the location of investment activity' (Article 15); 'preserve the environment; provide safety, health, convenience, and prosperity to workers; and comply with all of the rules of law' and 'allocate fund in stages for the recovery of location that fulfils the standard of environmental worthiness, whose implementation shall be in accordance with the rules of law' (Article 16). The 2007 Limited Liability Company Law No.40 defines 'social and environmental responsibility' as 'the company's commitment to participate in sustainable economic development in order to improve the quality of life and beneficial environment, both for the company itself, the local community, and society in general' (Article 1(3)). Article 74 requires natural resources companies 'to carry out social and environmental responsibility' as 'budgeted for and calculated as a cost of the company, and which is implemented with attention to appropriateness.' Companies can be sanctioned for failing 'to carry out social and environmental responsibility.'

An Indonesian court surprisingly rejected arguments that these broad provisions lack legal certainty, efficiency of economic justice and awareness of CSR's nature.[5] Despite the court's insistence that '[CSR] is a flexible concept which is subject to the interpretation of each country' (Waagstein, 2011:456), conceptual and practical difficulties arise from not distinguishing instrumental and purely ethical CSR. Article 74 of Law No.40, for example, is 'too general' and merely 'inspirational in character' and lacks automatic enforceability and clarity of goals, monitoring and implementation (Waagstein, 2011:461-465). Although provoked by environmental and human rights abuses, particularly by multinational extractive companies (Kemp, 2002; Waagstein, 2011:460), the laws create a paradox by attempting to compel both legal and voluntary behaviour standards. The failure to acknowledge differences between legal precepts and socially 'required' conduct is fundamentally at odds with the

[5] *'Judicial Review of 2008 Laws No. 40' Judgment, Case No. 53/PUU-VI/2008*, Indonesia Constitution Court (2009).

instrumental and ethical CSR conceptions. Using 'legal' instruments to compel 'voluntary' standards is an arduous and ultimately impossible task which confuses CSR with corporate responsibility in the broadest sense.

Similar difficulties apply to Nigeria's Corporate Social Responsibility Bill SB27 2008 seeking to establish a supervisory body to create international CSR standards; implement social and environmental inspection regimes; engage in social performance ratings; develop CSR policies; ensure accountability to employees, trade unions, investors, consumers, host communities and the environment; impose sanctions; develop environmental guidelines; and implement local content policies (clause 5). The bill is unlikely to become law being an amalgam of incompatibility seeking in general terms to compel CSR without regards to its instrumental or ethical basis. Compelling companies to 'respond to the needs of the host communities through strategic philanthropy, environmental protection, and community development' contains an inaccurate assumption that CSR is legally prescribed codes of conduct.

In the Philippines' on-going controversy, House Bill 1224 and Senate Bills 1239 and 2747 entitled 'An Act institutionalizing corporate social responsibility, providing therefor and for other purposes' 'mandated' CSR, while House bills 4575 and 306 entitled 'An Act encouraging corporate social responsibility, providing therefor and for other purposes' 'encourage' CSR. Section 3 of House Bill 306 'encourage' CSR observance by business organizations and defines CSR as 'the commitment of business to contribute on a voluntary basis to sustainable economic development by working with relevant stakeholders to improve their lives in ways that are good for business, sustainable development agenda and society at large.' Recognized CSR-related activities include 'charitable programmes and projects, scientific research, youth and sports development, cultural or educational promotion, services to veterans and senior citizens, social welfare, environmental sustainability, health

development, disaster relief assistance, and employee and worker welfare related CSR activities.' This narrow corporate philanthropy conception is contrary to the view that 'CSR is not philanthropy, contributing gifts from profits, but involves the exercise of social responsibility in how profits are made' (McBarnet, 2007:2). Business organizations will list their CSR activities in annual or regular reports to administrative agencies (section 8). Section 4 amends the Philippines' Corporation Code by prohibiting the retention of surplus profits exceeding paid-in capital stock except, among other grounds, 'when justified by definite corporate expansion or corporate social responsibility projects and programs approved by the board of directors.' The Department of Trade and Industry will grant 'national recognition and rewards…for outstanding, innovative and world-class CSR-related services, projects and programs' and endorse candidates for international awards (section 6) and local government units must extend necessary 'assistance' to companies in CSR performance (section 7). Unlike House Bill 4575 which applies to all businesses including small and medium enterprises and does not permit deduction of CSR-related expenses, Senate Bill 2747 applies only to 'large taxpayer corporations' (section 3) and contains tax deductibility (section 4). Bill 2747 excludes activities already mandated by existing legislations from the definition of CSR activities (section 3) and requires periodic reports to the SEC only (section 6). The country's businesses challenge the proposed legislation, arguing that since '[e]thics, just like morals and taste, cannot be legislated' CSR should be 'left as a voluntary practice that organizations can take on' and (del Mundo, 2011), thus hinting at the instrumental-ethical distinction discussed above. Substitution of philanthropy for CSR is another criticism.

In contrast, section 135 of India's Companies Act 2012 requires companies having a certain net worth, turnover or profit to appoint a 'CSR Committee' of three or more directors, one of whom must be an independent director, for recommending CSR policies and

expenditure to the Board of Directors and monitoring such policies. The Board must disclose CSR policies in directors' reports and on corporate websites, and also ensure that activities in the policies are undertaken. Schedule VII provides that CSR activities include: 'eradicating extreme hunger and poverty, promotion of education, reducing child mortality and improving maternal health, combating human immunodeficiency virus, acquired immune deficiency syndrome and other diseases, employment enhancing vocational skills, [and] contributing to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Government for socioeconomic development and relief.' The 'Companies (Corporate Social Responsibility Policy) Rules 2014' exclude activities 'undertaken in pursuance of normal course of business of a company' (sections 2(e), 4(1), 6(1)) or benefitting only a company's employees and their families (section 4(5)) and contributions to political parties (section 4(7)). This is a narrow philanthropy view of CSR although it reflects traditional Indian understanding of CSR as corporate responsiveness to social expectations and contributions to social and development initiatives (Mitra, 2009). Companies are required to spend at least two percent of average net profits of three preceding financial years for CSR, giving preference to local areas of operations. There are no sanctions although section 135(5) requires directors' reports to give reasons for non-compliance. Section 9 of the subsidiary legislation require the display of Board-approved CSR policies on corporate websites, suggesting that negative publicity is sufficient incentive for social responsibility.

The first issue arising from India's legislated CSR is the appropriateness of using CSR as a development tool and the respective roles of states and corporations. Simply put, a key question is 'what should be the role of government, and what should be the role of markets in proving desirable outcomes' (Fransen, 2013:224). Ho (2013:438) observes that state-centric regimes compel companies to contribute to development programmes. The fact

that CSR is an illustration and evidence of 'corporate political power' (Wilks, 2013:197) suggests that expectations of public governance functions are not farfetched notwithstanding Vogel's (2010) warning that CSR cannot replace government and needs to be 'reinforced by and integrated with state regulatory systems'. Franck (1995:439), argues, however, that political systems can determine 'key developmental priorities, cultural values and the distribution of social goods...within the larger quest for legitimate rules and institutions to promote development' and, developing countries especially, may include 'a degree of state intervention in the terms of capitalization, production and earnings.' MNEs are the more likely candidates to satisfy the financial thresholds for India's compulsory CSR. By section 3 of the subsidiary legislation, the CSR rules apply to companies with Indian branches or project offices. In that case, foreign companies may complain of a breach of general international investment law or specific bilateral investment treaties. However, international investment law only requires non-discriminatory and proportionate state interventions. Thus, Muchlinski (2006:549) argues that states can impose higher standards on corporations in addition to international CSR principles.

The second issue is the degree of command-and-control in the statutory CSR structure. Corporate organs are allowed discretion as to what activity to carry out and how it can be done, including the indication by sections 4(2),(3),(6) of the subsidiary legislation that CSR can be undertaken through registered trusts or societies, in collaboration with other companies albeit with separate annual reports, and by employee capacity building. Section 5 requires CSR committees to establish 'a transparent monitoring mechanism' for undertaking projects. The legislation is therefore reflexive to an extent, unlike the purely prescriptive Indonesian and Nigerian statutes. However, the omission of sanctions, empowerment of stakeholders and representative public and private organizations and lack of transnationalism reflecting the realities of globalization is likely to affect the effectiveness of the legislated

CSR. In view of the diverse regulatory experiences highlighted above, the next part of this article therefore explores how regulatory CSR can be pursued effectively through inventive interventionism.

6. Inventive interventionism

Unbounded prescriptive CSR equates improved corporate behaviour with greater regulation and fails to acknowledge that no regulation or legal system is entirely without loopholes and ambiguity. Legal interpretation may even be a social responsibility matter of avoidance or compliance with the spirit of the law (Zerk, 2006:34-37). Consequently, CSR strategies can be obstructionist (economic focus and rejection of ethical responsibility), defensive (passive legal compliance and rejection of ethical responsibility), accommodative (legal compliance plus minimalist and passive ethical responsibility), or proactive (active promotion of ethical responsibility) (Lee, 2011:286). This diversity of strategies demands appropriately designed regulatory CSR. Although greater regulation alone may not improve behaviour if avoidance is prevalent, 'responsibility' lacking legal prop can have a neutral impact if corporations are not proactive. Therefore, a regulatory design that tackles avoidance and encourages proactivity may be more successful in encouraging CSR.

