CORPORATE SOCIAL RESPONSIBILITY IN THE OIL INDUSTRY IN IRAQ

By

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Dedication

This thesis is dedicated to:

All those who work hard and sincerely to achieve stability and prosperity for Iraq

Acknowledgement

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Statement of Authentication

The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part, for a degree at this or any other institution.

Signature:

Date: 1/3/2019

Abstract

This thesis examines Corporate Social Responsibility (CSR) in the context of International Oil Companies operating in Iraq. International oil companies are the focus for examining CSR because the oil and gas industry is the backbone of the Iraqi economy and the primary source of government revenue.

Corporate social responsibility requires corporations to act as good corporate citizens. At the very minimum, corporations, in addition to complying with their legal obligations, should be responsible for negative externalities created by their activities; otherwise the community bears these costs rather than the corporation. Corporations should act responsibly to avoid negative impacts of its activities on society, its employees, the natural environment as well as respecting human rights, and taking measures to combat corruption and bribery.

This is justified according to the key theories of corporate governance. It is now generally accepted that, according to stakeholder theory, corporations should take into account the interests of stakeholders who may be seriously harmed by the corporation's activities. Although the primary concern of corporations is to maximise profits for the shareholder, modern elaborations of the shareholder primacy theory, namely enlightened shareholder value and enhanced shareholder welfare, now recognise that recognising stakeholder interests is important for a corporation's long-term sustainable development. Consequently, directors, in for example, the UK and the US are required to promote the long-term success of the company taking into account the concerns and interests of relevant stakeholders and the social and environmental impact of the company's activities.

Putting aside negative externalities, CSR does not require corporations to contribute to social welfare in ways that do not advance the long-term sustainability or reputation of the corporation. The thesis argues that, for Iraq, a broader conception of CSR should be used to

require International Oil Companies to positively contribute to community welfare by assisting with local infrastructure, training and local content. This is because Iraq and its citizens have not fairly shared in Iraq's oil wealth. The thesis argues that Iraq can learn from other developing countries which, rather than relying on voluntary CSR, have legislatively required large corporations (and International Oil Companies) to contribute to development and social welfare. This approach recommends imposing legal obligations on International Oil Companies through oil contracts and where possible by legislation. This approach recognises the limitations of CSR based on voluntary conduct and its principal concerns with negative externalities.

The thesis proposes a framework for implementing CSR in the oil industry which responds to the Iraqi context and makes recommendations for future policies and the imposition of legal obligations on International Oil Companies not only to avoid negative externalities but requiring them to positively contribute to social welfare.

Abbreviations

ACFI	Agreements on Cooperation and Facilitation of Investments
BIT	Bilateral Investment Treaty
BP	British Petroleum
CDA	Community Development Agreement
CEO	Chief Executive Officer
CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
EU	European Union
GMOU	Global Memorandum of Understanding
IEITI	Iraqi Extractive Industries Transparency Initiative
ISX	Iraq Stock Exchange
JMC	Joint Management Committee
KRG	Kurdistan Regional Government
NDDC	Niger Delta Development Commission
NGO	Non-governmental Organization
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of the Petroleum Exporting Countries
SOMO	State Organization for Marketing of Oil
TSC	Technical Service Contract
UK	The United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	The United States of America
USD	United States Dollar
WTO	World Trade Organization

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CHAPTER ONE

INTRODUCTION

1.1 Background

This thesis investigates the relevance of corporate social responsibility (CSR) to the oil industry in Iraq. Its particular focus is on the role of CSR in International Oil Companies (IOCs) in the Iraqi oil and gas industry, referred to collectively throughout as the 'oil industry.'[1] Several reasons motivated the choice of the oil and gas industry in Iraq.[2] First, the oil sector is the backbone of the Iraqi economy and the key to its future, as Iraq holds the world's fifth largest proven reserves of petroleum,[3] and the world's third-largest oil exporter.[4] Oil exports contribute around 90 per cent of central government revenue.[5] Second, Iraq opened up its oil and gas sector to foreign investment in 2009 and currently, many international oil companies invest in Iraq, see Appendix 1. Third, oil and gas infrastructure in Iraq is spread across the country and through areas with high biological diversity, high population and areas of cultural heritage. Many Iraqi giant oil fields are located on or close to the southern marshlands which are places of international cultural heritage, see discussion at 2.7.1 and Figure 2.2. Given that oil and gas activities create a wide range of negative impacts on the environment and local communities, further protection for the environment, society

[1] Domestic Oil refineries are not considered, see 2.4.
[2] The thesis excludes the oil industry in the Iraqi Kurdistan region because of the continuing constitutional dispute between the Central Government and the Kurdistan Regional Government on the control on investment in the oil resources located in the Kurdistan region. For the full discussion on the legal dispute between the Centre Government and the Kurdistan Regional Government see chapter two at 2.5.1.
[3] United States Energy Information Administration, *Iraq Country Overview* (2018) <https://www.eia.gov/beta/international/country.cfm?iso=IRQ>.
[4] See The World Factbook, Country Comparison: Crude Oil Exports, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2242rank.html>.
[5] For the full explanation on the role of oil in the Iraqi economy see chapter two at 2.2.

and cultural heritage from harm caused by IOCs activities beyond current legislative and contractual requirements, as CSR requires (see below), is a very important step.

The term corporate social responsibility used in the thesis is in its generally accepted sense of voluntary conduct of corporations acting as good corporate citizens because it is the right thing to do. Corporate social responsibility so defined does not include activities for which a corporation has legal obligations as every corporation is required to comply with its legal obligations. The thesis in chapter four explores what being a good corporate citizen (CSR) requires. It is now generally accepted that corporations should take into account the interests of stakeholders who may be seriously harmed by the corporation's activities, (stakeholder theory).[6] As a good corporate citizen, a corporation is expected to be responsible for any negative externalities created by their activities, for otherwise, the cost of redressing them falls on the community at large.[7] CSR is seen as a multidimensional concept which requires the corporation to consider the interests of stakeholders and take into account the impact of its activities on society, employees and the natural environment as well as requiring respect for human rights, and taking measures to combat corruption and bribery.[8] It is now accepted that taking into account stakeholder and community interests may contribute to sustainability, reputation and long term interests of a corporation. Despite this, there is still a tendency in some quarters to view shareholder value maximisation as the guiding objective of the corporation at the expense of stakeholder and community interests. However, more recent elaborations of shareholder primacy appear to acknowledge broader responsibilities through what has been termed, enlightened shareholder value, enhanced shareholder welfare and the recent US Warren Bill on Accountable Capitalism, discussed in chapter three.

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[6] Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower, 2012) 39.

[7] Gerlinde Berger-Walliser and Inara Scott, 'Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening' (2018) 55(1) *American Business Law Journal* 167, 218.

[8] See, *Directive 2014/95/EU of the European Parliament and of the Council* [2014] OJ L 330/1, para 6; see also Appendix 3 and Appendix 4.

Corporate social responsibility continues to be the subject of debate since it was first discussed in the early 1950s.[9] Advocates argue that CSR is part of a strategic management approach and necessary for the contemporary operations of companies to minimise harm to stakeholders not just shareholders.[10] CSR opponents argue that the only social responsibility of business is to maximise shareholders wealth, not social welfare.[11] The thesis explores these arguments in chapter three and argues that CSR should not be seen as in conflict with shareholders' interests but rather as a means for protecting their long-term interests and an increasingly important in the way corporations do business.[12] Moreover, large Companies have CSR policies which are reported in annual sustainability reports and report on non-financial performance.[13]

More recently, governments have become increasingly proactive in promoting CSR,[14] to the extent that the state has become a major CSR driver.[15] It is now standard practice in developed countries to have regulations promoting companies' accountability and transparency (eg EU, US, Canada and Australia).[16] Many developing countries have gone

[9] For a review of a history of CSR see, Archie Carroll, 'A History of Corporate Social Responsibility: Concepts and Practices' in Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald Siegel (eds) *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008) 19.
[10] Edward Freeman, *Strategic Management: A stakeholder Approach*, (Pitman, 1984).
[11] Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', *New York Times* (13 September 1970).
[12] Doreen McBarnet, 'Corporate Social Responsibility beyond Law, Through Law, for Law: the New Corporate Accountability', in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 9, 9.
[13] See chapter four, section 4.6.
[14] Josep Lozano, Laura Albareda,Tamyko Ysa, Heike Roscher and Manila Marcuccio, *Governments and Corporate Social Responsibility : Public Policies Beyond Regulation and Voluntary Compliance* (Palgrave Macmillan, 2008) 42; Anna Peters and Daniela Röß, *The Role of Governments in Promoting Corporate Responsibility and Private Sector Engagement in Development* (United Nations Global Compact, 2010) 12; Reinhard Steurer, 'Soft Instruments, Few Networks: How 'New Governance' Materializes in Public Policies on Corporate Social Responsibility Across Europe', (2011) 21 *Environmental Policy and Governance* 270, 290.
[15] Jeremy Moon, 'Government as a Driver of Corporate Social Responsibility: The UK in Comparative Perspective' (Research Paper No 20-2004, International Centre for Corporate Social Responsibility, 2004) 17; Reinhard Steurer, 'The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe' (2010) 43(1) *Policy Sciences* 49, 72.
[16] See chapter five, section 5.4.

further by requiring contribution to community welfare and sustainable development (eg India, Brazil, Tanzania, and Nigeria). This is discussed in chapter five.[17]

As the thesis focus on the implementation of CSR in IOCs in Iraq, this requires an understanding of regulatory problems in developing countries where priority is given to economic issues over issues of social responsibility. This is evidenced by the shortcomings in laws relating to issues like human rights and environmental protection.[18] There are serious issues related to regulatory enforcement and the capacity of government to both make and enforce laws.[19] Activities of IOCs have caused significant harm to host communities in developing countries (eg in India, Nigeria, Ecuador and others) without compensation to those that have been harmed.[20] As the discussion in chapter four will show, the costs of IOCs activities have been externalised to the community or the state. An issue discussed in chapter four examines whether the solution is to retain the voluntary CSR approach or whether the State should legislatively intervene so as to require IOCs to be held responsible for negative externalities.

The oil and gas sector are among the leading industries supporting CSR, mostly due to the highly visible adverse effects of oil operations on the environment and society and pressure by civil society and international organisations.[21] Critics point to the self-serving nature of CSR initiatives in this sector which can be used to generate competitive advantage,[22] improve the company's reputation,[23] and provide legitimacy and positive approval in markets where

[17] See chapter five, section 5.5.
[18] Mujih, above n 6, 1.
[19] Ibid.
[20] See the full discussion on the negative externalities of oil and gas operations in chapter four at 4.3.
[21] Jedrzej Frynas, *Beyond Corporate Social Responsibility: oil multinational and social challenges* (Cambridge University Press, 2009) 6.
[22] Michael Porter and Mark Krame, 'The Competitive Advantage of Corporate Philanthropy' (2002) *Harvard Business Review* 1, 15; Philippe Gugler and Jacylyn Shi, 'Corporate Social Responsibility for Developing Country Multinational Corporation: Lost War in Pertaining Global Competitiveness' (2009)87 *Journal of Business Ethics* 3, 24.
[23] Prakash Sethi, Terrence Martell and Mert Demir, 'Building Corporate Reputation Through Corporate Social Responsibility (CSR) Reports: The Case of Extractive Industries' (2016) 19(3) *Corporate Reputation Review*

products are standardised.[24] Chapter four examines what may be needed in order for positive CSR to be effective for local communities. In other words, corporations see the rendering of CSR as a major element of brand and product differentiation so as to gain a competitive edge over their rivals.[25] This is explored further in the thesis. The thesis aims to identify suitable approaches for Iraq to limit the negative impacts of the oil and gas industry and protect the environment and Iraqi society. The central research questions are: first how can international oil companies be made responsible for the negative impacts of their operations on the community, the environment and other stakeholders? Secondly, if CSR is defined as voluntary conduct, are there regulatory alternatives which can hold IOCs responsible for negative externalities caused by their operations and maximise social welfare? Thirdly, how can IOC compliance with legal requirements and voluntary CSR in the oil industry be monitored. The thesis draws on the experience of other countries, particularly oil-producing countries such as Nigeria, and, responding to the Iraqi context, makes recommendations for the protection of stakeholders.

The methodology employed in the thesis is primarily analytical based on positivist doctrinal approach involving the collection and analysis of primary source materials from Iraq. These include legislation and regulations relating specifically to the Iraqi oil industry. It will also involve the collection and analysis of standard form contracts which are used in the Iraqi oil industry. The thesis will also involve some comparative aspects. First it will examine and evaluate primary source materials from countries particularly oil producing countries such as Nigeria which have imposed positive 'CSR' like obligations on the oil industry so as to benefit the community. India has also been selected as a comparator. The thesis also examines the statutory requirement that large Indian corporations are required to contribute to

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219, 243; C Maden et al, 'Linking Corporate Social Responsibility to Corporate Reputation: a Study on Understanding Behavioral Consequences' (2012) 58 *Procedia - Social and Behavioral Sciences* 655, 664.

[24] See discussion in chapter four at 4.2.2.

[25] Frynas, above n 21, 115-133.

the welfare of the society. These comparators provide lessons for Iraq on possible approaches which will ensure that International Oil Companies act responsibly in their operations and contribute to the Iraqi society.

The next section outlines the structure of the thesis.

1.2 Thesis Structure

The thesis is structured into seven chapters. After this introductory chapter, chapter two provides an overview of the oil and gas industry in Iraq (oil and gas reserves, production and the importance of oil to the Iraqi economy) and the legal framework applying to this industry. If CSR is to be accorded some form of official recognition in Iraq, it is important to understand how the regulatory system operates. It next provides a brief description of the constitutional framework (the division of power between the federal authority and regional authorities) and the legal framework of investment and the scope of investment laws. The chapter continues with specific provisions regulating the industry including constitutional provisions, the Draft *Oil and Gas Law* as well as the standard Technical Services Contract (TSC) which sets out the contractual arrangements between the State-owned Oil Companies and the relevant International Oil Company. The chapter also addresses the structure of the oil industry in Iraq and the role of the Ministry of Oil and the state-owned oil companies in managing the sector and large oil fields.

Finally, the chapter addresses the question why oil companies operating in Iraq should engage in corporate social responsibility and discusses multiple rationales for the implementation of CSR in this industry. Understanding these reasons contributes to developing an appropriate strategy to implement CSR in the oil and gas industry, discussed further in chapter six. This introductory material sets the context for examination of CSR in relation to international oil companies in Iraq.

Chapter three examines the correlation between corporate governance and corporate social responsibility. Central to the discussion are the shareholder primacy and stakeholder models of governance as well as the more recent elaborations of enlightened shareholder value, enhanced shareholder welfare, and the US Warren Bill on Accountable Capitalism. The chapter then looks more closely at who are stakeholders for these purposes.

The chapter also describes the different types of Iraqi companies including state-owned oil corporations which play an active role in joint management committees with international oil companies. This is necessary to provide a foundation for the examination of whether the contemporary corporate governance framework and its implementation in Iraq can assist in promoting corporate social responsibility. The chapter also provides the backdrop for discussion of CSR in the following chapter.

Chapter four analyses the concept of corporate social responsibility and the key debates. It commences by discussing what corporate social responsibility is and its rationales and examines the view that corporations should be responsible for negative externalities, that is, the harm caused by their operations for which the community pays. This is then contextualised to the negative impacts of oil and gas operations. The chapter then discusses possible solutions to the problem of negative externalities, ranging from hard law solutions, pressure by the community and international institutions. The chapter thereafter inquires whether CSR requires that corporations should be responsible not only for negative externalities but also should contribute to social welfare. The term 'positive CSR' is used here to describe contributions to social welfare. The chapter examines strategies for implementing positive CSR such as community consultation and public-private partnerships and concludes with discussion of the benefits of CSR reporting (non-financial reporting) and the comply-or-explain approach.

Chapter five analyses the recent CSR practice internationally and domestically. This is in order to propose an approach to regulate CSR in the oil industry that is a good fit for Iraq. The chapter commences by showing how international instruments have set standards for CSR and the importance of bilateral trade and investment agreements to this issue. It then investigates how CSR can be implemented at the national level through government policies as a primary tool for promoting CSR. It thereafter proceeds to discuss different approaches that have been used to implement CSR in selected jurisdictions. Policy and legislative approaches are contrasted with examples of where CSR is relevant to the awarding of oil and gas contracts and incorporation of CSR like clauses into those contracts.

Building on the discussion in the previous chapters, chapter six focuses on the feasibility of implementing CSR in the oil and gas industry in Iraq. It aims to identify what approach would be suitable for implementing CSR in Iraq with the emphasis on IOCs. The chapter then examines a framework for CSR in the oil industry in responding to the Iraqi context. This includes corporate governance and stakeholder protection, training, local content and development projects for community welfare. The chapter also recommends a framework for monitoring IOC compliance with legal requirements and implementing voluntary CSR in the oil industry followed by conclusion.

The concluding chapter, chapter seven, draws together the threads of the argument set out in this thesis. It summarises the key findings of the thesis and makes recommendations for future policy in Iraq. This includes developing a national policy to implement CSR, including CSR requirements in bilateral agreements, developing legal requirements for stakeholder protection and social welfare, CSR clauses in oil and gas contracts, and developing a mechanism to monitor CSR in the oil industry. In closing, it examines the way forward for CSR in the oil industry in Iraq.

CHAPTER TWO

THE IRAQI CONTEXT

2.1 Introduction

As the oil industry is the backbone of the Iraqi economy, this chapter sets the context for the thesis and the discussion of Corporate Social Responsibility (CSR) in this industry. With this in mind, this chapter starts with an overview of the oil and gas industry in Iraq, oil and gas reserves, production and the importance of oil to the Iraqi economy. Iraq is the second-largest oil producer in the Organisation of the Petroleum Exporting Countries (OPEC). As a member of OPEC, Iraq's share in the oil market is governed by the OPEC regional agreement. When the oil price fell dramatically in 2017, Iraq as a member of OPEC, complied with the OPEC decision to reduce oil production. This had a serious impact on the Iraqi economy, see 2.7.2. In Iraq, similar to other oil producing countries in the region, most national companies operating in the oil and gas sector are 100 per cent owned and managed by the Ministry of Oil (referred to generically in the thesis as state-owned oil companies). The regulatory framework for the oil industry authorises the Ministry of Oil to develop and implement the oil policy for the whole sector. The Ministry of Oil deals with any state-owned oil company as part of a ministry's department. As a result, there is no separation between the roles and responsibilities of the government as an owner and the government as a manager and the board of directors in a state-owned oil company is not fully independent in making decisions (see discussion at 2.6.2 and 3.5).

Major oil fields are managed through joint ventures between the Ministry of Oil (through Iraqi State-owned Oil Companies) and international oil companies (IOCs). The Iraqi

government (through its state-owned corporations) retains significant interests in these ventures, usually 25 per cent interest (see 2.5.3). This is important to the argument that IOCs should engage more fully in CSR initiatives. Brief reference is made to the process leading up to the awarding of oil contracts (bidding rounds at 2.2.2) and the contractual framework provided by Technical Services Contracts (at 2.5.3). This information is important to the argument (in chapter 6) that Technical Services Contracts are one possible mechanism for implementation of CSR in Iraq.

To place in context the need to recognise CSR in Iraq, it is necessary to understand how the Iraqi regulatory system operates. With this in mind the chapter provides a brief description of the constitutional framework, and the division of power between the federal authority and regional authorities (2.3). It continues with a brief description of the legal framework of investment and the scope of investment laws (2.4).

The chapter then turns its attention to the legal framework applying to the oil and gas sector in Iraq including constitutional provisions regulating the industry and the Draft *Oil and Gas Law*. It also provides a brief discussion of the standard Technical Services Contract (TSC) which sets out the contractual arrangements between the State-owned Oil Companies and IOCs (2.5.3). Any recommendations relating to CSR in the oil industry need to recognise the role of the Iraqi state in managing oil resources through the Ministry of Oil and State Owned Oil Companies and its potential successor the Iraqi National Oil Company (2.6). Finally, the chapter addresses the question why oil companies operating in Iraq should engage in corporate social responsibility and discusses multiple rationales for the implementation of CSR in this industry (2.7). Understanding these reasons contributes to developing an appropriate strategy to implement CSR in the oil and gas industry, discussed further in chapter six. This introductory material sets the context for examination of CSR in relation to international oil companies in Iraq.

2.2. Overview of the Oil Industry in Iraq

2.2.1 Oil and Gas Reserves and Large Oil Fields

Iraq holds the world's fifth largest proven reserves of petroleum (143 billion barrels of oil)[1] and the world's 13th largest natural gas reserves (almost 112 trillion cubic feet of natural gas)[2] as well as significant scope for further discoveries. These oil and gas reserves give Iraq an important place in the global oil supply and represent a significant contribution to the stability of global oil markets.[3] In 2018, Iraq is the world's third-largest oil exporter after Saudi Arabia and Russia[4] with an export volume of 3.8 million barrels per day.[5] According to the latest available figures, oil exports account for 99 per cent of total Iraqi exports, and nearly 90 per cent of central government revenue.[6] Iraq has the added advantage of having one of the lowest extraction costs assisted by its 'relatively uncomplicated geology and its multiple, onshore super giant oil fields located close to coastal ports.'[7] This has made Iraq's oil industry very attractive for foreign investment (see the discussion at 2.7.2 below). Oil is crucial to the economic growth and the development of Iraq. Success in developing these natural resources and effective management of the resulting revenues can strengthen the

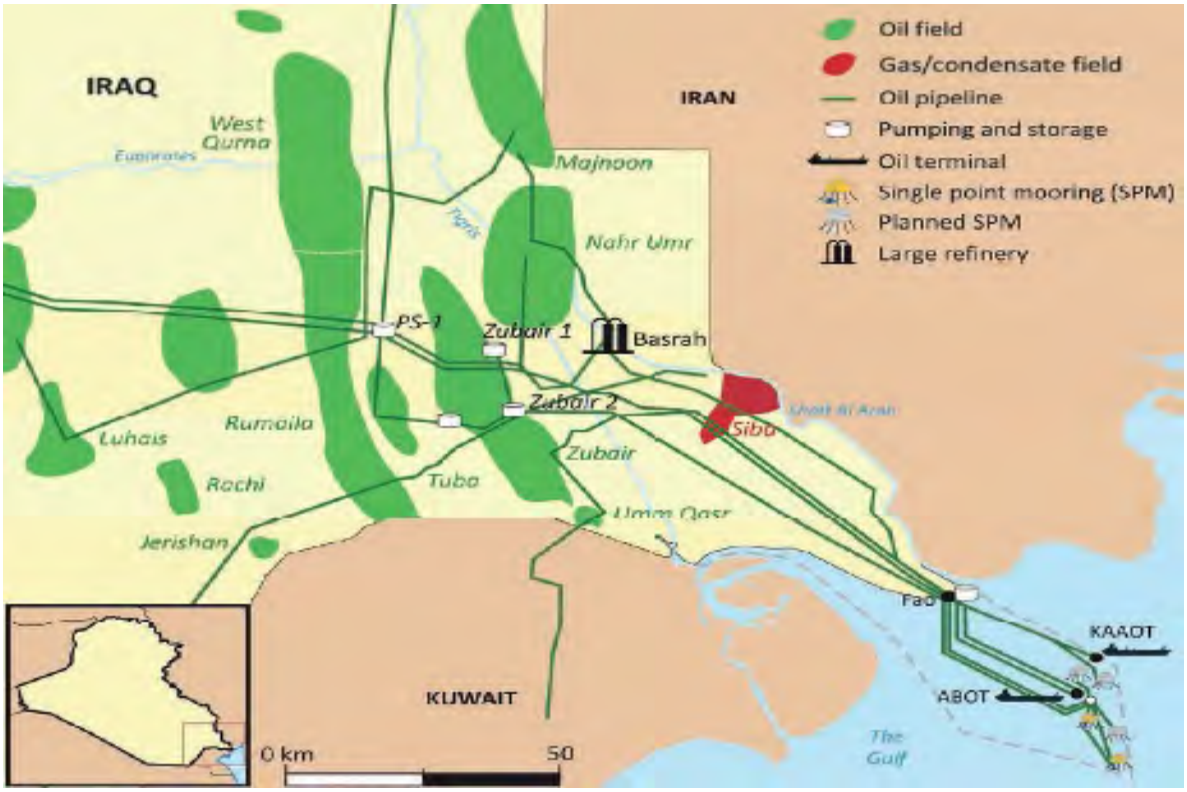
[1] World Bank, *Iraq Systematic Country Diagnostic* (Report No 112333-IQ, 3 February 2017) 13 <http://documents.worldbank.org/curated/en/542811487277729890/pdf/IRAQ-SCD-FINAL-cleared-02132017.pdf>.
[2] International Energy Agency, *Iraq Energy Outlook: World Energy Outlook Special Report* (9 October 2012) 18 <https://www.iea.org/publications/freepublications/publication/WEO_2012_Iraq_Energy_OutlookFINAL.pdf>.
[3] Ibid, 119.
[4] See, The World Factbook, *Country Comparison: Crude Oil Exports* <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2242rank.html>.
[5] Organization of the Petroleum Exporting Countries, *OPEC Annual Statistical Bulletin* (2017) 8 <http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2017_13062017.pdf>. Note that, at the time of writing, Iraq only exports crude oil but no gas or other refined products.
[6] World Bank, *Iraq Economic Monitor from War to Reconstruction and Economic Recovery* (2018) 5 <http://documents.worldbank.org/curated/en/771451524124058858/pdf/125406-WP-PUBLIC-P163016-Iraq-Economic-Monitor-text-Spring-2018-4-18-18web.pdf>.
[7] World Bank, *Iraq Systematic Country Diagnostic*, above n 1, 13.

country's present and future prosperity.[8] A brief description of large Iraqi oil fields and international investment is referred to next.

Iraq has 84 discovered oil and gas fields, many of them are located in the south of the country[9] as shown in Figure 2.1 below. Six of them (Kirkuk, Majnoon, Rumaila, Zubair, West Qurnah I, and West Qurnah II) are considered as supergiant fields, each containing more than 5 billion barrels of oil. Another 16 out of them are deemed large, each contains between 500 million and five billion barrels of oil.[10] Significant amounts of Iraqi oil reserves are concentrated in these supergiant and large oil fields.[11] Appendix 1 gives further information about these oil fields and their current status and investors.

[8] International Energy Agency, above n 2, 11.
[9] Some oil fields (north Rumaila, West Qurnah, Majnoon, and Halfaya) and oil exploration areas are close to the Iraqi southern marshlands which are World Heritage areas, and habitat to an indigenous group and diverse range of flora and fauna. As a result, oil exploration and extraction in these areas may threaten the integrity of the ecosystem of these Marshes (see the full discussion on this issue at 4.3.2).
[10] For specific information about all Iraqi oil and gas fields see, Ghanim Anaz, *Iraq Oil and Gas Industry in the Twentieth Century* (Nottingham University Press, 2012) 223-302.
[11] The total reserves in these oil fields are estimated at 112 billion out of 143 billion barrels of oil, the current total reserves of oil in Iraq. Ibid, 223.

Figure 2.1: Iraqi Southern Oil Fields



Source: International Energy Agency, *Iraq Energy Outlook* (2012)

However, wars and a decade of sanctions restricted Iraq's ability to turn these vast oil and gas reserves into commercial production. For instance, in 2005, out of the 84 discovered oil fields only 17 have been developed and put into production.[12] Significant investment was required to reconstruct Iraq's oil industry and increase oil production. This was beyond the capacity of the Iraqi government which lacked modern technology, equipment and expertise. Therefore, Iraq opened up its oil and gas sector to foreign investments through licensing rounds. The next section examines the licensing regime for operations in the oil and gas sectors.

[12] Lawrence Kumins, 'Iraq Oil: Reserves, Production, and Potential Revenues' (Congressional Research Service, 13 April 2005) <https://fas.org/sgp/crs/mideast/RS21626.pdf>.

2.2.2 Oil and Gas Licensing Rounds

Iraq opened up its oil and gas sector to foreign investment in 2009. The general strategy was to use a highly competitive licensing round system based on specific criteria.[13] The Iraqi government through the Ministry of Oil administered this process and held five licensing rounds. While the initial four rounds were to further developing currently producing large oil fields or to develop discovered but undeveloped oil fields,[14] the fifth licensing round, conducted in early 2018, was for rehabilitation and development of 11 new exploration blocks.[15]

Oil companies who passed the prequalification stage were also evaluated on their corporate social responsibility policies including training, health, safety and environmental protection.[16] The Iraqi government used CSR as a competitive standard to select companies for licences to invest in the oil and gas sector. These CSR requirements became a condition in signed contracts for companies awarded licences, see chapter 5 at 5.6, chapter 6 at 6.3.

As a result of these licensing rounds, many international oil companies obtained licenses to invest in the Iraqi oil industry and signed oil contracts with the government. Examples include BP, Shell, Total, ExxonMobil, Lukoil and many others, see Appendix 1. An overview of these oil contracts is given below at 2.5.3.

[13] The industry-related evaluation criteria include technical, financial and legal capabilities. See Ministry of Oil, *Features of Service Contracts for Licensing Rounds* <http://www.moo.oil.gov.iq/PCLD/PCLD/contractus&company.html>.
[14] Anaz, above n 10, 224.
[15] Ministry of Oil, *The Ministry of Oil Declares for 11 Exploration Blocks to be Developed & Rehabilitated* (1 April 2018) <https://oil.gov.iq/index.php?name=News&file=article&sid=1055>.
[16] Ministry of Oil, *Features of Service Contracts for Licensing Rounds*, above n 13.

2.3 Constitutional Framework

The current *Iraqi Constitution* was adopted on the 15th of October 2005 by a referendum.[17] The Constitution was drafted in 2005 by an Iraqi Constitutional Committee established by the transitional government that assumed power after handover of authority from the Coalition Provisional Authority in June 2004.[18] This section provides a brief overview of the constitutional framework of the state and governance system, the distribution of powers between the branches of government, and the identification of federal authorities' powers and those held by regional authorities.

Central to the state's form and governance system are the fundamental principles set out in the first section of the *Constitution*, Articles 1 and 13. Article 1 declares Iraq to be

> [A] single federal,...state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.[19]

Article 13 of the *Constitution* states that

> [1] This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. [2] No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.[20]

[17] The new governing document was passed by 79 per cent voting in support out of 63 per cent turnout of all eligible voters. See, Jonathan Steele, 'Iraqi constitution yes vote approved by UN' *The Guardian* (26 October 2005) <https://www.theguardian.com/world/2005/oct/26/iraq.unitednations>; Nic Robertson and Ingrid Formanek, 'Iraqi constitution passes, officials say' *CNN* (26 October 2005) <http://edition.cnn.com/2005/WORLD/meast/10/25/iraq.constitution/>.

[18] See Sharon Otterman, 'Q&A: Drafting Iraq's Constitution' *The New York Times* (12 May 2005) <https://archive.nytimes.com/www.nytimes.com/cfr/international/slot2_051205.html>.

[19] *Iraqi Constitution* 2005, art 1.

[20] Ibid, art 13.

The combined effect of those two articles is to provide a unified nation and to give the constitution priority over laws at the federal or regional level. Although the *Constitution* explicitly states that Iraq is a federated system, the emphasis is on a unified Iraq.

In practise, however, Iraq is divided into 18 political and administrative governorates, also known as 'provinces'.[21] Three of them are located in the north of the country constituted as the Kurdistan Region. The rest remain so-called 'governorates not incorporated into regions.'[22] The contemporary *Iraqi Constitution* recognises the Kurdistan Region which formalizes the country's only formal autonomous region at present. The independence of the Kurdistan region dates back to 1992, and the *Constitution* of 2005 confirms that. The region is officially governed by the Kurdistan Regional Government (KRG) and has its own regional parliament. In the following section (see 2.5.1) the federal authorities' powers and those held by KRG in terms of controlling the oil sector are discussed in more detail.

In relation to the federal government, and the separation of power principle, there are the three branches in the form of the legislative, judicial, and executive branches, as well as numerous independent bodies.[23] The Council of Representatives represents the legislative branch which consists largely of members directly elected by the Iraqi people.[24] It has many common legislative powers, as well as an authority to elect the President of the Republic and the Prime Minister.[25]

The judicial branch has administrative and adjudicative functions. The Higher Juridical Council is charged with managing and supervising the federal judiciary, nominating the Chief

[21] Iraq is divided to 18 administrative units each called a governorate.
[22] According to the *Law of Governorates Not Incorporated into a Region*, No 21 of 2008, as amended in 2010, governorates not incorporated into regions have ability to set up a region through a referendum process. However, this is not expected to occur, at least in the near future. This is because (a) oil and gas reserves are mostly located in the southern governorates while the western governorates have few proven reserves and (b) this creates an unstable political situation (see 2.5.2 below).
[23] *Iraqi Constitution* 2005, art 47.
[24] Ibid, arts 48, 49.
[25] Ibid, art 61.

Justice of the Federal Supreme Court and the members of the lower federal courts, as well as the chief state prosecutor, and preparing the federal judiciary's budget for submission to the Council of Representatives.[26] The adjudicative aspect has been assigned to Federal Supreme Court as an independent judicial body. The Federal Supreme Court has jurisdiction over constitutional questions, the application of federal law, the settling of disputes between the federal government and regional governmental entities, and disputes between regional entities themselves.[27]

The executive branch is composed of the President of the Republic and the Council of Ministers (ie the Cabinet).[28] The Prime Minister holds most of the executive authority and appoints the Council of Ministers which acts as a cabinet.[29] The President holds ceremonial powers only. The Ministers' powers, combined with those of the President, provide complete authority over the executive branch.

There are two categories of provisions relating to the relationship between the federal and regional authorities or governorates. The first are powers defined as 'exclusive' to the federal government. The second are concurrent powers where federal authorities share competence with subsidiary governmental units. There are, also, explicit provisions for oil and gas which are discussed in the following section (see 2.5.1). A lengthy list of powers is designated as 'exclusive' to the federal government and is contained in Article 110 of the *Constitution*. Generally, exclusive powers include both diplomatic and economic foreign policy matters, national security concerns and border protection, fiscal policy and commercial issues

[26] Ibid, art 91.
[27] Ibid, art 93. The highest courts in Iraq are the Federal Supreme Court, which is responsible for constitutional issues, and the Court of Cassation, which is the court of last resort for all cases except security-related case and adjudicates over cases involving Government officials and jurisdictional conflict between subordinate courts. See footnote n 52 below for the role of the Federal Supreme Court in the dispute between the central governmental authorities and those of the region of Kurdistan over the right to enter into oil and gas development agreements.
[28] *Iraqi Constitution* 2005, art 66.
[29] Ibid, art 78-80.

involving national budget of the State and administration of the central bank, citizenship and population affairs.[30]

Article 114 of the *Constitution* lists concurrent powers where federal authority is shared with regional and governorates that are not organized into regions. These include management of customs, regulating the main sources of electric energy, developing an environmental policy, regulating the internal water resources policy, formulating public health and education policy, as well as, the preparation for development and planning policy.[31]

Article 115, provides that powers not restricted as exclusive powers of the federal government are within the competence of the governorates not incorporated into regions. Moreover, Article 115(2) gives priority to the laws of regions and governorates not organized into regions in the event of a conflict with federal measures.[32]

These provisions are important to the discussion of the reach of federal oil legislation (Draft *Oil and Gas Law*) particularly with regard to the Kurdistan region, see 2.5.2 below. Attention is now turned to explore legal framework of investment in Iraq, investment laws and their application to the oil industry.

2.4 The Legal Framework for Investment

The main Iraqi law dealing with investment is the *Investment Law* 2006[33] and related regulations.[34] The Iraqi *Investment Law* requires investors to obtain investment licences from the National Investment Commission,[35] or from the regional or provincial commissions.[36] All

[30] Ibid, art 110.
[31] Ibid, art 114.
[32] Ibid, art 115.
[33] *Investment Law* No 13 of 2006, amended in 2010.
[34] *Investment Regulation* No 2 of 2009 and *Regulation of Sale and Lease of Real Estate and Landed Property of the State and Public Sector for Investment Purposes* No 7 of 2010.
[35] *Investment Law* 2006, art 4. The National Investment Commission, established in 2007, is responsible for federal strategic investment projects and drawing up national investment policies, identifying key areas for investment and preparing a list of investment opportunities, as well as issuing instructions, guidelines and

areas of investments (eg manufacturing industries, agriculture, infrastructure projects, health etc) are subject to the provisions of this law except for investment in oil and gas extraction or production and investment in banks and insurance companies.[37] The Kurdistan Region has a separate investment law[38] that governs all areas of investment except for investments in oil and gas extraction or production.[39] The general investment laws in Iraq and in Kurdistan Region (ie *Investment Law* 2006 and *Law of Investment in Kurdistan Region* 2006 respectively) do not regulate investment in the oil and gas extraction or production. It was noted in chapter one that industry-specific laws which govern investment in the oil and gas extraction and production in Kurdistan are not discussed because this thesis excludes Kurdistan Region. The relevant federal law is discussed below.

Investing in oil refining is subject to the *Law of Private Investment in Crude Oil Refining* 2007.[40] This law allows companies from private sector (Iraqi companies other than state-owned or foreign companies)[41] to establish and own crude oil refineries as well as operating and managing these facilities. Marketing refined products has to be through the national marketing oil company (The State Organization for Marketing of Oil) only.[42] Notably, neither the *Investment Law* (as a general investment law) nor the *Law of Private Investment in Crude Oil Refining* (as a specific law) refer to corporate social responsibility. Chapter six of this thesis provides in-depth analysis of how far, if at all, the regulatory framework should recognise and monitor CSR in the oil industry.

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monitoring the implementation of these guidelines. The Commission identifies profitable investment projects that address Iraq's most critical needs and facilitate the procedures for obtaining investment licenses.

[36] The *Investment Law* allows regions and governorates (see above) to establish Provincial Investment Commissions that are responsible for planning local investment and have the authority to granting investment licences (in coordination with the National Investment Commission) in areas of their jurisdiction, ibid, art 5.

[37] *Investment Law* 2006, art 29. This law applies to all investors (whether they are Iraqi or foreign investors) who obtain investment licenses. See *Investment Regulation* No 2 of 2009 art 1(1).

[38] *Law of Investment in Kurdistan Region* No 4 of 2006.

[39] Ibid, art 2.

[40] *Law of Private Investment in Crude Oil Refining* No 64 of 2007 as amended in 2011.

[41] Ibid, art 2(2). According to this article, the refining company does not vest the land of the project.

[42] State Oil Marketing Organization (SOMO) is a state-owned company that has the exclusive right to export and import all crude oil and refined products from and to Iraq. Currently, Iraq only exports crude oil, not refined products or gas.

The next section discusses the regulatory framework governing the oil industry, particularly oil and gas extraction or production. As noted earlier oil refining is governed by separate legislation. The discussion includes an overview of constitutional provisions regulating the oil industry and the disputes between the Federal Government and Kurdistan Region Government, the Draft *Oil and Gas Law* and petroleum contracts.

2.5 The Legal Framework Governing Iraq's Oil and Gas Industry

2.5.1 Constitutional Provisions Regulating the Oil and Gas Industry

The *Iraqi Constitution* contains several provisions that address the control and distribution of natural resources.[43] Article 111 states that 'oil and gas are owned by all the people of Iraq in all the regions and governorates.'[44] This indicates that any particular group, geographical or political region do not have exclusive ownership of any specific resources. The *Constitution*, in Article 112, reconfirms this principle and emphasises equitable revenue-sharing:

> [1] The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country...
>
> [2] The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.[45]

This article also assigns to the Federal Government the role of the management of oil and gas extracted from 'present fields' and the formulation of long-term strategic policies on the

[43] For further explanation on Iraqi constitutional provision on oil resources see, Muhammed Mazeel, *Iraq Constitution: Petroleum Resources Legislation and International Policy* (Diplomica Verlag, 2010) 10-15.
[44] *Iraqi Constitution* 2005, art 111.
[45] Ibid, art 112.

utilisation and development of the nation's oil and gas resources.[46] However, there is room for different interpretations of this article. There is a substantial dispute between the Federal Government and the Kurdistan Regional Government (KRG) on the constitutional authority of KRG to take legal action over oil produced from the region, specifically the legitimacy of oil contracts awarded by the KRG to International Oil Companies (IOCs) without the approval of the Federal Government.[47] The relevant constitutional provisions were subject to opposing interpretation by the two authorities.[48] This controversial issue stemmed from the ambiguity of the Constitution's text, in particular that the term 'present fields' referred to in Article 112 (above) was not defined. It is not clear if the term only includes fields that were producing at the time the *Constitution* was enacted in 2005 or if it also extends to the 'future' fields. From the KRG's point of view, the term 'present fields' does not include newly discovered oil or gas fields (after 2005) or fields where discovery has been made but production is pending.[49] This view is built on the fact that the constitutional wording says nothing about 'non-producing and future fields.'

Based on this perspective, the KRG enacted its own oil and gas law which was approved by the Kurdistan National Assembly in August 2007, along with a Production Sharing Contract model.[50] The differences between the Technical Services Contract model currently used by the Federal Government, and the alternative Production Sharing Contract model used by the KRG, are referred to below (see 2.5.3). Consequently, the KRG has signed Production

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[46] Ibid.
[47] For further discussion concerning the dispute between the Federal Government and the KRG see Rex Zedalis, *The Legal Dimensions of Oil and Gas in Iraq Current Reality and Future Prospects* (Cambridge University Press, 2009) 46-52; Peter Cameron, 'Contracts and Constitutions: The Kurdish Factor in the Development of Oil in Iraq' (2011) 5(1) *International Journal of Contemporary Iraqi Studies* 81, 99.
[48] Cameron, above n 47.
[49] The KRG claims that it has an exclusive authority under Article 112 and Article 115 of the *Constitution* to manage oil and gas in the Kurdistan Region extracted from fields that were not in production in 2005 whether they are new or they are discovered pre 2005 but not in production, see Kurdistan Regional Government, *Statement by Kurdistan Regional Government in Response to Federal Ministry of Oil Announcement* (25 May 2014) <http://cabinet.gov.krd/a/d.aspx?l=12&a=51600>.
[50] *Oil and Gas Law of the Kurdistan Region-Iraq* No 22 of 2007.

Sharing Contracts with several IOCs for fields in the Kurdish region and has exported oil independently,[51] ignoring the Federal Government's legal opinion on the matter. The Federal Government has insisted that the *Constitution* does not allow the KRG to adopt unilateral and permanent measures over the management of the oil fields, and therefore any oil contract signed with IOCs is 'illegal' until reviewed and approved by the federal Ministry of Oil.[52] In addition, the Federal Government considers the IOCs that signed contracts with KRG (like ExxonMobil, Repsol Exploration and Sinopec International Petroleum) are not qualified to invest in the oil sector in the rest of the country in the future.[53] Countless claims and conflicting statements have been made on this subject by both sides during the last few years and continue. These disagreements over the control of oil fields located in the region and other outstanding issues has contributed significantly to the deadlock between the Federal Government and the KRG in enacting national legislation on oil and gas. This is explained next.

2.5.2 Draft *Oil and Gas Law*

The critical requirement for long-term stability of oil investment and development in Iraq is the adoption of a modern oil and gas law and a unified petroleum resource management policy based on the *Constitution*. At present, Iraq does not have modern oil laws.[54] A Draft *Oil and Gas Law* was approved by the Council of Ministers and submitted to the Council of

[51] US, *Doing Business in Iraq* (2013) 19 <https://www.trade.gov/iraq/build/groups/public/@tg_iqtf/documents/webcontent/tg_iqtf_004087.pdf>.
[52] The Iraqi Ministry of Oil requested, on 27 September 2012, a legal opinion from the Federal Supreme Court on Article112 of the Constitution and whether or not, it gives regional and producing governorates the power to manage and sign contracts, to develop oil and gas resources, without the Federal Government ratification. In its decision on 9 October 2012, the court considered this matter as a dispute and held that the Ministry of Oil could file a lawsuit against such regional and producing government. See Federal Supreme Court, case No 74/Federal/2012 (9/10/2012) (constitutional interpretation).
[53] Ministry of Oil, *Features of Service Contracts for Licensing Rounds* <http://www.moo.oil.gov.iq/PCLD/PCLD/contractus&company.html>.
[54] The *Law for the Conservation of Hydrocarbon Wealth* No 84 of 1985 does not meet the modern requirements of the oil industry.

Representatives for approval in 2007.[55] The draft is part of a legislative package that also includes three companion pieces of legislation addressing revenue sharing, the creation of the Iraqi National Oil Company and reorganisation of the Iraqi Ministry of Oil.[56] The discussion in this section will focus on the obstacles that prevent the enactment of this law and some of the difficulties with the proposed law.

Political incompatibility is the main reason.[57] This may be related to the ethnic diversity in Iraq and the concentration of oil reserves in the south of the country. The Kurds in northern Iraq prefer a stronger management role for the regional authorities (Kurdistan Regional Government) in relation to resources in their region. However, the Sunnis in the west and central Iraq, and Shiites in the south prefer a stronger role for the central government.[58] This is because most oil and gas reserves are located in the southern governorates (see Figure 2.1 and the discussion on the large oil fields at 2.2.1 above) where the majority are Shiites; the western governorates, where the majority are Sunnis, have few proven reserves. This uneven distribution of oil reserves has also led to concerns about revenue sharing provisions in the proposed law. A stronger role for the central government in managing the oil industry could lead to a more equitable distribution of oil wealth for all citizens. The different interpretations of the *Constitution* and the classification of old versus new oil fields, as well as the role of outside investors who entered into Production Sharing Contracts with the Kurdish authorities

[55] The Draft *Oil and Gas Law* was first approved by the Council of Ministers in February 2007 and was submitted to the Council of Representatives for an expected vote in May 2007. Then, with no vote in May, a slightly modified version was resubmitted to the Council of Representatives in July 2007, where it was heavily criticised.

[56] For detailed explanation on the content of Draft *Oil and Gas Law* 2007 see Susan Sakmar, 'The Status of the Draft Iraq Oil and Gas Law' (2008) 30(2) *Houston Journal of International Law* 289, 314.

[57] Daniel Behn, 'Sharing Iraq's Oil: Analyzing Production-Sharing Contracts Under the Final Draft Petroleum Law' (SSRN, 17 September 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=976407>.

[58] Lionel Beehner and Greg Bruno, 'Why Iraqis Cannot Agree on an Oil Law', *Council on Foreign Relations* (22 February 2008) <https://www.cfr.org/backgrounder/why-iraqis-cannot-agree-oil-law>.

ignoring the ban of the central government (as explained in the previous section), have also divided Iraqi politicians.[59]

The other controversial issue is that the proposed law is based on Production Sharing Contracts as the mechanism for foreign investment in the oil industry.[60] Under the Draft *Oil and Gas Law*, the Production Sharing Contracts allows IOCs to develop specific areas of Iraq's petroleum sector in exchange for a share of the oil profits. Because of the Production Sharing Contracts contract is a form of oil sector privatisation, it has been criticised as permitting the exploitation of the state's oil wealth.[61] The alternative contract currently used by the Federal Government is the Technical Services Contract. This oil contract model is described and compared to the Production Sharing Contracts model in the next section (see 2.5.3). With all these disputes and outstanding issues, there is little potential that the law as it currently stands will be passed, or even voted on, in the near future.

It is noted that the Draft *Oil and Gas Law* does not refer explicitly to corporate social responsibility obligations, but it contains some provisions to build local content and expertise.[62] These provisions will be discussed and evaluated in chapter 6 at 6.3 along with similar requirements in the Technical Services Contract model presently in use.

With the difficulties in passing the national oil and gas law, the remaining option for the Iraqi government to regulate foreign investment in the oil industry is though oil contracts. The issue whether oil contracts provide a suitable vehicle for incorporating CSR is considered at 6.3. The following is an overview of key features of TSC model used in the oil licensing rounds (2.2.2 above).

[59] Ibid; Behn, above n 57.
[60] Sakmar, above n 56.
[61] Behn, above n 57.
[62] Draft *Oil and Gas Law* 2007, art 15.

2.5.3 Oil Contracts

The Iraqi government through the Ministry of Oil has held five licensing rounds. The latest round was conducted in early 2018[63] with Iraq has signing many oil contracts with large IOCs (see Appendix 1). While, some of these oil contracts related to a further development and expansion of currently producing large oil fields, others related to the development of discovered but undeveloped oil fields.[64] Oil contracts from the fifth licensing round held in 2018, however, are for rehabilitation and development of 11 new exploration blocks. The contract model currently in use is Technical Services Contract.[65] The duration of these contracts is 20-25 years. As such, they will shape the Iraqi oil industry for the next couple of decades. The Iraqi government has designed these contracts to combine elements from different categories of petroleum contracts to obtain the best benefits from each.[66]

The Technical Services Contract (TSC) is a long term contract between the Iraqi government and an international oil company for the development, expansion or exploration of oil or gas in return for stipulated fees.[67] The Iraqi government retains ownership of the field and production ownership rights. In contrast to the Production Sharing Contract, an IOC in a Technical Services Contract agrees to a pre-determined fee per-barrel rather than sharing profits from the sale of oil.[68] The TSC oil contract is much more advantageous method for the Iraqi government than the originally proposed Production Sharing Contract in the Draft *Oil*

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[63] Ministry of Oil, *The Ministry of Oil Declares for 11 Exploration Blocks to be Developed & Rehabilitated* (1 April 2018) <https://oil.gov.iq/index.php?name=News&file=article&sid=1055>.
[64] Anaz, above n 10, 224.
[65] There is no signed oil contract publicly available. The only available are Technical Services Contract model from the first bidding round (2010) <http://iraqieconomists.net/ar/wp-content/uploads/sites/2/2016/01/Clean_copy__BP_CNPC_comments__27_July__on_PCLD_draft_dated_01.pdf > and Exploration, Development and Production Contract model from the fifth bidding round (2018) <https://oil.gov.iq/upload/upfile/ar/659.pdf>. Nevertheless, extracts from those contract models provide in Appendix 2.
[66] For example, the contract includes Joint Ventures elements in addition to normal service contract elements. See Technical Services Contract model, above n 65, art 13; Appendix 2.
[67] Abbas Ghandi and Cynthia Lin, 'Oil and Gas Service Contract around the World: A Review' (2014) 3 *Energy Strategy Reviews* 63, 71.
[68] Ibid.

and Gas Law.[69] However, Iraq has to find a mechanism to share with IOCs the risks of oil price fluctuations to avoid paying a high fixed amount where the price of oil has fallen, see the discussion at 2.7.3 below.

The main driving factors behind the adoption of the TSC in Iraq are sovereignty concerns over natural resources on one hand,[70] and the need for international oil companies' capital and knowledge for developing oil and natural gas fields on the other.[71] Under TSCs, the IOCs bring new technology and industry expertise, and make upfront capital investment that is necessary to develop the oil fields and increase production. But IOCs do not acquire ownership of Iraqi oil and gas resources. Instead, the government reimburses IOCs for the cost of oil production (including investment expenses) plus a fixed fee per-barrel (around USD 1-6 depending on the contract)[72] as a remuneration fee for each new barrel of oil produced by them.[73]

Under the TSC, the parties are required to establish, shortly after the effective date, a Joint Management Committee for the purpose of general supervision and control of petroleum operations.[74] The IOC and the state-owned oil company as a government partner are represented equally in this committee.[75] The Joint Management Committee has a wide range

[69] Anaz, above n 10, 225.
[70] Ghandi and Lin, above n 67.
[71] In addition to the need to IOCs capital, the participation of the IOCs allows the host government to benefit from their knowledge. The knowledge is sometimes more than just the technology. It also includes project management in terms of how the capital is invested. This is because IOCs have a better advantage on the process and structural system of managing large-scale investment (business management and industry experts), Ibid.
[72] This amount is differs among the various oilfields. For instance, BP receives USD 2.00 per barrel of oil produced from Rumaila field; ExxxonMobil receives USD 1.90 per barrel of oil produced from West Qurna-1, see Anaz, above n 10, 225.
[73] Technical Service Contract model, art 23(3); this is so because most Iraqi oil fields were producing before the IOCs awarded the contract to develop them.
[74] Technical Services Contract model, above n 65, art 13(1); Appendix 2.
[75] For example, under TSC for Rumaila field, the JMC consists of ten members, five of them including the chairman are representing the state-owned oil company, and the other five members including the deputy chairman and the secretary are representing the IOC(s).

of duties and authorities related to petroleum operations.[76] It also has a power to control technical, financial, and legal performance. One of the functions of this committee is to approve training programs for developing Iraqi personnel and Iraqi employees' plans as required by the terms of the contract, and supervising the implementation of approved programs.[77] That is, the Joint Management Committee has an exclusive power to plan, carry out training and local content programs and supervise the implementation of such programs.

The participation of the state-owned company in the Joint Management Committee creates an opportunity for the government to steer the joint committee towards providing benefits other than just participating in technical and financial decision-making. This may include monitoring environmental and labour protection programs implemented by the IOC, as well as proposing and monitoring training plans and employment of Iraqis.[78] More specifically, the state-owned company can propose sustainable development projects for local communities to be implemented by the IOC as part of its CSR program. Given that the state-owned company has, in theory, equal rights in decision-making, projects cannot be implemented without approval of both sides. Therefore, state-owned company can influence the selection of projects that are relevant to the needs of communities local to the oil or gas field. This advantage, if managed properly, can help to avoid implementing low-benefit projects or projects that are not related to the needs of host communities. This will be discussed further in chapter six at 6.3.4 in the discussion of the national oil company's role in enhancing CSR programs of IOCs and at 6.4 in discussing the monitoring of these programs.

Despite these opportunities to provide significant benefits to the Iraqi community, Chapter six demonstrates that overall these avenues for promotion of CSR have not been successful

[76] Technical Services Contract model, above n 65, art 13(1); Appendix 2
[77] Ibid.
[78] The standard TSC includes provision for training and local content, see discussion in chapter 6 at 6.3.

despite the participation of the state-owned company. Chapter six provides detailed discussion of the reasons for this.

2.6 Iraqi Oil Companies

This section gives a brief description of petroleum companies in Iraq. It starts by discussing the types of companies in Iraq. Then it will explain the role of state-owned oil companies in the oil industry followed by a discussion of a possible future role for the proposed National Oil Company.

2.6.1 Types of Companies in Iraq

There are three categories of companies in Iraq: state-owned, mixed-sector and private-sector companies. The state-owned companies are wholly (100 per cent) owned by the state.[79] These companies are regulated by a special law, the *State Company Law* No 22 of 1997 rather than the general company law. All national oil companies in Iraq are state-owned companies see discussion below and in chapter three at 3.5. The other two categories, private-sector companies and mixed-sector companies are regulated by the general company law, the *Company Law* No 21 of 1997. A private-sector company is a company formed by an agreement between two or more persons (or companies) with 100 per cent private capital or a company that the state owns a share of its capital but less than 25 per cent.[80]

A company is a mixed-sector company where the state participates in a company jointly with the private sector. A mixed-sector company is a company formed by an agreement between one or more persons from the state sector (ie state-owned company) and one or more persons from outside the state sector. It may also be formed by two or more persons from the mixed-

[79] A state-owned company is defined as 'the economic unit which is self-financed, fully owned by the state, enjoying a corporate status, independent financially and administratively and functioning on economic bases.' See, *State Company Law* No 22 of 1997, art 1.
[80] *Company Law*, No 21 of 1997, art 8.

sector.[81] The share of the state in the capital of a mixed company should initially be 25 per cent or more. If the share of the state falls below 25 per cent, then the company should be treated as a private-sector company.[82]

The state is represented on the board of the mixed-sector company.[83] In addition, the accounts of the mixed company are subject to control and audit by a state audit agency (official auditor) similar to state-owned companies,[84] whilst the accounts of a company from the private-sector are subject to control and audit by auditors appointed by the company's general assembly (private auditor).[85] The governance structure in companies from the private sector and state-owned companies is discussed in the next chapter at 3.4 and 3.5.

2.6.2 State-owned Oil Companies

The Federal Government through the Ministry of Oil manages the oil and gas sector in Iraq and is responsible for setting policies, regulation, exploration, production, marketing and information disclosure.[86] Most national companies operating in the oil and gas sector are entirely (100 per cent) owned and managed by the Ministry of Oil, except for a few refining companies.[87] The national oil companies are referred to generically in the thesis as state-owned oil companies. Given that Iraq is estimated to have almost 10 per cent of the world's

[81] Ibid, art 7.
[82] Ibid.
[83] The board of directors in the mixed-sector company is limited to seven members. Two of them are representing the state sector See, *Company Law*, art 103(1).
[84] The auditing agency in Iraq is the Federal Board of Supreme Audit.
[85] *Company Law*, art 133(1).
[86] The Ministry of Oil has an exclusive right to publish data about monthly production and exports, and generated revenues. The majority of directors in a state-owned oil company are nominated by the Minister of Oil and they are all public officers. Moreover, some of the board's key decisions cannot be implemented until they approved by the Minister of Oil. See the discussion on the corporate governance of state-owned oil companies in the next chapter at 3.5. See also, Muhammed Mazeel, 'Restructuring and Reorganization of the Iraqi Oil Ministry and State-owned Oil Companies for Maximum Economic Growth and National Development' (2012) 6(2) *International Journal of Contemporary Iraqi Studies* 133, 162.
[87] As mentioned above (see 2.4), the *Law of Private Investment in Crude Oil Refining* of 2007 allows foreign companies and Iraqi companies other than state-owned to participate in the activity of crude oil refining.

proven oil reserves,[88] state-owned oil companies can play an important role not only in the local economy but in the international oil market as well.[89] In oil producing countries, state-owned companies are commonly used to manage national natural resources, and therefore have an essential role in many economies. With such value and economic capacity, the governance of state-owned oil companies is important not only to the economy but also, as will be indicated in chapter three, as a potential vehicle for the delivery of CSR. Table 2.1 below lists these state-owned petroleum companies. It is divided into five categories: exploration and drilling, extraction, refining, transport and marketing, and gas companies.

Table 2.1: Iraqi State-Owned Petroleum Companies

Exploration & Drilling	Extraction	Refining	Marketing & Transport	Gas Companies
Oil Exploration Company	North Oil Company	North Refineries Company	Oil Pipelines Company	North Gas Company
Iraqi Drilling Company	Basra Oil Company*	South Refineries Company	Iraqi Oil Tankers Company	South Gas Company
Heavy Engineering Equipment State Company	Midland Oil Company	Midland Refineries Company	State Organization for Marketing of Oil (SOMO)	Gas Filling Company
State Company for Oil Projects	Missan Oil Company		Oil Products Distribution Company	
	Dhi Qar Oil Company			

* Basra Oil Company was known as South Oil Company

Source: Author based on data from the Ministry of Oil[90]

2.6.3 Iraqi National Oil Company

Initially, the Iraqi National Oil Company was to be established under the Draft *Oil and Gas Law* proposed in 2007. But as noted above (see 2.5.2) the 2007 Bill never passed.[91] In 2018,

[88] World Bank, *Iraq Systematic Country Diagnostic*, above n 1, 13; see also, Iraqi Extractive Industries Transparency Initiative, *6th Report of the Iraqi Extractive Industries Transparency Initiative 2014* (April 2016) 16 <https://eiti.org/sites/default/files/documents/iraq-eiti-report-2014.pdf>.
[89] International Energy Agency, above n 2, 119.
[90] Ministry of Oil, *Ministry Establishments* (Accessed 20 August 2018) <https://oil.gov.iq/index.php?name=Pages&op=page&pid=95>.

the Parliament enacted a specific law to establish the Iraqi National Oil Company with the aim of ensuring the most efficient exploitation of oil and gas resources.[92] The functions of the National Oil Company are to oversight and manage oil and gas exploration, rehabilitation and development of oil fields, as well as production and marketing[93] based on the State oil policy.[94]

If the National Oil Company is established, it will be owned by the government and linked to, overseen and monitored by the Council of Ministers (ie the Cabinet, explained above at 2.3).[95] The National Oil Company will acquire, without any payment, nine of the state-owned oil companies listed in the Table 2.1 above,[96] and therefore all rights and obligations of these nine companies will come under the jurisdiction of the Ministry of Oil and are to be transferred to the National Oil Company.[97] Given that some of those nine companies are bound by oil contracts with IOCs based on the licensing rounds, all rights and obligations related to these contracts are also to be transferred from the state-owned oil companies under the Ministry of Oil to the National Oil Company.[98]

However, the process of transferring those nine companies to the National Oil Company has not commenced because the National Oil Company has not yet been officially established. The process has stalled because of serious legal and economic concerns and the appeal to the Federal Supreme Court claiming that the law is unconstitutional. In January 2019, the Federal Supreme Court decided that ten articles and sub-articles of the *Iraqi National Oil Company*

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[91] The legislative package proposed in 2007 also included legislation addressing revenue sharing and reorganisation of the Iraqi Ministry of Oil. See, Sakmar above n 56.
[92] *Iraqi National Oil Company Law*, No 4 of 2018.
[93] Ibid, art 3.
[94] Ibid, art 11.
[95] Ibid, art 2.
[96] These nine state-owned oil companies are Iraqi Oil Exploration Company, Iraqi Drilling Company, Basra Oil Company, North Oil Company, Meesan Oil Company, Central Oil Company, Dhi Qar Oil Company, State Organization for Marketing of Oil, Iraqi Oil Tankers Company. The National Oil Company also can establish branches in the oil producing provinces if necessary. Ibid, art 8(2).
[97] Ibid, art 8(5).
[98] Ibid.

Law 2018 were unconstitutional.[99] Consequently, the Iraqi National Oil Company cannot be established until the *Iraqi National Oil Company Law* is amended to avoid the constitutional difficulties. In light of this, the thesis will continue to refer to state-owned oil companies controlled by the Ministry of Oil.

2.7 Potential Role of Corporate Social Responsibility in the Oil Industry

The preliminary inquiry is why oil companies operating in Iraq should engage in corporate social responsibility. To answer this question, this section discusses multiple rationales for the implementation of CSR in the oil and gas industry. Understanding these reasons contributes to developing an appropriate strategy to implement CSR in this industry. By examining the issue from the Iraqi perspective, the following discussion refers to the long-term negative impacts of oil operations, the significance of oil for the Iraqi economy and profitability of IOCs. The following chapter provides an exposition on the nature of CSR and the theories that underpin that concept.

2.7.1 Long-term Negative Impacts

An important rationale for CSR is the protection of the environment and other stakeholders including traditional communities from the negative impacts of oil and gas activities. Corporate social responsibility is a means of making companies responsible for the negative effects of their operations and preventing negative externalities, see 4.3.1. Typically, oil and

[99] The Court decided that Article 8 of the *Iraqi National Oil Company Law* 2018 that regulates the duties of the Board of Directors is unconstitutional. This is because the majority of these duties are part of the authorities of the Federal Government, the Government of the Region and the Government oil producing provinces together according to Articles 78, 80 and 112 of the *Constitution* and thus, they cannot be part of the duties of the Board of Directors. Articles 3 and 11 of the law are also unconstitutional for the same reason. The Court also decided that Article 4(3)(5) and Article 7(2) (transfers the ownership of the State Organization for Marketing of Oil from the Ministry of Oil to the National Oil Company) of the law are unconstitutional. This is because marketing oil is an exclusive authority of the Ministry of Oil according to Articles 110 and 112 of the *Constitution*. Federal Supreme Court, case No 66 unified with 71, 157 and 224/Federal/media/2018 (23/1/2019) (constitutional appeal).

gas activities create a wide range of negative impacts on the environment and communities during each phase of operation (exploration, production, refining, transportations, etc) as discussed at 4.3.2. In Iraq, oil and gas infrastructure (including oil fields, refineries, gas production plants, pipelines, pumping stations and tanker terminals) are spread across the country and through areas with high biological diversity, high population and areas of cultural heritage, see Figure 2.2 below. The Iraqi Ministry of Health and Environment reported that there were many oil pollution incidents in the Basrah province.[100] These incidents included oil leakages from transport pipes and gas isolation plants, and the dumping of hazardous waste.[101] A study measuring air pollution in the Basrah province showed that the pollutants in different areas surrounding oil fields are over the acceptable international levels.[102] This air pollution is principally caused by gas flaring and burning.[103] The local environmental problems of gas flaring may include, but are not limited to, greenhouse gases emissions, black carbon deposition, and possibly acid rain which may render the land unproductive.[104] Many Iraqi giant oil fields are located on or close to the southern marshlands which are places of international cultural heritage. The negative impacts of oil operations on the southern marshlands are discussed at 4.3.2. Given that Iraq does not have an up-to-date technology to effectively deal with oil spills, any oil pollution, even small amounts, may cause serious harm.

[100] 12 of Iraqi currently productive oil fields are located in the Basrah province.
[101] Man Ali, 'An Economic Analysis of the Oil Environmental Pollution, with Special Reference to Basra Governorate' (Arabic version) (2015) 31(25) *Gulf Economist* 179, 213 [author's trans].
[102] Kadhim Al-Aasadi, Ali Alwaeli, and Hussein Kazem, 'Assessment of Air Pollution Caused by Oil Investments in Basra Province-Iraq' (2015) 4(1) *Journal of Novel Applied Sciences* 82, 86.
[103] Iraq has been reported as the second-largest source country of flared gas in the world behind Russia in 2017, See National Oceanic and Atmospheric Administration, National Centers for Environmental Information <https://www.ngdc.noaa.gov/eog/viirs/download_global_flare.html>.
[104] Many possible reasons might lead to associated gas flares including legal reasons such as lack of gas regulatory framework, limited gas institutions and facilities; economic reasons such as lower gas price compared to the oil price and non-attractive gas quantities; safety reasons; and finally lack of government and public awareness.

Figure 2.2: Major Oil and Gas Infrastructure in Iraq

Source: International Energy Agency, *Iraq Energy Outlook* (2012)

Significantly, the environmental governance framework and law enforcement in Iraq are still relatively weak, especially in relation to environmental protection. This makes a strong case for CSR which would require oil companies to protect the community against environmental risks arising out of their activities, and to undertake suitable measures to mitigate adverse negative consequences. How this would operate in Iraq is discussed in chapter six at 6.3.1.

2.7.2 The Role of Oil and Gas in the Iraqi Economy

The second rationale for implementing CSR in the oil industry is based on the fact that oil and gas resources are crucial to the country's present and future prosperity; other industries, occupations and services depend on the success and profitability of the oil industry. As explained above (see 2.2.1), oil exports account for 99 per cent of total Iraqi exports, and

more than 90 per cent of central government revenue.[105] The effective management of these natural resources can make a significant contribution to the development of the economy and maximise the general public good. A CSR policy can be used as a strategy in the management of those resources and to develop other related and non-related sectors through local content and building the capacity of individuals and communities through training and education. The following discussion illustrates and supports this argument.

The Iraqi Government should exploit the significant economic advantages of massive oil and gas reserves, and the many willing bidders not only to increase revenues but also to achieve long-term growth and social benefits. These oil and gas reserves give Iraq an important place in the global oil supply[106] and represent a significant contribution to the stability of global oil markets.[107] As noted earlier, the Iraqi petroleum industry is very attractive for international oil companies because of reduced oil production costs, see 2.2.1. In practice, for instance, there are many IOCs investing in the Iraqi petroleum industry in 2018 (see the discussion at 2.5.3 and Appendix 1). The number of IOCs is expected to increase because of new oil and gas discoveries, new pipeline projects and the potential for privatisation in the future. In contrast, non-oil investment remains subdued due to an unstable security and political situation, and a poor business environment.[108] The point here is that, despite security problems and other technical and legal difficulties, there is an intense competition between IOCs to invest in the Iraqi petroleum sector[109] whereas, sectors other than petroleum are less

[105] World Bank, *Iraq Systematic Country Diagnostic*, above n 1, 13.
[106] Iraq has approximately 10 per cent of the world's proven oil reserves, ibid; see also, Iraqi Extractive Industries Transparency Initiative, above n 88, 16.
[107] International Energy Agency, above n 2, 119.
[108] For example, in 2018 Doing Business Indicators publicised by the World Bank Group, measures business regulations and ranked Iraq at 168 on the ease of doing business out of 190 countries. Despite that Iraq has implemented in 2016 and 2017 substantive changes in the local regulatory framework in two main areas: starting a business and getting credit and more than 2,900 regulatory reforms making it easier to do business since 2004. See, World Bank Group, *Doing Business Report 2018 Reforming to Create Jobs: Economy Profile Iraq* (2018) 4, 65 <http://www.doingbusiness.org/~/media/wbg/doingbusiness/documents/profiles/country/irq.pdf>.
[109] For example, there were 16 IOCs participating in the conference hold by the Ministry of Oil in March 2018 to announce for the fifth bidding round to develop and rehabilitate 11 exploration zones on the borderline

attractive for foreign investment. Therefore, Iraq must take advantage of this opportunity by implementing CSR policy targeting the long-term growth not only in the oil industry but also in other sectors such as mining, cement, bricks, drilling, transport and so on.

From the Iraqi point of view, promoting local content in the oil industry through CSR mechanisms would contribute to the development and revitalisation of other related and non-related industries. It would assist in developing and activating the Iraqi private sector (see the discussion and recommendations in chapter six at 6.3.3). To explain, the Iraqi economy for a long period was centralised and dominated by state-owned companies particularly for essential public utilities. Centralised economic policy, international economic sanctions (1991–2003) and a series of wars[110] have undermined the domestic industry so that it is inactive and uncompetitive. The Iraqi economy is in process of transitioning from a centralized economy to an open market, but it is still dominated by state-owned companies.

Cooperation between international oil companies and local businesses to supply goods and services may speed up the transition phase from a centrally-driven economy to a market economy. Local content requirements in the oil industry could extend to, supplying equipment, materials and pipelines, as well as providing services. This will enable local industries an opportunity for more investment, increasing capital, and the acquisition of industry experience, enhance reputation and becoming more competitive. Local services requirements could include services such as legal and accounting services, supplying food, transport and delivery. This could also create jobs and contribute to the Iraqi economy and

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between Iraq, Iran and Kuwait. See, Ministry of Oil, *The Ministry of Oil Declares for 11 Exploration Blocks to be Developed & Rehabilitated* (1 April 2018)
<https://oil.gov.iq/index.php?name=News&file=article&sid=1055>.

[110] Iraq has had a significant security problem following the first Gulf War in1980-88, the second Gulf War in 1991, the fall of the old regime in 2003 and the fight with ISIS in 2014-2017.

assist in reducing unemployment and poverty. Given that, according to latest available figures, unemployment is 15 per cent with higher levels for youth.[111]

The inclusion of training and education requirements whether for employees or the local community can assist in participation in the labour market and the development of industrial and other sectors. CSR may be seen as a mechanism for developing local content requirements on the oil industry as a means of stimulating economic development. Discussion in 6.3.3 will explain how Iraq could achieve this.

Furthermore, an active private sector could contribute to the diversification of imports and reduce reliance on oil revenues to finance the federal budget in the changing energy environment. As noted above (see 2.2.1) nearly 90 per cent of the central government revenue comes from the oil sector.[112] Any decrease in oil revenue (eg, due to drop in the oil price or decrease in production rate) will have deep negative effects on the government revenue and the overall economy. This occurred during the financial crisis in Iraq in 2014 when the oil price fell.[113]

A further consideration is that, Iraq's share in the oil market is governed by the regional agreement of the Organization of the Petroleum Exporting Countries (OPEC). As a result of the 2016 Ministerial Conference of OPEC countries' decision to reduce oil production by January 2017,[114] Iraq's share of oil production has been reduced by 210 thousand barrels per day (equalling around 4 per cent of Iraq's production share in 2016).[115] Private sector

[111] World Bank, *Iraq Economic Monitor from War to Reconstruction and Economic Recovery*, above n 6, 10.
[112] Ibid, 5; see also, *Federal Budget Law of the Republic of Iraq for the Fiscal Year 2018* (Arabic version), No 9 2018, art 1 [author's trans].
[113] Oil price is usually governed by supply and demand rules, but sometimes it may influence by the alteration in the political and security situation in the Middle East region and in the global in general.
[114] The 171st Meeting of the Conference of OPEC was held in Vienna, Austria, in the 30th November 2016. The Conference agreed to reduce total oil production by 1.2 million barrels/day from 1 January 2017 in order to bring the oil market rebalancing. See, Organization of the Petroleum Exporting Countries, *OPEC Bulletin* (11 December 2016) 5 <http://www.opec.org/opec_web/static_files_project/media/downloads/publications/OB11_12%202016.pdf>.
[115] Ibid, 35.

earnings have not replaced the consequent reduction in oil revenue. This is largely attributed to the private sector's lack of experience and technical and financial capacity. This supports the argument that imposing local content requirements on IOCs can assist the development of sectors other than oil (like mining, drilling, construction, cement, bricks, transport etc) and therefore, reduce reliance on oil revenues and enhance the overall economic growth. Local content requirements under current oil contracts are discussed further in chapter six at 6.3.3.