At least five reasons exist in favour of a symbiotic law-CSR linkage. Firstly, reflexive law and responsive regulation show that law can support self-regulation in different ways. Secondly, CSR issues may be closely connected to legal obligations, including international human rights law (Buhmann, 2011). As Table 1 illustrates, social issues and expectations can precipitate regulation if voluntary/self-regulated approaches falter in achieving desired behaviour. Thirdly, voluntary CSR can create disunion between social demands, particularly ethical considerations, and the realities of corporate conduct. The Deepwater incident and other scandals confirm corporate inability to self-regulate in areas like environment and

financial probity (Ioannou and Serafeim, 2011:9). Fourthly, strategic, defensive, altruistic or public-spirited reasons can shape corporate social practices but 'business sense' often compels corporations, particularly highly visible global brands, to engage voluntarily in CSR, confirming the dominance of the managerial and financial perspectives in unregulated CSR. Spaces therefore exist in the market for both socially responsible and irresponsible corporations (Vogel, 2005:2-4, 10-13, 16-74, 75-161, 165-66). Since voluntary programmes of different objectives exist because of lack of regulation, regulatory CSR can set minimum standards and limit the boundaries of the free-for-all field of the managerial and financial perspectives. Fifthly, the stakeholder and institutional theoretic models demonstrate that external stimuli can increase the likelihood of social considerations in corporate agendas (Lee, 2011). Law's coercive and other properties make it an unrivalled stimulus, prompting institutional theories' support for using regulations to improve behaviour.

It is a question of whether to promote passive, restrictive or opportunistic legal environments. In passive domains corporations act without specific considerations of legal provisions and may just happen to be compliant. Restrictive domains compel compliance with legal requirements, while opportunistic domains allow corporations to exploit weak standards and loopholes (Schwartz and Carroll, 2003). A 'prescriptive-legislation-cures-all' approach assumes the law can promote socially responsible behaviour only through compulsion of socially desirable activities, a narrow view reflexive law and responsive regulation theories rightly reject. Other intervention methods such as market, information and financial incentives can promote CSR (Leon and Moon, 2007:480; Hsueh and Prakash, 2012). Nonetheless, reflexive law and responsive regulation portend doubtful effectiveness in CSR by pushing the main agenda of compliance with legally prescribed standards (Deakin and Hobbs, 2007:75). This demonstrates the need for inventive interventionism since CSR really requires actors to exceed legal minimum standards that may be much lower than social

expectations and stakeholder demands. Inventive interventionism can rely on a range of measures including incentives, recognition of self-regulatory bodies, and endorsement of guidelines issued by independent, public or private bodies, while recognizing CSR's multiple stakeholder framework in regulatory design and enforcement. As detailed below, inventive interventionism applies a functional approach to overcome pitfalls associated with extreme prescriptive and voluntary models by requiring appropriate institutional support for regulatory CSR, recognizing the distinctive features and goals of CSR and social disclosure and separating them in regulatory design, and linking performance and disclosure particularly through stakeholder empowerment.

6.1 Institutions

Prescriptive CSR can recognize 'reciprocal and dynamic interactions between law and economic development, as well as the manifold functions of law beyond the protection of property rights' (Desta and Hirsch, 2012:133). However, law and economic development require appropriate institutions to be effective, inspiring development scholarship's view that 'markets and institutions are closely intertwined, and that markets do not exist in a vacuum but rather require an institutional framework' (Desta and Hirsch, 2012:133). The new institutional economics school similarly demonstrate that 'economic behaviour, whether by individuals or by firms, is affected by the institutional setting in which actors find themselves' (Ohnesorge, 2007:268). The core components of institutions include 'the rule of law and tackling corruption, property protection and government effectiveness' (Desta and Hirsch, 2012:133). The legal system, including the quality of rules and enforcement, is particularly important to institutional economic development capacity (Dam, 2006:5-6; Davies and Trebilcock, 2009:902-904).

Institutional support is related to ability to regulate, a test developing countries sometimes fail. Some developing countries are 'soft states…unwilling to impose obligations on the governed, and the corresponding unwillingness of the latter to obey rules laid down even by democratic procedures' (Desta and Hirsch, 2012:133). The fact that the Philippines, Indonesia and Nigeria examples above resemble Ho's (2013:382) 'state-centric' CSR model that 'is unlikely to overcome existing governance gaps that impede the implementation of law' suggests two lessons. Firstly, regulatory CSR requires appropriate institutional support. Secondly, an approach may not work 'effectively' for particular jurisdictions. Regulatory CSR is a field where 'the mismatch between pre-existing conditions and transplanted law, which weakens the effectiveness of the imported legal order' is possible without institutional factors, and show the need to exercise care if 'the social, economic and institutional context often differs remarkably between origin and transplant country' (Berkowitz et al, 2003:171). Legal transplant analysis suggests that the importation/reception of legal concepts requires careful consideration of the operative systems' conditions and environments (Arvind, 2010), including the importing jurisdiction's non-governmental actors such as individuals, corporations and other organizations (Naiki, 2014:144).

Supporting legal and institutional infrastructure, including adequate enforcement and verification mechanisms, are required to ensure that responsibility is accompanied by the ability and willingness to abide by the rules. Indonesia is an example. Although the predecessors to its CSR statutes contained wide-ranging provisions on typical CSR issues such as labour standards, environment and consumer protection, weak enforcement prevailed through lack of judicial mechanisms for accountability, corruption, legal uncertainty instigated by overlapping rules, and a race-to-the-bottom for foreign investment (Waagstein, 2011:457-458). Despite requiring social and environmental disclosures in annual reports, the statutes may not fare better than their predecessors as there is no indication of renewed legal

and institutional infrastructures, including facilities for ensuring the credibility of disclosures, reporting standards, stakeholder participation and external assurance (Utama, 2011).

Inventive interventionism therefore advocates appropriate institutional capacity and other elements of effective legal systems to support regulatory CSR. In substance, this may require the establishment of CSR-specific regulatory, administrative and independent bodies to set standards, issue guidelines, coordinate the public sector and collaborate with the private sectors, engage in monitoring, inspection and verification, ensure external assurance, and apply sanctions. It may also require the reform of the adjudication process by, for example, reforming rules on making complaints and institution of legal claims, public interest action by public bodies and private persons, collective action by interest groups, and application of remedies such as injunction, damages and apology. Thus, inventive intervention places regulatory CSR in an institutional framework that provides for CSR-related legal powers for public and independent agencies and rights for stakeholders and enables the effective exercise of such powers and rights.

6.2 Decoupling CSR reporting

The unity model's matching of CSR with 'transparency and disclosure regime' (Amao, 2008:89) conflates CSR and disclosure. A functional approach distinguishes CSR and disclosure by acknowledging natural disparities in juridification justifications (Osuji, 2012). CSR and social reporting may respectively refer to 'activity' and 'reporting of activity' and have dissimilar regulatory goals and legal consequences despite having a common origin. Justifications for disclosure regulation including consideration of social issues in decision-making, transparency and provision of evaluation mechanisms differ from the desirability of the activity being disclosed, a key component of CSR. The multi-stakeholder counter-corruption Extractive Industries Transparency Initiative (EITI), which received legislative

backing in Nigerian Extractive Industries Transparency Initiative Act 2007 and the US Energy Security Through Transparency Act 2010, illustrates this distinction. EITI's set of reporting guidelines to companies, governments and interest groups for transparency of business-to-government payments implicitly separates CSR and reporting by requiring disclosure of payments without inquiring into fairness of amounts and other underlying issues.

Also applying this activity-reporting distinction are mandatory disclosure requirements in Denmark's Financial Statements Act 2008 (stand-alone reporting), South Africa's King Code of Governance Principles III 2009 (integrated financial and non-financial reporting), Sweden's guidelines (reporting by state enterprises), and the US Guidance Regarding Disclosure related to Climate Change 2010. In particular, section 99a of Denmark's statute requires annual reports of large and state-owned companies to include their social policies and actions, previous year's initiatives and future expectations. The statute, firstly, separates voluntary CSR from mandatory social reporting and does not compel performance of activities or behaving in particular ways although whether corporate operations are socially responsible must be disclosed. Secondly, instrumental and ethical CSR are implicitly treated equally by requiring disclosure of activities reflecting either or both and not compelling corporations to espouse either approach. Denmark's approach reflects its instrumental labelling of CSR as a competitiveness issue of 'the needs of business' rather than 'the needs of society' (Gjølberg, 2010:211-212, 216-220).

This demonstrates that an inventive interventionist approach has to recognize the distinctiveness of the twin concepts of CSR and social disclosures and make informed decisions that suit the regulating jurisdiction, particularly in view of its socioeconomic conditions and development needs. The decisions may relate to a jurisdiction-specific definition of CSR, preference for ethical or instrumental CSR and what elements of CSR

need to be disclosed. A jurisdiction can follow a different model by including ethical issues in CSR and, as India did, require disclosure of performance/non-performance of activities.

6.3 Performance-linked disclosure

Disclosure indirectly encourages CSR since it is preferable to disclose 'good news'. Disclosure usually satisfies institutional and stakeholder pressure, suggesting its reputation-focused application (Spence, 2011). However, voluntary disclosures and commitments to shared values alone may not improve social responsibility because of 'bluewash' (Berliner and Prakash, 2012:151) of exaggerated social performance creating 'frequently a gap between citizens' expectations and what they perceive to be the reality of business behaviour' (European Commission, 2011:9). Despite the proliferation of social reporting and rating agencies, negative reports largely lack the motivating element for improving decision-making and social performance, while damaging events such as administrative and judicial penalties, out-of-court settlements, environmental disasters and major health and safety issues are routinely ignored (Metcalf, 2010:146-148; Scalet and Kelly, 2010:74).