IOCs might be called upon to fund some basic infrastructure or development projects which will allow important services projects such as schools, hospitals, electricity or water, at least for local communities in the areas where IOCs operate.[116] Providing development projects for local communities will further discussed as part of CSR framework at 6.3.4.

2.7.3 International Oil Companies Profitability

Another reason to implement CSR in the oil industry is that IOCs have made large profits but are not bearing the financial risk of reduced oil prices.[117] Investment in the oil and gas industry is one of the most profitable economic activities and profitability of IOCs is expected to increase due to growing oil production. Under the Iraqi Technical Services Contracts (TSCs),[118] the government reimburses IOCs for the cost of oil production (including investment expenses) plus a fixed fee per-barrel (USD1-6 depending on

[116] See 4.5 (CSR and Community Welfare) and 5.5.2 (development projects in Nigeria). Funding some development projects might allow the government to reduce borrowings to fund necessary infrastructure projects. For example, The World Bank approved, in January 2018, a USD 210 million loan for Iraq to finance the Baghdad Water Supply and Sewerage Improvement Project. The development objective of this project is to improve the quality of drinking water supply and wastewater services in Baghdad. See, International Banks for Reconstruction and Development, 'Baghdad Water Supply and Sewerage Improvement Project' (Report No PAD2405, 9 January 2018)
<http://documents.worldbank.org/curated/en/869811517626846051/pdf/BAGHDAD-NEWPAD-01112018.pdf>.

[117] For example, Lukoil (Russian oil company) declared in its financial statements for the year of 2017 that net profit of West Qurna-2 oil field (one of the giant oil fields in Iraq) has increased by 17.8 per cent. See John Lee, *Lukoil reports Less Compensation Oil from West Qurna-2* (23 March 2018) Iraq-businessnews <http://www.iraq-businessnews.com/2018/03/23/lukoil-reports-less-compensation-oil-from-west-qurna-2/>.

[118] Full details about TSCs in Iraq are given at 2.5.3; extracts from a TSC model are in Appendix 2.

contracts)[119] as a remuneration fee for each barrel produced above a threshold level.[120] The terms of the contract mean that IOCs do not lose out if oil prices fall but will not receive any increase in payments if the oil price improves. Guaranteed fixed payment and quick cost recovery provide a stable profit margin for IOCs no matter how high or low the oil price is. At the time the contracts were originally negotiated, TSCs were lucrative for the government because oil prices were widely expected to average over USD100/barrel and the USD 2.00 fee per barrel, for example, appeared to be reasonable.[121] However, the fees became a burden on the government with falling oil prices in 2014 as revenues from oil exports sharply decreased[122] with cost and profit levels of IOCs remaining unchanged.[123] Iraq is seriously disadvantaged under these types of contracts.[124] In such circumstances, when contract renegotiation is not possible (subject to what is said below), it makes sense for Iraq to rebalance the books by other measures.

From Iraq's perspective, IOCs should share the risks of oil price fluctuations to restore the economic balance between the parties. However, Iraq's experience with IOCs indicates that these companies are reluctant to take any measures that may reduce their profits. Although IOCs agreed to renegotiate the contracts to allow adjustment for fluctuating oil prices,[125] IOCs saw this as an opportunity to gain additional benefits rather sharing the risks of lowered oil prices. This is illustrated by Iraq's request in 2014 (in response to the oil crisis) for review

[119] The fixed fee per-barrel differs among the various oilfields. For instance, BP receives USD2.00 per barrel of oil produced from Rumaila field; ExxonMobil receives USD1.90 per barrel of oil produced from West Qurna-1. See, Anaz, above n 10, 225.
[120] Ibid, 224.
[121] Ibid, 225.
[122] In the fourth quarter of 2014 Iraq was facing an economic crisis due to the slump in crude prices below USD60 a barrel from USD115 in June 2014. At the same time, IOCs were demanding payment in full without delay.
[123] The Economist Intelligence Unit, 'Iraq Looks to Renegotiate Oil Contracts' *The Economist* (18 March 2015) <http://www.eiu.com/industry/article/442989028/iraq-looks-to-renegotiate-oil-contracts/2015-03-18>.
[124] Ibid, *The Economist* has reported that Iraq owes the IOCs around USD 9 billion for 2014 only.
[125] Since oil contracts are binding agreements between the two parties, the Iraqi government cannot unilaterally change its terms.

of contracts with international operating companies[126] specifically those developing the major southern oil fields including Britain's BP, Russia's Lukoil, US's ExxonMobil, Italy's Eni, Royal Dutch Shell, and PetroChina.[127] Iraq first proposed to link the remuneration fee to oil prices rather than the current method of flat per barrel fees, but the companies refused this proposal.[128] The only choice left for Iraq is cutting oil production to reduce production costs which has a negative impact on the state revenues. This occurred in the case of BP and PetroChina who agreed, under a revised contract signed in September 2014, to cut the planned output target for Rumaila oil field from 2.85 million barrels per day to 2.1 million barrels per day. But in return, the stakes of both companies in the investment to develop the field were increased and the contract term was extended. The contract was extended by five years to run to 2034 and their stakes[129] increased (by 9.5 per cent for each) to 47.5 per cent for BP and 46.5 per cent for PetroChina; the government's share was reduced from 25 per cent to 6 per cent.[130] Similarly, PetroChina, Malaysia's Petronas and FrenchTotal[131] agreed to reduce the final production target for the Halfaya oil field from 535 to 400 thousand barrels per day, but in return, their operations in this oil field were extended from 20 years to 30 years.[132] Later in 2015, the Ministry of Oil requested IOCs to reduce development plans and lower oil fields' development budgets to reduce the burden of payments for oil development

[126] There is an argument for including renegotiation clauses and trigger events in the Iraqi petroleum contracts to make the processes of requesting and reviewing those contracts easier, which in return will participate in the progress of restoring the economic balance between both sides (the Iraqi government and the IOC). Renegotiation clauses in the investment contracts are often used for unforeseen and unpredictable events (such as the sharp drop in oil price in 2014), and their objectives are restoring economic balance.

[127] Reuters, 'BP, CNPC raise shares in Iraq's Rumaila oilfield -Iraqi official', *Reuters* (7 September 2014) <https://uk.reuters.com/article/iraq-oil-rumaila/bp-cnpc-raise-shares-in-iraqs-rumaila-oilfield-iraqi-official-idUKL5N0R80AZ20140907>.

[128] International Monetary Fund, *Iraq Selected Issues* (Country Report No 15/236, August 2015) 10 <https://www.imf.org/external/pubs/ft/scr/2015/cr15236.pdf>.

[129] Under the original contract signed in 2009, BP held a 38 percent stake in the Rumaila venture, PetroChina held a 37 percent share, while Iraq's State Oil Marketing Organisation (SOMO) controlled the rest.

[130] Anthony McAuley, *BP's Long Game in Iraq is Paying Off* (21 December2014) The National <https://www.thenational.ae/business/bp-s-long-game-in-iraq-is-paying-off-1.329910>.

[131] Under the terms of their contract, signed in 2010, PetroChina has a 37.5 percent stake in Halfaya oilfield, with 18.75 percent held by Petronas and another 18.75 by Total and 25 percent held by Missan Oil Company (an Iraqi state-owned company).

[132] Iraq-businessnews, *Oil and Gas Fields: Halfaya* <http://www.iraq-businessnews.com/list-of-oil-and-gas-fields-in-iraq/oil-and-gas-fields-halfaya/>.

(decreasing the cost by cutting of the investment expenses for construction, equipment and other enhancement).[133] Those examples demonstrate the difficulties that Iraq has encountered in dealing with IOCs and ensuring a fair distribution of the wealth and profits from Iraqi oil. This also indicates that IOCs are not sharing the risks of oil price fluctuations; instead they appear to obtain extra economic benefits. Thus, Iraq has to find a mechanism by new bidding rules for oil contracts to share with IOCs the risks of oil price fluctuations to avoid paying a high fixed amount where the price of oil has fallen.

IOCs, in addition, obtain preferential tax treatment. According to the technical service contract model, the sole tax liability of an IOC is the corporate income tax at a rate not to exceed 35 per cent levied on the remuneration fee (see above).[134] In the event that the IOC is subject to any further tax (other than corporate income tax as stated in the contract), the government partner (a state-owned company) should bear such additional tax.[135] The subsidiaries, branches or subcontractors of these companies operating in Iraq in the field of oil and gas extraction and production and the relevant industries are subject to same provisions.[136] Concurrently, IOCs and their foreign subcontractors are enjoying preferential

[133] For instance, the Ministry of Oil request to IOCs to postpone new projects and delay already committed projects as long as no additional costs were incurred. Ahmed Rasheed, 'Exclusive: Oil companies offer to cut 2015 spending in Iraq' *Reuters* (13 March 2015) <https://www.reuters.com/article/us-iraq-oil-contracts/exclusive-oil-companies-offer-to-cut-2015-spending-in-iraq-idUSKBN0M820X20150312>.

[134] Technical Service Contract model, art 23(3), see Appendix 2.

[135] Ibid, art 23(4). For additional information regarding tax in the Iraqi oil industry see eg EY, *Worldwide Corporate Tax Guide* (2018) 697-701 <https://www.ey.com/Publication/vwLUAssets/EY-2018-worldwide-corporate-tax-guide/$FILE/EY-2018-worldwide-corporate-tax-guide.pdf>; EY, *Global Oil and Gas Tax Guide* (2018) 285-296 <file://ad.uws.edu.au/dfshare/HomesPTA$/90928758/My%20Documents/Chapter%204/Ey-global-oil-and-gas-tax-guide.pdf>; see also, Deloitte, *Oil and Gas Taxation in Iraq* (2015) <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-iraq-oil-gas.pdf>.

[136] *The Law of Income Taxation on Foreign Oil Companies Working in Iraq*, No 19 of 2010, art 1, <http://www.moo.oil.gov.iq/Legal-Dir-websitee/Legal-Dir-website/PDF/LAW_NO_19_2010_EN.pdf>; *Facilitate Implementation of The Law of Income Taxation on Foreign Oil Companies Working in Iraq* (Instruction) No 5 of 2011.

treatment at the expense of the Iraqi subcontractors. For instance, IOCs and their foreign subcontractors are exempt from fees, whereas the Iraqi subcontractors are not.[137]

As noted above, Iraq has found it difficult to achieve fair terms in oil contracts, and CSR could be seen as one mechanism to achieve a more equitable outcome for Iraq. But the issue is whether this is the appropriate strategy having regard to 2017 proposals to review oil contracts and amend their terms. The Parliament in the budget law for the fiscal year 2017[138] committed the Federal Government and the Ministry of Oil to reviewing oil contracts and amending their terms to preserve Iraq's economic interests.[139] This may include an agreement to increase oil production, reduce production costs and finding a mechanism for cost recovery that responds to changes in the price of oil.[140] The Parliament has reimposed this commitment on the government in the federal budget law for the year 2018,[141] but this time the Parliament has also required all monitoring bodies to submit a report to the House of Representatives on the procedures for implementing this obligation during 2018.[142] This suggests that the Parliament believes that current oil contracts are unfair for the Iraqi economy. If this unfairness results from the Iraqi government being unable to get fair terms in negotiating contracts, is it efficient to use CSR as a strategy to overcome this unfairness. If the Iraqi government cannot renegotiate fair terms, how can it persuade IOCs to adopt voluntary CSR? Its inability to pass the oil and gas law (see 2.5.2), suggests that legislative attempts to impose new obligations under new contracts or introducing legislation imposing CSR may have little prospect of success. This issue is taken up again in chapter 6 at 6.2.

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[137] *Law of Exempting Foreign Companies and Foreign Subcontractors Contracted in Licensing Rounds from Fees* (Arabic Version) No 46 of 2017 [author's trans].
[138] The fiscal year of the Iraqi government commences 1 January of each calendar year.
[139] *Federal Budget Law of the Republic of Iraq for the Fiscal Year 2017* (Arabic version), No 44, art 48(1) [author's trans].
[140] Ibid.
[141] *Federal Budget Law of the Republic of Iraq for the Fiscal Year 2018*, above n 112, art 2(2)(21).
[142] The *Federal Budget Law of the Republic of Iraq for the Fiscal Year 2018* did not specify exactly which of the monitoring bodies are intended.

2.8 Conclusion

This chapter provides a contextual framework for the operation of CSR in the oil industry in Iraq. The oil and gas industry are central to the Iraqi economy. If proposals for the implementation of CSR in Iraq target IOCs this must be undertaken in the context of the existing regulatory framework, constitutional limitations and current legal arrangements relating to oil production contracts, TSCs. It must also take into account that the Iraqi government (through its state-owned corporations) operates not just as the regulator but as a joint venture in oil contracts. Later discussion will examine whether CSR should continue to operate as a voluntary mechanism by which corporations contribute to community welfare and the public good. The alternative, discussed in chapter five, is for Iraq to consider whether some form of mandatory regime such as exists in India, Nigeria and Tanzania might be a better approach (see 5.5). The chapter following examines the nature of CSR and its purposes and the tensions between shareholder primacy, the protection of stakeholder interests and community welfare.

CHAPTER THREE

CORPORATE GOVERNANCE AND CORPORATE SOCIAL RESPONSIBILITY

3.1 Introduction

The framework of corporate governance specifies the distribution of rights and responsibilities of the company's shareholders, directors and managers, and the establishment of transparent processes for the accountability for the exercise of these powers and responsibilities. It also encourages the efficient use of resources and requires accountability for the stewardship of those resources. As noted in chapter one, corporate social responsibility (CSR) is defined in this thesis as involving voluntary activities by a corporation for the benefit of stakeholders, the environment and the community over and above legal requirements. Corporate social responsibility is concerned with balancing economic and social goals and requires directors to consider the impact of their decisions on stakeholders, community and the environment.

This chapter explains the relationship between corporate governance and corporate social responsibility. Given that Iraq has a large amount of oil reserves, state-owned and international oil companies managing these resources have an essential role not only in the local economy but in the international oil market as well. With such value and economic capacity, the governance of state-owned oil companies and IOCs is important not only to the economy but also as a potential vehicle for the delivery of CSR. The purpose of this chapter is to examine whether the contemporary corporate governance framework and its implementation in Iraq can assist in promoting corporate social responsibility. It begins by

outlining the overlap between corporate governance and CSR and then different corporate governance models dealing with corporate social responsibility. It discusses the evolution and elaboration of shareholder primacy and the push for recognition of stakeholder interests through enhanced shareholder value, enhanced shareholder welfare and the most recent US Bill, *Responsible Capitalism*. The chapter then looks more closely at who are stakeholders for these purposes. The chapter then gives a brief overview of corporate governance with observations concerning corporate governance in Iraq and governance of state-owned companies. This chapter provides the backdrop for discussion of CSR in the following chapter.

3.2 Corporate Governance and Corporate Social Responsibility

In its narrow, and most usual, sense corporate governance is the system by which companies are directed and controlled,[1] with the focus on the accountability of the company and its Board to the shareholders as owners of the company. In a broader sense, corporate governance involves a set of relationships among various participants including a company's management, its board, its shareholders and other stakeholders.[2] The company's relationships with stakeholders such as employees, suppliers, customers, and society as a whole have become important in the governance of corporations. Further discussion of who are stakeholders, and stakeholder theory, is set out below at 3.3.2.

Advocates of CSR argue that corporate governance is no longer merely about maximising shareholder value but requires the corporation to take into account interests of stakeholders and the community. As will be seen in the chapter following, one argument is that CSR is concerned with addressing negative externalities, that is, those costs engendered by company

[1] Sir Adrian Cadbury, 'The Corporate Governance Agenda' (2000) 8(1) *Journal of Corporate Governance* 7, 15.
[2] Organization for Economic Co-operation and Development, *G20/OECD Principles of Corporate Governance* (2015) 9; see also, Mia Rahim, *Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy* (Springer, 2014) 21.

operations for which the public, but not the corporation, pays (see 4.3). The following chapter will also examine the argument that CSR is not limited to negative externalities but extends also to maximising the creation of shared value for a wide range of stakeholders including the society at large (see 4.5).[3] The discussion of CSR is integrally bound up with the nature of corporate governance and its purposes. If corporate governance is exclusively concerned with maximizing shareholder value, the shareholder primacy approach, then the Board of Directors can only take into account stakeholder interests or community welfare if this affects long term shareholder value. This necessarily limits the scope of CSR. It may be in the long term interest of the company to take into account the interests of stakeholders and the community.[4] In this context, CSR could be defined as an effective strategy in corporate governance to meet shareholder value maximisation.[5] The next section will discuss modern elaborations of the shareholder primacy theory and stakeholder theory.

3.3 Corporate Governance Models

3.3.1 Shareholders Primacy Approach

The dominating principle in corporation law is 'shareholder primacy', the view that the corporation exists only to make money for its shareholders.[6] According to this view, public corporations exist for one purpose only, to maximise shareholders' wealth as the owners of the company.[7] Accordingly, directors, as agents, have a fiduciary duty to make decisions that

[3] Commission of the European Communities, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM/681/Final (25 October 2011) 6 <http://www.accessibletourism.org/resources/csr_communication_ec_com2011681.pdf>.
[4] Lawrence Mitchell, 'The Board as a Path toward Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 279.
[5] Dima Jamali, Asem Safieddine and Myriam Rabbath, 'Corporate Governance and Corporate Social Responsibility Synergies and Interrelationships' (2008) 16(5) *Corporate Governance* 443, 459.
[6] Julian Velasco, 'Shareholder Ownership and Primacy' (2010) 3 *University of Illinois law Review* 897, 956.
[7] This is so because, according to shareholder value theory, everyone else (ie employees, creditors, suppliers and customers) are simply third parties who contract with the corporation for long-term benefits as much as they do with any sole proprietor. Therefore, they benefit from mutual benefit contracts, and society benefits from the opportunities that corporations create for its citizens. Ibid.

are in the best interests of the shareholders.[8] Proponents of this principle view CSR as inconsistent with shareholder value creation.[9] Milton Friedman argued that the only duty of business is to maximise profits for shareholders.[10] According to this argument, expenditure protecting stakeholder or community interests amount to a violation of directors' fiduciary duties.[11]

Traditional corporate legal governance is modelled on the shareholder theory. However, critics of shareholder primacy argue that public corporations should serve the public interest, not shareholders' alone:

> shareholder value ideology is just that –an ideology, not a legal requirement or a practical necessity of modern business life. United States corporate law does not, and never has, required directors of public corporations to maximize either share price or shareholder wealth. To the contrary, as long as boards do not use their power to enrich themselves, the law gives them a wide range of discretion to run public corporations with other goals in mind, including growing the firm, creating quality products, protecting employees, and serving the public interest. Chasing shareholder value is a managerial choice, not a legal requirement.[12]

It seems now to be accepted that shareholder value may be maximised in the long-term by taking into account the interests of other stakeholders.[13] This has become known as the enlightened shareholder approach which has been incorporated into corporation laws in many

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[8] For a discussion of Shareholder value theory see generally, D. Gordon Smith, 'The Shareholder Primacy Norm' (1998) 23(2) *Journal of Corporation Law* 277, 325; Lynn Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 *Southern California Law Review* 1189, 1210.

[9] Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower, 2012) 19.

[10] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962) 133.

[11] Jose Salazar and Bryan Husted, 'Principals and Agents: Further Thoughts on the Friedmanite Critique of Corporate Social Responsibility' in Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008) 137; Robert Reich, 'The Case Against Corporate Social Responsibility', (Working Paper No GSPP08-003, University of California, 1 August 2008) 54 <https://gspp.berkeley.edu/assets/uploads/research/pdf/ssrn-id1213129.pdf>.

[12] Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler, 2012) 3-4.

[13] Mujih, above n 9, 19.

countries. For example, the UK *Companies Act 2006* and the Indian *Companies Act 2013* require the directors to take into account the interests of other stakeholders for the long-term benefit of the company. In the US there is a demand for more responsible capitalism. Senator Elizabeth Warren proposed on August 2018 a bill for *Accountable Capitalism Act*. The next sections will discuss Enlightened Shareholder Value, Enhanced Shareholder Welfare as modern elaborations of shareholder primacy. This is followed by discussion of the Accountable Capitalism proposal.

A. Enlightened Shareholder Value

Directors are required to promote the long-term success of the company. This may require the company and its board to take into account the concerns and interests of relevant stakeholders including the social and environmental impact of the company's activities.[14] In this context, taking into account stakeholder interests can be seen as a vital investment to enhance companies' efficiency and benefit by increasing corporate profit and stimulate long-term sustainable development.[15]

The UK *Companies Act 2006* adopts 'enlightened shareholder value' model as an alternative to a narrow conception of shareholder primacy to capture this.[16] Enlightened Shareholder Value is a management approach in which the corporations should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits having regard to the

[14] Ibid; see also, Virginia Harper Ho, 'Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36(1) *Journal of Corporation Law* 59, 112.
[15] Marshall Magaro, 'Two Birds, One Stone: Achieving Corporate Social Responsibility Through the Shareholder-Primacy Norm' (2010) 85 *Indiana Law Journal* 1149, 1167.
[16] David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law' in P.M. Vasudev and Susan Watson (eds), *Corporate Governance after the Financial Crisis* (Edward Elgar Publishing, 2012) 68, 69; see also Kent Greenfield, 'The Third Way: Beyond Shareholder or Board Primacy' (2014) 37 *Seattle University Law Review* 749, 773; Roman Tomasic, 'Company Law Modernisation and Corporate Governance in the UK' (2011) 1 *Victoria Law School Journal* 43, 61; Andrew Keay, 'Tackling the Issue of the Corporate Objective: an Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'' (2007) 29(4) *Sydney Law Review* 577, 612.

interests of all who contribute to and are affected by the corporate activity.[17] Enlightened Shareholder Value still recognises the priority of shareholder value, however generating this value is qualified by taking into account the long-term external impacts of this value creation.[18] Under the UK *Companies Act* attention to corporate stakeholders, including employees, the environment and local communities, is seen as critical to generating long-term shareholder wealth.[19] Section 172 (1) of the Act makes it clear that a director's duty is to

> act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,…[20]

The duty is still primarily to promote the success of the company as a whole but taking into account stakeholder and community interests. It does not require directors to engage in community welfare independently of the interests of the corporation. This development in the UK corporation law has led to similar provisions in other jurisdictions.[21] For instance, India has also adopted the Enlightened Shareholder Value model followed in the UK in the context of directors' duties to act in the best interests of stakeholders not just shareholders. Section 166 (2) of the Indian *Companies Act 2013* reads:

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[17] Harper Ho, above n 14.
[18] Millon, above n 16, 70.
[19] Harper Ho, above n 14.
[20] UK *Companies Act 2006* s. 172(1)(a)–(d); Andrew Keay, 'The Duty to Promote the Success of the Company: is it fit for Purpose in a Post-financial Crisis World?' in Joan Loughrey (ed), *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar, 2013) 50, 56.
[21] For example, in Australia s 181 of the *Corporations Act 2001* permits directors to have regard for the interests of stakeholders other than shareholders and the broader community. See Parliamentary Joint Committee on Corporations and Financial Services, *Corporate responsibility: Managing Risk and Creating Value* (June 2006) <https://www.aph.gov.au/binaries/senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/report.pdf>.

> A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.[22]

Section 166(2), however, requires directors to treat non-shareholder interests as an end in itself without necessarily constituting a means of enhancing shareholder value.[23] On the face of it the Indian provision does not give primacy to shareholders' interests in case of conflict, but 'casts a positive duty on directors to cater to the interests of shareholders and other stakeholders in equal measure.'[24] If directors do not fulfil the statutory duties set out in s 166(2) they could be punishable by a fine.[25] This section enables directors to discharge other duties set out in, eg s 135 of the *Companies Act 2013* which mandates certain companies to spend, in every financial year, at least 2 per cent (2%) of their average net profits on socially responsible and development activities allowing directors to consider the interests of non-shareholders, namely corporate social responsibility policy,[26] see extended discussion in chapter five at 5.5.1. But despite the possible breadth of the provision, this cannot mean that a corporation can spend vast amounts on activities which do not promote shareholder value in the long term. The dominating principle set out in the first part of the section, it is argued, is still that the corporation and its directors must act for the benefit of the company and its members as a whole. It does however require the company to consider stakeholder interests. The duty is one of good faith only.

In the US, at the federal level, there is a demand for more accountability for large corporations. A Bill for *Accountable Capitalism Act* has been proposed to the Congress on

[22] Indian *Companies Act 2013*, No 18, s 166(2).
[23] Mihir Naniwadekar and Umakanth Varottil, 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis' in Mahendra Singh (ed), *The Indian Yearbook of Comparative Law 2016* (Oxford University Press, 2017) 95, 97.
[24] Ibid, 107.
[25] Indian *Companies Act* 2013, s 166 (7).
[26] Ibid, s 135 (5).

August 2018. The next section gives a brief explanation of this Bill. The discussion of the *Accountable Capitalism* Bill is not to illustrate how enlightened shareholder value would work but to give an example of the current thinking of forces for change.

B. Accountable Capitalism

In August 2018, Senator Elizabeth Warren proposed to the Congress a Bill called the *Accountable Capitalism Act*. Warren argues that, in the early 1980s, America's large corporations gave less than half of their profits to shareholders and reinvested the rest in the company. But focusing on 'shareholder value maximisation', in more recent times has allowed large American companies to pay 93 per cent of their earnings to shareholders, thereby redirecting trillions of dollars that could have gone to workers or long-term investments. This has led to booming corporations and shareholder profits based on rising worker productivity but at the cost of restraining wages growth.[27] The Warren Bill may help solve this problem and help eliminate skewed market incentives.[28]

The proposed Bill requires large corporations[29] to balance the benefits to shareholders and other stakeholders including employees, customers and the communities in which the company operates.[30] Directors of large corporations have to consider the interests of all major

[27] Elizabeth Warren, 'Companies Shouldn't Be Accountable Only to Shareholders', *Wall Street Journal* (14 August 2018) <https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687>.
[28] Ibid.
[29] The bill is proposed to apply to large corporations with more than USD 1 billion in annual revenue, estimated to be a few thousand companies.
[30] The Bill is derived from the 'Benefit Corporation' model that allows businesses to choose new legal structures to not only focus on profit maximisation but also on social and environmental goals. The Benefit Corporation is a new legal business entity that is obligated to pursue public benefit in addition to the responsibility to return profits to shareholders. Similar to other business corporations, a benefit corporation is a for-profit corporation, but the profit is made through conducting the business in a socially and environmentally responsible manner. More specifically, a benefit corporation is required to generate 'public benefit' when discharging their economic objective regardless of the sector in which they operate, and that should be specified in its certificate of formation. Some legislation defines 'public benefit' as 'a positive effect, or a reduction of a negative effect, on one or more categories of persons, entities, communities, or interests, other than shareholders.' See eg, Texas *Benefit Corporation Legislation* of 2017, § 21.952; Delaware *General Corporation Law* as amended in 2013, § 362. Recently, legislations for Benefit Corporation exist in 34 states including Districts of Columbia, Delaware, New York, California and Florida. For more discussion on Benefit Corporation model see, J Haskell Murray,

corporate stakeholders in company decisions, not only shareholders. Following the successful approach in Germany (with two tier boards) and other developed economies that give employees a legal right to elect representatives to the Board (see 3.4.1 below), the proposed Bill would give workers a stronger voice in corporate decision-making by requiring large corporations to ensure that no fewer than 40 per cent of their directors are selected by the corporations' employees.[31]

Further, in the US, the top corporate executives are compensated mostly in company equity which provides financial incentives to focus exclusively on shareholder returns. To address self-serving financial incentives in corporate management, the Bill prohibits directors and officers from selling company shares within five years of receiving them or within three years of a company stock buyback.[32] This is to ensure that directors and officers are focused on the long-term interests of all corporate stakeholders, not only shareholders.[33] If the company has engaged in serious and repeated illegal conduct, the Bill permits the federal government to revoke the charter of the company.[34] However, even there is little likelihood of the Warren Bill being passed, the Bill is important for the discussion because it shows the current thinking of forces for socially responsible conduct, especially because it proposed by a democratic candidate for the Presidential elections in the US.

To summarise, under the dominating principle of shareholder primacy, directors' duties are to maximise profits for shareholders. This has been moderated by recognising that the long-term

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'Social Enterprise Innovation: Delaware's Public Benefit Corporation Law' (2014) 4 *Harvard Business Law Review* 345, 371; Izi Pinho, 'The Advent of Benefit Corporations in Florida' (2018) 47 *Stetson Law Review* 333, 364; Mark Loewenstein, 'Benefit Corporations: A Challenge in Corporate Governance' (2013) 68 *The Business Lawyer* 1007, 1038.

[31] Elizabeth Warren, *Warren Introduces Accountable Capitalism Act* (15 August 2018) <https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act>.

[32] Ibid.

[33] Moreover, the bill prohibits US corporations from making any political expenditure without the approval of 75 per cent of its directors and shareholders, to ensure any political expenditure benefit all corporate stakeholders. Ibid.

[34] Ibid, see also Warren above n 31.

viability and sustainability of the business may require the corporation to take into account stakeholder interests and the social and environmental impact of the corporation's business activities. This shift towards recognizing the importance of stakeholder interests to company and shareholder value is reflected in modern statements of directors' duties (eg UK and India). This allows the corporation and its directors to focus on the long-term success of the company rather than immediate shareholders profit. The shareholder primacy rule assumes that shareholders are exclusively interested in dividends and not on the corporation acting as a good corporate citizen. Recent commentary suggests that shareholder interest may extend beyond dividends to socially responsible conduct, the enhanced shareholder welfare view.[35] This notion of a corporation as having duties as would any other socially responsible citizen is also reflected in the US Warren draft *Accountable Capitalism Act*.

While the shareholder value theory is based on a shareholder primacy model that has its principal focus on the economic functions of the corporation, the stakeholder theory embraces internal and external actors apart from shareholders who play a significant role in the corporation. The next section examines stakeholder theory.

3.3.2 Stakeholder Theory

The emergence of CSR is largely based on the stakeholder theory in corporate governance.[36] Stakeholders are broadly defined as 'any group or individual who can affect or is affected by the achievement of the organisation's objective'[37] or by the 'actions, decisions, policies, or

[35] Oliver Hart and Luigi Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' (2017) 2(2) *Journal of Law, Finance, and Accounting* 247, 275.
[36] Mujih, above n 9, 20. Regarding stakeholder theory, see generally Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman, 1984); Thomas Donaldson and Lee Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence and Implication' (1995) 20(1) *Academy of Management Review* 65, 91; Domenec Mele, 'Corporate Social Responsibility Theories' in Crane et al, above n 11, 47; Thomas Dunfee, 'Stakeholder Theory: Managing Corporate Social Responsibility in a Multiple Actor Context' in Crane et al, above n 11, 346.
[37] Freeman, above n 36, 46.

goals of the organization.'[38] Although a company's stakeholders can differ because of size, sector and sometimes the geographical location, the commonly identified stakeholder groups include shareholders, customers, investors, suppliers, employees, the environment and the society at large.[39] However, as the thesis is concerned with CSR in the oil industry, the emphasis is on social stakeholders including suppliers, employees, local communities, the environment and civil society.[40]

The core idea of stakeholder theory is that companies have relationships with many constituent groups (stakeholders) that affect and are affected by their actions. According to stakeholder theory, a corporation's responsibilities extend beyond shareholders to stakeholders whose interests must be considered in making decisions. All corporations must obey the law. In so far as stakeholders' interests are protected by law, corporations must protect those interests. Where stakeholder interests have not been granted legal protection, there is no legal obligation to protect those interests. But it is here that stakeholder theory intersects with CSR. Where a corporation fails to mitigate the costs arising out of their activities such as industrial pollution and work injuries (negative externalities),[41] stakeholder theory would require a corporation, as a good corporate citizen, to be responsible for that harm. As will be seen in the chapter following, CSR may be seen as primarily focused on negative externalities so that corporations, rather than the public, bear the costs of their activities. As noted in the previous section, the long term value, sustainability and financial

[38] Archie Carroll and Ann Buchholtz, *Business and Society: Ethics, Sustainability, and Stakeholder Management* (Cengage Learning, 9th ed, 2015) 66.
[39] Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility: a Legal Analysis* (LexisNexis, 2009) 13-14.
[40] David Chan and William Werth, *Strategic Corporate Social Responsibility: Stakeholders, Globalization, and Sustainable Value Creation* (Thousand Oaks, 3rd ed, 2013) 54; see also David Woodward, Pam Edwards and Frank Birkin, 'Organizational Legitimacy and Stakeholder Information Provision' (1996) 7 *British Journal of Management* 329, 347.
[41] The negative externalities are discussed in the next chapter at 4.3.

performance of the company may depend on positive relationships with stakeholders.[42] Although the primary concern of a company is to increase shareholder wealth, the success in doing so is likely to be affected by other stakeholders.[43] In other words, shareholder's interests cannot be met without satisfying to some degree the demands of other stakeholders.[44]

The stakeholder theory initially challenged the traditional view that corporation should be managed for the benefit of its shareholders. As indicated in the previous section, the shareholder primacy theory has been elaborated so that stakeholder interests should be considered where this affects the long term sustainability of the corporation. The relevance of the shareholders primacy model or a stakeholder model is reflected in the corporate governance structure and monitoring mechanisms.[45] For instance, under the German governance model employees have a legal right to elect representatives to the supervisory board. In contrast, Anglo-American model, with its emphasis on shareholder value, the board is constituted by executive and non-executive directors elected by shareholders.[46] This is further explained in the following section (see 3.4.1 below) on corporate governance.

3.4 The Structure of Corporate Governance

3.4.1 Board of Directors

The board structure may be single or two-tier depending on the jurisdiction.[47] The single board model, common practice in the US and the UK, is characterised by one single board

[42] Dunfee, above n 36, 352; Rahim, above n 2, 66-69; Abagail McWilliams and Donald Siegel, 'Corporate Social Responsibility: A Theory of the Firm Perspective' (2001) 26(1) *Academy of Management Review* 117, 127.
[43] David Foster and Jan Jonker, 'Stakeholder Relationships: The Dialogue of Engagement' (2005) 5(5) *Corporate Governance: The International Journal of Business in Society* 51, 57.
[44] Dima Jamali, 'A Stakeholder Approach to Corporate Social Responsibility: A Fresh Perspective into Theory and Practice' (2008) 82(1) *Journal of Business Ethics* 213, 231.
[45] Christine Mallin, *Corporate Governance* (Oxford University Press, 5th ed, 2016) 20.
[46] Ibid.
[47] Ibid, 177.

comprising both executive and non-executive directors who are responsible for all aspects of the company's activities.[48] In contrast, the two-tier board model is a form of board structure found in Germany, Austria and Denmark. It consists of a supervisory board and an executive board of management. While the management board is responsible for the running of the business, the supervisory board oversees the direction of the business.[49] In some countries, such as Germany, employees have representation on the supervisory board.[50]

In Iraq the company's board structure is in the form of single board. Prior to amendments of the *Company Law* in 2004, directors appointed by the General Federation of Trade Unions of Iraq represented employees' interests. However, after the modification of the *Company Law* in 2004 by the Coalition Provisional Authority,[51] there are no longer employees' representatives on the Board, in contrast to State Owned Corporations (see below). It is unclear why the Coalition Provisional Authority made that change. The most likely reason is that the Coalition Provisional Authority was seeking to make the corporate governance model in Iraq closer to what is implemented to the single tier board in the US, which gives no representation to employees. By contrast, the presence of employees' representatives on the board of directors in some countries, for instance in German and Japan, reflects the priority of stakeholders in the corporate governance system in those countries. There is a call to restore employee representation as employees represent an important segment of a company's stakeholders who could be affected by the company's operations.

[48] Ibid, 178.
[49] Ibid.
[50] Ibid.
[51] The Coalition Provisional Authority work in Iraq is consistent with the UN Security Council Resolutions no 1483 and 1511 (2003).