Nevertheless, disclosure and information flow are critical components of regulatory CSR and require the acknowledgment that inadequate regulatory oversight of self-regulation is unhelpful to transparency. Disclosure can improve CSR commitments only if it facilitates objective performance measures that exclude 'soft, unverifiable claims' (Clarkson et al, 2008:309), a point highlighted well by the Deepwater spill. Apart from undermining BP's image as 'a transnational' and 'perennial [CSR] leader' (Matejek and Gössling, 2014:573; Metcalf, 2010:157), the spill indicted BP's ethical marketing and third-party ratings. BP's reputation-boosting campaigns had persisted despite credibility concerns from previous incidents, including deaths and injuries from the March 2005 explosion and fire incident at Texas City Refinery and inspections that revealed systemic poor health and safety standards.

BP was fined a record $21million for the 2005 incident and another record $87,430,000 in 2009 for health and safety violations (Balmer et al, 2011; Cherry and Sneirson, 2011; Kurtz, 2011; Matejek and Gössling, 2014; OSHA, 2009a, 2009b, 2009c).

Just as the Deepwater incident pushed the US to examine the need for mandatory environmental and social reporting, disclosure can act as collateral regulation if appropriately linked to performance (Clarkson et al, 2008). As Loss (1988:33) rightly observed, 'people who are forced to undress in public will presumably pay some attention to their figures.' This requires legal substantive and procedural rights of stakeholders because '[t]o the extent that law focuses on companies' internal responsibility processes rather than external accountability outcomes, law runs the risk of becoming a substanceless sham, to the delight of corporate power-mongers who can bend it to their interests' (Parker, 2007). It also involves recognizing that stakeholders rely on 'infomediaries' such as the mass news media and industry and professional publications for information (Scheiber, 2015:559).

Therefore, stakeholder rights through inventive interventionism can, for example, include verification, complaints to administrative agencies and judicial redress relating to corporate disclosures, third party ratings and other matters. This may require substantive stakeholder rights encapsulated in a statutory tort that defines duties, rights and remedies. It may also require the reform of torts such as defamation and trespass to property to provide appropriate defences for stakeholders to enable them promote CSR in a balanced manner.

7. Transnational inventive interventionism

While the preceding section has considered inventive interventionism within national boundaries, the flawed examples of regulatory CSR also demonstrate unawareness of the increasingly globalized CSR environment. Prescriptive CSR attempts to tackle the recondite

issue of how to 'persuade' companies, including MNEs, to be socially responsible and apply international best standards despite legal obligations and institutional control in host jurisdictions, particularly developing countries. The state of international law, including an absent overarching international authority exacerbated by significant disparities in substantive regulations and enforcement among developing and developing countries, makes CSR a more practical alternative to legal control of MNEs. For instance, the Forest Stewardship Council's transnational certification scheme (FSC, 2015) appears to work reasonably well in developed countries in contrast to developing countries (Marx and Cuypers, 2010; Schepers, 2010; Tollefson et al, 2008).

Some factors help to galvanise support for prescriptive CSR in developing countries. One is the globalization-created power shift enabling corporations to act as equals or stronger partners of governments of developing countries (Reed, 2002) that often lack adequate institutional and stakeholder control of corporations (Stovall et al, 2009). Another is voluntary corporate codes of conduct, which emerged because of lack of national and international regulatory instruments for MNEs, are not often effective in improving corporate behaviour. Corporations are more likely to adopt CSR principles that are closely connected to regulations (Porter and Kramer, 2006). Furthermore, MNEs adopt obstructionist positions in developing countries with weak legal and institutional environments (Lee, 2011:289; Sethi, 2011).

For example, the United Nations Environment Programme's (UNEP) (2011) environmental assessment of Ogoniland, Nigeria revealed extensive environmental degradation, public health threats, and gross institutional and regulatory failures. The African Commission on Human and Peoples' Rights (ACHPR) similarly noted that 'pollution and environmental degradation to a level humanly unacceptable has made living in Ogoniland a nightmare' and held that Nigeria's government acted contrary to treaty obligations and

'internationally established principles' in facilitating and giving 'green light' to environmental destruction by multinational oil companies.[6] The Court of Justice of the Economic Community of West African States reached a similar decision in 2012.[7] Oil companies disregarded internal procedures, industry best practices, international standards and national regulations, including weak and inadequate remediation provisions. Regulators, who lacked relevant expertise and resources, colluded with MNEs to undermine environmental standards (UNEP, 2011). Regulators also tended to rely wholly on and refrain from verifying corporate-provided data, including attributing in a report to UNEP over 90 percent of Niger Delta's oil spillages to sabotage and criminal activities rather than unsafe equipment and negligent practices (Amnesty, 2009, 2013; Okeke, 2011). The data allegedly originated from Shell, a dominant MNE that regularly cited sabotage-related factors despite challenges from environment groups and host communities. A court confirmed that Shell provided no evidence for allocating to sabotage 28 percent between 1989 and 1994, 70 percent in 2007 and over 90 percent in 2010.[8] Nigerian law's lack of primary and secondary liability for sabotage-related consequences probably provided incentives for false claims to avoid paying compensations to host communities (Amnesty, 2013; Frynas, 1999:128).

Another example of low regulatory standards relating to competition for investments is Nigerian laws' preferential treatment of oil companies. The Constitution's acknowledgment of an overriding common good objective in exploitation of human and natural resources (section 17(2)(d)) is part of Chapter 2's socioeconomic provisions the courts firmly held to be declaratory policies and unenforceable (Nnamuchi, 2008; Odinkalu,

[6] *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 155/96 (2001), paras.60,70.
[7] *SERAP v Nigeria* Judgment N° ECW/CCJ/JUD/18/12 of 14 December 2012.
[8] *Shell v Isaiah* (1997) 6 NWLR (pt. 508) 236, 263.

2008).[9] The Constitution and statutes grant limited land rights to individuals and host communities and permit expropriation often exercised in favour of oil companies. Provisions encourage inadequate compensation for land used for oil exploration and production while oil companies, regulators and enforcement agencies routinely ignore pollution prevention, control and remediation provisions (Amnesty, 2009, 2013; Frynas, 2000:170).[10] The judicial system tilts toward oil companies and practically denies host communities access to justice. For instance, Shell, which recently reached a $15.5million settlement in US over its Nigerian operations,[11] might not have settled the case had it been instituted in Nigeria. An injunction restraining Shell from environmental pollution was once declined because oil was considered critical to the economy (Idowu, 1999:181). Despite its prohibition since 1984, ministerial permits for gas flaring in oil production and exploration if reinjection or utilization is not possible created loopholes often exploited by MNEs with the result that statutory conditions, including environment impact assessment and transparency are frequently ignored (Amnesty, 2009, 2013; Ezeamalu, 2014).[12] A regular ritual of extending deadlines exists despite a 2005 court order for cessation of gas flaring for violating the constitutionally guaranteed fundamental rights to life, healthy environment and human dignity reinforced by the African Charter on Human and Peoples Rights.[13]

While laws of some developing countries are minimally consistent with international standards inadequate enforcement means that regulation is really lacking even where it exists. One recent documented instance of this regulatory capture- leaked diplomatic cables

[9] *Attorney-General of Ondo State v Attorney-General of the Federation* [2002] 6 SC (pt 1) 1; *Attorney-General of Lagos State v Attorney-General of Federation* (2003) 6 SC (pt 1) 24; *Archbishop Okogie v Attorney–General of Lagos State* 1981 NCLR 337; *Uzoukwu v Ezeonu* 1991 6 NWLR pt 2000 P 708 at 761.

[10] 1999 Constitution, sections 44(3), 315(5), 315(6); Land Use Act 1978, sections 1, 5, 28, 47; Oil Pipelines Act, sections 5(1), 6,11; Petroleum Act, section 36; Oil Pipelines Act, section 20.

[11] *Wiwa v Royal Dutch Petroleum* (S.D.N.Y.) (No. 96 Civ. 8386); *Wiwa v Shell. Settlement Agreement and Mutual Release* (2011). http://wiwavshell.org/documents/Wiwa_v_Shell_agreements_and_orders.pdf.

[12] Associated Gas Reinjection Act 1979, section 3; Associated Gas Reinjection (Continued Flaring of Gas) Regulations 1984; *Gbemre v Shell*, Suit No FHC/B/CS/153/2005, 2005, 14 November 2005 (Nwokorie J) 30-31.

[13] 1999 Constitution, sections 33, 34; African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Articles 4, 16, 24; *Gbemre v Shell*, Suit No FHC/B/CS/153/2005, 2005, 14 November 2005 (Nwokorie J) 29-30.

indicating absolute control by multinational oil companies of Nigeria's regulatory and administrative authorities (Sahara Reporters, 2010)- explains why regulators undertake little enforcement. At the January 2011 Dutch parliamentary hearings, activists accused Shell of environmental pollution, gas flaring, double standards and flouting international good practices in Nigeria (EAW, 2011). Nigerian authorities failed to react despite years of complaints from activists and local communities (Amnesty, 2015; Ezeamalu, 2014).