Sound governance practice recommends that companies have a majority of independent non-executive directors.[52] In Iraq, a unique feature is that all directors in a private sector company, the term used in Iraq to denote a public company that is not a state owned enterprise, are required to be shareholders according to the *Company Law*.[53] They all have 'skin in the game' which is consistent with the expectations of all large corporations. The purpose of requiring the directors to be shareholders is to ensure commitment to the success of the company. To avoid possible conflict of interests, directors are required to act in the interests of the company and not to act to disadvantage minority shareholding interests.[54] Accordingly, the chairman and board members are prevented from having direct or indirect interests in deals that are concluded with the company. They are also prohibited and from voting upon or participating in a matter in which they have direct or indirect interests.[55]

3.4.2 Board Committees

Listed companies may be required to appoint various committees for specific purposes and delegate part of the board work to them. The aim of establishing such committees is to assist the board in dealing adequately with complex or specialised issues.[56] Standing board committees usually include audit, appointments, risk management, and compensation committees. Some companies have also established a corporate social responsibility committee.[57] Since companies should take into account stakeholder's interests, the role of a board CSR committee is to assess and monitor stakeholder needs.[58] The presence of a CSR

[52] Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (Oxford University Press, 2009) 62-64.
[53] *Company Law*, art 106(1). According to the *Company Law*, each director should continuously own at least two thousand shares. Directors will lose board's membership if shareholdings drop below this level.
[54] *Company Law*, art 119(2).
[55] Ibid.
[56] For further explanation on board committees see, Tricker, above n 52, 67-72.
[57] Companies that have CSR committee include SAMSUNG, Coca-Cola European Partners and others.
[58] A CSR committee may alternatively be named as an ethics, sustainable development, environment, health and safety, or a public responsibility committee. For further discussion on CSR committees see, Edina Eberhardt-

committee may also improve the quality and quantity of CSR reporting.[59] Whereas establishing board committees is usually a listing requirement, in some countries the appointment of a CSR committees is a legal requirement whether the company is listed or not. In India companies (public or private) with specified profit thresholds must establish a CSR committee consisting of three or more directors, at least one of whom must be independent.[60] According to the Indian *Companies Act 2013*, the CSR committee should formulate and recommend to the board a CSR policy. The policy must indicate the activities to be undertaken by the company and the amount of expenditure on these activities, as well as monitoring this policy regularly.[61] CSR requirement in India according to this law is further discussed in chapter five at 5.5.1.

In Iraq, the *Company Law* only requires companies to establish audit and remuneration committees.[62] The law does not determine the number and qualifications of the members. The duties of those committees and the contents of reports that should be submitted to the board of directors have not been spelled out.

3.4.3 Chairman and the Chief Executive Officer

The roles of chairman and the chief executive officer (CEO) are frequently separated. The chairman has responsibility for running the board, whilst the CEO has the executive responsibility for the running of the company's business.[63] There is continuing debate whether the role of the chairman and the chief executive should be separated or combined in one person. The argument in favour of dividing the roles is that the separation increases

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Toth, 'Who Should Be on a Board Corporate Social Responsibility Committee?' (2017) 140 *Journal of Cleaner Production* 1926, 1935.

[59] Shayuti Adnan, David Hay and Chris Staden, 'The Influence of Culture and Corporate Governance on Corporate Social Responsibility Disclosure: A Cross Country Analysis' (2018)198 *Journal of Cleaner Production* 820, 832.

[60] Indian *Companies Act 2013*, no 18, s 135.

[61] Ibid.

[62] *Company Law* of 1997, art 117(2).

[63] Mallin, above n 45, 180.

accountability and avoids abuses resulting from concentration of power in one individual.[64] Separation of the roles allows the chief executive to focus on managing the business and the chairman having responsibility for running the board, and relations with shareholders, the government, the regulators, as well as the media.[65] Separation of roles also provides a checking mechanism by making the managing director responsible to the board. Chairpersons exercise their authority on behalf of the board whereas managing directors have personal authority based on the terms of their appointment.[66] The advocates for combining the roles argue that a dynamic enterprise needs just one leader and that separating leadership duties between two people leads to conflict.[67] In the UK the roles of chairman and chief executive officer are separated, whereas the two functions are often combined in the US.[68]

In Iraq, the role of chairman and CEO are separated in the public companies (known in Iraq as private sector companies), see Table 3.1 below, but not in the state-owned companies, below 3.5. In a public company (private sector company), the role of chairman and the CEO (Managing Director) cannot be exercised by the same person.[69] The board of directors at the first meeting elects the chairman among its members. The board then appoints the CEO (Managing Director).[70] The board of directors has authority to dismiss managing directors who do not fulfil their obligations.[71]

Overall, examining the provisions of board structure in Iraq shows the weakness in separation between the executive and non-executive directors and their independence. In a company from the private-sector all directors should be shareholders, and in a state-owned company (eg state-owned oil company) all directors are government officers (see the next). There is a

[64] Ibid.
[65] Tricker, above n 52, 58.
[66] Sir Adrian Cadbury, *Corporate Governance and Chairmanship: a Personal View* (Oxford University Press, 2002) 99.
[67] Ibid.
[68] Ibid.
[69] See *Company Law*, art 121(2).
[70] Ibid.
[71] *Company Law*, art 122.

need for provisions to regulate some issues related to the board of directors, particularly those linked to structure and composition of the board, selecting members and essential tasks entrusted to board's members, as well as board's role in overseeing executive directors. There is no comprehensive and specific description of the duties of the chairman and the board members, nor solutions for conflict between management, board members and shareholders as the result of misuse of assets and transactions. In addition, there is no independent evaluation of the performance of members of the board of directors nor oversight on the effectiveness of corporate governance.

As the central focus of this thesis is how to implement corporate social responsibility in the oil industry, the next section discusses the corporate governance structure of state-owned oil companies. This is important because state owned oil companies are joint venturers with IOCs in the Iraqi oil industry. The examination will show how the governance structure of state-owned oil companies is entirely different to that of companies from the private sector. This is so because each is subject to different laws and therefore has a different governance structure. The next section discusses corporate governance in the state-owned oil companies and its importance to the implementation of CSR in the oil industry.

3.5 Corporate Governance and State-owned Oil Companies

State-owned oil companies have a governance structure that is quite different from companies in the private sector particularly in relation to nominating board members, their independence and employees representation. The board of directors in a state-owned oil company consists of a majority of appointed members all of whom are state officers and two elected members, see Table 3.1 below. The Board consists of general manager as a chairman and eight other members as executive directors.[72] Six of them are nominated by the Ministry of Oil. They are

[72] *State Companies Law*, No 22 of 1997, art 20.

chosen from the heads of the particular State-owned company's various units and from the Ministry's officers based on their experience and specific knowledge. Unlike the private sector, employees are directly represented by the appointment of two directors elected by the state-owned company's employees.[73]

The General Manager is appointed in a dual role of chairman and chief executive officer. The general manager is responsible for running the company's day to day business and directing the board.[74] One of the issues is whether the CEO performing a dual role is disadvantageous to the effective operation of state-owned companies. While board members are appointed by the Ministry of Oil, the General Manager is appointed by the Council of Ministers (the Cabinet),[75] the highest executive authority in the country.

Table 3.1: Governance Structure in the Iraqi Company Laws

Type of company	Ownership	Board of Directors	CEO	Listed in ISE	Applicable Law
State-owned company	-A single share -100% owned by the State	-Fixed (9 members) -All state officers	-Dual role -State officer	Cannot be listed	*State Company Law* No 21 of 1997
Public (Private sector) company	Shareholder ownership	-Not fixed (5-9 members) -All must be shareholders	Separate role	Could be listed	*Company Law* No 22 of 1997

Source: Author based on the provisions of Iraqi *Company Law* and *State Company Law*

In a state-owned oil company, there is no separation between the roles and responsibilities of the government as an owner and the government as a manager. The Ministry of Oil deals with any state-owned oil company as part of a ministry's department.[76] As noted above, the

[73] Ibid.
[74] Ibid, art 27.
[75] Ibid.
[76] Muhammed Mazeel, 'Restructuring and Reorganization of the Iraqi Oil Ministry and State-owned Oil Companies for Maximum Economic Growth and National Development' (2012) 6(2) *International Journal of Contemporary Iraqi Studies* 133, 162.

majority of board directors are nominated by the government and are all public officers. As a result, the board of directors in state-owned oil company is not fully independent in making decisions. For example, some of the board's key decisions cannot be implemented until they approved by the Minister of Oil.[77] Disclosure on important financial and non-financial statements is not required. This is because the Ministry is the responsible authority so it can request such information at any time. The regulatory framework for the oil industry authorises the Ministry of Oil to develop and implement the oil policy for the whole sector. It effectively exercises dual functions as the Ministry responsible and as the national oil company.[78] Therefore, the performance of state-owned oil companies is measured by reference to their ability to fulfil plans set forth by the Ministry of Oil, rather than on a competitive basis.

3.6 Conclusion

This chapter has provided the background for discussion of CSR in the following chapter. It indicates that the issue of CSR is integrally connected with the theories of corporate governance. If the company's, (and its board of directors), only duty is to enhance shareholder value, this leaves no room for the Board to engage in CSR where there are no advantages to be gained by the company. As discussed above more recent elaborations of shareholder primacy recognise that stakeholder interests should be taken into consideration as important for the long term sustainability and profitability of the company.[79] It has also been argued that shareholders are not exclusively interested in dividends but that protection of the environment etc is also important to enhanced shareholder welfare.[80] The chapter also pointed to the recent proposal, the *Accountable Capitalism bill* for large US corporations to

[77] See eg, *State Companies Law* of 1997, art 26.
[78] Mazeel, above n 76.
[79] Magaro, above n 15.
[80] Hart and Zingales, above n 35.

act as good corporate citizens. The following chapter provides an exposition on the nature of CSR and its purposes. It will also discuss CSR reporting and the comply-or-explain regime.

CHAPTER FOUR

THE ROLE OF CORPORTE SOCIAL RESPONSIBILITY

4.1 Introduction

The previous chapter examined the principal theories relating to corporate governance. It discussed the shareholder primacy theory with its more recent elaborations of enlightened shareholder value and shareholder welfare and recent calls for responsible capitalism. It also discussed stakeholder theory. This discussion underpins the examination of corporate social responsibility (CSR) in this chapter. If the duty of a company is not only to its shareholders but to stakeholders, this provides the essence of the argument that, at a minimum, CSR is concerned with the duty of a company to avoid negative externalities and avoid harm to its stakeholders, employees, suppliers, consumers and the community. Whether CSR also involves positive duties to contribute to community welfare is also discussed.

The concept of corporate social responsibility remains controversial despite the vast literature attempting to identify its scope and objectives. In this chapter the distinction between negative externalities and benevolence is important to the understanding of the concept of CSR. This chapter commences by discussing the concept of corporate social responsibility and the key debates, specifically the argument that CSR is essentially concerned with voluntary rather than legal responsibilities. It also discusses why corporate social responsibility is needed and the common arguments against CSR.

The chapter then discusses whether the corporation (and its Board of Directors) have duties beyond increasing shareholder value to stakeholders including the community. If the corporation's primary duty is to increase shareholder value, this means that the harm it may

cause to the community by its operations (negative externalities) are borne by the community rather than its shareholders. The problem of, and the solutions to dealing with, negative externalities are examined in the context of the Oil and Gas industry. As the oil industry is the backbone of the Iraqi economy, (see chapter 2) the two selected examples of approaches to CSR are set in the context of the oil industry. It then discusses the role of corporate social responsibility in maximising social welfare and strategies for implementing positive CSR.

The chapter also discussed CSR reporting is a new accountability practice that allows the public and other monitoring agencies to oversight corporations' social and environmental performance. A number of jurisdictions have introduced regulatory requirements governing CSR (non-financial information) reporting on a comply-or-explain basis, specifically in EU. It investigates if Iraq can use CSR reporting on a comply-or-explain basis to increase accountability in the oil industry. This is followed by the conclusion.

4.2 The Concept of Corporate Social Responsibility

4.2.1 What is Corporate Social Responsibility?

A particular challenge of studying corporate social responsibility is that there is no accepted definition of CSR despite numerous efforts to define its concept.[1] In 2008, for instance, a study found 37 separate definitions of CSR[2] confirming that CSR is understood and

[1] Max Clarkson observed that a 'fundamental problem in the field of business and society has been that there are no definitions of corporate social performance (CSP), corporate social responsibility (CSR_1), or corporate social responsiveness (CSR_2) that provide a framework or model for the systematic collection, organization, and analysis of corporate data relating to these important concepts. No theory has yet been developed that can provide such a framework or model, nor is there any general agreement about the meaning of these terms from an operational or a managerial viewpoint'. Max Clarkson, 'A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance' (1995) 20(1) *Academy of Management Review* 92, 117; see also, Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower, 2012) 11; Dirk Matten and Jeremy Moon, 'Implicit and Explicit CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) 33(2) *Academy of Management Review* 404, 424; William Werther and David Chandler, *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (SAGE Publications, 2010) 6.

[2] See Alexander Dahlsrud, 'How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions' (2008) 15 *Corporate Social Responsibility and Environmental Management* 1, 13 (for the convenience of the reader, Dahlsrud listed all the 37 CSR definitions In the Appendix); see also, Irene Buhanita, 'Dimensions in

interpreted differently by companies, scholars, governments, non-government organisations and other interested groups.[3] This is because corporate social responsibility in not the only term used in describing 'business-society relations', but in some cases it used interchangeably with related terms and ideas.[4] Another reason for lack of definition is that CSR is in a constant state of evolution associated with social expectations and concerns. Thus, the norms of CSR change with each generation and its criteria may change according to the societal values.[5] In practice, the absence of an accepted definition allows flexibility for CSR across all sectors of an economy and international borders,[6] and may foster evolution and development of the concept.[7]

Whatever the reason, or maybe the benefit, behind the absence of an accepted definition for CSR, giving some examples of proposed definitions will provide useful clarification of the elements of CSR and provide focus for the discussion. The section begins with definitions offered by international bodies. For example, the World Business Council for Sustainable Development considers CSR as a means to achieve sustainable development by defining it as 'the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their

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CSR: an Evaluation of Current Definitions' (2015) 10(4) *Romanian Journal of Journalism & Communication* 64, 72; However, focusing on the academic literature, Carroll has reviewed and discussed over 25 different ways that CSR is defined. See, Archie Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38(3) *Business and Society* 268, 295.

[3] For example, CSR could mean something different to corporation than to civil society groups (NGOs). It can also mean different thing to researchers trying to establish it as a discipline and to decision-makers seeking to perform CSR inside companies. Thus, all have been free to define and interpret CSR as best fits their purpose. See, Michael Blowfield and Jedrzej Frynas, 'Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World' (2005) 81(3) *International Affairs* 499, 513.

[4] Matten and Moon, above n 1; See also, Carroll, above n 2. In some cases, CSR is linked to related terms such as sustainability, corporate citizenship, socially responsible investment, non-financial risk management, business sustainability, the triple bottom line and corporate governance.

[5] Mia Rahim, *Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy* (Springer, 2014) 15.

[6] Samuel Idowu, 'The United Kingdom of Great Britain and Northern Ireland' in Samuel Idowu and Walter Filho (eds), *Global Practices of Corporate Social Responsibility* (Springer, 2009) 11, 32.

[7] For a review of the history of CSR and definitions see Archie Carroll, 'A History of Corporate Social Responsibility: Concepts and Practices' in Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald Siegel (eds) *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008) 19.

quality of life.'[8] The European Commission has previously, in 2001, defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.'[9] In this definition, the European Commission's emphasis is on the protection of stakeholders, the society and the environment. The European Commission, based on its new strategy for CSR adopted in 2011, puts forward a new simpler definition of CSR as 'the responsibility of enterprises for their impacts on society.'[10] In turn this requires companies' directors to act responsibly and take into account the impact of their decisions on society.[11]

The dominating principle in the corporate social responsibility literature is the principle of voluntarism which implies that the responsible business activities are discretionary and reach beyond legal requirements.[12] There is evident, for example in the following description of CSR as

> an umbrella term for a variety of theories and practices all of which recognize the following: (a) that companies have a responsibility for their impact on society and the natural environment, sometimes beyond legal compliance and the liability of individuals; (b) that companies have a responsibility for the behaviour of others with whom they do business (e.g.

[8] Richard Holme and Phil Watts, 'Corporate Social Responsibility: Making Good Business Sense' (Report, World Business Council for Sustainable Development, 2000) 10 <http://www.ceads.org.ar/downloads/Making%20good%20business%20sense.pdf>.
[9] Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibilities*, COM/366 final (18 July 2001) 6 <http://csdle.lex.unict.it/Archive/LW/Data%20reports%20and%20studies/Reports%20and%20%20communication%20from%20EU%20Commission/20110830-103712_com_2001_366enpdf.pdf>.
[10] Commission of the European Communities, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM/681/Final (25 October 2011) 6 <http://www.accessibletourism.org/resources/csr_communication_ec_com2011681.pdf>.
[11] Rado Bohinc, 'Corporate Social Responsibility: (A European Legal Perspective)' (2014) 20 *Canterbury Law Review* 21, 37.
[12] Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law: the New Corporate Accountability', in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 9, 11; Bryan Husted and David Allen, 'Corporate Social Responsibility in the Multinational Enterprise: Strategic and Institutional Approaches' (2006) 37(6) *Journal of International Business Studies* 838, 849; Abagail McWilliams and Donald Siegel, 'Corporate Social Responsibilities: A Theory of the Firm Perspective' (2001) 26(1) *Academy of Management Review* 117, 127.

within supply chains); and (c) that business needs to manage its relationship with wider society, whether for reasons of commercial viability or to add value to society.[13]

The above recognises that CSR extends beyond the obligation to obey legal and regulatory minimum standards and the duty to maximise profit for the shareholders.[14] The most widely held view is that corporate social responsibility requires corporations to prevent negative externalities (the costs to society of company's activities which the corporation does not pay), to protect the stakeholders and the public from the negative impacts of their operations.[15] Further explanation on negative externalities and solutions is given in the following at 4.3 and 4.4 respectively. It has also been argued that CSR should extend beyond mitigating negative externalities to require a company to contribute positively to the welfare of society.[16] This can be in the form of education and health care programs for a local community, investments in local infrastructure like roads, electricity, sanitation and housing etc. Maximising social welfare is discussed later in this chapter at 4.5 below.

Indeed, CSR is a multidimensional concept that covers a wide range of issues. Based on international standards that set CSR norms and promote policies such as the UN Global Compact,[17] OECD *Guidelines for Multinational Enterprises*,[18] ISO 26000 *Guidance*

[13] Blowfield and Frynas, above n 3, 503.
[14] Mujih, above n 1, 10; McWilliams and Siegel, above n 12. However, Carroll argued that obeying the law constitutes a part of CSR as he breaks down the concept into four components: the economic responsibilities, the legal responsibilities, the ethical responsibilities, and the philanthropic responsibilities of the company. This is because laws reflect society's view of fair practices, so complying with these laws is part of a business's responsibilities toward society. Archie Carroll, 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) 34 *Business Horizons* 39, 48.
[15] Mujih, above n 1, 36; see also Commission of the European Communities, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, above n 10, 6.
[16] Ibid, Keith Davis and Robert Blomstrom, *Business and Society: Environment and Responsibility* (McGraw-Hill, 3rd ed, 1975) 39; Archie Carroll and Ann Buchholtz, *Business and Society: Ethics, Sustainability, and Stakeholder Management* (Cengage Learning, 9th ed, 2015) 31.
[17] UN Global Compact, *United Nation Global Compact Progress Report* (2017) <https://www.unglobalcompact.org/docs/publications/UN%20Impact%20Brochure_Concept-FINAL.pdf>.
[18] Organization for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* (2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

Standard on Social Responsibility[19] and many others,[20] CSR may include efforts to mitigate the impact of companies' activities on matters related to the environment, society and employees, respect for human rights,[21] anti-corruption and anti-bribery measures[22] (see Appendix 3 and Appendix 4).[23]

4.2.2 The Rationale for Corporate Social Responsibility

The fundamental question in the corporate social responsibility debate is why corporations should engage in positive CSR activities in addition to avoiding negative externalities. Corporate social responsibility justifications are related to models of governance discussed in the preceding chapter.[24] In a stakeholder value model, companies must address and balance the need of their stakeholders.[25] CSR is seen as a means to protect the stakeholders from the adverse impacts of companies' operations. Stakeholders consist of individuals or groups of people who are affected by the company's activities.[26] According to stakeholder theory (previously discussed at 3.3.2), companies should balance their economic, social and environmental activities. In relation to negative externalities (see below), it is justified because these are the costs of the company's operations for which it does not pay but which are imposed on the community. Although the primary concern of a company is to maximise profit, however, this profit should be made in such a way that minimises adverse impacts on

[19] International Organization for Standardisation, *ISO 26000 Guidance on social responsibility* (2010) <https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/discovering_iso_26000.pdf>.
[20] For detailed information on many others corporate responsibility initiatives see Deborah Leipziger, *The Corporate Responsibility Code Book* (Routledge, revised 3rd ed, 2017).
[21] See generally Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge, 2011).
[22] See generally Adefolake Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-corruption* (Cambridge University Press, 2012).
[23] *Directive 2014/95/EU of the European Parliament and of the Council* [2014] OJ L 330/1, para 6.
[24] Patricia Crifo and Antoine Reberioux, 'Corporate Governance and Corporate Social Responsibility: a Typology of OECD Countries' (2016) 5(2) *Journal of Governance and Regulation* 14, 27.
[25] Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility: a Legal Analysis* (LexisNexis, 2009) 13.
[26] Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman, 1984) 46.

the society and the environment. The stakeholder centred model holds directors responsible for running the company to ultimately benefit all relevant stakeholders.[27]

In relation to the shareholder model of corporate governance (previously discussed at 3.3.1), the sole duty of corporate directors is to maximise shareholder wealth. Under this model CSR can be legitimate if it is proved to be associated with higher (short-term or long-term) profit or increases shareholder value.[28] However, modern company law, even in shareholder primacy jurisdictions, has moved towards a stakeholder model of governance.[29] This is because the company success in maximising shareholder wealth is likely to be affected by the concerns of other stakeholders,[30] and that the shareholder's interests cannot be met without satisfying to some degree the demands of other stakeholders.[31] Consequently, directors are required to promote the long-term success of the company, but they have to take into account the concerns and interests of relevant stakeholders and consider the social and environmental impact of the company's activities. From this perspective, CSR is seen as a vital investment to enhance companies' efficiency and benefit by increasing corporate profit and stimulating long-term sustainable development.[32] This is called a 'business case for CSR.'[33] That is, the use of social initiatives to achieve corporate objectives (maximise profit).[34] Strategic reasons relating to long term sustainability of the corporation appear to be the predominant motive of

[27] Crifo and Reberioux, above n 24.
[28] Ibid; Robert Reich, 'The Case Against Corporate Social Responsibility', (Working Paper No GSPP08-003, University of California, 1 August 2008) 54 <https://gspp.berkeley.edu/assets/uploads/research/pdf/ssrn-id1213129.pdf>.
[29] Virginia Harper Ho, 'Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder Divide' (2010) 36(1) *Journal of Corporation Law* 59, 112.
[30] David Foster and Jan Jonker, 'Stakeholder Relationships: The Dialogue of Engagement' (2005) 5(5) *Corporate Governance: The International Journal of Business in Society* 51, 57.
[31] Dima Jamali, 'A Stakeholder Approach to Corporate Social Responsibility: A Fresh Perspective into Theory and Practice' (2008) 82(1) *Journal of Business Ethics* 213, 231.
[32] Thomas Donaldson and Lee Preston, 'The Stakeholder Theory of The Corporation: Concepts, Evidence and Implication' (1995) 20(1) *Academy of Management Review* 65, 91.
[33] For more details on the business case for CSR see eg, Elizabeth Kurucz, Barry Colbert and David Wheeler, 'The Business Case for Corporate Social Responsibility' in Crane et al, above n 7, 83; Paul Argenti, *Corporate Responsibility* (SAGE Publications, 2015) 41-61.
[34] Carroll and Buchholtz, above n 16, 41-42.

CSR.[35] Companies may invest in CSR activities to achieve higher economic benefits, generate competitive advantage,[36] attract new business, strengthen employees' loyalty and enhance relationships with customers and suppliers.[37] In general, multiple strategic motivations for CSR activities may be at work at once.

In addition to these strategic reasons for CSR, oil companies' engagement in CSR activities may be motivated by concerns over long-term reputational risk[38] which are perhaps more visible in the oil industry than some other sectors of the economy.[39] The negative impacts of oil operations are detailed in the following section (see 4.3.2 below). Prominent examples of catastrophes in the oil industry include oil spills such as those involving the Exxon Valdez and the Deepwater Horizon explosion; the involvement of oil companies in human rights abuses such as Chevron in Nigeria and BP in Colombia; and protests by indigenous groups such as occurred in the anti-Shell protests in Nigeria. Such events (widely reported by the media) with increased awareness of the local communities and civil society institutions towards corporate behaviour (what it does and what corporations should do), have put particular pressure on IOCs to act in ways conforming to responsible conduct expected by society.[40] Social activists (eg politicians, labour unions, indigenous people and NGOs campaigns) have made direct demands that IOCs internalise negative externalities that affect

[35] Forest Reinhadt, Robert Stavins and Richard Vietor, 'Corporate Social Responsibility through an Economic Lens' (2008) 2(2) *Review of Environmental Economics and Policy* 219, 239; Som Bhattacharyya, 'Exploring the Concept of Strategic Corporate Social Responsibility for an Integrated Perspective' (2010) 22(1) *European Business Review* 82, 101.

[36] Michael Porter and Mark Krame, 'The Competitive Advantage of Corporate Philanthropy' (2002) 80(12) *Harvard Business Review* 56, 68; Philippe Gugler and Jacylyn Shi, 'Corporate Social Responsibility for Developing Country Multinational Corporation: Lost War in Pertaining Global Competitiveness' (2009) 87 *Journal of Business Ethics* 3, 24.

[37] Jedrzej Frynas identified four motives for oil companies to engage in community development projects as a business case including: obtaining competitive advantage, maintaining a social licence to operate, managing external perceptions and keeping employees happy. See, Jedrzej Frynas, *Beyond Corporate Social Responsibility: Oil Multinational and Social Challenges* (Cambridge University Press, 2009) 116-121.

[38] See eg, Prakash Sethi, Terrence Martell and Mert Demir, 'Building Corporate Reputation Through Corporate Social Responsibility (CSR) Reports: The Case of Extractive Industries' (2016) 19(3) *Corporate Reputation Review* 219, 243; C Maden et al, 'Linking Corporate Social Responsibility to Corporate Reputation: a Study on Understanding Behavioral Consequences' (2012) 58 *Procedia - Social and Behavioral Sciences* 655, 664.

[39] Frynas, above n 37, 6; David Spence, 'Corporate Social Responsibility in the Shale Patch' (2017) 21(2) *Lewis and Clark Law Review* 387, 425.

[40] Frynas, above n 37, 6.

particular environmental and social aspects[41] (see the case of Chad-Cameroon Oil Pipeline explained at 4.4.2 below). If there are adverse impacts of a company's operations on the environment and society, then there is a possibility of unrest in local communities towards the company. This could lead to the stalling of a company's operational activities (for example day to day running of facilities or delaying in the commissioning of new projects) which might cause financial loss.[42] Protest by social institutions against the company might also lead to a wide spread loss of company reputation. This might result in further economic risks as when a company suffers reputational loss this may negatively affect its relationships with financial institutions and investors.[43] Thus, it is important for corporations to act in more socially desirable manner and manage their relationship with wider society. In this case, CSR investment by IOCs is a response to external pressure from civil society, but at the same time it provides legitimacy and social approval for corporations, and contributes to maintaining a stable working environment.[44] Finally, oil companies might adopt CSR programs because basically it is 'the right thing to do' to be a good corporate citizen.[45]

Overall, motives for companies' responsible behaviours can be justified on different grounds according to the model of governance. It is difficult to disentangle the multiple, usually concurrent, motivations for CSR activities which can range from avoiding external pressure from civil society and concerns over long-term reputational risk to companies' self-interest. Critics see many CSR efforts as 'greenwashing' particularly if the company also benefits from CSR spending in some way. The following discussion highlights the main arguments against CSR.

[41] Ibid.
[42] Bhattacharyya, above n 35.
[43] Ibid.
[44] Frynas, above n 37, 117; Crifo and Reberioux, above n 24.
[45] Spence, above n 39.

4.2.3 Arguments Against Corporate Social Responsibility

The debates about whether the business should be socially and environmentally responsible first appear in the early 1950s and continue.[46] Corporate social responsibility advocates claim that CSR is a necessary part of contemporary business' operations to prevent the externalising of corporate costs and enhancing long-term success (as discussed in the previous section).[47] CSR opponents argue that the role of the corporation is to maximise shareholders wealth, and not engage in social welfare. Milton Friedman argues that the company's only duty is to maximise shareholder profits.[48] They exist only to serve consumers and thereby make money for investors, and this is how they serve the public.[49] This line of argument sees corporate social responsibility as sacrificing profits in the social interest.[50] However, this view limits CSR to benevolence and fails to consider CSR as critical to minimising negative externalities.[51] In addition, the most available evidence demonstrates that most corporations view socially responsible actions in the same way that they view more traditional business activities.[52] Corporations are not sacrificing profits for the social good, rather they engage in a more profitable set of socially beneficial activities that contribute to their financial bottom line (reducing costs and increasing profits).[53] Thus, CSR should not be

[46] For a review of the history of CSR see Carroll, 'A History of Corporate Social Responsibility: Concepts and Practices', above n 7, 19-46.
[47] McWilliams and Siegel, above n 12; Bhattacharyya, above n 35.
[48] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962) 133.
[49] Reich, above n 28, 55.
[50] Einer Elhauge, 'Corporate Managers' Operational Discretion to Sacrifice Corporate Profits in the Public Interest' in Bruce Hay, Robert Stavins, and Richard Vietor (eds), *Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business* (Resources for the Future, 2005) 13.
[51] Mujih, above n 1, 39.
[52] Reinhadt et al, above n 35; McWilliams and Siegel, above n 12.
[53] For example, Dow Chemical reduces its carbon emissions to reduce its energy costs. Walmart has applied 'green' packaging for its fresh produce (transparent plastics from corn sugars) because it is cheaper than petroleum-based packaging. These steps may be worthwhile in terms of environmental protection; however, they are not undertaken because they are socially responsible but to reduce costs. Although such initiatives might have some beneficent impact on the rest of society, yet the main focus of corporation is profit. See Reich, above n 28, 6 –7.

seen as in conflict with shareholders' interests but rather as protecting their long-term interests.[54]

Corporate social responsibility issues are also viewed as having a public character so that it is the role of state, not companies, to address these issues.[55] Consequently, it is inappropriate for corporations to be engaged in social welfare which can impair efficiency by distracting management from the company's legitimate business activities.[56] It is argued that, corporations being socially responsible mislead the public into believing that more is being done by the private sector to meet certain public goals and that diverts public attention from the task of establishing such laws and rules defining responsible behaviour in the first place.[57]

As discussed in chapter two, since oil and gas are central to the Iraqi economy, this sector is the obvious focus for any CSR measures. This is because oil and gas activities can pose severe threats to the environment, workers and the community at large. As CSR, at a minimum, requires corporations to reduce or eliminate negative externalities, the following section examines the negative externalities arising out of oil and gas operations and how oil companies should deal with these impacts and what CSR would require them to do?

4.3. Negative Externalities in the Oil Industry

4.3.1 Negative Externalities

Negative externalities are the negative consequences of a corporation's economic activity that affect the public, environment and third parties who are not directly involved in those activities and for which the corporation does not pay.[58] Negative externalities arise when a

[54] McBarnet, above n 12, 9.
[55] Mujih, above n 1, 86.
[56] Ibid.
[57] Reich, above n 28, 51.
[58] Externalities in general are defined as activities that generate costs or benefits to people not directly involved in those activities. These effects are generally unplanned or unintended, therefore, they was not included in the

corporation's activities injure surrounding communities and the environment but the corporation does not pay for these costs, rather the costs are borne by the community. In economics, the analysis of negative externalities assumes that market failures[59] arise because corporations ignore the external effects of their actions.[60] There is evidence that oil activities create certain negative externalities both global (greenhouse gas emissions that cause global climate change) and local (eg oil spills or property damages, see 4.3.2 below). However, when a corporation pays the external costs of its activities, it internalises the costs of that externality. The issue is what corporations are expected to do about negative externalities and what is the potential role of corporate social responsibility in solving this problem.

The most widely held view is that corporate social responsibility requires corporations to protect the stakeholders and the public from negative externalities by identifying, preventing and mitigating the possible adverse impacts of their operations.[61] This involves both preventive and responsive aspects. Under the preventive aspect, the company takes proactive steps to avoid causing harm to society by anticipating the externalities that may arise from its activities and takes pre-emptive measures to address them.[62] For example, the company expects that potential harm may result from discharging its hazardous waste, and develops a hazard-free method for disposing the waste.[63] Another example is an oil company anticipates the risks that could result from drilling a new oil well or transporting oil by pipelines and, therefore, designs a good risk management policy (due diligence initiatives) using modern technology to prevent any possible harm.

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original market price for the transaction. See, Terry Hillman, *Economics* (Mike Sanders, 2014) 45; see also, Robert Frank and Ben Bernanke, *Principles of Economics* (McGraw-Hill, 5th ed, 2013) 279.

[59] Market failure is an economic situation where the allocation of goods and resources in a free market is not efficient. It occurs when the price mechanism fails to account for all of the costs and benefits necessary to provide and consume a good.

[60] William McEachern, *Economics: a Contemporary Introduction* (Thomson South-Western, 7th ed, 2006) 365.

[61] Commission of the European Communities, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, above n 10, 6; Mujih, above n 1, 36.

[62] Mujih, above n 1, 45.

[63] Ibid.

In contrast, the responsive aspect is concerned with the way the company reacts to negative externalities after they have occurred.[64] It assumes that the company has acted in a way that causes negative externalities such as injuring employees because of an incident during the operations or an oil spill causing pollution and property damage. In this situation, the oil company should mitigate damage caused by their operations and provide fair compensation to the victims. The way the company reacts to the problem can determine whether the company is a socially responsible entity or not. It has been argued that, action taken to remedy a fundamental breach of the law or in response to enormous pressure from activists, stakeholders and the government does not amount to social responsibility, but only action based on principle qualifies as CSR.[65] Thus, the responsive aspect is a crucial matter for the company because its response to the problems might have a significant effect on its image and, therefore, its future in the community.[66]

4.3.2 Potential Negative Impacts of Oil and Gas Operations

Oil and gas activities, both onshore and offshore, pose serious threats to the environment and society during each stage of industrial process including exploration, production, refining and transport.[67] The negative environmental impacts include land clearance, oil spills, hazardous waste, noise, road congestion, natural gas emissions and contribution to global warming.[68]

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[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] See eg, Javier Estrada, Kristian Tengen, and Helge Bergesen, *Environmental Challenges Confronting the Oil Industry* (Wiley, 1997); Yusaf Samiullah, 'Biological Effects of Marine Oil Pollution' (1985) 2(4) *Oil and Petrochemical Pollution* 235, 264.
[68] Global warming is an increase of Earth's average surface temperature due to effect of greenhouse gasses (GHG) such as carbon dioxide emissions from burning fossil fuels. Given scientific evidence like the results presented in the *Climate Change 2014 Synthesis Report*, such emissions impact the world climate negatively. An increase in the concentration of GHG can led to increase the mean atmospheric temperature implying a higher frequency of disasters and natural catastrophes (such as droughts, floods, and heat waves), higher mortality rates, and a significant loss of biodiversity. For further explanation on global warming and climate change see Intergovernmental Panel on Climate Change, 'Climate Change 2014 Synthesis Report' (Report, 1 November 2014)
<ftp://atitlan.ethz.ch/docs/afischli/for-srinivasan/TS-01978822-Can't%20suppress%20pdf%20indexing%20during%20imports/Attached%20PDFs/Ip096.pdf>.

Given that oil and gas companies usually operate in locations of high biodiversity and environmentally sensitive areas, any oil or chemical pollution, even small amounts, may cause huge ecological damage and harm to local communities. In addition, oil spills not only harm the soil immediately surrounding the spill but can also pollute ground and surface water, threatening drinking water sources and agricultural land. These environmental effects can cause adverse health impacts and significant economic loss (see the case of Deepwater Horizon oil spill, 4.3.2 below). Other social effects include threats to the safety of the workplace and the community; preventing the use of property rights or exclusion of indigenous people; human rights abuse (see the case of Chad-Cameroon Oil Pipeline below at 4.4.2); increase in local population levels (immigration) leading to many social problems (eg pressure on social amenities such as schools and health, a prevalence of diseases like HIV Aids, high prices of goods and services and inflation); and impact on other sectors of the economy (eg abandonment of farming for the oil and gas industry which affect agriculture).[69]

The BP's Deepwater Horizon oil spill in the Gulf of Mexico is the most recent example of damage caused by the operations of international oil companies. The Deepwater Horizon oil drilling rig, leased and operated by BP, exploded and sank on the 20th of April 2010, causing the death of 11 workers on the rig and the largest offshore oil release in US history.[70] The Macondo well was damaged in the explosion and start leaking a torrent of oil and gas into the Gulf for around three months. It was estimated that more than 4.9 million barrels of oil had been released into the Gulf before the well was successfully closed on the 15th of July 2010.[71] The spill resulted in substantial negative economic, social and ecological consequences. In addition to the loss of workers' lives and injuries to others, different groups of people were

[69] For a brief explanation on how business might impact the internationally recognised human rights see, UN Guiding Principles, 'The Relationship Between Business and Human Rights' <https://www.ungpreporting.org/wp-content/uploads/2015/07/UNGPRF_businesshumanrightsimpacts.pdf>.
[70] US Department of the Interior, *U.S. Scientific Teams Refine Estimates of Oil Flow from BP's Well Prior to Capping* (1 August 2010) <https://www.doi.gov/news/pressreleases/US-Scientific-Teams-Refine-Estimates-of-Oil-Flow-from-BP-Well-Prior-to-Capping>.
[71] Ibid.

directly exposed to the oil spill (ie clean-up workers and Gulf Coast residents). Those exposed continue to suffer multiple chronic diseases[72] and mental illness.[73] The incident also damaged natural resources, destroyed the habitats of marine animals and organisms, and contaminated many coasts and marshes along the Gulf. This impacted on the livelihoods of thousands of fishermen as well as the tourism sector.[74] The Deepwater Horizon explosion is an example of corporate failure to protect the environment and to secure the safety of workers.