Table 2 therefore shows the prevalence of opportunistic legal domains in some developing countries. The domains highlight the difficulty of separating CSR from host countries' legal system and regulatory, cultural and other components of corporate operating environments. A related issue is how home countries can make MNEs recognize a 'global public domain' (Ruggie, 2004:519-521; Hofferberth et al, 2011:216) of shared values and expectations. Developed nations which generally profess commitment to environmental protection (Gainet, 2011:214) may want companies to pursue this goal globally as exemplified by the European Commission (2001b) Strategy for Sustainable Development. The relative weakness of public international law norm setting, implementation and enforcement mechanisms elevate such commitments to 'complementary' and 'potentially important mechanisms for the transmission of public law norms in the global sphere' (Metcalf, 2010:155, 192, 199). Therefore below are transnational approaches that channel international norms into corporate operations.

[TABLE 2]

7.1 Globalization of standards

Captured in the concept of 'CSR+' is the notion of obligations beyond national legal standards that are often weak in developing countries (Buhmann, 2011:150). CSR+ conveys the idea of internationalisation of best standards applicable everywhere. It promotes

universalism of legal standards hindered by difficulties in achieving internationally coordinated actions and binding commitments of developed and developing countries (Posner and Weisbach, 2010; Vandenbergh and Cohen, 2010). Consequently, soft laws 'regulating' MNEs as a first step to evolution into binding treaties and customary international law (Weissbrodt and Kruger, 2009:913-914; Zerk, 2006) include global-orientated CSR-related initiatives (Baines, 2009; Davarnejad, 2011; Knudsen, 2011; OECD, 2008). The UN Global Compact, for example, asks corporations to comply with and report on certain social principles in their global operations. Similar substantive and reporting initiatives such as the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, Global Reporting Initiative and AccountAbility demonstrate that universalism of standards is not only possible but desirable, and international coordination can establish common standards for MNEs despite different CSR definitions and models. 'Global' rating systems such as the Council for Economic Priorities, Franklin Research and Development Corporation and Newsweek Green Rankings, the International Integrated Reporting Committee and the International Organization for Standardization's ISO 2600 suggest the existence of global consensus on some elements of CSR and social reporting (Ioannou and Serafeim, 2011:10-11; Rahman and Post, 2012).

Despite their prominence, voluntary action and soft law initiatives may not achieve improved corporate behaviour, particularly in developing countries because, firstly, lack of enforceable international standards makes such countries susceptible to regulatory capture, poor regulations and ineffective enforcement. For example, international rules on trans-boundary movement of hazardous electrical and electronic waste emerged when strict regulations in developed countries merely created export markets in developing countries (Boudier and Bensebaa, 2011). Secondly, although an ideal solution to disparity of standards is using international treaties to impose binding obligations on MNEs (Affolder, 2009) like

treaties on civil liability for nuclear damage and oil pollution (Halpern, 2008:172-173), a binding CSR treaty (Kuschnik, 2008; Zerk, 2006) is unlikely to materialize because of lack of inter-state coordination. Nevertheless, soft instruments signpost internationally accepted practices that can form the basis of disclosure and other regulatory requirements for willing and able jurisdictions to insist on best standards. Internationalisation of standards provides room for a global-focused inventive interventionism to hold 'firms responsible for actions far beyond their boundaries, including the actions of suppliers, distributors, alliance partners, and even sovereign nations' (Davis et al, 2008:32).

Inventive interventionism can be by, for example, referencing appropriate standards to international/industry best practices existing from time to time and stipulating that standards in national law are not a defence to claims for breach of CSR-related obligations from administrative agencies, stakeholders and interest groups. For developing countries especially that are more susceptible to regulatory capture and might lack the expertise and resources to determine the most appropriate standards it allows an efficient fluid interpretative device to check the activities of MNEs and other corporations that are even in a better position to grasp and apply international/industry best standards.

7.2 Globalization of disclosure

Incorporation of global operations in reporting can resolve difficulties of translating globalization of standards in disclosures of 'global' issues such as environmental protection. This 'regulation by information' (Backer, 2008; Case, 2005; Metcalf, 2010:146-155) can occupy the space created by an absent international authority for MNEs. It recognizes that, irrespective of the nature and location of social issues, the source, stakeholders and targets of CSR disclosures are often global rather than nationally spatially restricted. No physical boundaries prevent using CSR disclosures for 'differentiating a certain product or service on

the basis of an environmental or social quality' (Van de Ven, 2008:348) to influence consumers and employees in developed and developing countries (Alniacik et al, 2011; Du et al, 2010; Stanaland et al, 2011). As the social legitimacy's link between positive image and corporate survival is largely determined by available information and how it is communicated (Wæraas and Ihlen, 2009), a global view enhances the reliability of disclosures for consumers and stakeholders in different jurisdictions. It can also improve the credibility of third-party ratings and certifications, which have emerged as distinct arms of the CSR movement.

Home state social disclosure obligations (Cragg, 2010) are likely to be more effective than host developing nations since the former are often developed countries with more effective institutions. This is demonstrated by a 1991 Memorandum of Understanding between Nigeria's government and multinational oil companies providing fiscal incentives known as reserve additional bonus (RAB), calculated from differences between oil reserve discoveries and actual production. In 2003, the government disallowed most of the allegedly falsified tax deductible RAB claims. This prompted legal actions by the companies later withdrawn after US and UK regulators respectively fined Shell US$120 million and £17 million in 2004. Shell later settled investors' claims for falsifying its reserves level (BBC, 2007). Since transnational financial disclosure requirements enabled US and UK to sanction the multinational company, social disclosures can be more effective with global schemes than narrow national standpoints. The carbon emissions disclosure, for example, provides an incomplete picture if MNEs are only required to disclose emissions in developed countries and exclude activities in developing nations (Vandenbergh and Cohen, 2010).

Inventive interventionism therefore takes a global/transnational view of CSR, social disclosures and stakeholders/targets of disclosures by, for example, requiring disclosure on accessible platforms such as corporate and regulator websites and regulating disclosures in wide reaching and mass participation outlets such as blogs, online news outlets and social

media. It can provide legal support to similar schemes to the voluntary factory/supplier disclosure in the apparel industries (Doorey, 2011) to identify supply and purchasing chains and enable global due diligence provisions similar to the two US social disclosure statutes discussed above. This is a useful technique for developed countries that are committed to the global application of international best standards and also for developed countries that lack regulatory capacity and need corporate activities and disclosures to be visible to stakeholders and interest groups including those beyond their borders and in more advanced countries.

7.3 Globalization of enforcement and empowerment

Global approaches to social legitimacy issues in CSR disclosures are required to fill international enforcement gaps caused by disparities in rules. The credibility of mandatory reports is often linked to the level of enforcement and quality of social performance in both developing and developed countries (Ioannou and Serafeim, 2011:4-5, 15-16; Markandya and Halsnæs, 2002). Globalization of enforcement is therefore necessary to encourage MNEs to promote globally shared values wherever they operate (Cahn and Gambino, 2008). Pioneered in international human rights and humanitarian law, universal enforcement recently included in counter-corruption treaties enable criminalization of bribery of foreign public officials in national legislations such as US Foreign Corrupt Practices Act 1977 and UK Bribery Act 2010 (Horder, 2011; Osuji, 2011). Universalism combines elements of international law and national enforcement to resolve global issues particularly where governance structures, substantive rules and enforcement mechanisms are weak or non-existent.

National regulations lag behind the global reach of CSR reports by omitting enforcement rights for the targets of such disclosures. The gap leaves stakeholders, particularly consumers, unable to assess CSR claims and ratings because of ‘green washing’ (Parguel et al, 2011) and incapable of challenging false and misleading claims even when

disclosures constitute an 'explicit promise to the stakeholders and the general public that the corporation excels with respect to their [CSR] endeavours' (Van de Ven, 2008:345). The link between performance and disclosure can therefore be tightened to protect global targets of disclosures.

What may be required under inventive interventionism are legal frameworks for the complementary regulatory efforts of stakeholders and interest groups. It needs to recognize global ethical identity reflecting, especially, the influence of corporate communications and marketing (Balmer et al, 2011:1-2). National rules can enable public agencies and private persons, particularly in developed countries, to challenge CSR claims irrespective of the origin and factual background. This acknowledges that litigation and private remedies can be used to control MNEs and other corporations (Funk, 2011; Muchlinksi, 2009; Yandle et al, 2011). By promoting corrective and distributive justice and encouraging appropriate conduct, individual rights help the enforcement of rules, particularly when public agencies are reluctant. For example, a Californian statute enabled a private claimant to challenge Nike's claims and compel improved labour standards in its overseas practices and more credible disclosures.[14]

8 Conclusion

The European Commission's (2011:5) acknowledgment of 'the role that complementary regulation plays in creating an environment more conducive to enterprises voluntarily meeting their social responsibility' has reinforced the need to examine the law-CSR relationship, a relatively unexplored field despite the vast body of literature on both CSR and

[14] See note 4 above; Nike, *2004 Corporate Social Responsibility Report* (2004). http://www.nike.com/nikebiz/nikebiz.jhtml?page=29.

regulation. Lacking systematic attention are analytical factors for assessing CSR's effectiveness as a national and global governance tool. Although contributions from diverse disciplines on regulation and alternative regulation underline the dynamic nature of law, little attention has been given to theoretical and practical challenges CSR poses to regulation, including as an instrument of socioeconomic development.

Imperative therefore is a new direction beyond existing approaches, including deeper consideration of the legal nature of CSR as a governance mechanism for correcting externalities and closer scrutiny of the law-CSR relationship and its national and global implications. This article demonstrates that responsive regulation and reflexive law theories that acknowledge law's multidimensional and multidirectional nature which is relevant to the law-CSR relationship are not specifically targeted at CSR and are not completely suitable to CSR's unique multi-stakeholder framework in rule design and enforcement. Responsive regulation, for example, depends on legislative provisions of wide ranging investigative tools and credible sanctions to regulators and also does not consider the range of corporate responsibilities and the instrumental and ethical justifications for CSR.

Building on reflexive law, responsive regulation and regulatory CSR perspectives, this article proposes inventive interventionism to disentangle the complex mixes of law, regulation, self-regulation, institutions and contexts in the CSR-regulation debate, and overcome difficulties associated with regulators' capacity and powers. It therefore assesses the limits of the linear CSR regulation debate and how to transcend regulatory challenges. From a conceptual perspective, the article contributes to the development of an analytical framework for CSR and reforming its national and global regulatory environments. The functional approach of inventive interventionism recognizes different instrumental and ethical justifications for regulating CSR and social disclosures and, in particular, links performance and disclosure while advancing socioeconomic goals. Inventive interventionism

recognizes that globalization has introduced complexities to the twin questions of scope of CSR commitments and control of corporations, particularly MNEs. Using CSR as a transnational governance tool for state and non-state actors helps to address one of the criticisms of the existing international system: the prevalence of fragmented and weak institutions that allow little input from developing countries in areas such as energy governance (Gunningham, 2012). Inventive interventionism suggests that strategies for enhancing the effectiveness of regulatory regimes must reflect CSR's global multi-stakeholder nature and allows CSR to fill gaps in national and international corporate regulation by highlighting global reputation and complementary regulation by stakeholders and interest groups including those outside the regulatory jurisdiction. This analytical approach proceeds on the assumption that CSR is both a product of the regulatory system and a phenomenon of business and can provide processes for the transmission and transplantation of domestic and international norms to businesses.

This article therefore reflects a transnational and comparative approach to regulatory CSR, demonstrating that existing prescriptive CSR is likely to be deviant rather than prototypical for being oblivious of complex regulatory issues in national and global contexts. It contributes to a better understanding of the complex nature of the law-CSR relationship and the interplay of law and regulation in promoting effective regulatory systems, demonstrating that regulatory CSR is conceptually and practically possible within the boundaries of functionality. An extreme voluntary or straight race-to-the-top prescriptive CSR cannot translate to appropriate behaviour without addressing the conceptual and practical challenges to its juridification. Inventive interventionism demonstrates that CSR can address public governance challenges, particularly in emerging and developing economies, when supported by institutional, political and social infrastructure for the globalization of standards, disclosure, enforcement and stakeholder empowerment.

Bibliography

ABBOTT, K.W. and SNIDAL, D. (2009) 'Strengthening International Regulation through New Governance: Overcoming the Orchestration Deficit', *Vanderbilt Journal of Transnational Law* 42:501-578.

AFFOLDER, N. (2011) 'Why Study Large Projects? Environment Regulation's Neglected Frontier', *University of British Columbia Law Review* 44(3):521-556.

AFFOLDER, N.A. (2009) 'The Private Life of Environmental Treaties', *American Journal of International Law* 103(3):510-526.

ALNIACIK, U., ALNIACIK, E. and GENC, N. (2011) 'How Corporate Social Responsibility Information Influences Stakeholders' Intentions', *Corporate Social Responsibility and Environmental Management* 18:234-245.

AMAO, O. (2008) 'Mandating Corporate Social Responsibility: Emerging Trends in Nigeria', *Journal of Commonwealth Law and Legal Education* 6(1):75-95.

AMAO, O.O. (2007) 'Reflexive law: Does it have any Relevance to the Corporate Social Responsibility (CSR) Debate?' *Cork Online Law Review* 6:55-64.

AMNESTY (2009) *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*. London: Amnesty International.

AMNESTY (2013) *Bad Information: Oil Spill Investigation in the Niger Delta*. London: Amnesty International.

AMNESTY and GLOBAL WITNESS (2015) *Digging for Transparency: How U.S. Companies Are Only Scratching the Surface of Conflict Minerals Reporting April 2015*. London: Amnesty International and Global Witness.

ANDERSON, H., WELSH, M., RAMSAY, I. and GAHAN, P. (2012) 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison', *International and Comparative Law Quarterly* 61(1):171-207.

ARVIND, T.T. (2010) 'The Tortological Question and the Public-Private Relationship in Tort Law', *The Journal Jurisprudence* 7:349-777.

AßLÄNDER, M.S. and CURBACH, J. (2014) 'The Corporation as Citoyen? Towards a New Understanding of Corporate Citizenship', *Journal of Business Ethics* 120:541-554.

AYRES, I. and BRAITHWAITE, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press.

BACKER, L.C. (2008) 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations', *Georgetown Journal of International Law* 39:591-609.

BAINES, T. (2009) 'Integration of Corporate Social Responsibility through International Voluntary Initiatives', *Indiana Journal of Global Legal Studies* 16(1):223-248.

BALDWIN, R. and BLACK, J. (2008) 'Really Responsive Regulation', *Modern Law Review* 71(1):59-94

BALDWIN, R. and BLACK, J. (2010) Really Responsive Risk-Based Regulation', *Law and Policy* 32(2):181-212.

BALMER, J.M.T., POWELL, S.M. and GREYSER, S.A. (2011) 'Explicating Ethical Corporate Marketing. Insights from the BP Deepwater Horizon Catastrophe: The Ethical Brand that Exploded and then Imploded', *Journal of Business Ethics* 102:1-14.

BARDY, R., DREW, S. and KENNEDY, T. (2012) 'Foreign Investment And Ethics: How to Contribute to Social Responsibility by Doing Business in Less-Developed Countries', *Journal of Business Ethics* 106(3):267-282.

BARKAY, T. (2009) 'Regulation and Voluntarism: A Case Study of Governance in the Making', *Regulation and Governance* 3:360-375.

BARNARD, C., DEAKIN, S. and HOBBS, R. (2005) 'Reflexive Law, Corporate Social Responsibility, and the Evolution of Labour Standards: The Case of Working Time' in O. De Schutter and S. Deakin (eds) *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* Brussels: Bruylant, 205-244.
BARNES, P. (2009) *Stock Market Efficiency, Insider Dealing and Market Abuse*. Farnham: Gower/Ashgate.
BARNETT, M. (2007) 'Stakeholder Influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility', *Academy of Management Review* 32(3):794-816.
BARTLE, I. and VASS, P. (2007) 'Self-Regulation within the Regulatory State' *Public Administration* 85(4):885-905.
BBC (2007) 'Shell Settles Oil Reserves Claims'. Available at: http://news.bbc.co.uk/1/hi/business/6544057.stm.
BERKOWITZ, D., PISTOR, K. and RICHARD, J.F. (2003) 'The Transplant Effect' *American Journal of Comparative Law* 51(1):163-204.
BERLINER, D. and PRAKASH, A. (2012) 'From Norms to Programs: The United Nations Global Compact and Global Governance', *Regulation and Governance* 6:149-166.
BLOWFIELD, M. and FRYNAS, J.G. (2005) 'Editorial: Setting New Agendas- Critical Perspectives on Corporate Social Responsibility in the Developing World', *International Affairs* 81(3):499-513.
BOUDIER, F. and BENSEBAA, F. (2011) 'Hazardous Waste Management and Corporate Social Responsibility: Illegal Trade of Electrical and Electronic Waste', *Business and Society Review* 116(1):29-53.
BP (2011a) 'Claims Information'. Available at: http://www.bp.com/sectiongenericarticle.do?categoryId=9036580&contentId=7067577.
BP (2011b) 'Gulf of Mexico Restoration'. Available at: http://www.bp.com/sectionbodycopy.do?categoryId=41&contentId=7067505.
BP (2011c) 'Three Gulf Research Institutions to Receive First Round of $500 Million Funding'. Available at: http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062936.
BRADSHAW, C. (2013) 'The Environmental Business Case and Unenlightened Shareholder Value', *Legal Studies* 33(1):141-161.
BRAITHWAITE, J. (2006) 'Responsive Regulation and Developing Economies' *World Development* 34(5):769-932.
BRAITHWAITE, J. (2011) 'The Essence of Responsive Regulation' *University of British Columbia Law Review* 44(3):475-520.
BRAITHWAITE, V., MURPHY, K. AND REINHART, M. (2007) 'Taxation Threat, Motivational Postures, and Responsive Regulation', *Law and Policy* 29(1):137-158.
BUHMANN, K. (2011) 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: The EU Case', *International Journal of Law in Context* 7(2):139-179.
Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) (2011) 'Regulatory Reform'. Available at: http://www.boemre.gov/ReorganizationRegulatoryReform.htm.
CAHN, N. and GAMBINO, A. (2008) 'Towards a Typology of Corporate Responsibility in Different Governance Contexts: What to do in the Absence of Responsible Country Governance', *Georgetown Journal of International Law*, 39:665-678.
CARR, I. (2007) 'Corruption, Legal Solutions and Limits of Law', *International Journal of Law in Context* 3(3):227-255.
CARROLL, A.B. (1991) 'The Pyramid of Corporate Social Responsibility–Toward the Moral Management of Organizational Stakeholders', *Business Horizons* 34(4):39-48.