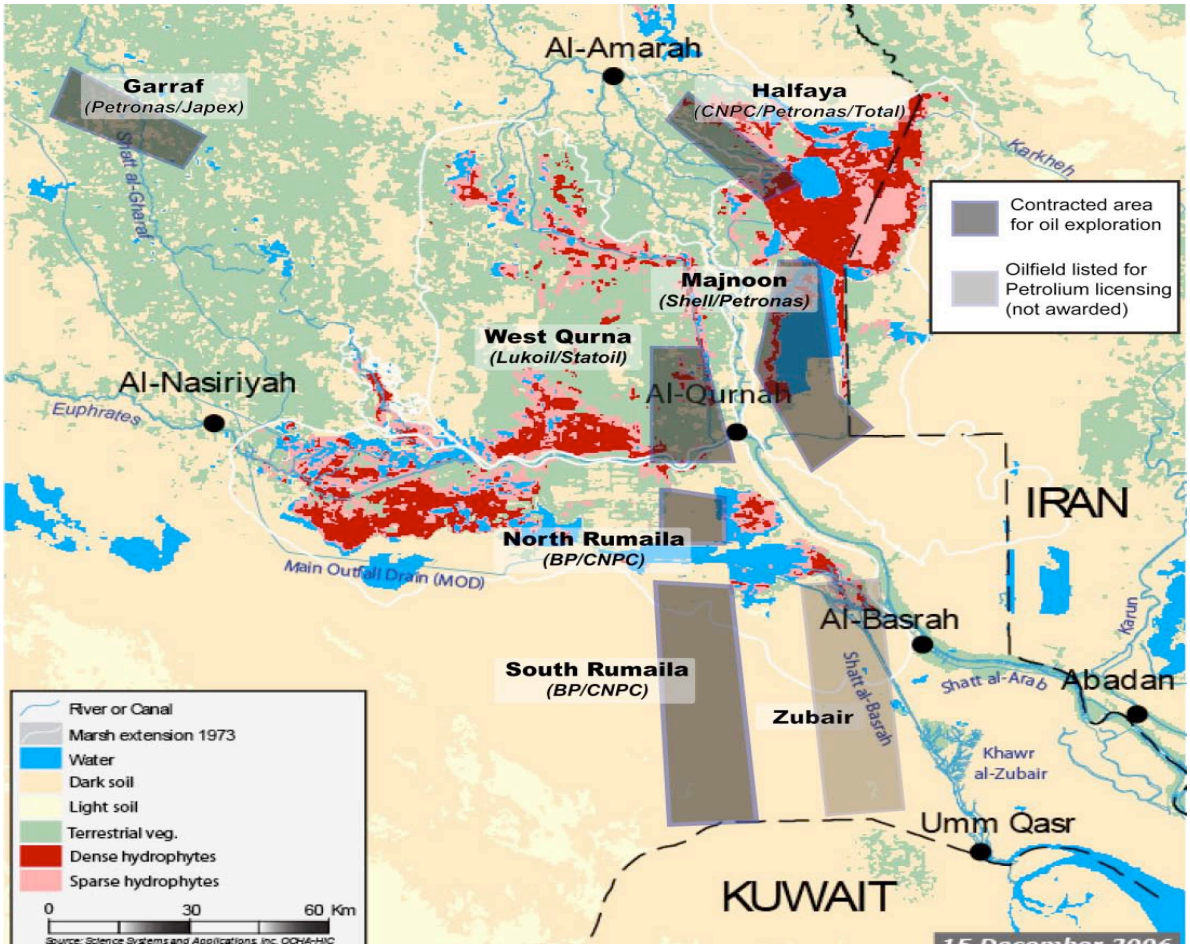
Another illustration of negative environmental impacts arising out of oil industry operations is in relation to the Iraqi southern marshlands. The Iraqi southern marshlands, also known as the 'Ahwar of Southern Iraq', comprise the lower floodplains of the Euphrates and the Tigris which are the largest wetlands in the Middle East. The main marshes are Al-Hammar, Qurnah and Al-Hawizeh which together cover an area about 15-20 thousand sq. km, Figure 4.1 below.[75] The area supports a diverse range of flora and fauna, and is considered as a major stopping point for migratory birds, and is inhabited by more than 500 thousand persons.[76] In July 2016, the Iraqi southern marshlands were named a UNESCO World Heritage Site for their mixed biodiversity and archaeological values of global significance.[77] Being part of the World Heritage Site means that these marshlands become legally protected areas from any

[72] Mark D'Andrea and G. Kesava Reddy, 'Health Consequences among Subjects Involved in Gulf Oil Spill Clean-up Activities' (2013) 126(11) *The American Journal of Medicine* 966, 974; Lauren Peres et al, 'The Deepwater Horizon Oil Spill and Physical Health among Adult Women in Southern Louisiana: The Women and Their Children's Health (WaTCH) Study' (2016) 124(8) *Environmental Health Perspectives* 1208, 1213.
[73] Tonya Hansel et al, 'Longer-Term Mental and Behavioral Health Effects of the Deepwater Horizon Gulf Oil Spill' (2015)3 *Journal of Marine Science and Engineering* 1260, 1271; Richard Kwok et al, 'Mental Health Indicators Associated with Oil Spill Response and Clean-up: Cross-sectional Analysis of the GuLF STUDY Cohort' (2017) 2 *Lancet Public Health* 560, 567.
[74] Natural Resources Defense Council, 'Summary of Information Concerning the Ecological and Economic Impacts of the BP Deepwater Horizon Oil Spill Disaster' (June 2015) 6-7 <https://www.nrdc.org/sites/default/files/gulfspill-impacts-summary-IP.pdf>.
[75] For more information on the Ahwar of Southern Iraq and its history see Nadhir Al-Ansari, Sven Knutsson and Ammar Ali, 'Restoring the Garden of Eden, Iraq' (2012) 2(1) *Journal of Earth Sciences and Geotechnical Engineering* 53, 88.
[76] Ibid.
[77] World Heritage Committee, *Convention Concerning the Protection of the World Cultural and National Heritage*, WHC/16/40.COM/8B, 40th sess, (27 May 2016)15 [B.2.].

activities that can potentially impact their integrity. These marshlands face fundamental conservation challenges because of the overlap between marshlands' zones and potential and actual areas for oil exploration or production. In practice, there are numerous contracted areas for oil exploration inside and immediately close to the Marshes as shown in Figure 4.1 below. This includes north Rumaila oil field in the east Al-Hammar area (contracted to BP/CNPC), West Qurnah oil field in the central Marshes (contracted to Lukoil/Statoil), Majnoon oil field in the south Al-Hawizeh (contracted to Shell/Petronas), and Halfaya oil field, in the north Al-Hawizeh (contracted to CNPC/Petronas/Total).[78] Oil development in these areas is recognised as an emerging threat to the integrity of the Marshes.[79] Table 4.1 below summarises these threats.

[78] Tobias Garstecki and Zuhair Amr, 'Biodiversity and Ecosystem Management in the Iraqi Marshlands – Screening Study on Potential World Heritage Nomination' (International Union for Conservation of Nature and Natural Resources, 2011) 87.
[79] Ibid.

Figure 4.1: Contract Areas for Oil Exploration in the Marsh Area



Source: IUCN 2011[80]

Table 4.1: Direct and Indirect Threats from Oil Exploration/Extraction to the Integrity of the Ecosystem of the Marshes

• Habitat destruction and fragmentation for oil infrastructure (access roads, oil installations, pipelines)
• Freshwater consumption during oil extraction, 4-15 per cent of the oil volume (scarce water resources available in the Marshes)
• Accidental pollution with crude oil or chemicals used in the extraction process,
• Disturbance and potentially increased hunting pressure because of easier access to marsh areas via oil transport infrastructure, and
• Deterioration of the aesthetic values of the area, decrease of attractiveness to future tourists (once security situation has improved), and loss of tourism income, and hence incentives for local resource users to switch from non-sustainable to sustainable ways of natural resource use.

Source: IUCN 2011[81]

[80] International Union for Conservation of Nature and Natural Resources, Ibid.
[81] Ibid.

The most important threats from oil exploration and extraction to the integrity of the ecosystem of the marshes are draining the marshlands, possible oil pollution and freshwater availability. Because of oil exploration, a large area of the marshes (1000 km2) was drained for the major oil fields in southern of Iraq (mentioned above).[82] As a result, the size of the marshes would depend on the size and the existence of the oil installations. Any oil pollution into the water will cause harmful impacts on biological species like fish and birds. The rapid spread of oil pollution in the water and the absence of appropriate technology for treating such pollution in Iraq increase the dangers of any oil incident. Furthermore, oil extraction from fields close to marshes might create demands on the scarce freshwater resources available in the marshes and thus threaten the aquatic ecosystem.[83] This is because oil production, in particular from the Iraqi southern fields, requires on average 1.5 thousand barrels of water injected replacing the space in the reservoir created by producing one thousand barrels of oil.[84] This method is in use to maintain the reservoir pressure and increase the percentage of oil extraction. Obviously, oil exploration and extraction in these areas poses a threat not only to the general ecological integrity, but also specifically influencing the life of indigenous people heavily dependent on the marshes for their livelihoods.[85]

In order to protect the Iraqi marshes, as a world heritage site, and the other environmental issues mentioned above, oil companies both national and international must integrate social and environmental protection policy into their existing corporate strategies. This is because,

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[82] Al-Ansari et al, above n 75.
[83] United Nations World Water Assessment Programme, 'United Nations World Water Development Report 2014: Water and Energy' (UNESCO, 2014) 80.
[84] International Energy Agency, *Iraq Energy Outlook: World Energy Outlook Special Report* (9 October 2012) 66 <https://www.iea.org/publications/freepublications/publication/WEO_2012_Iraq_Energy_OutlookFINAL.pdf>.
[85] The United Nations Integrated Water Task Force for Iraq reported that the quality of water in the Marshlands is poor and not safe for human consumption in many areas. It also reported that water in the Marshlands is less suitable for agriculture and other economic uses. This has added a challenge to actually poor living conditions and lack of opportunities for people living in the Marshlands area. See United Nations Integrated Water Task Force for Iraq, 'Managing Change in the Marshlands: Iraq's Critical Challenge' (Report, United Nations, 2011) 4.

as argued in the previous section (see 4.3.1), CSR requires oil companies to take responsibility for the harm caused to the environment and the community by their activities (negative externalities). They have to undertake due diligence initiatives to mitigate any possible risks on the environment and the negative consequences on the local communities and cultural heritage in the areas of their operations (internalising the externality). In this context, CSR should be viewed as a complement to, rather than, a substitute for, increasing government regulation.[86] The role of corporate governance and CSR in protecting the environment and other stakeholder in Iraq is discussed further in chapter six at 6.3.1.

However, evidence shows that many oil companies have failed to prevent the negative impacts of their operations on the environment and society, especially those operating in developing countries.[87] In some cases oil companies were not forced by legislation to fully internalise the harm caused to the environment and society. For example the supertanker Exxon Valdez oil spill in 1989 leaked 11 million gallons of crude oil in Alaska, resulting in severe economic, cultural and social impacts that continued for years after the accident.[88] At the time of Exxon Valdez oil spill, the liability for oil pollution was limited under the US law.[89] This accident encouraged the US government to make significant legal changes by enacting a comprehensive oil pollution statute, the *Oil Pollution Act of 1990*, to prevent future oil spills, impose penalties and help victims of future oil spills if an oil spill occurs.[90] Even when there are environmental, health and safety laws, oil companies do not always

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[86] Reinhadt et al, above n 35.
[87] See generally, Charles Woolfson and Matthias Beck (eds), *Corporate Social Responsibility Failures in the Oil Industry* (Baywood Pub, 2005); Jedrzej Frynas, 'The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies' (2005) 81(3) *International Affairs* 581, 598.
[88] See, eg, Steven Picou and Cecelia Martin, 'Long-Term Community Impacts of the Exxon Valdez Oil Spill: Patterns of Social Disruption and Psychological Stress Seventeen Years after the Disaster' (Report, University of South Alabama, April 2007) <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=F299148FFD59BF7E016245D471ED1EEA?doi=10.1.1.383.6130&rep=rep1&type=pdf>.
[89] Jeffery Morgan, 'The Oil Pollution Act of 1990: a Look at its Impact on the Oil Industry' (1994) 6(1) *Fordham Environmental Law Journal* 1, 27.
[90] Ibid.

comply with those laws. For example, in the case of Deepwater Horizon oil spill, BP breached the *Clean Water Act* 1972 (US) and the *Migratory Bird Treaty Act* 1918 (US) in addition to 11 felony counts of misconduct or neglect by ships officers relating to the loss of 11 lives.[91]

This problem is most visible in developing countries where high levels of corruption often impede meaningful enforcement of existing legislation and where adequate compensation measures for adversely affected groups rarely exist.[92] For example, in April 2013, the Rana Plaza factory in Bangladesh collapsed. It caused the death of over 1,100 garment workers and injured more than 2,500 garment workers.[93] In this incident, companies had breached existing building and labour protection laws in Bangladesh.

Another example is the Bhopal tragedy, where the victims have not been fairly compensated after more than three decades of litigation in the US and India.[94] The international company that caused the catastrophe, Union Carbide, neither remedied the human and environmental damage nor paid compensation.[95] Similarly, Chevron's oil exploration and production activity in Ecuador damaged the environment and threatened the livelihood of people from at least six indigenous groups. After more than twenty years of litigation, the impacted area has still not been cleaned up and the victims have still not been compensated.[96]

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[91] Guilty Plea Agreement, *United States v BP Exploration and Production Inc*, No 12-292 (ED La, 15 November 2012) Rec Doc 2-1.

[92] European Parliament, 'New Options for Strengthening Standards on Social and Environmental Responsibilities of Corporations and their Implementation' (Study, June 2013) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/457138/EXPO-DEVE_ET%282013%29457138_EN.pdf>.

[93] BBC NEWS, *Bangladesh Factory Collapse Toll Passes 1,000* (10 May 2013) <https://www.bbc.com/news/world-asia-22476774>.

[94] Kanu Priya and Urvashi Bhardwaj, 'India after Bhopal Gas Tragedy and Other Legal Systems' (2018) 3(2) *International Journal of Advanced Research and Development* 1162, 1169.

[95] Shruti Rajagopalan, 'Bhopal Gas Tragedy: Paternalism and Filicide' (2014) 5 *Journal of Indian Law and Society* 201, 224.

[96] Audrey Crasson, 'The Case of Chevron in Ecuador: The Need for an International Crime Against the Environment?' (2017) 9(3) *Amsterdam Law Forum* 29, 48.

These incidents show that even if there exists legal regulation, enforcement is a serious problem not only for developing countries such as Bangladesh but also in relation to large companies operating in developed countries like BP in the US (see the case of Deepwater Horizon explosion explained above). The problem is particularly acute in developing countries because of political influence of large industries and corruption risks. So, the issue is whether where there is a failure of law enforcement, CSR has any role to play in improving working conditions or minimum environmental standards. In addition to providing a sound basis for voluntary CSR, it also points to the need for more comprehensive and effective enforcement of existing regulations. The potential role for CSR in Iraq in protecting stakeholders from the negative impacts of oil activity is discussed in chapter six at 6.3.1.

4.4 Solutions for Negative Externalities

As explained above, negative externalities arise because corporations do not pay for the external effects of their actions, creating a market failure.[97] Economists (eg Ronald Coase) argue that externalities can sometimes be internalised through a private negotiation between the affected party and the company causing the damage. As long as the bargaining costs are low, the parties would achieve an efficient solution to the problem of externalities by assigning property rights to one party or the other.[98] Consequently, a private deal would negate the inefficiency of the market because the cost not originally included could be paid to the injured party.[99] However, solving the problem of negative externalities through a private negotiation is more likely to be effective for small and local externalities than for larger or global ones. This is because global externalities, like global warming, involve a large number

[97] McEachern, above n 60, 365.
[98] Ibid.
[99] Hillman, above n 58, 48.

of people and corporations. When the number of parties involved in the transaction is large, assigning property rights is not a useful solution for efficient outcomes.[100]

It is argued that with large-scale or global externalities only government action can successfully aggregate the interests of all individuals suffering from the externality. Legislation is seen as the necessary solution to remedy the externality.[101] As a result, governments have developed policies and enacted laws in several areas to protect the environment and society from the externality of corporates' actions. One policy that has been tried is requiring a corporation to pay a tax that is equal to the marginal social cost of pollution, usually 100 dollars per ton of emissions. This tax internalises the externality and removes the inefficiency of the negative externalities.[102] Another solution is for governments to enact legislation to force corporations to bear the costs in particular areas, for example, human rights, labour rights, and environmental protection etc. In areas such as those, CSR is not seen as an appropriate response; it is not left to corporations as good corporate citizens to do the right thing. The next section will give illustrations of legislation in these areas.

4.4.1 Hard Law Solution

Many countries, specifically industrialised countries, have enacted strong environmental and labour protection laws to require companies to obey labour standards and protect the environment. These laws are continually updated to respond to current issues. For example, Canada has issued much stronger environmental legislation to ensure the safety of pipeline projects. The Canadian *Pipeline Safety Act* 2015 incorporates the 'polluter pays' principle into Canadian law by imposing additional financial requirements on companies that construct

[100] This is because shared ownership of property rights gives each owner power over all the others, so joint owners have to all agree to the proposed solution.
[101] Andrews Doku and Benjamin Appiah-Kubi, 'Internalizing the Negative Externalities of Mining in Ghana: Should Corporate Social Responsibility Be Voluntary?'(2014) 4 (15) *Developing Country Studies* 76, 83; see also Crasson, above n 96.
[102] Hillman, above n 58, 47.

or operate pipelines.[103] According to this Act, in the case of oil or gas release, the financial liability of a pipeline company is unlimited,[104] and there is liability for the costs and damages it causes without proof of fault or negligence.[105] In Europe there are numerous specific measures to increase labour protection in supply chains, such as *Modern Slavery Act 2015* in the UK[106] and *Duty of Vigilance Law 2017* in France.[107] The following chapter gives illustrations of where legislation, rather than CSR, was seen as the necessary solution to protect workers in developing countries, who produced goods for sale in developed economies, see the discussion in chapter five at 5.4.

For example, the US adopted legislative solutions to force oil companies to internalise the negative externalities of their operations. In the Deepwater Horizon oil spill (see 4.3.2 above), the environment, coastal communities and wild life were protected by legislation with BP subject to criminal and civil penalties and civil liability for the harm caused. BP agreed to plead guilty to the criminal charges related to the accident.[108] This led BP to enter into criminal and civil settlements[109] with the US government in addition to other payments such as clean-up costs. These settlements included penalties for breach of laws, compensation for victims, procedures to improve BP's code of conduct and social welfare programs. Under the Guilty Plea Agreement,[110] approved by the court in early 2013,[111] BP was required to pay

[103] *Pipeline Safety Act*, SC 2015, c 21, s 48(11).
[104] Ibid, s 48(12)(1).
[105] Ibid, s 48(12)(4).
[106] *Modern Slavery Act 2015* (UK) c 30, s 54.
[107] *Loi n° 2017-399 du 27 mars 2017* [Law No 2017-399 of 23 March 2017] (France) JO, 28 March 2017.
[108] BP pleaded guilty to 14 counts of criminal conduct; 11 felony counts of misconduct or neglect of ships officers relating to the loss of 11 lives; one misdemeanour count under the *Migratory Bird Treaty Act*; one misdemeanour count under the *Clean Water Act*; and one felony count of obstruction of Congress. See, Guilty Plea Agreement, *United States v BP Exploration and Production Inc*, No 12-292 (ED La, 15 November 2012) Rec Doc 2-1.
[109] These settlements include the Guilty Plea Agreement, Economic and Property Damages Settlement Agreement, Medical Settlement Agreement and Administrative Agreement.
[110] The Guilty Plea Agreement resolves all federal criminal charges but it does not cover civil claims.
[111] *United States v BP Exploration and Production Inc*, No 12-292 (ED La, 15 November 2012) Rec Doc.

billions of dollars as fines.[112] Under other settlements, BP agreed to pay billions of dollars to resolve civil claims[113] and substantial compensation to the affected people, businesses and local governments.[114]

For the purpose of preventing future accidents, the Guilty Plea Agreement further included specific requirements enforced by the court to enhance BP's ethics, safety and risk management practices (corporate' internal environment). The Agreement imposed a five-year term of probation, whereby BP's performance would be overseen for the next four years. To meet the terms of its probation, BP is specifically required, for example, to conduct Safety and Environmental Management Systems audits; comply with operational oversight provisions; develop ethical conduct in dealings with the authorities; adopt specific oil spill response training and drill measures and programs; revise its oil spill response plan and develop new safety technologies.[115] It was also required to hire a third-party auditor to oversee compliance with these conditions and publicly disclose compliance information.[116] These provisions required BP to internalise the adverse effects of its activities, as well as setting in place measures to prevent future harm to persons, property, and the environment. The US Department of Justice declared that such safety provisions combined with the

[112] Under this agreement, BP had to pay, over a five-year period, USD 4.0 billion as criminal penalties. This amount includes USD 1.15 billion to the Oil Spill Liability Trust Fund, USD 100 million to the North American Wetlands Conservation Fund, USD $350 million to the National Academy of Sciences, USD 2.394 billion to the National Fish and Wildlife Foundation and other criminal fines. *United States v BP Exploration and Production Inc*, No 12-292 (ED La, 15 November 2012) Rec Doc. For the interest of the reader see also, Jordan Diamond et al, 'Deepwater Horizon Restoration & Recovery Funds: How Much, Going Where, For What?' (Report, Environmental Law Institute, May 2014)
<http://eli-ocean.org/wp-content/blogs.dir/2/files/Funding-DH-Restoration-Recovery.pdf>.

[113] Under the Economic and Property Damages Settlement Agreement, BP had to pay USD 8.1 billion for natural resource damages, USD 5.5 billion for *Clean Water Act* civil penalties, USD 350 million to reimburse federal and state assessment costs and other payments. For example, BP was required to pay USD 4.9 billion to the Gulf States to resolves their economic damage claims, USD 8.1 billion in natural resource damages and USD 5.5 billion civil penalty under the *Clean Water Act*.

[114] According to the *Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act* 2012 (RESTORE Act), 80 percent of all *Clean Water Act* penalties should be dedicated to Gulf Coast restoration. See, John Cruden, Steve O'Rourke and Sarah Himmelhoch, 'The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure' (2016) 6(1) *Michigan Journal of Environmental & Administrative Law* 65, 149, 86-88.

[115] Guilty Plea Agreement, Exhibit B, [1]-[32].

[116] Ibid.

financial requirements (criminal and civil) have made this settlement 'the strongest of its kind in history.'[117]

At the same time, BP agreed under several settlements with the US government to finance programs for the benefit of various stakeholders including the environment, local communities, and federal and state governments (corporate's external environment).[118] These settlements provided an opportunity to turn Deepwater Horizon crisis into long-term investment to support Gulf Coast communities. In addition to providing compensation for damages resulting from the accident, many of those settlements have established sustainable programs to support research, education, health, and environmental restoration and protection, to mitigate the adverse effects of this oil spill and prevent similar future incidents.[119]

Overall, the preceding discussion demonstrates that the US has taken a hard law legislative approach to ensure that IOCs, in this case BP, were held responsible for the negative externalities created by its activities. Environmental protection and the safety of workplace are not left to voluntary CSR. The government has imposed tough requirements in the settlements with BP to protect the internal (ie employees) and external stakeholders (ie the environment, affected communities and the government). These operated to deter BP and other deep-water drillers from causing a similar catastrophic loss in the future. BP had to

[117] Joint Memorandum in Support of Proposed Guilty Plea by BP Exploration & production Inc, *United States v BP Exploration and Production Inc*, No 12-292 (ED La, 16 January 2013) Rec Doc 49, 27.
[118] Guilty Plea Agreement, Exhibit B-1, See also Environmental Law Institution, 'BP Oil Disaster: Restoration & Recovery' (February 2013)
<http://eli-ocean.org/wp-content/blogs.dir/2/files/BP-Criminal-Plea-Agreement.pdf>.
[119] For example, BP fund the Gulf Region Health Outreach Program commenced in May 2012 with USD 105 million. The Health Outreach Program is a series of integrated, five-year projects designed to strengthen healthcare in Gulf Coast communities. See, Gulf Region Health Outreach Program, *About the Gulf Region Health Outreach Program* (2014) <http://www.grhop.org/Pages/About.aspx>.

agree to review its code of conduct, improve process safety and risk management plan and conduct specified training exercises for drills and oil spill response.[120]

The Deepwater Horizon case also demonstrates that the US is able through both its legislative regime and jurisdiction to control IOCs and provide support for stakeholders from the negative consequences of an oil spill. As of May 2015, claims related to Deepwater Horizon have been mostly resolved and BP has paid billions of dollars in criminal fines and compensation, and been responsible for the costs of clean-up. By contrast, victims of catastrophes caused by IOCs in developing countries as India, Ecuador, Nigeria, Ghana and others, have not received fair compensation nor clean-up of the pollution caused by the oil company.[121]

The lessons learned from these cases is that developing countries should enact hard laws for environmental protection and workplace safety to require IOCs to protect stakeholders and impose liability for harm that arises from their activities. In this regard, developing countries should also learn from the Canadian experience which incorporates the 'polluter pays' principle into oil and gas pipeline law that make the liability of a pipeline company unlimited for the costs and damages the company may cause (see above). It follows, therefore, that in developing countries CSR should, at best, complement, rather than be a substitute for, environmental and labour protection laws.[122] Legislative protection in developing countries should be combined with strong enforcement and monitoring mechanisms. The position in relation to Iraq is discussed in chapter six at 6.3.1.

Nevertheless, legislation is not the only possible avenue for forcing IOCs to compensate. The Chad-Cameroon Oil Pipeline Project, discussed next, is illustrative.

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[120] Cruden et al, above n 114, 130.
[121] Rajagopalan above n 95; see also Crasson, above n 96; Doku and Appiah-Kubi, above n 101.
[122] Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibilities*, above n 9, 7; Reinhadt et al, above n 35.

4.4.2 Community and Pressure from International Institutions

The Chad-Cameroon Oil Pipeline Project is an oil development project which includes construction of a 1,070 km underground pipeline designed to carry crude oil from the Doba region of southern Chad to the Atlantic coast of Cameroon for transportation to the world market. The project was approved by World Bank in 2000.[123] The project was executed and operated by a consortium of three international oil companies; the project leader ExxonMobil owns 40 per cent, Chevron 25 per cent and Petronas of Malaysia 35 per cent.[124] The consortium of three IOCs provided approximately 97 per cent of the project capital needed whilst Cameroon and Chad were to provide the remaining 3 per cent.[125] Both countries applied for loans from the World Bank to fund the project.

According to the World Bank, the project was expected to generate significant economic benefits to both countries during its 25-year life span.[126] Building the pipeline was necessary for Chad because it is landlocked and its quickest access to the ocean from the oil fields is through Cameroon. At the same time, Cameroon benefits from transit fees and taxes on 90 percent of the pipeline that had to go through its territory. It was expected that both countries would benefit from substantial improvements to their infrastructure, increased employment, capacity-building and poverty reduction.[127]

Despite the estimated benefits from the project for both countries, the project was heavily criticised by civil society, institutions and foreign governments.[128] The concern was the negative impacts on the host communities in terms of environmental degradation, adverse

[123] World Bank and International Finance Corporation, 'Chad-Cameroon Petroleum Development and Pipeline Project: Overview' (Report No 36569-TD, December 2006) <http://documents.worldbank.org/curated/en/821131468224690538/pdf/36569.pdf>.
[124] Ibid.
[125] Ibid; the total cost of constructing the project was estimated at USD3.5 billion. Therefore, Cameroon and Chad were required to provide approximately USD115 million to cover the 3 per cent of the project cost.
[126] Ibid.
[127] Ibid; see also, Celine Germond-Duret, 'Extractive Industries and the Social Dimension of Sustainable Development: Reflection on the Chad–Cameroon Pipeline' (2014) 22 *Wiley Online Library* 231, 242.
[128] Mujih, above n 1, 93.

health impacts, and human rights abuses. Criticism centred on the possible adverse effects of the project on the environment and community that were not adequately addressed in the first Environmental Impact Assessment (EIA) study submitted by the project sponsor in 1998. The pipeline route was expected to cross 17 main rivers and pass through or close to important areas that are home to indigenous peoples in Cameroon, as well as through rainforest inhabited by endangered species of plants and animals.[129] The offshore terminal on the Cameroon coast posed a threat to the ecologically diverse coastal region whose inhabitants largely depend on fishery and tourism. As a result, any pipeline leakages could cause groundwater contamination and freshwater or marine pollution. This could seriously affect communities that rely on these water systems for their daily needs. There were also concerns about forced resettlements of householders around oil wells and significant loss of fertile land for local farmers and cattle ranchers because of oil exploitation and production.[130] In addition, massive migration into the project area during construction may pose threats to food security and increase the risk of transmitting diseases. There was also a risk of ethnic conflict in the region.[131] The EIA study was intended to mitigate the project's social and ecological risks. However, the EIA study prepared by the consortium did not provide a plan to respond to an oil spill nor did it clearly define the responsibility for spills and other disasters. It also lacked adequate participation and consultation with the affected people.[132]

Following the numerous concerns that were raised by critics of the project, NGOs and other concerned groups pressured the World Bank to force IOCs to mitigate negative externalities. The World Bank was the target because without its involvement, the oil pipeline could not be

[129] Ibid, 95.
[130] Ibid,
[131] Susanne Urgewald, 'The Chad Cameroon Petroleum Development and Pipeline Project: Risky Business' *Profiling Problem Projects* (September 2000) <http://ciel.org/Publications/IFCCSChadCameroon.pdf>.
[132] Ibid; Mujih, above n 1, 96.

built, as the project sponsors ExxonMobil admitted.[133] The World Bank, in turn, influenced oil companies by incorporating community demands into the project's lending conditions. The World Bank made its involvement in the project conditional on the consortium holding active consultations with local people and requiring a detailed study to address the negative impact of the project.[134] It required the consortium of oil companies to provide a new EIA study that addressed social and ecological concerns raised about the project and elaborate the measures that would be taken to reduce or eliminate any adverse impact of the project on the environment and the community.[135]

Due to the direct and indirect pressure by the community and the World Bank, the IOCs undertook numerous improvements to address the criticisms made in relation to the first version in the second EIA study that became public in 1999. These changes included redesigning the pipeline route in response to concerns about the effects of a possible oil spill, and plans to mitigate the adverse impacts. Table 4.2 below details these changes.

The discussion on the Chad-Cameroon Oil Pipeline Project shows that absent pressure from the community and the World Bank (funder of the project), IOCs would have not internalised negative externalities. The external pressures have influenced oil companies' decisions significantly and led to better project management including significant adjustments to the project design to protect the environment and society and suitable consultation with local communities.[136] IOCs report that they continue with CSR initiatives over the project's life.[137]

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[133] The World Bank's participation was necessary for the IOCs although they could easily have provided the remaining finance. This is because the World Bank's involvement provides political risk assurance, mitigating the financial risk of the companies, and allowing the consortium to attract investors and gain access to cheaper capital. See Mujih, above n 1, 93.
[134] Ibid, 96.
[135] Ibid.
[136] Germond-Duret, above n 127; Marieme Lo MSc, 'Revisiting the Chad-Cameroon Pipeline Compensation Modality, Local Communities' Discontent, and Accountability Mechanisms' (2010) 30(1-2) *Canadian Journal of Development Studies* 153, 174.
[137] Esso Exploration and Production Chad, 'Chad Export Project' (Report, No 28, 2010) <http://cdn.exxonmobil.com/~/media/global/files/chad-cameroon/28_allchapters.pdf>.

Such pressure by NGOs forces IOCs to take CSR seriously, principally in developing countries where environmental and social protect legislation is not as stringent as that of developed countries or not enforced.[138] However, it must be noted that NGO pressure may have worked in this instance because the NGO was able to exert influence on the World Bank as the project funder.

Table 4.2: Changes in the Second EIA Study of the Chad-Cameroon Oil Pipeline Project

1	Re-routing the pipeline away from sensitive habitats,
2	Developing an Oil Spill Response Plan,
3	Presenting an Environmental Monitoring Plan,
4	Developing an Operations Integrity Management System,
5	Introducing an Indigenous Peoples' Plan,
6	Presenting a Compensation Plan to those whose land and property would be affected by the project and
7	Introducing a health outreach programme to local communities and workers

Source: Author based on information provided by Edwin Mujih (2012)[139]

NGOs and international institutions may be able to influence various CSR initiatives, but their legitimacy and capacity are often limited,[140] because of their lack of accountability.[141] Moreover, the majority of oil projects do not involve international financial institutions and civil society pressure is rarely strong enough to force socially responsible conduct by IOCs. This confirms the need for statutory regulations, specifically in developing countries, to ensure at the very least, environmental protection. This is practically important for Iraq, as is explained in chapter 2 (see 2.7.1) discussing how oil projects pose serious threats to

[138] Thomas Lyon and John Maxwell, 'Corporate Social Responsibility and the Environment: A Theoretical Perspective' (2008) 2(2) *Review of Environmental Economics and Policy* 240, 260.
[139] Mujih, above n 1, 89-99.
[140] Frynas, above n 37, 62.
[141] Matthew Winters and John Gould, 'Betting on Oil: The World Bank's Attempt to Promote Accountability in Chad' (2011) 17(2) *Global Governance* 229, 245.

indigenous communities and places of cultural heritage. Legislation for protecting the environment and other stakeholders in Iraq is discussed in chapter 6 at 6.3.1.

4.5. Corporate Social Responsibility and Community Welfare

4.5.1 Maximizing Social Welfare

As previously explained, CSR can be seen not only as a means by which IOCs can be held responsible for negative externalities arising from their operations but also as means to contribute to sustainable development in host countries. In some developing countries, IOCs are not merely expected to act appropriately in terms of negative externalities requiring responsible environmental practice and health and safety, but also to increase social welfare.[142] Whilst the primary objective of host countries is to obtain fiscal revenues from oil and petroleum as a means to build infrastructure that will benefit the community,[143] some countries look to IOCs to provide benefits and infrastructure for local communities. This can be short term while operations are on-going, like supplying goods and services, and longer term such as training and skills development, as well as local community infrastructure such as roads, electricity etc.[144] Many host countries have regulated local content and training requirements in the extractive industries (mining, oil and gas) (see 5.5 and 6.3).

Companies' positive contributions to community welfare are particularly relevant in developing countries, where the state has been unable to provide necessary infrastructure, health, and education facilities.[145] Local communities in developing countries expect oil companies to play an essential role in providing public goods. Moreover, in developing

[142] Frynas, above n 37, 102; John Morgan and Justin Tumlinson, 'Corporate Provision of Public Goods' (2013) 1 *Academy of Management Proceedings*.
[143] James Otto, 'How Do We Legislate for Improved Community Development?' (Working Paper No 2017/102, World Institute for Development Economics Research, April 2017) 1 <https://www.wider.unu.edu/sites/default/files/wp2017-102.pdf>.
[144] Ibid. This is so because of the nature of non-renewable natural resources. Usually a petroleum project has a finite lifespan and that once the oil or the gas has been depleted, the project will cease operation. Therefore, host countries are seeking to maximise social benefits during the life of the project.
[145] Frynas, above n 37, 102.

countries where existing regulations require a level of environmental and social protection below social expectations, additional corporate investment to improve living standards can increase social welfare. However, companies' contributions to increase social welfare are not limited to developing countries. At present in the US, for example, many shale producers have made large contributions to local governments (eg local fire departments and road repairs) and other social programs (eg healthcare, education, training and local content) aimed at alleviating the social impacts resulting from the boom in producing shale placed on the local infrastructure and the community.[146] This may be seen by shale producers as essential for their long term interests and necessary to maintain public support for this industry in what had become a hostile environment.