CASE, D.W. (2005) 'Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective', *University of Colorado Law Review* 76:379-442.
CHERRY, M.A. and SNEIRSON, J.F. (2011) 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster', *Tulane Law Review* 85(4):983-1038.
CHIU, I.H.Y. (2006) 'The Paradigms of Mandatory Non-Financial Disclosure: A Conceptual Analysis Part 1', *Company Lawyer* 27(9):259-268, 267.
CLARKSON, P.M., LIE, Y., RICHARDSON, G.D. and VASVARI, F.P. (2008) 'Revisiting the Relationship between Environmental Performance and Environmental Disclosure: An Empirical Analysis', *Accounting, Organizations and Society* 33(4-5):303-327.
Commission of the European Communities (2001a) *Recommendation 2001/453/EC on the Recognition, Measurement and Disclosure of Environmental Issues in the Annual Accounts and Annual Reports of Companies of 30 May 2005*. OJ L 156.
Commission of the European Communities (2001b) *Promoting a European Framework for Corporate Social Responsibility*. EU Doc. COM (2001) 366.
Commission of the European Communities (2001c) *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*. EU Doc. COM (2001) 264 final.
Commission of the European Communities (2002) *Corporate Social Responsibility: A Business Contribution to Sustainable Development*. EU Doc. COM (2002) 347.
Commission of the European Communities (2011) *A Renewed EU Strategy for Corporate Social Responsibility*. EU Doc. COM (2011) 681 final.
CRAGG, B.T. (2010) 'Home is Where the Halt Is: Mandating Corporate Social Responsibility through Home State Regulation and Social Disclosure', *Emory International Law Review* 735-776.
DAHLSRUD, A. (2008) 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions', *Corporate Social Responsibility and Environmental Management* 15(1):1-13.
DAM, K.W. (2006) *The Law-Growth Nexus: the Rule of Law and Economic Development*. Washington D.C.: Brookings.
DAM, L. & SCHOLTENS, B. (2012) 'Does Ownership Type Matter for Corporate Social Responsibility?' *Corporate Governance: An International Review* 20(3):233-251.
DAVARNEJAD, L. (2011) 'In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises', *Journal of Dispute Resolution* 2011(2):351-385.
DAVIES, K.E. and TREBILCOCK, M.J. (2009) 'The Relationship between Law and Development: Optimists Versus Sceptics', *American Journal of Comparative Law* 57:895-946.
DAVIS, G.F., WHITMAN, M.V.N. and ZALD, M.N. (2008) 'The Responsibility Paradox', *Stanford Social Innovation Review* Winter:31-37.
DE BURCA, G. (2010) 'New Governance and Experimentalism: An Introduction', *Wisconsin Law Review* 1:227-238.
DEAKIN, S. and HOBBS, R. (2007) 'False Dawn for CSR? Shifts in Regulatory Policy and the Response of the Corporate and Financial Sectors in Britain', *Corporate Governance* 15(1):68-76.
DEL MUNDO, J. (2011) 'Should Corporate Social Responsibility Be Legislated?' EON Insight. Available at: http://www.eon.com.ph/eon-insight/view/309/newsid/219/should-corporate-social-responsibility-be-legislated.html.
DESTA. M.G. and HIRSCH, M. (2012) 'African Countries in the World Trade System: International Trade, Domestic Institutions and the Role of International Law', *International and Comparative Law Quarterly* 61(1):127-170.

DOOREY, D. J. (2011) 'The Transparent Supply Chain: From Resistance to Implementation at Nike and Levi-Strauss', *Journal of Business Ethics* 103:587-603.
DORF, M.C. (2003) 'The Domain of Reflexive Law' *Columbia Law Review* 103:384-401.
DRISCOLL, C. and STARIK, M. (2004) 'The Primordial Stakeholder: Advancing the Conceptual Consideration of Stakeholder for the Natural Environment', *Journal of Business Ethics* 49:55-73.
DU, S., BHATTACHARYA, C.B. and SEN, S. (2010) 'Maximizing Business Returns to Corporate Social Responsibility (CSR): The Role of CSR Communication', *International Journal of Management Reviews* 12(1):8-19.
EDELMAN, L.B. and SUCHMAN, M.C. (1997) 'The Legal Environments of Organizations', *Annual Review of Sociology* 23:479-515.
ELHAUGE, E. (2005) 'Sacrificing Corporate Profits in the Public Interest', *New York University Law Review* 80(3):733-869.
ELKINGTON, J. (2006) 'Governance for Sustainability', *Corporate Governance* 14(6):522-529.
Environmentalists Against War (EAW) (2011) 'Shell Accused of Nigerian Crimes at Trial in The Netherlands'. Available at: http://www.envirosagainstwar.org/know/read.php?itemid=10448.
European Parliament, *Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct*, Resolution A4-0508/98 1999 C 104/180 of 15 January 1999.
EZEAMALU, B. (2014) 'Investigation: How Decades of Gas Flaring is Harming Nigerians'. Available at: http://www.premiumtimesng.com/news/160899-investigation-decades-gas-flaring-harming-nigerians-part-1.html.

FAIRMAN, R. and YAPP, C. (2005) 'Enforced Self Regulation, Prescription and Conceptions of Compliance within Small Businesses: The Impact of Enforcement', *Law and Policy* 27(4):491-519.
FASSIN, Y. (2009) 'The Stakeholder Model Refined', *Journal of Business Ethics* 84:113-135.
Forest Stewardship Council (FSC). (2015) 'Who Are We: Global Forest Certification'. Available at: http://www.fsc-uk.org/about-fsc.2.htm.
FOX, T. WARD, H. and HOWARD, B. (2002) *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study*. Washington: The World Bank.
FRANCK, T.M. (1995) *Fairness in International Law and Institutions*. Oxford: Clarendon Press.
FRANSEN, L. (2013) 'The Embeddedness of Responsible Business Practice: Exploring the Interaction between National-Institutional Environments and Corporate Social Responsibility', *Journal of Business Ethics* 115:213-227.
FREEMAN, R.E. (1984) *Strategic Management: A Stakeholder Approach*. Boston: Pitman.
FREEMAN, R.E. and PHIPPS, R. (2002) 'Stakeholder THEORY: A LIBERTARIAN DEFENSE', *Business Ethics Quarterly* 3(12):331-349.
FRYNAS, J. G. (1999) 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria', *Journal of African Law* 43(2):121-150.
FRYNAS, J. G. (2000) *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities*. London: Transaction.
FRYNAS, J.G. (2005) 'The False Development Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies', *International Affairs* 81(3):81-598.
FRYNAS, J.G. (2010) 'Corporate Social Responsibility and Societal Governance: Lessons from transparency in the Oil and Gas Sector', *Journal of Business Ethics* 93:163-179.

FUNK, W. (2011) 'Regulation by Litigation: Not so Bad?' *Regulation and Governance* 5:275-285.
GAINET, C. (2011) 'Exploring the Impact of Legal Systems and Financial Structure on Corporate Responsibility', *Journal of Business Ethics* 95:195-222.
GARRIGA, E. and MELÉ, D. (2004) 'Corporate Social Responsibility Theories: Mapping the Territory', *Journal of Business Ethics* 53:51-71.
GILL, F. (2012) 'Practicing Environmental Responsibility: Local and Global Dimensions', *Social Responsibility Journal* 8(1):21-32.
GJØLBERG, M. (2010) 'Varieties of Corporate Social Responsibility (CSR): CSR meets the Nordic Model', *Regulation and Governance* 4:203-229.
GRABOSKY, P. (2013) 'Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process', *Regulation and Governance* 7:114-123.
GUNNINGHAM, N. (2008) 'Environmental Regulation and Non-State Law: The Future Public Policy Agenda' in H. van Schooten and J. Verschuuren (eds) *International Governance and Law: State regulation and Non-State Law*. Cheltenham: Edward Elgar, 109-128.
GUNNINGHAM, N. (2012). 'Confronting the Challenge of Energy Governance', *Transnational Environmental Law* 1(1):119-135.
HAIGH, N. and GRIFFITHS, A. (2009) 'The Natural Environment as a Primary Stakeholder: The Case of Climate Change', *Business Strategy and the Environment* 18(6):347-359.
HALPERN, I. (2008) 'Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century', *Buffalo Human Rights Law Review* 14:129-207.
HARRINGTON, A.R. (2011) 'Corporate Social Responsibility, Globalization, the Multinational Corporation, and Labor: An Unlikely Alliance', *Albany Law Review* 75(1):483-510.
HART, S. M. (2010) 'Self-Regulation, Corporate Social Responsibility, and the Business Case: Do They Work in Achieving Workplace Equality and Safety?' *Journal of Business Ethics* 92(4):585-600.
HO, V.H. (2013) 'Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China' *Vanderbilt Journal of Transnational Law* 46:375-442.
HOFFERBERTH, M., BRUHL, T., BURKART, E., FEY, M. and PELTER, A. (2011) 'Multinational Enterprises as "Social Actors"-Constructivist Explanations for Corporate Social Responsibility', *Global Society: Journal of Interdisciplinary International Relations* 25(2):205-226.
HORDER, J. (2011) 'Bribery as a Form of Criminal Wrongdoing', *Law Quarterly Review* 127(1):37-54.
HSUEH, L. and PRAKASH, A. (2012) 'Incentivizing Self-Regulation: Federal vs. State-Level Voluntary Programs in US Climate Change Policies', *Regulation and Governance* 6:445-473.
IDOWU, A.A. (1999) 'Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode', *Netherlands Quarterly of Human Rights* 17(2):161-184.
IOANNOU, I. and SERAFEIM, G. (2011) 'The Consequences of Mandatory Sustainability Reporting', Working Paper 11-100, Harvard Business School.
JOHNSTON, A. (2011) 'Facing up to Social Cost: The Real Meaning of Corporate Social Responsibility', *Griffith Law Review* 20(1):221-244.
KEMP, M. (2002) *Corporate Social Responsibility in Indonesia. Quixotic Dream or Confident Expectation*. Geneva: United Nations Research Institute for Social Development.

KINGSTON, S. (2010) 'Environment', *International and Comparative Law Quarterly* 59(4):1129-1134.
KINGSTON, S. (2013) 'Surveying the State of EU Environmental Law: Much Bark with Little Bite', *International and Comparative Law Quarterly* 62(4):965-982.
KNUDSEN, J.S. (2011) 'Company Delistings from the UN Global Compact: Limited Business Demand on Domestic Governance Failure?' *Journal of Business Ethics* 103:331-349.
KOLK, A. and PINKSE, J. (2008) 'A Perspective on Multinational Enterprises and Climate Change: Learning From an Inconvenient Truth', *Journal of International Business Studies* 39(8):1359-1378.
KURTZ, R.S. (2011) 'Oil Pipeline Regulation, Culture, and Integrity: The 2006 BP North Slope Spill', *Public Integrity* 13(1):25-40.
KUSCHNIK, B. (2008) 'On the Difficulties of Legally Regulating Multinational Enterprises', *European Business Law Review* 19(5):895-908.
LEDERER, M. (2012) 'Market Making Via Regulation: The Role of the State in Carbon Markets', *Regulation and Governance* 6:524-544.
LEE, M.P. (2011) 'Configuration of External Influences: The Combined Effects of Institutions and Stakeholders on Corporate Social Responsibility Strategies', *Journal of Business Ethics* 102:281-298.
LEON, P. and MOON, S.G. (2007) 'Contexts and Corporate Voluntary Environmental Behaviours: Examining EPA's Green Lights Voluntary Program', *Organization & Environment* 20(4):480-496.
LOSS, L. (1988) *Fundamentals of Securities Regulation 2nd edition*. Boston: Little, Brown & Co.
LOZANO, J.M., ALBAREDA, L. and YSA, T. (2008) *Governments and Corporate Social Responsibility: Public Policies Beyond Regulation and Voluntary Compliance*. Basingstoke: Palgrave Macmillan.
LYON, T.P. and MAXWELL, J.W. (2008) 'Corporate Social Responsibility and The Environment: A Theoretical Perspective', *Review of Environmental Economics and Policy* 2(2):240-260.
MARKANDYA, A. and HALSNÆS, K. (2002) *Climate Change and Sustainable Development—Prospects for Developing Countries*. London: Earthscan.
MARX, A. and CUYPERS, D. (2010) 'Forest Certification as a Global Environmental Governance Tool: What is the Macro-Effectiveness of the Forest Stewardship Council?' *Regulation & Governance* 4(4):408-434.
MATEJEK, S. and GÖSSLING, T. (2014) 'Beyond legitimacy: A case study in BP's green lashing', *Journal of Business Ethics* 120:571-584.
MATTEN, D. & MOON, J. (2008) 'Implicit and Explicit CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility', *Academy of Management Review* 33(2):404-424.
MAZURKIEWICZ, P. (2004) *Corporate Environmental Responsibility: Is a Common CSR Framework Possible?* Vancouver: Development Committee, World Bank.
MCBARNET, D. (2007) 'Corporate Social Responsibility Beyond Law, Through Law, For Law' in D. McBarnet, A. Voiculescu and T. Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law*. Cambridge: Cambridge University Press, 9-58.
MCVEA, H. (1995) 'What's Wrong with Insider Dealing' *Legal Studies* 15:390-414.
MCWILLIAMS, A. and SIEGEL, D. (2001) 'Corporate Social Responsibility: A Theory of the Firm Perspective', *Academy Of Management Review* 26(1):7-127.

MERINO, A. and VALOR, C. (2011) 'The Potential of Corporate Social Responsibility to Eradicate Poverty: An Ongoing Debate', *Development in Practice* 21(2):157-167.
METCALF, C. (2010) 'Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information', *Pace Environmental Law Review* 28(1):145-199.
Ministry of Foreign Affairs, The Netherlands (IOB) (2013) Study. *Corporate Social Responsibility: The Role of Public Policy. A Systematic Literature Review of The Effects of Government Supported Interventions on the Corporate Social Responsibility (CSR) Behaviour of Enterprises in Developing Countries*. Amsterdam: Policy and Operations Evaluation Department (IOB), Ministry of Foreign Affairs, The Netherlands.
MITRA, M. (2009) *It's Only Business! India's Corporate Social Responsiveness in a Globalized World*. New Delhi: Oxford University Press India.
MUCHLINKSI, P. (2009) 'The Provision of Private Law Remedies against Multinational Enterprises: A Comparative Law Perspective', *Journal of Comparative Law* 4(2):148-170.
MUCHLINSKI, P. (2006) 'Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard', *International and Comparative Law Quarterly* 55(3):527-558.
NAIKI, Y. (2014) 'The Dynamics of Private Food Safety Standards: A Case Study on the Regulatory Diffusion of Global G.A.P.', *International and Comparative Law Quarterly* 63(1):137-166
National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (NCBD) (2011) *Final Report*. Available at: http://www.oilspillcommission.gov/final-report.
NNAMUCHI, O. (2008) 'Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria', *Journal of African Law* 52(1):1–42.
NONET, P. and SELZNICK, P. (1978) *Law and Society in Transition: Toward Responsive LAW*. New York: Harper/Colophon.
NORTON, S. (2007) 'The Natural Environment as a Salient Stakeholder: Non-Anthropocentrism, Ecosystem Stability and the Financial Markets', *Business Ethics: A European Review* 16:387-402.
O'LAUGHLIN, B. (2008) 'Governing Capital? Corporate Social Responsibility and the Limits of Regulation', *Development and Change* 39(6):945-957.
ODINKALU, C.A. (2008) 'The Impact of Economic and Social Rights in Nigeria' In V. Gauri and D. Brinks (eds.) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. New York: Cambridge University Press, 183-223.
OHNESORGE, J.K. (2007) 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience', *University of Pennsylvania Journal of International Economic Law* 28:219-308.
OKEKE, C.C.S. (2011) 'Environmental Pollution in the Niger Delta Region of Nigeria: A Case of Oil Companies and Corporate Social Responsibility', *Journal of Development Alternatives and Area Studies* 30(3):43-59.
Organization for Economic Cooperation and Development (OECD) (2008) *Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility*. Paris: OECD.
OSUJI, O.K. (2011) 'Fluidity of Regulation-CSR Nexus: The Multinational Corporate Corruption Example', *Journal of Business Ethics* 103:31-57.
OSUJI, O.K. (2012) 'Corporate Social Responsibility- Fairness and Promise as the Fundaments for Juridification of Social Disclosures', *Contemporary Issues in Law* 12(1):46-74.
PARGUEL, B., BENOÎT-MOREAU, F. and LARCENEUX, F. (2011) 'How Sustainability Ratings Might Deter 'Greenwashing': A Closer Look at Ethical Corporate Communication', *Journal of Business Ethics* 102:15-28.

PARKER, C. (2002) *The Open Corporation*. Cambridge: Cambridge University Press.
PARKER, C. (2006) 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement', *Law and Society Review* 40(3):591-622.
PARKER, C. (2007) 'Meta-regulation: Legal Accountability for Corporate Social Responsibility' in D. McBarnet, A. Voiculescu and T. Campbell, T. (eds) *The New Corporate Accountability. Corporate Social Responsibility and the Law*. Cambridge: Cambridge University Press, 207-239.
PORTER, M. and KRAMER, M. (2006) 'The Link between Competitive Advantage and Corporate Social Responsibility', *Harvard Business Review* December:1-15.
PORTNEY, P.R. (2008) 'The (Not So) New Corporate Social Responsibility: An Empirical Perspective', *Review of Environmental Economics and Policy* 2(2):261-275.
POSNER, E.A. and WEISBACH, D. (2010) *Climate Change Justice*. Princeton: Princeton University Press.
RAHMAN, N. and POST, C. (2012) 'Measurement Issues in Environmental Corporate Social Responsibility (ECSR): Toward A Transparent, Reliable, and Construct Valid Instrument', *Journal of Business Ethics* 105:307-319.
REED, D. (2002) 'Corporate Governance Reforms in Developing Countries', *Journal of Business Ethics* 37(3):223-247.
RICHARDSON, B.J. (2009) 'Climate Finance and its Governance: Moving to a Low Carbon Economy through Socially Responsible Financing?' *International and Comparative Law Quarterly* 58(3):597-626.
RIVOLI, P. and WADDOCK, S. (2011) 'First They Ignore You...: The Time-Context Dynamic and Corporate Responsibility', *California Management Review* 53(2):87-104.
Ruggie, J.G. (2004) 'Reconstituting the Global Domain: Issues, Actors, and Practices', *European Journal of International Relations* 10(4):499-531.
RUSSELL, A.F.S. (2011) 'Incorporating Social Rights in Development: Transnational Corporations and the Right to Water', *International Journal of Law in Context* 7(1):1-30.
SAGOOFF, M. (2013) 'What Does Environmental Protection Protect?' *Ethics, Policy & Environment* 16(3):239-257.
SAHARA REPORTERS (2010) 'Shell rules: Wikileaks cable details shell petroleum absolute control of Nigeria'. Available at: http://saharareporters.com/news-page/shell-rules-wikileaks-cable-details-shell-petroleum-absolute-control-nigeria.
SAURWEIN, F. (2011) 'Regulatory Choice for Alternative Modes of Regulation: How Context Matters', *Law and Policy* 33(3) 334-366.
SCALET, S. and KELLY, T. F. (2010) 'CSR Rating Agencies: What is their Global Impact?' *Journal of Business Ethics* 94(1):69-88.
SCHEIBER, F. (2015) 'Dressing Up for Diffusion: Codes of Conduct in the German Textile and Apparel industry, 1997-2010', *Journal of Business Ethics* 126:559-580.
SCHEPERS, D.H. (2010) 'Challenges to the Legitimacy at the Forest Stewardship Council', *Journal of Business Ethics* 92:279-290.
SCHEUERMAN, W.E. (2001) 'Reflexive Law and the Challenges of Globalization', *The Journal of Political Philosophy* 9(1):81-102.
SCHLEIFER, P. (2013) 'Orchestrating Sustainability: The Case of European Union Biofuel Governance', *Regulation and Governance* 7:533-546.
SCHUCK, P. (2000) *The Limits of Law: Essays on Democratic Governance*. Boulder CO: Westview Press.
SCHWARTZ, M.S. and CARROLL, A.B. (2003) 'Corporate Social Responsibility: A Three-Domain Approach', *Business Ethics Quarterly* 13(4):503-530.