As part of the growing global expectation that the oil industry should contribute positively to long-term local development, international oil companies are called on to play a role in international development goals such as poverty alleviation and promoting education and health.[147] IOCs have responded to these challenges by accepting social responsibilities and demonstrating their commitment by increasing community development spending. Oil companies are now spending millions of dollars on CSR initiatives.[148] As part of their 'social licence' to engage in the oil industry, IOCs have initiated, funded and implemented community development projects (eg hospitals, schools, roads, water and electricity, sports' facilities, assist youth employment programmes) in developing countries and participated in

[146] See Spence, above n 39.
[147] In 2015, the United Nations committed to help achieve eight sustainable development goals what so called the Millennium Development Goals by 2030. The Millennium Development Goals focus on major global issues like end poverty, promote prosperity and well-being for all, and protect the planet. See United Nations Development Programme, *The Millennium Development Goals* <http://www.undp.org/content/undp/en/home/sdgoverview/mdg_goals.html>.
[148] For example, in 2016, Chevron contributed more than USD 185 million and ExxonMobil contributed USD 242 million to communities around the world. See Chevron, 'Corporate Responsibility Report Highlights' (2016) 22 <https://www.chevron.com/-/media/shared-media/documents/2016-corporate-responsibility-report.pdf>; ExxonMobil, 'Corporate Citizenship Report' (2016) 33 <https://corporate.exxonmobil.com/en/~/media/Global/Files/sustainability-report/publication/2016-CCR-full-digital.pdf>.

partnerships with established development agencies (eg US Agency for International Development and the United Nations Development Program).[149]

The rationale is that providing social development programs may mitigate the negative perceptions of the oil industry and its negative effects. CSR engagement by IOCs offers an opportunity for companies to generate competitive advantage, improve the company's reputation, and provide legitimacy and positive approval (see the full discussion on the rationale of CSR engagement above at 4.2.2).

However, the effectiveness of CSR initiatives in this sector has been increasingly questioned.[150] Expenditure is likely to be a very small in comparison to the huge profits made by IOCs. Corporate social engagement has relatively little potential for tackling the developmental challenges of local communities.[151] Oil companies' initiatives for local communities are limited because of companies' motives for community development work and problems of implementation.[152] From the companies perspective, the main motive for positive engagement is the 'business case for CSR' that is, the use of social initiatives to achieve corporate objectives (see discussion at 4.2.2 above).[153] As a consequence, social projects are usually driven by short-term expediency rather than the long-term development needs of a community.[154] This motive combined with an absence of proper consultation with the affected community means that CSR projects may reflect the company's priorities rather than those of local communities. The other reason for limited development potential of CSR initiatives is that oil companies ordinarily implement social projects without integrating these

[149] Jedrzej Frynas, 'The False Developmental Promise of Corporate Social Responsibility: Evidence From Multinational Oil Companies', above n 87.
[150] Frynas, above n 37, 6.
[151] Ibid, 115-133.
[152] Jedrzej Frynas, 'The False Developmental Promise of Corporate Social Responsibility: Evidence From Multinational Oil Companies', above n 87.
[153] Frynas identified four motives for oil companies to engage in community development project that all considered as a business case including: obtaining competitive advantages, maintaining a licence to operate, managing external perceptions and keeping employees happy; Ibid.
[154] Ibid.

projects into a larger regional development plan or coordinating with government agencies.[155] The consequence is that projects may bring little benefit to the community. For example, an oil company in Nigeria built a road which ran parallel to another road built by a government agency (the Niger Delta Development Commission).[156]

Nigeria provides an illustration of the problems. Putting aside the fact that IOCs in Nigeria are required by legislation to contribute to development (see 5.5.2), IOCs claim that they have contributed to development in the Niger Delta via programmes in education, health, agriculture, transport and construction as part of their corporate social responsibility. These initiatives did not satisfy community demands with antipathy by host communities against oil companies.[157] IOCs have been criticised for not achieving tangible benefits from development projects for local stakeholders.[158] This is largely because oil companies failed to consult with the broader host communities, so that projects may not be relevant to their needs.[159] The next section discusses community consultation as necessary for the success of development projects and is a key strategy for Corporations making positive contributions to social welfare. This is sometimes referred to as positive CSR although 'positive CSR' may more properly describe those beneficial community outcomes which derive from the corporations' operations, such as conducting research which benefits not only the corporation itself but also the broader industry and the economy. In the section following 'positive CSR' is used in the broader sense.

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[155] Ibid, Similar finding of Jedrzej Frynas's study have been demonstrated by other study on the multinational oil companies in Azerbaijan and Kazakhstan see Lars Gulbrandsen and Arild Moe, 'Oil Company CSR Collaboration in 'New' Petro-States' (2005) 20 *Journal of Corporate Citizenship* 53, 64.
[156] Frynas, above n 37, 130.
[157] See footnote n 166 below.
[158] O Alabi and S Ntukekpo, 'Oil Companies and Corporate Social Responsibility in Nigeria: An Empirical Assessment of Chevron's Community Development Projects in the Niger Delta' (2012) 4(2) *British Journal of Arts and Social Sciences* 361, 374.
[159] Uchechukwu Nwosu, 'Corporate Social Responsibility of EXXON-Mobil in Akwa Ibom State, Nigeria and Community-industry Relation: a Sociological Jurisprudence Prism' (2017) 4(2) *International Journal of Peace and Conflict Studies* 164, 179; Eghosa Ekhator, 'Corporate Social Responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: An appraisal' (2014) 28 *Cadernos de Estudos Africanos* 119, 140; Alabi and Ntukekpo, above n 158; Frynas, above n 37, 124-126.

4.5.2 Strategies for Implementing Corporations Contributions to Social Welfare

A. Community Consultation

Many large oil projects implement CSR programmes, sometimes referred to as 'positive CSR' (see above) which often include benefits for nearby communities. As noted above community consultation is essential to maximise community benefits. One approach is to enter into Community Development Agreements (CDAs). CDAs can be a useful approach that provides both the oil company and the community with a mutually agreed means to define and manage development expectations from the oil project.[160] The core objectives of the CDAs are, first, improving relationships between companies, communities, governments and other stakeholders; and second, promoting sustainable and mutually rewarding benefits from oil projects, including poverty alleviation and other initiatives which may be beyond the immediate scope of impacts for the project.[161] The World Bank encourages government and companies to use CDAs

> as a tool to enhance community participation and consultation, manage expectations of involved parties, and ultimately maximize pro-poor benefits to impacted communities while helping to establish "social license to operate" for governments and industry.[162]

CDAs are increasingly being used in the mining industry, either in response to CSR principles or under legal requirements.[163] CDAs can also be used in the oil and gas sectors.[164] They have been used extensively by Chevron in the Niger Delta of Nigeria.

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[160] Otto, above n 143.
[161] Word Bank, *Mining Community Development Agreements: Source Book* (March 2012) 5 <http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf>.
[162] Ibid, 1.
[163] Governments are increasingly mandating in legislation (Australia, Canada, India, Nigeria, Guinea, Indonesia, Afghanistan, Kazakhstan, etc) that mining industry projects must have programmes for community development rather than relying on voluntary efforts. See Columbia Center on Sustainable Investment, 'Requirements for Community Development in Mining Laws' (2017) <http://ccsi.columbia.edu/files/2014/09/Mining-Community-Development-Requirements-Summary-Table-CCSI-2017_February.pdf>.
[164] Otto, above n 143.

Chevron's Global Memorandum of Understanding (GMOU) in Nigeria is a successful example of implementing consultation approach for community development. Prior to launching the GMOU in 2005, Chevron's model for engagement with local communities included individual agreements with communities near the company's operations and infrastructure development projects selected by the company. This model was problematic[165] and did not result in a stable operational environment.[166] Nor did it contribute to community development of the sort that the company intended, or that most community members wanted.[167] Chevron realised that a more reliable governance model that relies on using a new community engagement approach was needed.

As a result, Chevron dramatically reshaped its community engagement strategy in 2005[168] and established the Global Memorandum of Understanding (GMOU) as a public-private model to promote economic and social stability.[169] The GMOUs were signed between Chevron, clusters of communities impacted by the company's operations and state

[165] Individual agreements take the form of funding for small-scale development projects, homage payments to traditional leaders and sometimes contracts for work. As a result, there were few development results to show for them and funds often ended up enriching only community leaders. In addition, larger-scale infrastructure projects were selected, designed and implemented by Chevron alone and seen as the company's projects rather than community projects, therefore the communities targeted them during the 2003 crisis. See in general, Merrick Hoben, David Kovick, David Plumb and Justin Wright, 'Corporate and Community Engagement in the Niger Delta: Lessons Learned from Chevron Nigeria Limited's GMOU Process' (Case Study, Consensus Building Institute, November 2012) 4 <http://accessfacility.org/sites/default/files/Hoben,%20Kovick,%20Plumb%20%26%20Wright%20-%20Corporate%20and%20Community%20Engagement%20in%20the%20Niger%20Delta%3B%20Lessons%20Learned%20from%20Chevron%20Nigeria%20Limited%27s%20GMOU%20Process.pdf>.

[166] The relationships between communities and oil companies in the Niger Delta have long been characterized by substantial mistrust and antagonism. The crisis of governance in the country, since the 1990s, has created a range of disturbances including the theft of crude oil, kidnapping expatriate staff, sabotage of oil pipeline and equipment, blocking oil facilities, and human rights violations. This has damaged oil companies' reputation and negatively affected both government revenue and corporate profit. During the inter-ethnic crisis in 2003, many of Chevron's production facilities (along with other international oil companies) as well as social projects intended to benefit the community were damaged or destroyed. Nwosu, 'Corporate Social Responsibility of EXXON-Mobil in Akwa Ibom State' above n 159; see also, Uchechukwu Nwosu, 'The Relationship between Oil Industries and their Host Communities in Nigeria's Niger Delta Region' (2017) 4(1) *International Journal of Public Administration and Management Research* 42, 52.

[167] Hoben et al, above n 165, 4.

[168] Ibid, 2.

[169] Chevron, 'Roots of Change: Chevron's Model Community Empowerment Program in the Niger Delta' (2017) <https://www.chevron.com/-/media/chevron/stories/documents/nigeria-case-study-GMoU.pdf>.

governments.[170] The GMOUs are essentially CSR initiatives in the form of agreements by the oil companies (with groups of communities instead of with single communities) to provide communities with benefits like employment, businesses and scholarships.[171] Under GMOUs host communities participate in decision-making regarding development projects, and assume responsibility and accountability for how to use funding provided by the company and for implementing the projects selected.[172] The World Economic Forum in 2016 stated that, implementing GMOU model 'has established [Chevron] as industry leader in social performance in Nigeria and has been adopted by other companies in Nigeria'[173] like Shell. It has led to achieve tangible outcomes including

> [A] measurable improvement in the security of the operating environment, a substantial improvement in the health, education and economic well-being of local communities and a remarkable improvement in the cordial relationship between the local communities and the company.[174]

Based on this successful experience, in 2007 the government of Nigeria requires mining companies to reach community development agreements with their prospective host communities towards the provision of social and economic benefits that would enhance the sustainability of host communities.[175] However, this assumes an authorised spokesperson(s) body, which in turn assumes a stable society, accountability, and transparency which features Iraq struggles to achieve.

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[170] Ibid.
[171] Ibironke Odumosu-Ayanu, 'Governments, Investors and Local Communities: Analysis of a Multi-actor Investment Contract Framework' (2014) 15(2) *Melbourne Journal of International Law* 473, 514.
[172] Chevron, above n 169.
[173] Global Agenda Council on Fragility, Violence & Conflict 'Responsible Investment in Fragile Contexts' (Report, World Economic Forum, May 2016) 22 <http://www3.weforum.org/docs/GAC16_Responsible_Investment_Fragile_Context.pdf>.
[174] Ibid.
[175] See *Nigerian Minerals and Mining Act* 2007, No 20, s. 116. According to the government, numerous mining companies have been sanctioned for failing to conduct a Community Development Agreement. See, Ministry of Mines and Steel Development, *FG Sanctions 313 Mining Companies* (22 March 2017) <http://www.minesandsteel.gov.ng/2017/03/22/fg-sanctions-313-mining-companies/>.

B. Public-Private Models

In addition to effective community consultation, public-private collaboration is another successful approach for using CSR for community development. As part of their commitment to corporate social responsibility, most IOCs initially engaged in direct community development projects. But recently the emphasis has shifted to the use of a partnership strategy to address social and environmental issues. While the primary task of the public sector is to map societal and environmental needs, private sector companies engage primarily through CSR initiatives in financing and executing projects to meet those needs. This approach can maximise the benefits from development projects and enhance the relationship between the government, companies and stakeholders. In some cases the social and environmental issues are more complex, and cannot be solved by the government alone or by individual private initiatives (see the case of India below). For this, corporations may enter into a public-private partnership, whereby the government provides the necessary infrastructure (ie legal framework, planning and design) with the remaining responsibilities to be borne by the private sector (ie capacities, experience and execution). Following are two example of using public-private partnerships to implement CSR for social welfare.

Brazil has successfully implemented the public-private partnership approach in the oil industry to increase social benefits from investment in this sector. Since 2005, Brazil required (under the petroleum law and contractual clauses)[176] that oil and gas companies invest in research and development to the value equal to 1 per cent (1 %) of gross revenues from large oil fields. Half of these resources (50 per cent) must be invested in scientific and technological institutions (ie in non-profit public or private universities or research institute

[176] This obligation further discussed in chapter 5 at 5.6.

located in Brazil) accredited by the government (the National Petroleum Agency).[177] This interaction between oil companies and research institutions allows the fostering of technological development and training of qualified workers related to the oil industry.[178] In practice, this collaboration has strengthened oil companies' contribution to technological development and boosted scientific research, technological capabilities, and innovation.[179] It is again noted that these are legislative requirements but the implementation does suggest suitable approaches to dealing with non-mandatory voluntary CSR.

India has also used CSR as a means of achieving national social and environmental goals.[180] One massive environmental problem in India is that about 60 per cent of the Indian population have no access to clean sanitation and practice open defecation.[181] This impacts the health and well-being of the society, reduces gross domestic product and results in economic loss.[182] In response, the Government of India launched in October 2014 a nation-wide cleanliness campaign[183] named Swachh Bharat Abhiyan.[184] The objectives of this five-

[177] The R&D clause in Brazil is currently regulated by the National Petroleum Agency resolutions 47/2012 and 50/2015, as well as by the National Petroleum Agency technical regulations 7/2012 and 3/2015.
[178] Giovanna Gielfi, Andre Furtado and Andre Campos, 'University-industry Collaboration in the Brazilian Oil Industry: A Bibliometric Examination' (Paper presented at the 12th Globelics International Conference, Ethiopia, 29th-31st October 2014)
<file://ad.uws.edu.au/dfshare/HomesPTA$/90928758/Downloads/Globelics2014%20(2).pdf>.
[179] Lorenzo Mancini and Maria Paz, 'Oil Sector and Technological Development: Effects of the Mandatory Research and Development (R&D) Investment Clause on Oil Companies in Brazil' (2018) 58 *Resources Policy* 131, 143.
[180] Beena Lawania and Shikha Kapoor, 'Leveraging Corporate Social Responsibility for the Advancement of Development Goals in India: the Sanitation and Cleanliness Movement in India' (2018) 12(2) *Australasian Accounting, Business and Finance Journal* 46, 70.
[181] Ibid.
[182] Ibid.
[183] This campaign covers more than 4,040 statutory towns of the country; ibid.
[184] Cleanliness in India would otherwise be impossible with around 67 per cent of rural households defecating in open and 78 per cent of sewage dumped into rivers. Likewise, 12 per cent of urban households have no toilets, over 200,000 Indians die due to poor sanitation & hygiene, over 24 per cent young girls drop out of school because they lack access to sanitary toilets at home or school, and 6000 tonnes of plastic waste is littered daily. See, Supreet Jaggi, Kajal Chaudhary, Surjan Singh and Milandeep Kour, 'Swachh Bharat: Clean India: Green India' (2017) 2(1) *International Journal of Innovative Studies in Sociology and Humanities* 30, 39; Government of India, 'Swachh Bharat & Ganga Rejuvenation People's Participation & Sustainability' (Report, February 2016) 21
<http://csharyana.gov.in/WriteReadData/Miscellaneous/Administrative%20Reforms/5753.pdf>.

year cleanliness campaign[185] are to provide sanitation and water supply facilities in the country, improve solid waste disposal systems, and generate awareness about sanitation and its linkage with public health.[186] Swachh Bharat Abhiyan has been included as CSR activities under Schedule VII of the *Companies Act 2013* that requires certain companies to spend at least 2 per cent of their average net profits of the last three financial years on CSR programs (further discussed at 5.5.1).[187] As such, the Government has called upon companies to invest part of their CSR expenditure on this campaign. For instance, oil and gas enterprises and their joint ventures were advised to spend 33 per cent of CSR funds on Swachh Bharat activities.[188] Along with companies from other sectors, oil companies are notably supporting Swachh Bharat, by undertaking clean up initiatives, constructing sanitation facilities and increasing awareness.[189] Some oil companies have focused on large projects. For example, as a method of managing solid waste, Indian Oil is in the process of installing 10 waste-to-energy plants of 5 tonnes per day capacity in Varanasi city. The first plant under this project was installed in 2017 and the electricity generated from organic waste at this plant is being used to illuminate street lights in the vicinity.[190] In doing so, the Government of India had established an effective partnership with companies to require large corporations to contribute to community welfare.[191] Although the Indian legislation refers to these contributions as 'CSR' and the funds as 'CSR funds', consistently with the thesis definition of CSR (see 4.2.1 above), these contributions do not qualify as CSR. But what it does indicate is that

[185] As a befitting tribute to Mahatma Gandhi, the government has set itself to achieve this massive task –Clean India– by October 2019, the 150th anniversary of Mahatma Gandhi.
[186] Government of India, above n 184, 7.
[187] Indian *Companies Act 2013*, s 135.
[188] K Tripathi, 'Enabling Initiatives Towards a Clean India' in *Standing Conference of Public Enterprises* (April 2017) 14 <http://www.scopeonline.in/SCOPE-pdf/April-2017-Issue-KALEIDOSCOPE.pdf>.
[189] For example, Oil Central Public Sector Enterprises and its Joint Ventures have constructed more than 20,187 school toilets; about 95 per cent of them were in rural areas, which help to reduce the drop-out rate among girl students due to non-availability of separate toilet facilities. See Government of India, Ministry of Petroleum and Natural Gas, *Annual Report 2017-18* (2018) 19 <http://petroleum.nic.in/sites/default/files/APR_E_1718.pdf>.
[190] Ibid, 148.
[191] Lawania and Kapoor, above n 180.

government and the community expect large corporations to positively contribute to social welfare and legislation is seen as the appropriate mechanism to achieve this. This also demonstrates that these legal obligations in India provide an opportunity to build a productive relationship between the public and the private sector to implement public policy agenda, and it allows the government to invest resources in projects that actually support social welfare.

As noted in chapter three and in this chapter, modern legislative responses acknowledge that Corporations have duties to take into account the impact of their operations on stakeholders. Concurrently with this development are increased reporting requirements for Corporations on CSR activities. This is discussed in the next section.

4.6 Corporate Social Responsibility Reporting

4.6.1 The Benefits of CSR Reporting

Corporate social responsibility reporting refers to a corporation's reporting of social and environmental performance information or 'non-financial information' to investors as well as to the broader public. CSR reporting requirements have developed due to increasing stakeholder demands for companies to be more transparent about their social and environmental policies.[192] Stock exchanges and securities regulators have also acknowledged that information on companies' environmental and social performance may be material to investors and to the stability of modern capital markets.[193] This is because reporting financial performance alone is not adequate to judge the success of a company or its overall

[192] For example, in US the *Sarbanes-Oxley Act 2002* was amended in 2012 to strength corporate governance disclosure requirements in response to corporate collapses such as Enron and WorldCom; See also, Sanford Lewis, 'Lessons on Corporate "Sustainability" Disclosure from Deepwater Horizon' (2011) 21(2) *New Solutions* 197, 214.

[193] Virginia Harper Ho, ''Comply or Explain' and the Future of Nonfinancial Reporting' (2017) 12(2) *Lewis and Clark Law Review* 317, 355.

performance; integrated reporting practice must combine financial and non-financial information (social and environmental) into a single annual report.[194]

Corporate social responsibility reporting is one of the most important widely applied governance practices reflecting the evolution of companies' governance systems from a shareholder interest focus to a broader stakeholder's perspective.[195] Sharing qualitative and verifiable non-financial information can build and enhance trust between the company and key stakeholders.[196] This is because such information provides stakeholders with an understanding of how the company has taken into account or responded to major environmental and social risks. Presenting this information to stakeholders and integrating their feedback into the company's policy leads to greater stakeholder engagement, and may help firms better manage their stakeholder expectations.[197] Hence, CSR reporting seems to be a new accountability practice that allows the public and other monitoring agencies (eg the government, stock markets, NGOs, and the media) to gauge companies' social and environmental performance, and increase pressure on them to act in a more responsible way.[198]

Moreover, non-financial disclosure can be seen as an opportunity to integrate sustainability into business practices and support companies to achieve benefits and efficiencies. Companies can generate continuous improvements in business impact by learning from interactions with their stakeholders and past experiences, and implementing this learning in

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[194] Sanford Lewis argues that 'without more stringent standards, integrated reports would neglect substantial risks and, as BP's sustainability reports demonstrate, create false impressions of good practice.' See Lewis, above n 192.

[195] Suzanne Young and Magalie Marais, 'A Multi-level Perspective of CSR Reporting: The Implications of National Institutions and Industry Risk Characteristics' (2012) 20(5) *Corporate Governance: An International Review* 432, 450.

[196] CSR Europe and Global Reporting Initiative, *Member State Implementation of Directive 2014/95/EU* (Report, 2017) 6 <https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf>.

[197] Ibid.

[198] Jonathan Doh and Terrence Guay, 'Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective' (2006) 43(1) *Journal of Management Studies* 47, 73.

their future strategy. For these reasons, performance assessments, risks' management and stakeholder's engagement, which are all part of the reporting process, serve as necessary elements for companies to generate more positive impact on society.[199] Thus, CSR reporting is an opportunity for companies to enhance their societal value and for stakeholders to monitor companies' social and environmental performance.

Although reporting on CSR policy is important for both companies and key stakeholders, reporting on CSR practice until recently has been voluntary. This voluntary reporting approach (self-regulation) has allowed companies not to fully disclose their efforts, if any, to integrate CSR initiatives in their core policies; some may focus on positive rather than negative indicators and, therefore, neglect substantial risks or, in some cases, publish deceptive information.[200] Moreover, in contrast to more regulated financial reporting, a voluntary CSR disclosure regime does not meet investors' concerns who require information that is timely, reliable, consistent, and comparable among firms and over time.[201] It is argued that mandatory regulation is the best way of improving the quantity and quality of non-financial information.[202] A study confirmed that the quality of non-financial disclosures is lower in countries without regulative mandate, compared to countries with regulations.[203] A study of effects of national regulations on CSR activities in 24 OECD countries found that

[199] CSR Europe and Global Reporting Initiative, above n 196.
[200] For instance, Sanford Lewis argued that BP sustainability reports between 2005 and 2009 have omitted substantial information that the company made a series of money-saving and cost cutting measures on safety spending that dramatically increased the danger of a destructive Deepwater Horizon oil spill in 2010 (discussed above). See Lewis, above n 192.
[201] For more details on the limitations of voluntary non-financial information disclosures from an investment perspective see Harper Ho, ''Comply or Explain' and the Future of Nonfinancial Reporting', above n 193, 326-327.
[202] Elise Crawford and Cynthia Williams, 'Should Corporate Social Reporting be Voluntary or Mandatory? Evidence from the Banking Sector in France and the United States' (2010) 10(4) *International Journal of Business in Society* 512, 526.
[203] Ibid.

companies in countries with mandatory non-financial disclosure engage in significantly more CSR activities.[204]

Many CSR disclosure measures in corporate laws, securities and capital markets regulation are moving increasingly toward mandatory CSR reporting using a 'comply-or-explain' model, discussed next.

4.6.2 Comply or Explain

The widely applied approach for enforcing CSR reporting or non-financial information disclosures is the 'comply-or-explain' regime that is described as flexible corporate governance practice.[205] Under the comply-or-explain model, a stock exchange, securities regulator or other authority adopts a code incorporating corporate social responsibility best practice. Companies then can choose between complying with these principles or explaining why they do not.[206] Accordingly, a company that fails to implement the code's best practice and fails to provide an adequate explanation would be noncompliant.[207] Companies, however, are not sanctioned if they do not establish and implement adequate social responsibility policies but rather they have to give a reasonable explanation for non-compliance. There is a divergence of views on whether comply-or-explain is a mandatory or voluntary approach.[208] On the one hand, it is mandatory because all subject companies should either comply or explain under the same code provisions, 'the codes themselves represent a form of soft law or

[204] Gregory Jackson et al, 'Regulating Self-Regulation? The Politics and Effects of Mandatory CSR Disclosure in Comparison' (SSRN, 1 March 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925055>.
[205] Comply-or-explain model was first introduced in the UK in the 1990s as the core of its corporate governance reforms, and have since been adopted around the world. See Report of the Committee on the Financial Aspects of Corporate Governance, also known as the Cadbury Report (December, 1992) <http://www.ecgi.org/codes/documents/cadbury.pdf>.
[206] Harper Ho, ''Comply or Explain' and the Future of Nonfinancial Reporting', above n 193.
[207] Ibid.
[208] See eg, Andrew Keay, 'Comply or Explain in Corporate Governance Codes: in Need of Greater Regulatory Oversight?' (2014) 34(2) *Legal Studies* 279, 304 (referring to corporate governance codes as voluntary regimes and 'soft law'); contra see, David Seidl, Paul Sanderson and John Roberts, 'Applying the 'comply-or-explain' Principle: Discursive Legitimacy Tactics with Regard to Codes of Corporate Governance' (2013) 17(3) *Journal of Management & Governance* 791, 826 (referring to comply-or-explain 'as a particular type of enforced self-regulatory regime').

self-regulation' because complete conformity to the code is not required.[209] In fact, comply-or-explain, therefore, represents an intermediate approach to regulation, as it neither fully mandatory nor fully voluntary.[210] Further, the comply-or-explain approach is more likely to be effective where discipline is exercised by the financial market, where there is strong shareholder activism and a critical financial press which create a market sanction rather than a legal one.[211] It is also relies on the level of relevant stakeholders' awareness so as to exert effective community control over the performance of markets and the way companies work.

Although reporting on a comply-or-explain basis is mostly used to disclose corporate governance practice, using this regime has expanded existing corporate governance disclosures to include a wide range of CSR issues in many jurisdictions. For instance, comply-or-explain regime implemented by regulations that focus on stakeholder protection and require corporations to report on environmental protection, human rights, anti-corruption, anti-bribery matters (eg EU countries and Australia)[212] as well as regulations that focus on increasing social welfare (eg India and Tanzania).[213]

There is international recognition of the importance of strengthening market mechanisms to monitor the social and environmental performance of corporations. A number of jurisdictions have introduced regulatory requirements governing CSR disclosure on a comply-or-explain basis.[214] In the EU, for example, a series of decisions have been taken to enhance reporting

[209] Harper Ho, ''Comply or Explain' and the Future of Nonfinancial Reporting', above n 193.
[210] Ibid.
[211] Ramin Gamerschlag, Klaus Moller and Frank Verbeeten, 'Determinants of Voluntary CSR Disclosure: Empirical Evidence from Germany' (2011) 5(2-3) *Review of Managerial Science* 233, 262; Sridhar Arcot, Valentina Bruno and Antoine Grimaud, 'Corporate Governance in the UK: Is the Comply or Explain Approach Working?' (2010) 30 *International Review of Law and Economics* 193, 201.
[212] Australian companies are obliged to disclose sustainability-related information under the *Corporations Act 2001* (Cth) and also under the *National Greenhouse and Energy Reporting Act 2007* (Cth).
[213] See, Indian *Companies Act 2013*, s 135; Tanzanian *Petroleum Act 2015*, ss 220, 222; see also the discussion at 5.5.1 and 5.5.3 respectively.
[214] In 2016, there were over 400 sustainability reporting regulations and other instruments across 64 countries, the majority of them were mandatory, in contrast to 180 instruments across 44 countries in 2013. See UNEP, GRI, KPMG & Centre for Corporate Governance in Africa, 'Carrots and Sticks: Global Trends in Sustainability

requirements on social, environmental and governance issues, effectively making reporting of non-financial information compulsory across the EU.[215] In 2014, the European Parliament issued Directive 2014/95/EU that set greater business transparency and accountability on social and environmental issues.[216] The directive requires all member states to enact laws, regulations and administrative provisions necessary to comply with this directive.[217] By requiring companies to disclose accurate, clear and verifiable details, the directive seeks to enhance the consistency and comparability of non-financial information throughout the Union.[218] The directive requires companies with an average of 500 employees to disclose information on their performance and measures undertaken relating to the impact of their activities on the environment, social and employee matters, respect for human rights, anti-corruption and bribery matters.[219] By 2017, all 28 EU member states enacted regulations to implement the provisions of Directive 2014/95/EU into their national law.[220] Implementing this directive in all EU countries represents a significant development in regulating CSR reporting.

In order to comply with Directive 2014/95/EU, some EU countries (eg UK[221], France[222] and Germany[223]) have amended their company laws. In some jurisdictions specific laws have

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Reporting Regulation and Policy' 11 <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/05/carrots-and-sticks-may-2016.pdf>.

[215] For example, in 2013 the European Parliament issued a resolution that 'Calls on major international garment brands to critically investigate their supply chains and to cooperate with their subcontractors to improve occupational health and safety standards' and 'Calls on the Commission actively to promote mandatory responsible business conduct among EU companies operating abroad, with a special focus on ensuring strict compliance with all their legal obligations, in particular international standards and rules in the areas of human rights, labour and the environment.' See, *Recent Casualties in Textile Factory Fires, Notably in Bangladesh* [2015] OJ C 440/94, arts 7, 8; see also, *Labour Conditions and Health and Safety Standards Following the Recent factory Fires and Building Collapse in Bangladesh* [2016] OJ C 55/120, arts 2, 10, 12; *Directive 2013/34/EU of the European Parliament and of the Council* [2013] OJ L 182/19.

[216] Directive 2014/95/EU of the European Parliament and of the Council [2014] OJ L 330/1 (regarding disclosure of non-financial and diversity information by certain large undertakings and groups).

[217] Ibid, art 4(1) (the transposition deadline to implement the directive was 6 December 2016).

[218] Ibid, para 6.

[219] Ibid, art 1.

[220] European Commission, *Non-financial Reporting Directive-Transposition Status* (25 January 2017) <https://ec.europa.eu/info/publications/non-financial-reporting-directive-transposition-status_en>.

[221] UK amended the *Companies Act 2006* by inserting two new sections: section 414CA sets out the requirement for large public interest entities with over 500 employees to prepare a non-financial information statement and

been enacted, like the UK *Modern Slavery Act 2015*,[224] thereby expanding the scope of the law to include listed and unlisted companies, compared to countries that mandate CSR reporting through stock market regulation that applies to listed companies only such as *Dodd-Frank Act 2010* in the US.[225] As such, the reporting obligation will not only impact specific categories of companies but corporations generally. Some EU countries have accompanied the reporting obligations with additional enforcement mechanisms by imposing penalties and sanctions[226] for breaching reporting requirements.[227]

Mandatory CSR reporting in EU not only impacts on companies operating in Europe, but it will have a worldwide influence because many large EU companies operate overseas. This applies to international oil companies from the EU who operate overseas such as British BP (until the UK exits the EU), Dutch Shell, and French Total etc. As a result, oil companies with headquarters in the EU are now obligated to report on their CSR practice in host countries. They are required to disclose non-financial information related to the environment, employee-related matters, human rights, anti-corruption and bribery. This CSR reporting requirements will increase companies' accountability and, in theory, may encourage IOCs to take on more CSR activities.[228] Overall, the comply-or-explain approach to CSR disclosure

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section 414CB sets out the content of the non-financial information statement, see *Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016* (UK) No 1245.

[222] The France *Corporate Duty of Vigilance Law* has inserted Articles L. 225-102-4 and L. 225-102-5 into the *French Commercial Code, Loi n° 2017-399 du 27 mars 2017* [Law No 2017-399 of 23 March 2017] (France) JO, 28 March 2017.

[223] *Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten* [Law on strengthening the non-financial reporting of companies in their situation and group management reports] (Germeny) No 20, (11 April 2017).

[224] UK *Modern Slavery Act 2015*, c 30, s 54.

[225] US *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111-203, 124 Stat 1376, s 1502.

[226] See eg, the UK *Companies Act 2006*, s 414D.

[227] This is because the previous Directive 2013/34/EU (amended by Directive 2014/95/EU) required member states to do so. Article 51 of Directive 2013/34/EU states that 'member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive.' *Directive 2013/34/EU of the European Parliament and of the Council* [2013] OJ L 182/19, art 51.

[228] Jackson et al, above n 204.

may offer a useful tool for improving corporate governance practice and stakeholder access to corporate social responsibility information.

However, such an approach might not be effective in the very different financial climate in Iraq. The next section will explain why the comply-or-explain approach may not be effective for reporting on CSR in Iraq.

4.6.3 Can Comply or Explain Work in Iraq

Considering the current status of the capital market in Iraq, the comply-or-explain regime is less likely to be the appropriate choice for implementing CSR in the oil industry. The current legislative and regulatory framework of the Iraq Stock Exchange (ISX) limits the possibility of enforcing CSR reporting in Iraq through corporate governance or listing rules. This is because; the ISX is small and under-developed.[229] As at January 2019 there were only 120 companies listed on ISX, the majority of them are financial companies (banks, insurance and money transfer).[230] International oil companies and state-owned oil companies are not listed. Second, the ISX, since it was incorporated and began operations in June 2004, is subject to an interim law issued by the Coalition Provisional Authority.[231] The *Securities Law* has not yet been enacted, though drafted in 2008. This has made ISX less attractive for companies and investors both domestic and foreign. Third, there are no specific corporate governance guidelines, but the ISX has issued instructions in disclosure regulations and can suspend

[229] Sahar Nasr, 'Republic of Iraq: Financial Sector Review' (Report, The World Bank, 25 September 2011) 45. For example, in 2011 the total market capitalisation was approximately USD 3 million which, in comparison for example the Amman Stock Exchange has a market capitalisation of USD 27 million and Kuwait Stock Exchange has approximately USD 101 million. See Organization for Economic Co-operation and Development, *The Role of MENA Stock Exchanges in Corporate Governance* (2012), 22.

[230] See Iraq Stock Exchange, <http://www.isx-iq.net/isxportal/portal/companyGuideList.html?currLanguage=en>.

[231] The Iraq Stock Exchange was incorporated under the *Interim Law on Securities Markets* (Coalition Provisional Authority's Order No 74, 18 April 2004). This CPA's Order also stopped the operations of Baghdad Stock Exchange and liquidated it.

trading by non-compliant companies.[232] However, according to the ISX rules, companies are only required to disclose their financial statements but not their social or environmental performance.[233] In contrast, under a comply-or-explain regime for corporate governance and CSR requires companies to disclose both financial and non-financial information (see above). Thus, the accountability mechanisms which might have been implemented through listing rules are not an option.

Listing international oil companies in the ISX is not expected to occur in the near future. In relation to state-owned oil companies if they are partially or fully privatised in the future, they could be listed in the ISX.[234] However, even if state-owned oil companies have been listed in the ISX, which is unlikely to occur soon, the comply-or-explain regime is not expected to be effective to impose corporate accountability and corporate social responsibility without amending the current regulatory framework of ISX to mandate strong CSR reporting requirements and improve monitoring efficiency.