SCOTT, C. (2008) 'Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The Heineken Effect', in N. Boeger, R. Murray, R. and C. Villiers (eds) *Perspectives on Corporate Social Responsibility*. Cheltenham: Edward Elgar, 170-185.
SETHI, S.P. (2011) 'Self-Regulation through Voluntary Codes of Conduct' in S.P. Sethi (ed) *Globalization and Self-Regulation. The Crucial Role that Corporate Codes of Conduct Play in Global Business*. New York: Palgrave, 3-16.
SHAMIR, R. (2004) 'Between Self-Regulation and the Alien Tort Claims Act: On Contested Concept of Corporate Social Responsibility', *Law & Society Review* 38(4):635-664.
SHAMIR, R. (2011). 'Socially Responsible Private Regulation: World-Culture or World-Capitalism?' 45 *Law & Society Review* 313.
SHEEHY, B. (2008) 'The Trouble with Stockjobbers: the South Sea Bubble, the Press and the Legislative Regulation of the Markets', *Newcastle Law Review* 10:117-134.
SHELDON, J. (2011) 'Ripples from the Gulf of Mexico', *International Energy Law Review* 29(1):12-14.
SHUM, P.K. and YAM, S.L. (2011) 'Ethics and Law: Guiding the Invisible Hand to Correct Corporate Social Responsibility Externalities', *Journal of Business Ethics* 98:549-571.
SMITH, D.K. (2011) 'A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector', *University of British Columbia Law Review* 44(3):695-742.
SPANGLER, I.S. and POMPPER, D. (2011) 'Corporate Social Responsibility and the Oil Industry: Theory and Perspective Fuel A Longitudinal View', *Public Relations Review* 37:217-225.
SPENCE, D.B. (2011) 'Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk', *Chicago Kent Law Review* 86(1):59-86.
STALLWORTHY, M, (2006) 'Sustainability, the Environment and the Role of UK Corporations', *International Company and Commercial Law Review* 17(6):155-165.
STANALAND, A.J.S., LWIN, M.O. and MURPHY, P.E. (2011) 'Consumer Perceptions of the Antecedents and Consequences of Corporate Social Responsibility', *Journal of Business Ethics* 102:47-55.
STOVALL, O.S., NEILL, J.D. and REID, B. (2009) 'Institutional Impediments to Voluntary Ethics Measurement Systems: An International Perspective', *Journal of Applied Business Research* 25(2):119-126.
SUNSTEIN, C.R. (1996) 'On the Expressive Function of Law', *University of Pennsylvania Law Review* 144:2021-2053.
TEUBNER, G. (1983) 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review* 17(2):239-285.
TEUBNER, G. (1996) 'Global Bukowina: Legal pluralism in the world society', in G. Teubner (ed) *Global Law without a State*. Dartmouth: Aldershot, 3-38.
TOLLEFSON, C., GALE F. and HALEY, D. (2008) *Setting the Standard: Certification, Governance and the Forest Stewardship Council.* Vancouver: UBC Press.
TOMBS, S and WHYTE, D. (2013) 'Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety in the UK', *Regulation and Governance* 7:61-79.
United Nations Environment Programme (UNEP) (2011) *Environmental Assessment of Ogoniland*. Available at: http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf.
US Department of Labor's Occupational Safety and Health Administration (OSHA) (2009a) *Fact Sheet on BP 2009 Monitoring Inspection*. Available at: http://www.osha.gov/dep/bp/Fact_Sheet-BP_2009_Monitoring_Inspection.html.
US Department of Labor's Occupational Safety and Health Administration (OSHA) (2009b) *Citation and Notification of Penalty*. Available at: http://www.osha.gov/dep/bp/BP_Citation_Willful_All.pdf.

US Department of Labor's Occupational Safety and Health Administration (OSHA) (2009c) 'OSHA Issues Record Breaking $87 Million in Fines to BP'. Available at: http://www.osha.gov/dep/bp/bp.html.
UTAMA, S. (2011) 'An Evaluation of Support Infrastructures for Corporate Responsibility Reporting in Indonesia', *Asia Business and Management* 10(3):405-424.
VAN DE VEN, B. (2008) 'An Ethical Framework for the Marketing of Corporate Social Responsibility', *Journal of Business Ethics* 82(2):339-352.
VAN TULDER, R. and VAN DER ZWART, A. (2006) *International Business and Society Management: Linking Corporate Responsibility and Globalization*. Abingdon, Oxon: Routledge.
VOGEL, D. (2005) *The Market for Virtue. The Potential and Limits of Corporate Social Responsibility*. Washington, D.C: The Brookings Institution.
VOGEL, D. (2010) 'The Private Regulation of Global Corporate Conduct', *Business & Society Review* 49(1):68-87.
VOICULESCU, A. (2007) 'The other European Framework for Corporate Social Responsibility: From Green Paper to New Uses of Human Rights Instruments' in D. McBarnet, D., Voiculescu, A. and T. Campbell (eds) *The New Corporate Accountability. Corporate Social Responsibility and the Law*. Cambridge: Cambridge University Press, 365-397.
WAAGSTEIN, P.R. (2011) 'The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications', *Journal of Business Ethics* 98:455-466.
WÆRAAS, A. and IHLEN, Ø. (2009) 'Green Legitimation: The Construction of an Environmental Ethos', *International Journal of Organizational Analysis* 17(2):84-102.
Ward, H. (2008) 'Corporate Social Responsibility in Law and Policy' in N. Boeger, R. Murray, R. and C. Villiers (eds) *Perspectives on Corporate Social Responsibility*. Cheltenham: Edward Elgar, 8-38.
WEISSBRODT, D. and KRUGER, M. (2003) 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights', *American Journal of International Law* 97:901-922.
WENK, M.S. (2004) 'EU's Eco-Management and Audit Scheme: An Analysis of EMAs, with a Case Study of Its Impacts', *Environmental Quality Management* Autumn:59-70.
WILKS, S. (2013) *The Political Power of the Business Corporation*. Cheltenham: Edward Elgar Publishing Ltd.
WILLIAMS, C.A. (2002) 'Corporate Social Responsibility in an Era of Economic Globalization', *University of California Davis Law Review* 35(3):705-777.
XANTHAKI, H. (2008) 'Legal Transplants in Legislation: Defusing the Trap', *International and Comparative Law Quarterly* 57(3):659-673.
YANDLE, B, DORCHAK, A. and MORRISS, A.P. (2011) 'Regulation by Litigation', *Regulation and Governance* 5:241-249.
ZERK, J.A. (2006) *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*. Cambridge: Cambridge University Press.

TABLE 1

Regulation Issues in Deepwater Horizon Oil Spill

Issue	*Possibility of Regulation*	*Difficulty/Impossibility of Regulation*	*Company Acting 'Beyond' Regulation*
Environment Protection	YES	YES	YES
Health and Safety	YES	YES	YES
Labour Standards	YES	YES	YES
Host Community Relationship	YES	YES	YES
Supply Chain Relationship	YES	YES	YES
Stakeholder Rights	YES	YES	YES
Stakeholder Engagement	YES	YES	YES
Adequacy of Remedies/Compensation	YES	YES	YES
Information Rights	YES	YES	YES
Social Legitimacy of Disclosures	YES	YES	YES
Collusion with Regulators	**NO**	YES	YES
Weak Enforcement	**NO**	YES	YES
Weak Regulations	YES	YES	YES
International Best Standards	YES	YES	YES
Link between Performance and Disclosure	YES	YES	YES
Global Visibility	YES	YES	YES

TABLE 2

Governance issues in a developing country (Nigeria's example)

Market Failure	Regulatory Failure	Property Rights	Access to Justice
-Weak Stakeholder Pressure -Weak Civil Society -Weak Institutional Pressure	-Regulatory Capture -Weak Substantive Rules/Standards -Regulatory Loopholes -Weak/Inadequate Enforcement -Corruption -Pro-Oil Policy -National Competitiveness	-Limited 'Ownership'/Use -Ease of Expropriation -Low Compensation -Inadequate Remedy for Injurious Use -Limited Information Right	-No Injunction -Inadequate Damages -No Challenge to Disclosures -Judicial Attitude -Ineffective Legal System