Overall, the current position of ISX is inadequate for disclosure of non-financial information particularly CSR in the oil industry based on a comply-or-explain regime because IOCs are not listed in the first place and because of the absence of CSR reporting. IOCs accountability outside the ISX is also weak. IOCs are not required to disclose their social and environmental performance to any official authority. The role of civil society organizations particularly activist NGOs and Unions is almost non-existent. The civil society has no regulatory impact on companies. Moreover, the financial press and the public in general are not active in

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[232] *Conditions and Requirements of the Companies Listing at ISX* (Instruction No 6, 2008); *Disclosure Instructions of the Listed Companies at ISX* (Instruction No 8, 2010). All are available at Iraq Stock Exchange <http://www.isx-iq.net/isxportal/portal/companyGuideList.html?currLanguage=en>.

[233] Ibid; *Interim Law on Securities Markets*, 2004, s. 3(6).

[234] For example, at the time of writing, Saudi Arabia is planning to sell 5 per cent of the state owned Saudi Aramco. But, there is still no timeline for an actual date for any selling or listing of Aramco's shares. See eg, John Kemp, 'Saudi Aramco International Share Sale Might Never Happen' *Reuters* (10 March 2018) <https://www.reuters.com/article/us-saudi-privatisation-kemp/saudi-aramco-international-share-sale-might-never-happen-kemp-idUSKCN1GL2F0>.

providing oversight of the work of oil companies due to the lack of public awareness on the negative impacts of oil companies' operations on the environment and society (labour and local community), which makes comply-or-explain regime less effective. Thus, alternative approaches need to be considered. This will be discussed further in chapter six at 6.2 and 6.3.

4.7 Conclusion

This chapter examined the concept of corporate social responsibility. Corporate social responsibility has been defined as involving voluntary activities by a corporation beyond legal responsibilities. Viewed from the perspective of corporate governance, there is an important linkage between CSR and a corporation's stakeholders. Despite the difference in the corporate governance model, CSR is now a systematic element of companies' strategy and a routine aspect of their spending whether for the purpose of increasing stakeholders' welfare or for achieving the company self-interest.

Corporate social responsibility is primarily concerned with the recognition that corporations should pay for negative externalities caused by their operations. Corporate responsibility principles at a minimum require companies to internalise negative externalities. But this is often in the absence of legislative requirements or enforcement of laws relating to environmental protection, health and safety legislation and the like. The chapter discussed two quite different approaches to managing externalities in the oil industry. In the Deepwater Horizon case legislation imposed huge penalties on BP for breach of environmental protection legislation. In the case of the Chad-Cameroon oil pipeline, the World Bank in its role as private lender was able to insist on protection of the environment, community consultation etc. But there has been considerable debate whether loan conditions were actually effective in protecting the community. Both were examples of where the IOC had

legal obligations to protect the community and the environment. Other methods have included community consultation and public-private partnership approach.

This chapter goes further to argue that a corporation should in addition operate in a way that protects and improves the welfare of society as a whole. Stakeholders, including the community, bear the brunt and costs of negative externalities. But this does not account for the argument that a corporation has positive duties to act for the welfare of the community. This chapter points to community expectations that corporations should positively contribute to community welfare not just be responsible for negative externalities. The chapter discussed how developing countries, such as India and Nigeria, have translated what might have been considered CSR in the past into formal legal obligations. Chapter five discusses jurisdictions where Corporations are statutorily required to contribute to development or community welfare. This provides possible models for Iraq.

The chapter also discussed the benefits of reporting non-financial information in building trust between the company and key stakeholders, and may lead to better management of stakeholder expectations. CSR reporting is a new accountability practice that allows the public and other monitoring agencies to oversight corporations' social and environmental performance. A number of jurisdictions have introduced regulatory requirements governing CSR (or non-financial information) reporting on a comply-or-explain basis, specifically in EU. However, the current status of the Iraq Stock Exchange is inadequate for disclosure of non-financial information particularly in the oil industry based on a comply-or-explain regime because IOCs are not listed in the first place. Chapter five will discuss alternative approaches for implementing CSR that might be possible models for Iraq. This includes promoting CSR through government policies and statutory requirements for protection of stakeholder interests and contributions to community welfare and development.

CHAPTER FIVE

LEGISLATIVE ALTERNATIVES TO CORPORATE SOCIAL RESPONSIBILITY

5.1 Introduction

The dominating principle in corporate social responsibility literature is that such actions are done because it is 'the right thing to do' over and above any legal requirements requiring compliance (discussed in chapter four). This approach underpins the thesis, see chapter one at 1.1. Corporations, along with other associations and individuals, are required to obey the law and are subject to sanctions and penalties for non-compliance. It is sometimes suggested that in developing economies with weak institutional and legal structures and high levels of corruption, obedience to the law might be regarded as a matter of choice rather than obligation[1] and therefore obeying the law should qualify as CSR. There are also some who argue that CSR should not be just a matter of voluntary benevolence but should be a normal part of company operations and integrated into the corporate governance framework,[2] see discussion at 3.3. This chapter includes discussion of what can be generally termed CSR statutes which impose statutory obligations on corporations to contribute to community development and welfare. The rationale for this inclusion is that it opens up alternative approaches to CSR which could be considered by Iraq. This chapter examines the approaches to CSR at both the international and domestic level for the purpose of assessing an approach to CSR in the oil industry that is a good fit for Iraq.

[1] Peter Dobers and Minna Halme, 'Editorial Corporate Social Responsibility and Developing Countries' (2009) 16 *Corporate Social Responsibility and Environmental Management* 237, 249.
[2] Jingchen Zhao, 'Promoting More Socially Responsible Corporations Through a Corporate Law Regulatory Framework' (2017) 37(1) *Legal Studies* 103, 136.

The chapter begins by exploring how international instruments set standards for CSR and the importance of bilateral trade and investment agreements on this issue. It then investigates the various approaches to CSR at the national level. An important aspect of this discussion is the role of government policies as a primary tool for promoting CSR. The chapter proceeds to discuss the different approaches to CSR that have been used in selected jurisdictions. With a particular focus on oil and gas contracts, these approaches are contrasted with examples of where CSR is mandated through oil and gas contracts. Finally, the chapter concludes with a summary and overview.

5.2. Promoting Corporate Social Responsibility in International Legal Instruments

5.2.1 Norm Setting

There are a wide range of international standards and policies dealing with CSR. Many of them focus on the activities of multinational enterprises. These instruments seek to achieve efficient and safe functioning of global commerce by ensuring that financial profit is not generated at the expense of people, society and the environment (negative externalities). They also aim to promote positive contributions by multinational enterprises to economic, environmental and social welfare worldwide. They include, for example, the UN Global Compact,[3] *UN Guiding Principles on Business and Human Rights*,[4] the OECD *Guidelines for Multinational Enterprises*,[5] the *ILO Declaration on Fundamental Principles and Rights at*

[3] The United Nations Global Compact, to date, is the largest international CSR and sustainability initiative launched in 2000. It is defined as a 'call to companies everywhere to align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption'. See United Nations Global Compact, *United Nation Global Compact Progress Report* (2017) <https://www.unglobalcompact.org/docs/publications/UN%20Impact%20Brochure_Concept-FINAL.pdf>.

[4] United Nations, *UN Guiding Principles on Business and Human Rights* (2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

[5] The *OECD Guidelines for Multinational Enterprises*, first adopted in 1976 and last updated in 2011, is one of the most important CSR initiatives for responsible business conduct in a global context. It provides recommendations for multinational enterprises on a wide range of issues such as taxation, bribery, labour relations, human rights, and environment. See Organization for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* (2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

Work,[6] the ISO 26000 *Guidance Standard on Social Responsibility*,[7] the EU *Oil and Gas Sector Guide*,[8] and others.[9]

These international instruments set standards and policies for CSR. They do not have the status of international treaties that are ratified by states, nevertheless, they set norms, create standards of behaviour and promote policies in the areas of social, labour, and environmental protection, health and safety, respect for human rights, anti-corruption and bribery. These CSR standards are increasingly shaping investment policy at the national and international levels.[10] As will be seen in the following discussion, many Trade Investment Agreements refer to these international CSR standards. Some matters covered by existing CSR international instruments are the subject of national polices, domestic legislation, and contractual agreements such as petroleum contracts. This reflects the movement of CSR obligations from purely voluntary activities to legislative and contractual solutions at least in relation to negative externalities and in some instances through mandatory contributions to development and community welfare, (see 5.4 and 5.5 below).

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[6] International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work*, adopted in 1998 and revised in 2010 <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

[7] The ISO 26000 guidance standard on social responsibility was launched in 2010. It provides guidance on how businesses and organizations can operate in a socially responsible manner by acting in an ethical and transparent way that contributes to the welfare of society. Unlike some other ISO standards, ISO 26000 cannot be certified because it provides guidance rather than requirements. International Organization for Standardisation, *ISO 26000 Guidance on Social Responsibility* (2010) <https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/discovering_iso_26000.pdf>.

[8] In 2013, the European Commission issued the Oil and Gas Sector Guide. It focuses on both national and international oil and gas companies whether exploration companies, production companies, or pipeline companies and etc. It is also applicable to all sizes of oil and gas companies regardless of the type of ownership and structure. The Oil and Gas Sector Guide is designed to be applied to EU oil and gas companies operating inside and outside the EU on their activities and to their business relationships with third parties including companies' direct relationships and supply chain. Nevertheless, it is possible to be adopted globally. See European Commission, *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (2013) <https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide_O&G.pdf>.

[9] For detailed information on other corporate responsibility initiatives see Deborah Leipziger, *The Corporate Responsibility Code Book* (Routledge, revised 3rd ed, 2017).

[10] United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (2015) 35 <https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf>.

5.2.2 Trade and Investment Agreements

Although international investment agreements are mostly geared towards the protection of investors and investment, many recent agreements call for businesses to meet standards of corporate social responsibility. Incorporating CSR provisions into investment treaties helps to solve the tension between investor's rights and guarantees under international investment law and the rights of host states to regulate in the fields of social and environmental protection.[11] On the one hand, International Investment Agreements mostly regulate the behaviour of host governments towards foreign investors, generally committing states to provide foreign investors compensation for expropriation, unfair, inequitable or discriminatory treatment. On the other hand, states have sovereign rights to enact regulations and to take measures to protect society and the environment from harm by foreign investors.[12] The host state's regulation of foreign companies requiring foreign companies to satisfy social and environmental responsibilities may conflict with the State's substantive obligations under investment agreements.[13] This may expose the state to claims by foreign investors.[14] To overcome this, a new approach has been taken by many countries including Canada, Brazil and the EU that incorporate CSR provisions into investment treaties,[15] leading to the development of what so called a 'new generation' of International Investment Agreements.[16] As a result, in the last few years, there are increasing numbers of International Investment

[11] Mary Footer, 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18(1) *Michigan State Journal of International Law* 33, 64.
[12] Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) *Journal of International Economic Law* 1037, 1075.
[13] For instance, the host state may violate the non-discrimination principle by distinguishing between foreign companies having different social and environmental impacts or it may violate the Fair and Equitable Treatment (FET) standard if the regulation on CSR issues is frustrating the legitimate expectations of foreign corporations. See Ying Zhu, 'Corporate Social Responsibility and International Investment Law: Tension and Reconciliation' (2017) 1 *Nordic Journal of Commercial Law* 91, 119.
[14] Ibid.
[15] Rafael Peels, Elizabeth Echeverria, Jonas Aissi and Anselm Schneider, 'Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business and Workers' (Research Paper No 13, International Labour Office, April 2016) 5 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf>.
[16] Spears, above n 12; Footer, above n 11.

Agreements which include obligations to promote CSR. In practice, this approach is necessary to achieve a balance between the social and ecological impacts of foreign investor's activities and the many guarantees and rights they receive under these agreements. In other words, the inclusion of CSR provisions in International Investment Agreements confirms the rights of host states to regulate for the protection of society and the environment as well as investment promotion and protection.

For example, Canada has incorporated CSR norms into a series of its bilateral treaties based on an enhanced CSR strategy. Article 16 of the 2013 Canada-Benin bilateral investment treaty (BIT), for example, has provisions explicitly entitled 'Corporate Social Responsibility'. It states

> Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.[17]

This Article requires the Parties to *encourage* enterprises to commit to CSR in their 'practices and internal policies.'[18] Article 16 of the 2014 Canada-Senegal BIT takes a further step. It not only obliges states to encourage CSR commitments by the enterprises, but also to encourage such enterprises 'to make investments whose impacts contribute to the resolution of social problems and preserve the environment.'[19] Most Canadian agreements that adopt CSR

[17] *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments*, signed 9 January 2013 (entered into force 12 May 2014) art 16.
[18] Canada has also included similar CSR provisions in its Foreign Trade Agreement with Honduras in 2013, BIT with Mali in 2014, and BIT with Burkina Faso in 2015.
[19] *Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments*, signed 27 November 2014 (entered into force 5 August 2016) art 16.

provisions do not explicitly refer to specific CSR instruments, but rather make general references towards 'internationally recognised standards of corporate social responsibility.' In contrast to this, some international investment agreements make explicit reference to particular CSR international instruments. For example, the 2009 Norwegian BIT model explicitly encourages investors to comply with the OECD Guidelines and the UN Global Compact. Overall, the Canadian BIT model marks a start by incorporating CSR terms into international investment treaties.[20]

References to CSR are made in the Brazilian series of Agreements on Cooperation and Facilitation of Investments (ACFIs). In contrast to BITs that are intended for investment protection, the ACFIs focus on investment facilitation and risk mitigation.[21] Unlike the Canadian BITs, the Brazilian ACFIs use a different approach to CSR. The Brazilian agreements speak directly to investors rather than State Parties. For instance, Article 9 of the 2015 Brazil-Malawi ACFI under the title 'Corporate Social Responsibility' provides

> Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.[22]

The second paragraph of this Article clearly identifies CSR concepts by setting out a best-efforts obligation on investors and their investments to protect the environment, respect human rights and achieve sustainable development. [23] It also strengthens responsible internal

[20] Zhu, above n 13.
[21] Fabio Morosini and Michelle Badin, 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' 3(6) *Investment Treaty News* (August 2015) 4 <https://www.iisd.org/sites/default/files/publications/iisd-itn-august-2015-english.pdf>.
[22] *Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi*, signed 25 June 2015(not yet in force) art 9(1).
[23] For example, the investors are required to (I) strengthen the relationship with the local community; (II) encourage the development of human capital especially by creating employment opportunities and facilitating

policies.[24] In contrast to the Canadian and Norwegian BIT model, the Brazilian ACFI explains in detail in the text of the agreement what it meant by CSR (see Appendix 4). In doing so, Brazil provides an advanced model of the new generation of BIT. Other recent BITs refer, in general language, to internationally recognised CSR standards or existing CSR instruments, but in many cases in the annexes only. The Brazilian ACFIs model makes no provision for mechanisms to enforce these CSR obligations but is innovative by explicitly identifying CSR and 'best efforts' to protect the environment, human rights and sustainable development.[25]

The European Union has also made significant progress towards the inclusion of CSR in trade and investment agreements by publishing a resolution in 2012 on future European international investment policy. The policy calls for a corporate social responsibility clause to be included in every free trade agreement the EU signs.[26] Following this policy, the EU has included CSR provisions in a number of its recently concluded Association Agreements and Free Trade Agreements.[27] The obligation to promote CSR in these agreements is imposed on State Parties rather than directly on investors. For example, the 2014 EU-Ukraine Association Agreement, Article 293 provides that the Parties shall strive to facilitate and promote trade and foreign direct investment in environmentally friendly goods, services, technologies and energies, and 'shall strive to facilitate trade in products that contribute to sustainable development', including products 'respecting corporate social responsibility and

professional training; (III) and promote the knowledge and professional training of the workers. Ibid art 9(2). For more details see Appendix 4, full text of this Article.

[24] For instance, investors must make best-efforts to (I) absorb host state regulations and not to seek illegal exemptions relating to environment, health, security, work or financial incentives; (II) develop and apply effective self-regulatory practices and management systems; (III) develop and apply good practices of corporate governance. Ibid. The same provisions were included in the Brazilian ACFIs signed in 2015 with Mozambique, Angola and Mexico. See Morosini and Badin, above n 21.

[25] Ibid.

[26] *European International Investment Policy* [2012] OJ C 296 E/34, art 28.

[27] The Association Agreements are a better platform for reconciling investment promotion and protecting the social interests than other investment agreements because they cover a much wider variety of topics, including political, economic and social cooperation between the Parties. Zhu, above n 13.

accountability principles.'[28] Similarly, Article 154 of the 2016 EU-Kazakhstan Enhanced Partnership and Cooperation Agreement provides that the Parties agree to promote 'trade and investment in environmental goods and services and in climate-friendly products and technologies', and to promote 'corporate social responsibility practices.'[29] Significantly, the recently signed Economic Partnership Agreement between EU and Japan not only requires the Parties to promote corporate social responsibility considering the relevant internationally recognised principles and guidelines,[30] but also includes a specific chapter on corporate governance for the first time in an EU trade agreement.[31]

Likewise, the 2012 EU-Iraq Partnership and Cooperation Agreement recognises the social and the environmental dimensions of economic development, and contains several clauses laying down the protection of the environment and the human rights as well as achieving sustainable development.[32] Including CSR provisions in the trade and investment agreements is an option for Iraq in promoting CSR. But at best the only 'obligations' imposed are to encourage, promote or strive to implement CSR.

Overall, the number of countries including CSR requirements in the trade and investment agreements is increasing. The inclusion of CSR clauses in the international trade and investment agreements provides a new avenue to encourage corporate social and environmental behaviour beyond the current reliance on voluntary initiatives and national legislation. By supporting CSR initiatives in trade and investment agreements, states could play an important role in shaping the conditions for responsible business behaviour of

[28] *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part*, signed 21 March 2014(entered into force 1 September 2017) art 293(2)(3).
[29] *Enhanced Partnership and cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part*, signed 12 December 2015 (applied provisionally 1 May 2016) art 154(1).
[30] *Agreement Between the European Union and Japan for an Economic Partnership*, signed 17 July 2018, art 16(1).
[31] Ibid, arts 15(1)-15(7).
[32] *Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part*, signed 11 May 2012. See eg, Articles 84, 86 and 93.

enterprises that are in their territories, subject to their jurisdiction, or even overseas.[33] Accordingly, CSR clauses in international instruments may contribute to increased harmonization and indirectly influence companies' CSR commitments. Even though the direct implications of CSR clauses are situated at the level of states, in some international investment agreements (the case of Brazil) CSR clauses address investors and enterprises. Despite the relatively soft character of states' commitments (eg 'shall strive to', 'shall promote'), they are included in binding agreements. This means that states, in principle, can be called to account although in practice these provisions operate as aspirational statements.[34] It is, however, doubtful whether there is an expectation that these types of provisions could actually be enforced.

5.3 Government Policies Promoting Corporate Social Responsibility

Over the last two decades, CSR has increasingly been the subject of public policies. As a consequence, governments have become the major CSR driver[35] by encouraging companies to behave in a responsible and sustainable manner.[36] In EU, for example, governments have assumed an increasingly active role in shaping and promoting CSR by developing policies and programs (see below).[37] Incorporating CSR into the national development policy could assist government to achieve policy objectives in a more strategic way, and provide an

[33] Rafael Peels and Elizabeth Echeverria, 'CSR in International Trade and Investment Agreements' (2017) 5(6) *GREAT Insights* 29, 31.
[34] Peels et al, above n 15.
[35] Jeremy Moon, 'Government as a Driver of Corporate Social Responsibility: The UK in Comparative Perspective' (Research Paper No 20-2004, International Centre for Corporate Social Responsibility, 2004) 17; Josep Lozano, Laura Albareda,Tamyko Ysa, Heike Roscher and Manila Marcuccio, *Governments and Corporate Social Responsibility : Public Policies Beyond Regulation and Voluntary Compliance* (Palgrave Macmillan, 2008) 42.
[36] Anna Peters and Daniela Röß, *The Role of Governments in Promoting Corporate Responsibility and Private Sector Engagement in Development* (United Nations Global Compact, 2010) 12; Reinhard Steurer, 'Soft Instruments, Few Networks: How 'New Governance' Materializes in Public Policies on Corporate Social Responsibility Across Europe', (2011) 21 *Environmental Policy and Governance* 270, 290.
[37] Reinhard Steurer, 'The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe' (2010) 43(1) *Policy Sciences* 49, 72.

attractive complement for hard-law regulations in particular where new laws are controversial or not politically feasible.[38]

The most relevant comparative analyses of CSR policies framework distinguishes four types of policy to promote CSR based on their regulatory strength: endorsement, facilitation, partnering, and mandate (see Table 5.1). This framework has been used for studies of government CSR policies in both developing countries,[39] and European countries.[40]

As indicated in the chart, the regulatory strength of government's policies varies according to promotion, facilitating, partnership and mandatory approaches. At its lowest is an endorsement policy, which aims at raising awareness of CSR, and promotes good social practices.[41] CSR is promoted through providing political support for, and affirming companies recognised for good social and environmental CSR programmes.[42]

[38] Including CSR in the public policy might have low political costs compared to hard-law regulations because the government can easily issue an administrative order to enforce that policy without engaging in conflicts with political partners or advocates on special issues, Steurer, 'The Role of Governments in Corporate Social Responsibility', above n 37.

[39] Tom Fox, Halina Ward, and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (The World Bank, 2002); Uwafiokun Idemudia 'Corporate Social Responsibility and the Rentier Nigerian State: Rethinking the Role of Government and the Possibility of Corporate Social Development in the Niger Delta' (2010) 30(1-2) *Canadian Journal of Development Studies* 131, 151.

[40] Jette Knudsen, Jeremy Moon and Rieneke Slager, 'Government Policies for Corporate Social Responsibility in Europe: a Comparative Analysis of Institutionalisation' (2015) 43(1) *Policy Press* 81, 99; Jean-Pascal Gond, Nahee Kang and Jeremy Moon, 'The Government of Self-regulation: On the Comparative Dynamics of Corporate Social Responsibility' (2011) 40(4) *Economy and Society* 640, 671.

[41] Knudsen et al, above n 40.

[42] Fox et al, above n 39, 6. For example, the Australian Federal Ministry for Social Security competition rewards for the enterprise with the best equal opportunity and family friendly policy, Australian Prime Minister's Awards for Excellence in Community Business Partnerships, and Green Business Award in Taiwan.

Table 5.1: CSR Policies and Their Regulatory Strength

Type of policy	Description	Regulatory strength entailed in policies
Endorse	Political support for CSR through general information campaigns and websites, political rhetoric, award and labelling schemes	Low regulatory strength
Facilitate	Incentives for companies to adopt CSR through subsidies or tax incentives; public procurement	Medium regulatory strength
Partner	Collaboration of government organisations with business organisations to disseminate knowledge or develop/maintain standards, guidelines and so on	Medium regulatory strength
Mandate	Regulation of minimum standards for business performance	High regulatory strength

Source: Adapted from Knudsen et al, 2015[43]

The medium regulatory strength includes facilitating and partnering policies which involve governments playing more active roles in promoting CSR.[44] Such policies enable or incentivise companies to engage with the CSR agenda or to lead social and environmental improvements.[45] Governments can also promote CSR through partnerships between government and CSR actors.[46] Partnership policies can create multi-stakeholder initiatives and involve mixed complementary resources. To illustrate, governments often provide fiscal and regulatory capacity while companies bring their networks, employees and knowledge to

[43] Knudsen et al, above n 40.
[44] Fox et al, above n 39, 5.
[45] Ibid.
[46] For example, in UK and Denmark, the governments have entered partnering agreements (Ethical Trading Initiative) with some companies, trade unions and NGOs and committed to improving working conditions in global supply chains. See, Knudsen et al, above n 40.

bear in addressing problems.[47] Indeed, partnerships provide governments with more opportunities to frame and carry out CSR policy than simple facilitation.[48]

The most robust policies mandate 'CSR' within the regulatory framework. As noted in chapter four, according to the standard definition adopted in this thesis, CSR refers to voluntary activities over and above legal requirements. Where regulations require corporations to recognise and protect interests of stakeholders, the environment and the public, and, in some cases, positively contribute to community welfare, this is no longer CSR according to the standard definition. Negative externalities (cost of operations imposed on the public) are now internalised into the cost of the corporation's operations. The discussion which follows gives some illustrations of where countries demand through legislation that corporations do more than promote shareholder interests. It is based on the premise that corporations cannot, and do not, voluntarily act for the benefit of stakeholders and the community. The legislation could take the form of imposing minimum standards for business performance which take into account stakeholder interests, or legislation imposing development levies or mandate minimum 'CSR' spending on designated community welfare projects. The minimalist approach is to impose obligations on corporations in relation to non-financial reporting. Non-financial reporting aims at encouraging companies to establish the tools to measure their social and environmental impacts, discussed at 4.6. At the other end of the scale is India, where companies that meet a financial threshold are required by legislation to spend 2 per cent (2%) of the company's average net profits (based on the previous three financial years) on socially responsible and development activities (see section 5.5.1 below). The following section looks in greater detail at the legislative initiatives requiring corporations to promote stakeholder and community welfare.

[47] Gond et al, above n 40.
[48] Ibid.

The following discussion is important as it will be seen from the discussion in chapter six, that in the context of Iraq, there is little evidence that IOCs will voluntarily act to undertake activities to promote community welfare. The consequence is that Iraq may see benefit in legislation requiring IOCs to contribute to the community and public welfare beyond the duty to pay for the costs of harm caused to the public. These initiatives are options that Iraq may consider in relation to IOCs.

5.4 Legislative Alternatives to Corporate Social Responsibility

The selected examples in this section illustrate the different approaches that have been used to provide alternatives to CSR in each jurisdiction. Examples are drawn from developed countries including the US, the UK, France, and the EU. These countries impose legislative obligations related to corporations' negative externalities. This section will examine legislative alternatives to CSR in the areas of human rights, labour rights and accountability in supply chains.

5.4.1 Human Rights Protection

The *Dodd-Frank Wall Street Reform and Protection Act* 2010 (Dodd-Frank Act)[49] includes provisions dealing with the involvement of US companies in conflict minerals and resource extraction payments. Section 1502 requires companies, who deal in certain 'conflict minerals'[50] originating in the Democratic Republic of Congo (Congo) or an adjoining country, to demonstrate that their products are not fuelling conflict in Congo. Companies are required to carry out supply chain due diligence and to report to the US Securities and

[49] *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111-203, 124 Stat 1376.
[50] 'Conflict minerals' are defined as '(A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country. Ibid, s 1502(e)(4). These minerals are widely used in industries including mining, automotive, aerospace, and jewellery, so that s 1502 has a wide impact on the global trade.

Exchange Commission.[51] The reason for enacting this requirement is the problem that the trade in conflict minerals has fuelled human rights abuses in eastern Congo for over a decade.[52] By enhancing supply-chain transparency, the goal is to stop national armed groups in Congo from illegally using profits from the minerals trade to fund conflict. Section 1502 of the *Dodd-Frank Act* requires companies to ensure that conflict minerals used in their products and their suppliers do not directly or indirectly finance armed conflict or result in labour or human rights violations. If companies comply with these requirements, this can minimise possible harmful impacts, and promote peace and stability.

Section 1504 of the *Dodd-Frank Act* requires resource extraction issuers[53] to disclose to the Securities and Exchange Commission payments made to a foreign government[54] or the US Federal Government for the commercial development of oil, natural gas, or minerals. This is defined as including 'exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity.'[55] The resource extraction issuer or an entity under its control must disclose in an annual report filed with the Securities and Exchange Commission information about the type and full

[51] *Dodd-Frank Act*, s 1502(b); Celia Taylor, 'Conflict Minerals and SEC Disclosure Regulation' (2012) 2 *Harvard Business Law Review* 105, 120.

[52] According to The Congress the 'exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence… particularly sexual- and gender-based violence and contributing to an emergency humanitarian situation therein...'. *Dodd-Frank Act*, s 1502(a). This attitude was built on a report prepared by United Nations Group of Experts on the Democratic Republic of the Congo published by Security Council in 2008, that address the link between the trad in certain minerals from conflict-affected areas and the finance of internal armed conflicts. The report shows that the principal method used by armed groups in Congo to raise funds is through the illegal trade of mineral resources. They were reaping profits estimated to worth millions of dollars a year from this trade. It also demonstrates that some companies, domestic and foreign, were complicit in a systematically trad with the armed groups and knowingly purchasing minerals from them. The report suggests that promoting due diligence within the international minerals supply chain would represent effective ways for cutting off the financial support to those armed groups. See especially United Nations Security Council, S/2008/773, 12 December 2008 [72-73] (Letter dated 10 December 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council).

[53] The 'term "resource extraction issuer" means an issuer that— (i) is required to file an annual report with the Commission; and (ii) engages in the commercial development of oil, natural gas, or minerals.' *Dodd-Frank Act*, s 1504.

[54] Foreign government means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government; Ibid.

[55] Ibid.

amount of the payments made for each project and to each government concerning the commercial development of oil, natural gas, or minerals.[56] The purpose of these commercial disclosure requirements is to support international transparency efforts relating to the commercial development of natural resources.[57] This would in turn promote corporate accountability and mitigate corruption specifically for supply chains in developing countries. For example, financial disclosure of payments to foreign governments for natural resources development may help to ensure that international oil companies are not involved in supporting armed groups in the host country.

As an additional measure to enforce these provisions of the *Dodd-Frank Act*, the President of US issued an Executive Order blocking the property and interests in property of certain persons, including companies, who contribute to the conflict in the Democratic Republic of the Congo through, for example among other activities, the illicit trade in natural resources of Congo.[58] Any breach of this order could lead to imposing civil monetary penalties and criminal penalties.[59] Companies are also required to submit a description of any products manufactured by the company to determine whether the product is 'Democratic Republic of the Congo conflict free' or not.[60] Labelling products as 'not Democratic Republic of the Congo conflict free' can create significant reputational risks for companies that can be avoided if the company does not use such minerals in its products.[61] These requirements

[56] Michael Seitzinger and Kathleen Ruane, 'Conflict Minerals and Resource Extraction: Dodd-Frank, SEC Regulations, and Legal Challenges' (Congressional Research Service, 2 April 2015) <https://fas.org/sgp/crs/misc/R43639.pdf>.
[57] For this purpose, the law suggests applying guidelines of the Extractive Industries Transparency Initiative as commonly recognised standard in this area.
[58] President of the United States, *Executive Order* 13671 79, 132 (8 July 2014) s 1(a)(C)(7).
[59] The civil monetary penalties would be up to the greater of USD 284,582 as of 1 August 2016 for violations occurring after 2 November 2015. The criminal penalties would be up to USD 1,000,000, imprisonment for up to 20 years, or both. See for more details Office of Foreign Assets Control, *Democratic Republic of the Congo Sanction Program* (5 October 2016).
[60] Products are Democratic Republic of the Congo conflict free if they do not contain minerals that directly or indirectly finance or benefit armed groups in Congo or an adjoining country.
[61] Andreas Manhart and Tobias Schleicher, 'Conflict minerals – An evaluation of the Dodd-Frank Act and other resource-related measures' (Oeko Institute for Applied Ecology, August 2013) 26

demonstrate that legislative measures by the US government have replaced voluntary socially responsible conduct by Corporations.

The *Dodd-Frank Act* was the first domestic legislation that required US-listed companies to report the use of conflict minerals in their products. This approach has been adopted in other countries, particularly the EU. The European Parliament issued a regulation in May 2017 'to provide transparency and certainty as regards the supply practices of Union importers, and of smelters and refiners sourcing from conflict-affected and high-risk areas.'[62] Similarly to the *Dodd-Frank Act*, the EU regulation establishes a framework for supply chain due diligence in order to curtail opportunities for armed groups and security forces to trade in conflict minerals.[63] However, the EU regulations have a broader scope and geographic coverage than US law.[64]

The due diligence framework required by the *Dodd-Frank Act* is similar to the OECD due diligence guidance on conflict minerals published in 2011. The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas*[65] provides a five-step due diligence framework[66] developed by a UN Group of Experts on the Democratic Republic of the Congo. Although the general due diligence approach in the OECD guidance is voluntary in nature, it recommends that the concept be incorporated into national legislation. In addition, the commercial disclosure requirements in those two

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<https://pdfs.semanticscholar.org/daf3/18602187aac0a9e82e1bf2bd33f4b5b7413c.pdf?_ga=2.120241615.677154703.1527675221-1813851469.1527675221>.

[62] *Regulation 2017/821/EU of the European Parliament and of the Council* [2017] JO L 130/1, art 1 (laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas).

[63] Ibid.

[64] The EU regulations are not limited to tantalum, tin, tungsten and gold (collectively known as 3TG), but covers other metals. It is also not limited to conflict minerals originating in Congo, but covers minerals originating from conflict-affected and high-risk areas. Ibid, Annex 1.

[65] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2nd ed, 2013) <https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf>.

[66] Based on the five-step due diligence framework companies are required to strengthen their management systems; Identify and assess risks in supply chains; design and implement a strategy to respond to identified risks; ensure independent third-party audits; and publicly disclosing supply-chain due diligence and findings.

sections of the *Dodd-Frank Act* were imposed for reasons other than the prevention of consumer deception.[67] Section 1502 of *Dodd-Frank Act* seeks to prevent companies from engaging in human rights abuses. This is in line with the UN Global Compact Principles mentioned earlier (5.2.1), that required companies to ensure that they are not complicit in human rights abuses; and develop policies and concrete programmes to avoid any forms of corruption internally and within their supply chains. It is also consistent with both UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises as updated in 2011. Those two guidelines emphasise that companies operating in the conflict-affected areas should respect human rights, and avoid causing or contributing to adverse human rights impacts. As noted above, these initiatives demonstrate state preference for legislating to protect against human rights abuses in supply chains rather than relying on voluntary initiatives by corporations.

5.4.2 Labour Practices

Another area where states have preferred legislative solutions rather than rely on CSR is in relation to what has been termed 'modern slavery'. The term modern slavery refers to a range of exploitative practices which includes, human trafficking, slavery, debt bondage, forced labour, wage exploitation, and similar practices.[68] It includes forced labour of adults and children. Companies are required to take affirmative steps to protect against modern slavery in the conduct of their business both domestically and in their global supply chains.

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[67] Seitzinger and Ruane, above n 56.

[68] Forced labour can be in the form of threats or actual physical harm to the worker; restriction of movement of the worker (to the workplace or to a limited area); debt bondage, where workers work partly or exclusively to pay off debts or loans and are not paid for their services; withholding wages or refusing to pay the worker at all; retention of passports and identity documents so that the workers cannot leave or prove their identity and status; threat of denunciation to the authorities, where the worker has an irregular immigration status. See International Labour Office, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* (2005) 20-21 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081999.pdf>.

For example, the United Kingdom and California have taken measures to protect labour rights in supply chains through the UK *Modern Slavery Act* 2015 and the *California Transparency in Supply Chains Act of* 2010.[69]

The Californian Act requires retail sellers and manufacturers that do business in California and have over USD 100 million in gross annual receipts[70] to publicly disclose their efforts to eradicate slavery and human trafficking from their supply chains. According to this Act, companies are required to disclose what actions they are taking, if any, to evaluate, and address the risks of human trafficking and slavery in their product supply chains. Companies must also be transparent about their efforts to audit their suppliers' compliance with company standards in this regard. Companies must provide their employees and management, who have direct responsibility for supply chain management, training on mitigating human trafficking and slavery and develop and maintain accountability mechanisms for employees or contractors who fail to meet company standards regarding this issue. These disclosures must be publicly available on the company's website or, if a company does not have a website, through written disclosures.[71]

The UK *Modern Slavery Act* 2015 s 54 is modelled on a similar provision in the Californian Act, but it has a broader reach.[72] Section 54 of the *Modern Slavery Act* applies to 'commercial organisations' which are defined as being, first, either bodies corporate (wherever incorporated) or partnerships (wherever formed) that, second, carrying on a business, or part of a business in the United Kingdom.[73] In this way, the Act uses the

[69] *California Transparency in Supply Chains Act of 2010*, ch 556 Cal Stat s 2641 (West 2012). The *California Transparency in Supply Chains Act of 2010* enacted section 1714.43 of the *Civil Code of the State of California*. Australia has also enacted modern slavery laws at the federal level, *Modern Slavery Act 2018* (Cth), and at the state level, *Modern Slavery Act 2018* (NSW).
[70] Cal Civ Code s 1714.43(a)(1) (West 2012).
[71] Sarah Altschuller, Amy Lehr and Andrew Orsmond, 'Corporate Social Responsibility' (2011) 45(1) *The International Lawyer* 179, 189.
[72] *Modern Slavery Act 2015*, c 30, s 54(1).
[73] Ibid s 54(12).

activities of business entities as a basis for regulation rather than their domicile. This has expanded the reach of the legislation to business entities incorporated in foreign jurisdictions but which carry on business in the UK.[74] Third, the entity must supply goods or services whether the goods and services are supplied in the UK or offshore.[75] In this respect, the UK *Modern Slavery Act* is broader than the Californian Act which imposes a disclosure obligation only on retail sellers and manufacturers. Fourth, the entity must have a 'total turnover' greater than the threshold amount prescribed by the Secretary of State.[76] This threshold is a much lower threshold than under the Californian Act.[77] Importantly, according to the Secretary of State's regulations the 'total turnover' includes the turnover of the disclosing entity and 'any of its subsidiary undertakings.'[78] The inclusion of a subsidiary undertaking in the calculation of the turnover threshold extends the reach of the legislation, compared with a calculation on an entity-by-entity basis.[79]

Section 54 of the UK *Modern Slavery Act* requires companies to disclose the steps they have taken to ensure that slavery and human trafficking is not taking place in any part of their business and supply chains or to disclose that they have taken no such steps.[80] 'Slavery and human trafficking' is defined under the Act as conduct that 'constitutes an offence' or 'would constitute an offence' under certain anti-slavery legislation if it were to have occurred in the United Kingdom.[81] This involves the offences of slavery, forced or compulsory labour, human trafficking and third party involvement in such acts.[82] If the disclosing company has a

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[74] Ryan Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17(1) *Melbourne Journal of International Law* 1, 22.
[75] *Modern Slavery Act 2015* s 54(2)(a).
[76] As at September 2018, this is £36 million (roughly USD 43.5 million); *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) SI 2015/1833 reg 2.
[77] This is USD 100 million in 'annual worldwide gross receipts.' See, Cal Civ Code s 1714.43(a)(1) (West 2012).
[78] *Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (UK) SI 2015/1833 reg 3(1).
[79] Turner, above n 74.
[80] *Modern Slavery Act*, s 54(4).
[81] Ibid, s 54(12).
[82] Ibid.

website, it must then publish the slavery and human trafficking statement on its website and include a link to the Statement on its home page.[83] The disclosing statement may include information about the company's due diligence processes to assess and manage any possible risk of slavery and human trafficking in its business and supply chains; its effective measures against such performance; and training about slavery and human trafficking available to its staff.[84] The disclosure obligations imposed on companies by s 54 are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction.[85] In addition, non-compliance would create a reputational risk and market consequences.

5.4.3 Accountability in Supply Chains

The French law *Corporate Duty of Vigilance* 2017 is a significant step forward for corporate accountability in supply chains.[86] This law was motivated by the devastating collapse of the Rana Plaza factory in Bangladesh 2013 that killed more than 1,000 garment workers and injured many thousands more.[87] French clothing brands were manufactured in this factory. Most victims and their families did not receive adequate compensation because neither French companies, nor their suppliers, were liable under French law at that time.[88] The French law, *Corporate Duty of Vigilance* 2017, established a legally binding obligation for parent companies to prevent serious violations of human rights of workers within supply chains and environmental protection. Secondly, the law makes the parent company responsible for the conduct of its subsidiaries whether located in France or abroad. The parent company is exposed to civil liability for the wrongful conduct of its subsidiaries (see below). Finally, French courts have jurisdiction over corporate violations of human rights committed

[83] Ibid, s 54(7).
[84] Ibid, s 54(5).
[85] Ibid, s 54(11).
[86] *Loi n° 2017-399 du 27 mars 2017* [Law No 2017-399 of 23 March 2017] (France) JO, 28 March 2017.
[87] BBC NEWS, *Bangladesh Factory Collapse Toll Passes 1,000* (10 May 2013) <https://www.bbc.com/news/world-asia-22476774>.
[88] Vivian Curran, 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations' (2016) 17(2) *Chicago Journal of International Law* 403, 446.

by a subsidiary of a French corporation anywhere in the world.[89] This assists victim of human rights abuse overcome some of the barriers they face in achieving justice.

The French statute, the *Corporate Duty of Vigilance* 2017 applies to large companies[90] from all business sectors incorporated or registered in France subject to the French *Commercial Code*.[91] It requires parent companies to identify and prevent abuses of human rights, protect the health and safety of individuals, and be responsible for environmental impacts resulting from their activities, and their subsidiaries, subcontractors and suppliers, with whom they have an established commercial relationship. According to Article 1 of the law (includes Article L. 225-102-4 added to the French *Commercial Code*), the parent company is required to establish, publish and effectively implement a vigilance plan.[92] The vigilance plan must include: (1) a mapping that identifies, analyses and ranks risks; (2) procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship; (3) appropriate actions to mitigate risks or prevent serious violations; (4) an alert mechanism for potential or actual risks; and (5) a monitoring scheme to follow up on the measures implemented and assess their efficiency.[93]

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[89] Ibid.

[90] The law will apply to companies established in France which, at the end of two consecutive financial periods, employ at least 5,000 people within the company itself and in its direct or indirect subsidiaries, whose head office is located in France, or employ at least 10,000 people within the company itself and in its direct or indirect subsidiaries, whose head office is located in France or abroad.

[91] The law adds two new articles, L. 225-102-4 and L. 225-102-5, to the French *Commercial Code*. The law will only apply to companies subject to the obligation provided for in Article L.225-102 of the French *Commercial Code*, namely, public limited companies listed or unlisted. Thus, it does not apply to parent companies governed by foreign law, since they are not subject to the French law.

[92] *Loi n° 2017-399 du 27 mars 2017* [Law No 2017-399 of 23 March 2017] (France) JO, 28 March 2017, art 1. The vigilance plans, as well as the report concerning its effective implementation must be published and included in the company's annual management report.

[93] Ibid; See also European Coalition of Corporate Justice, *The French Duty of Vigilance Law - Frequently Asked Questions* (23 February 2017) European Coalition of Corporate Justice <http://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions>; this website also provides an English translation for the law.

In the event of any breach of the obligations under the duty of vigilance, the company may be issued with a formal notice and given a three-month period to meet its obligations.[94] If the company still fails to meet the obligations after the three-month period is over, a court order may require compliance and publication of a vigilance plan. The court order can be issued at the request of any person who has a legitimate interest (including affected people and communities) in bringing proceedings before a competent court.[95] Article 2 of the law (includes Article L. 225-102-5 added to the French *Commercial Code*) which states that in the event of a breach of the obligations laid down in Article 1 if the misconduct has caused loss, the company or any of its direct or indirect subsidiaries could be held liable, and will have to compensate for the harm it caused. This Article provides that the liability of the company will be determined according to the conditions provided for under Articles 1240 and 1241 of the *Civil Code*, confirming the application of the general rules of the tort law.[96] Finally, in such a case, the judgment (or relevant excerpt) on liability may be made public.[97] This would negatively impact the company's reputation. It should be mentioned that the law initially provided a civil fine (maximum of 10 million Euros) for breaching the vigilance obligations, but the civil fine was declared unconstitutional by the French Constitutional Council during its review of the Law.[98] This law is relevant to oil industry in Iraq because it applies to French IOCs operating in Iraq such as Total.

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[94] *Loi n° 2017-399 du 27 mars 2017* [Law No 2017-399 of 23 March 2017] (France) JO, 28 March 2017, art 1.
[95] Ibid.
[96] Ibid, art 2.
[97] Ibid, see also Stéphane Brabant and Elsa Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' *Revue International de la Compliance et de Lethique des Affairs* (14 December 2017)
<https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20-%20Penalties%20-%20Int%2527l%20Rev.Compl_.%20%26%20Bus.%20Ethics_.pdf>.
[98] *Conseil Constitutionnel* [French Constitutional Court], decision n° 2017-750 DC, 23 March 2017 reported in JO, 23 March 2017, 14. Nevertheless, it may be possible to reimpose the civil fine in the future if the constitutional conditions are fulfilled. This is because the law was prepared during a four-year process that involved considerable joint efforts from civil society organizations, trade unions and Members of Parliament; and passing the law's bill through by the French National Assembly voting demonstrates that the civil fine was acceptable by all of these actors. See, Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, 'The

The statutory provisions outlined above are instances where States have legislated to require corporations to act as good corporate citizens rather than rely on voluntary CSR. The next section provides some illustrations where States likewise have preferred to legislate to require corporations to contribute to community welfare.

5.4 Mandatory Contributions to Community Welfare and Development

This section provides three illustrations where corporations have been required to contribute to community welfare or regional development. Examples are drawn from India, Nigeria and Tanzania. The Indian legislation explicitly defines CSR activities and requires certain companies to spend a percentage of their profits on developmental activities and community welfare. Nigeria and Tanzania are particularly interesting as they specifically deal with the oil and gas industry and offer a comprehensive legal framework for local content and value adding by oil and gas corporations. These examples provide possible models for Iraq. Their suitability will be discussed in chapter six at 6.3.

5.5.1 India

The Indian *Companies Act 2013* provides an example of legislation requiring large corporations to contribute to community welfare and development.[99] Rather than relying on voluntary corporate benevolence, this Act requires certain companies (see below) to spend a percentage of their profits on socially responsible and developmental activities based on the 'comply-or-explain' approach, discussed in the previous chapter at 4.6.2. These provisions

French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017)2 *Business and Human Rights Journal* 317, 323.

[99] Sandeep Gopalan and Akshaya Kamalnath, 'Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials' (2015) 10(1) *Northwestern Journal of Law and Social Policy* 34, 129; Bala Balasubramaninan, 'Strengthening Corporate Governance in India: A Review of Legislative and Regulatory Initiatives in 2013-2014' (Working Paper No 447, Indian Institute of Management, 23 June 2014).

are contained in s 135 of the *Companies Act 2013*, specifying which companies are subject to this section and the obligations of these companies.[100]

Section 135 requires companies satisfying certain size or annual profit thresholds to spend at least 2 per cent (2%) of their net profits averaged over the preceding three financial years on what are in the statute described as 'corporate social responsibility' activities.[101] Most importantly is that all publicly traded and privately held companies with operations in India (including foreign-owned companies) from any sector are subject to s 135 if they fall within the set threshold. The Ministry of Corporate Affairs promulgated a set of rules in 2014 that regulates procedural and reporting requirements and provides a list of the activities that satisfy the requirement for CSR spending.[102] The combined effect of the s 135 provisions and the rules are described below.

The Boards of Companies that satisfy the threshold requirement under s 135 must establish a CSR committee consisting of three or more directors; at least one of them must be independent.[103] This committee is responsible for framing the company's CSR policy outlining the activities to be undertaken, and the amount that should be spent by the company on these activities. The committee must then recommend this policy to the board.[104] Once the board approves the recommended CSR policy, it must be disclosed in the annual board report and also displayed on the company website, if the company has one.[105] It is then the board's responsibility to ensure the required amount is spent on the activities outlined in the policy,

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[100] Dhammika Dharmapala and Vikramaditya Khanna, 'The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013' (2018) 56 *International Review of Law and Economics* 92, 104.
[101] Section 135 of the *Companies Act* is applicable to companies that have net worth of rupees 500 crore or more (equivalent USD 70 million dollars) or those that have an annual turnover of rupees 1,000 crore or more (equivalent USD 140 million dollars). Note, in India, a crore equal 10 million.
[102] Ministry of Corporate Affairs, *Companies (Corporate Social Responsibility Policy) Rules* (issued in 27 February 2014; amended in 23 May 2016) (hereafter referred to as CSR Rules) <http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification2_2014.pdf>.
[103] *Companies Act 2013*, No 18, s 135(1).
[104] Ibid, s 135(3).
[105] Ibid, s 135(4).

and (where applicable) for explaining why the firm failed to do so.[106] The CSR committee is charged with regularly monitoring the company's CSR policy.[107]

Only specified types of activities qualify as 'CSR' activities.[108] Schedule VII of the *Companies Act 2013* sets out activities qualifying for CSR compliance purposes.[109] The activities listed are very broad and cover a large area of what is typically considered as community welfare spending such as spending on education, health, poverty eradication, gender equality, environment, some designated government programs,[110] and funds for technology incubators in government academic institutions.[111] Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare qualifies for CSR. But there will always be an issue whether those funds might be subject to political influence. This requires careful monitoring to ensure that those funds are used for proper purposes. This leaves companies

[106] Ibid, s 135(5).
[107] Ibid, s 135(3) (c).
[108] Balasubramaninan, above n 99, 9.
[109] There was a question as to whether Schedule VII of the *Companies Act 2013* provides an illustrative or exhaustive list of activities. The Ministry of Corporate Affairs in its General Circular No 21/2014 clarified that the items under Schedule VII must be 'interpreted liberally' to catch the essence of the subjects counted in the Schedule. The Circular clearly explains that the items listed in the amended Schedule VII of the Act are 'broad-based and are intended to cover a wide range of activities.' For instance, as the Ministry of Corporate Affairs clarified in the Annexure of the General Circular, 'consumer protection services' are eligible under CSR. Specifically, 'promoting education' of Section VII could be broadly interpreted to include consumer education and awareness. See, Gopalan and Kamalnath, above n 99; see also, Ministry of Corporate Affairs, *Clarifications with Regard to Provisions of Corporate Social Responsibility under Section 135 of the Companies Act 2013*, General Circular No 21/2014, (18 June 2014)
<http://www.mca.gov.in/Ministry/pdf/General_Circular_21_2014.pdf>.
[110] For example, corporations have engaged, as part of their corporate social responsibility, in a large sanitary project named Swachh Bharat Abhiyan launched by the Government of India in 2014. See the discussion at 4.5.2.
[111] Schedule VII of the *Companies Act 2013* outlines the flowing activities:
(I) eradicating extreme hunger and poverty; (II) promotion of education; (III) promoting gender equality and empowering women; (IV) reducing child mortality and improving maternal health; (V) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; (VI) ensuring environmental sustainability; (VII) employment enhancing vocational skills; (VIII) social business projects; (IX) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and (X) such other matters as may be prescribed. It should note that these activities are further extended by the Annexure of the General Circular No 21/2014, above n 109.

with considerable discretion in directing their CSR spending and selecting activities from among the listed items that they believe would serve their companies' mission and business objectives or values.[112]

Expenditures that would have been undertaken in the normal course of business, that are meant to benefit only their employees or political parties, or that relate to activities occurring outside India will not count as CSR spending according to CSR Rules.[113] For instance, CSR projects or programs that benefit only the employees of the company and their families will not be considered as CSR activities in accordance with s 135 of the Act.[114] According to the Ministry of Corporate Affairs Clarifications in 2014, the expenses incurred in the course of complying with any legislative requirements will not count as CSR. As a result, compliance with applicable legislation such as labour laws or environmental statutes does not qualify. CSR activities are further distinct from activities undertaken in pursuance of company's normal course of business.[115] Consequently, CSR under the Indian legislation clearly excludes activities required by law or activities that benefit the companies or their employees.

Finally, the reporting requirements of the company board have been considerably extended by the Act. A CSR Report must be included in the directors' annual report to shareholders, along with the financial statements.[116] In the CSR Report, companies are required to provide an outline of their CSR policy including an overview of the projects or programs to be undertaken and a web-link to the company website where the CSR policy and programs are

[112] Dharmapala and Khanna, above n 100.
[113] CSR Rules (4).
[114] CSR Rules (4)(5). For example, running an informal school by DLF Company, a large real estate developer in India, for children of its low-income construction workers cannot be regarded as CSR activities because it is solely for the benefit of its employees and their family. See, Dharmapala and Khanna, above n 100.
[115] However, some Indian companies have mistakenly deemed normal business activities as CSR. For example, United Spirits considers the identification and use of sustainable technology for its business operations as part of its CSR. Similarly, Cipla (a company operating in India) cut the price of cancer drugs as part of its 'humanitarian' activities. The Act does not see these activities as CSR since there is no resulting expenditure that can be listed based on reduction in the prices of cancer medication, or use of sustainable technologies. The Act clearly states that CSR will not include business activities. See, Gopalan and Kamalnath, above n 99.
[116] *Companies Act 2013*, s 134(3).

outlined in detail.[117] The report must also clarify the composition of the CSR committee, the average net profit of the company for the last three financial years, the prescribed CSR expenditure, the details of CSR spending during the financial year (including the amount spent, and the amount allocated but not spent), and the manner in which the amount was spent.[118] The Indian Government had initially adopted a 'comply-or-explain' approach. This approach presupposed that in case the companies have failed to spend the required amount on CSR activities in a year, then they must explain the reasons for not doing so in their Board reports, see the discussion on this approach at 4.6.2.

It is important to note that the Act initially did not specify a penalty for companies that do not comply with the CSR spending requirements but imposed penalties for non-reporting based on a 'comply or explain' approach (see above).[119] However, in the most recent amendment in 2019, the *Companies Act* adopted formal enforcement for CSR requirements and set out penalties for non-compliance.[120] This legislative development makes CSR completely mandatory in India and highlights the need for similar provisions in other countries such as, Iraq.

Available data on compliance shows that companies are responding well to the mandatory CSR obligations. A high percentage (95 %) of obligated companies have a CSR policy and board-level CSR committee. The percentage of companies that are spending more than the

[117] Gopalan and Kamalnath, above n 99.
[118] CSR Rules.
[119] The failure to report on CSR activities would make the company subject to a penalty set out in s 134(8) of the *Companies Act.* This is because the expression of CSR as a board function implies that non-compliance with the provision ought to trigger the penalties stipulated for breach of directors' duties. See Gopalan and Kamalnath, above n 99.
[120] According to the *Companies Act* amendment in 2019, a company that failed to comply with CSR requirements (sub-section 5 or 6 of s 135) could be punished by fines ranging from 50 thousand rupees (equivalent USD 702) up to 2500 thousand rupees (equivalent USD 35,104). In addition, every officer of such company who is in default could be punishable with prison up to three years, a fine, or both. *Companies Act* 2013, s 135(7).

prescribed amount on CSR is increasing.[121] Energy and oil companies (National Thermal Power Corporation Oil and Natural Gas Corporation) were reported to be in the top 10 CSR spenders over the last four years.[122] This has to be evaluated in the light of the government's measures to monitor the implementation of CSR policies. In April 2018 the government set up a centralised scrutiny and prosecution mechanism to examine records of the top 1000 companies obliged to spend on CSR. Based on this review preliminary notices were issued to many companies and prosecution filed against companies who did not comply with CSR requirements and did not give valid reasons for not doing so.[123] It is anticipated that this harsher regime and continuing monitoring are likely producer greater compliance.

Overall, the Indian legislation recognises the importance of corporations undertaking activities that benefit the community. The Indian legislation again provides an option that Iraq may consider. Whether it is appropriate for Iraq is discussed in chapter six.

5.5.2 Nigeria

Nigeria is the largest oil producer in Africa, and its economy is mainly dependent on crude oil revenues.[124] Oil reserves are concentrated in the southern part of the country, known as the Niger Delta.[125] Oil production in the Niger Delta has resulted in significant negative environmental and social impacts. Despite these natural resources and the vast revenue made from the sale of crude oil, the Niger Delta has suffered from deprivation and lack of development and, as a consequence, increasing violence and instability, particularly in the

[121] Girija Srinivasan and Narasimhan Srinivasan, *India CSR Report 2019: Trends and Prospects of CSR* (SAGE 2019), 19.
[122] Ibid, 37.
[123] Ibid, 21.
[124] According to the World Bank, oil and gas sector contributes 99 percent of the country's export revenues, and 85 percent of government revenues. World Bank, *Niger Delta Social and Conflict Analysis* (May 2008) ix <http://siteresources.worldbank.org/EXTSOCIALDEV/Resources/3177394-1168615404141/3328201-1172597654983/Niger_Delta_May2008.pdf>.
[125] The Niger Delta region comprises nine oil-producing states. The region population is estimated to be over 28 million people. The region hosts many oil producing companies including, for example, Total, Petrobras, Chevron, Shell, and Exxon Mobil. Ibid.

late 1990s. Furthermore, oil extraction in the region has caused environmental degradation resulting from oil spillages and gas flaring, which in turn negatively impacts other industries such as fishing and agriculture (the two main occupations in the region).[126] The development of the Niger Delta has remained a major challenge for the Nigerian authorities with local communities increasingly expressing their dissatisfaction with government and its unsuccessful development initiatives.[127] To address these significant challenges, Nigeria has enacted the *Niger-Delta Development Commission Act* in 2000 and the *Nigerian Oil and Gas Industry Content Development Act* in 2010. Both Acts seek to overcome the social and environmental problems in the Niger Delta mostly caused by the oil industry and to promote the development of the region.

A. The *Niger-Delta Development Commission Act 2000*

The *Niger-Delta Development Commission Act 2000* (NDDC Act) established the Niger Delta Development Commission (NDDC), in order 'to offer a lasting solution to the socio-economic difficulties of the Niger Delta Region' by 'facilitat[ing] the rapid, even and sustainable development of the Niger Delta into a region that is economically prosperous, socially stable, ecologically regenerative and politically peaceful.'[128] This requires the Commission to tackle ecological and environmental problems that arise from oil exploration and production in the region and coordinate with the Federal Government, the member States and oil companies on all matters for prevention and control oil spillages, gas flaring and environmental pollution.[129] The Commission is further required to formulate policies for the development of the Niger Delta and implement projects and programs for sustainable

[126] Ibid.
[127] The federal government had created special agencies for development intervention in the Niger Delta including the Niger Delta Basin Development Board established in 1965 and, the Oil Minerals Producing Areas Development Commission in 1992. However, those initiatives were unsuccessful in addressing social and environmental difficulties in the Niger Delta.
[128] Niger Delta Development Commission, *The Niger Delta Regional Development Master Plan* (2006) 103.
[129] *Niger-Delta Development Commission Act 2000,* No 6, ss 7(h), (i).

development in fields such as health, education, housing, roads, water supply, electricity, etc.[130]

The NDDC Act provides an important model that could be used in other oil-producing countries and possibly in Iraq. Under the Act, the commission consists of members representing the Federal Government, oil producing States and oil producing companies.[131] It requires all oil and gas producing companies operating in the Niger Delta area to fund this commission with 3 per cent (3%) of their total annual budgets.[132] This approach has many advantages. It brings together key stakeholders in one official commission which facilitates the process of formulating a comprehensive development policy that considers the real needs of the region. To clarify, the NDDC has authority to plan and implement projects and programs for sustainable development and 'ensure sound and efficient management of the resources of the Niger Delta region.'[133] This avoids the disadvantages where each oil company implements its own CSR projects that may not be necessarily useful for the local community. Nonetheless, NDDC Act does not prevent oil companies engaging in CSR outside the NDDC plan. In such a case, the commission is empowered to monitor any project being funded or carried out by oil or gas companies, as well as ensuring that funds released for such projects are properly utilised.[134] This may provide a useful model for Iraq, and is discussed further at 6.3.

B. *Nigerian Oil and Gas Industry Content Development Act*

The object of the *Nigerian Oil and Gas Industry Content Development Act* 2010 (*Content Development Act*) is to enhance the contribution of the oil and gas industry to the country's

[130] Ibid, s 7(1)(b).
[131] Ibid, s 1, 2. For more details about the functions and powers of the NDDC see *Niger-Delta Development Commission Act 2000*, s 7.
[132] Ibid, s 14.
[133] See Niger Delta Development Commission, *Making a Difference* (2018) <http://www.nddc.gov.ng/about%20us.html>.
[134] *Niger-Delta Development Commission Act* 2000, s 7(1)(g).

sustainable development.[135] Assuming that the principal negative externalities are dealt with directly by statute (eg NDDC Act 2000, discussed above), the *Content Development Act* concentrates on the positive aspects of CSR in the Nigerian oil and gas sector. It provides a comprehensive legal framework for local content in the oil and gas industry and sets out three governing policies. These policies promote Nigerian content, reporting requirements for companies and create a regulatory body to oversee these provisions.[136] The Act explicitly provides for specific categories of activities to be procured locally to the oil and gas sector; local content targets are set between 80 and 100 per cent.[137] For example, in order to stimulate development of local businesses and industries, Nigerian companies must be selected for the procurement of some goods and services.[138] These requirements will enhance the oil industry's contribution to the economic development and value creation.[139] The *Content Development Act* also requires all companies operating in the oil and gas industry to employ only Nigerians in junior or intermediate positions; foreigners may fill a maximum of 5 per cent of management posts.[140]

Companies operating in the oil and gas industry must submit to the Nigerian Content Development and Monitoring Board specific plans covering all their projects and activities

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[135] Miriam Weiss, 'The Role of Local Content Policies in Manufacturing and Mining in Low- and Middle-income Countries' (Working Paper No 19, United Nations Industrial Development Organization, 2016) 18 <https://www.unido.org/api/opentext/documents/download/9929070/unido-file-9929070>.

[136] Gary Hufbauer, Jeffrey Schott and Cathleen Cimino, *Local Content Requirements: Report on a Global Problem* (Peterson Institute for International Economics, 2013) 107.

[137] See *Nigerian Oil and Gas Industry Content Development Act* 2010, Schedule A. For example, goods and services such as steel pipes and plates, cables, valves, cement, audit services and geographical survey services must 100 per cent provide locally.

[138] Isabelle Ramdoo, 'Local Content Policies in Mineral-rich Countries an Overview' (Discussion Paper No 193, European Centre for Development Policy Management, May 2016) 5 <http://ecdpm.org/wp-content/uploads/ECDPM-Discussion-Paper-193-Local-Content-Policies-Mineral-Rich-Countries-2016.pdf>.

[139] Theophilus Acheampong, Marcia Ashong and Victoria Svanikier, 'An assessment of local-content policies in oil and gas producing countries' (2016) 9 *Journal of World Energy Law and Business* 282, 302. According to the last estimates, the implementation of the Act has resulted, until early 2017, in attracting investments worth USD 2 billion into the country and created about 38,000 job opportunities. See KPMG, *Recent Developments on Nigerian Content law in the Oil and Gas Industry* (Newsletter, 15 March 2017) <https://assets.kpmg.com/content/dam/kpmg/ng/pdf/tax/ng-recent-developments-on-nigerian-content-law-oil-and-gas-industry.pdf>.

[140] *Nigerian Oil and Gas Industry Content Development Act, 2010*, s 35.

such as 'Nigerian Content Plan',[141] 'Employment and Training Plan',[142] 'Technology Transfer Plan'[143] and others. These plans require companies to demonstrate their current levels of compliance with the Nigerian content requirements (or a timeline for reaching the target levels) or otherwise be subject to penalties for non-compliance. The Nigerian Content Development and Monitoring Board is granted a broad authority to guide, monitor, coordinate and implement the provisions of the *Content Development Act*.[144] Particularly, the Board 'appraises, evaluates and approves' all required plans from foreign operators and awards the 'Certificate of Authorization.'[145] In case of non-compliance with the local content commitments by companies, the Board is empowered to impose penalties against non-compliant companies that can lead to the cancellation of projects and fines equivalent to 5 per cent (5%) of the project value.[146] Establishing a monitoring institution and empowering it with authority to impose sanctions is one reason why Nigerian local content regime is often viewed as successful,[147] with other countries following this approach.[148] In fact, it would be difficult to achieve and measure the value-add resulting from local content obligations without establishing mechanisms for effective monitoring and enforcement.

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[141] Ibid, s 7.
[142] Ibid, s 29.
[143] Ibid, s 44.
[144] Ibid, s 4.
[145] Ibid, s 70(e)(f).
[146] Ramdoo, above n 139, 5.
[147] For instance, before enacting the *Content Development Act*, local content requirements were negotiated in individual contracts. However, these were rarely implemented by international companies because they lacked the force of law and therefore had no penalty for non-compliance. After issuing the *Content Development Act*, with appropriate sanctions, is observed that the level of compliance has improved, increasing the positive impact on local content uptake. Ibid, 10.
[148] Ghana has followed Nigeria's lead by establishing a 'Local Content Committee' for its oil sector. The committee is required to monitor and coordinate all aspects of implementing its 2013 local content Regulation, and similarly in Tanzania. In comparison, among several Middle East and North Africa countries who stipulate local content requirements only Saudi Arabia, Iran and Oman have established institutions or mechanisms for monitoring and enforcing such obligations. For example, the national oil company Saudi Aramco directly evaluates and monitors the 'added value' brought to the Kingdom by suppliers. See, Saudi Aramco, *In-Kingdom Total Value Add (IKTVA) Program*, <http://iktva.sa/participating-in-iktva/>; Damilola Olawuyi, 'Local Content and Procurement Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa' (Paper no 18, Oxford Institute for Energy Studies, November 2017) 11 <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/11/Local-content-and-procurement-requirements-in-oil-and-gas-contracts-regional-trends-in-the-Middle-East-and-North-Africa-MEP-18.pdf>.

Regardless of the degree of implementation of the *Nigerian Oil and Gas Industry Content Development Act* 2010 and its impact in Nigeria,[149] the Act provides an approach that could be considered for Iraq. This is discussed further at 6.3.

5.5.3 Tanzania

In 2010, Tanzania discovered significant quantities of natural gas after more than half a century of exploration for oil and gas.[150] The rapid growth of the industry has challenged the Government to establish legal and institutional frameworks to manage the industry effectively.[151] The government has formulated a comprehensive petroleum policy to guide the growth and development of the industry and maximising substantial benefits for its citizens.[152] In 2015, Tanzania revised the legal framework for the petroleum industry by enacting the *Petroleum Act 2015* and other related Acts.[153] This Act imposes high standards for protecting the environment, and public health and safety in the petroleum operations (mitigates the negative impacts of petroleum activities).[154]

Further, the *Petroleum Act 2015* sets out explicit provisions for 'corporate social responsibility' programs; and obligations for the recruitment and training of Tanzanians, and local content. According to this Act, a contractor and licence holder[155] must annually prepare

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[149] Ituma Calistus, 'The Antithesis of Nigerian Local Content Act 2010 to Nigeria's Laws, Global Trade and Investment Norms' (2017) 5(3) *International Journal of Business & Law Research* 1, 187; Uwafiokun Idemudia 'Corporate Social Responsibility and the Rentier Nigerian State: Rethinking the Role of Government and the Possibility of Corporate Social Development in the Niger Delta' (2010) 30(1-2) *Canadian Journal of Development Studies* 131, 151.

[150] Tanzania has been exploring for oil and gas since 1950s, however, only in 2004 and 2006 commercial production of natural gas was commenced. See Ministry or Energy and Minerals, *The National Natural Gas Policy of Tanzania* (October, 2013) 1 <http://www.eisourcebook.org/cms/Nov%202013/Tanzania%20Natural%20Gas%20Policy%202013.pdf>.

[151] Ibid.

[152] Ibid, 16.

[153] The two other related Acts are *The Tanzania Extractive Industry (Transparency and Accountability) Act 2015* and *The Oil and Gas Revenues Management Act 2015*.

[154] *Petroleum Act 2015*, ss 207-217.

[155] Contractor means 'a second party or an entity to which any interest on the licence may be transferred in the application of the provisions of the relevant agreement.' Licence holder means 'a holder of an exploration or development licence granted under this Act.' Ibid, s 3.

a credible CSR plan be agreed with the relevant local government authorities.[156] The prepared CSR plan should take into account environmental, social, economic, and cultural activities based on local government priorities of the host community.[157] Thus, the CSR plan must be submitted to a local government authority for consideration and approval.[158] This means that a CSR program is subject to negotiation between the licence holder and the local government, and cannot be decided by the licence holder alone. In this regard, every local government authority is required to prepare CSR guidelines having regarding their localities' concerns. The local government authority is also empowered to oversee the implementation of the approved CSR action plan by the contractor or the licence holder.[159]

In relation to the employment and training of Tanzanians, a licence holder and a contractor is required to provide training and recruitment of Tanzanians in all phases of petroleum operations and gas activities taking into account gender, equity, persons with disabilities and host communities concerns.[160] For that purpose, a licence holder and contractor must annually submit to the Petroleum Upstream Regulatory Authority (discussed below) for approval a detailed programme for training and employment.[161] The Act further requires the licensee to report to the Petroleum Upstream Regulatory Authority annually on the execution of the training programme[162] including their commitment to establish management and technical capabilities, maximise technology transfer and skills relating to petroleum and gas industry to Tanzanians who are employed in this sectors, and steps taken to close any identified learning gaps.[163] Reporting to a regulatory agency about the efforts made and progress for training and knowledge transfer allows the state to monitor the progress. Iraq can

[156] Ibid, s 222(1).
[157] Ibid, s 222(2).
[158] Ibid, s 222(3).
[159] Ibid, s 222(4).
[160] Ibid, s 220(2). For this purpose, ‘‘'host communities" means inhabitants of the local area in which petroleum operations or gas activities take place.' Ibid, s 220(5).
[161] Ibid, s 220(1).
[162] Ibid, s 220(4)
[163] Ibid, s 221.

take advantage from this experience and implement similar requirements as will discussed further at 6.3.

The Tanzanian *Petroleum Act 2015* also places an obligation on a licence holder to give preference to Tanzanian goods and services.[164] This provision has wide ranging implications for service providers including oil services companies, financial and insurance, legal, accounts and health matters. Where Tanzanian goods and services are not available, such goods and services must be provided by a company which has entered into a joint venture with a local company. The local company must hold no less than 25 per cent of the shares in such joint venture company.[165] In other words, any foreign supplier must enter into partnerships with a local company to qualify for supplying the petroleum sector with goods and services. These requirements promote local enterprises. It would also stimulate the development of sectors other than the petroleum industry by enabling technology transfer and developing local capacity for Tanzanian companies.[166] To ensure that local content requirements are carried out, the licence holder is required to submit to the Petroleum Upstream Regulatory Authority on an annual basis a report of their achievement and their contractor, and subcontractors' achievement in utilising Tanzanian goods and services.[167]

Petroleum Upstream Regulatory Authority is a body established by the *Petroleum Act 2015* to regulate and monitor the petroleum sector.[168] This Authority is responsible, among other functions, to ensure compliance by industry players with the provisions of the *Petroleum Act* and any other regulations or contract terms, for example, monitoring the implementation of local content, training and knowledge transfer in the petroleum sector.[169] However, because

[164] Ibid, s 219(1).
[165] Ibid, s 219(3).
[166] Ministry or Energy and Minerals, *The National Petroleum Policy of Tanzania* (April 2014) 25.
[167] *Petroleum Act 2015*, s 219(8).
[168] Ibid, s 11.
[169] For more details about functions and responsibilities of Petroleum Upstream Regulatory Authority see *Petroleum Act 2015*, s 12.

petroleum projects in Tanzania are still under negotiation between the government and IOCs, no reporting on CSR, local content and training have issued yet.

The illustrations from India, Nigeria and Tanzania provide alternative approaches for Iraq to consider in relation to the responsibility and accountability of multinational investors in the oil and gas industry, and the transparency of these processes in implementing local content and procurement, training and employment of locals, and sustainable development of the sector generally. Although the examples from Nigeria and Tanzania both set out monitoring mechanisms, Iraq will need to be alert to whether these provisions are able to avoid inefficiency and corruption risks and achieve the goals for which they were established as well as the viability of these approaches in the Iraqi context. This is further discussed in chapter six at 6.4.

The next section examines the approach that has thus far been used in Iraq, that is, the use of Oil Contracts to impose obligations on IOCs.

5.6 Corporate Social Responsibility in Oil Contracts

In addition to international instruments and national legislation, contracts have been used as an important tool to promote CSR. Oil contracts addressed in this thesis are those entered into between an International Oil Company or companies and the host state or, in some cases, the National Oil Company.[170] Oil contracts may require IOCs to protect the environment, employees and society from the impact of oil activities (preventing negative externalities), and also to provide for development of localities and the sustainable development of communities in which they carry out their activities (providing positive

[170] Tim Boykett et al, *Oil Contracts: How to Read and Understand a Petroleum Contract* (Times Up Press, 2012) 21 <http://www.eisourcebook.org/cms/January%202016/Oil%20Contratcs,%20How%20to%20Read%20and%20Understand%20them%202011.pdf>.

contributions).[171] In doing so, the host state can hold the IOC accountable for non-performance, poor or part-performance, and performance which is substantially different from what was reasonably expected.[172]

The oil contract, as a binding legal agreement, imposes contractual obligations on IOCs. Consequently, contractual conditions requiring IOCs to provide community programs etc do not qualify as CSR as defined for this thesis, see chapter four at 4.2.1. They are considered here as there is little prospect those IOCs will do much by way of voluntary CSR in Iraq, see discussion at 6.3. Direct CSR provision in the oil contract can be in three forms: explanatory to the legislative rules, confirming the legislative requirements, or it could impose new legal obligations under contractual clauses required by the host state authority.

Contractual CSR provisions may complement or clarify or restate the provisions of the law. This can occur where the law only provides general statement of what is required without identifying the area of CSR interest or specifying the minimum percentage of CSR expense. This is not the position in Iraq as there are no 'CSR' style statutory obligations but it provides an option for consideration. The oil contract may have express provisions related to the impact of oil operations on communities and specify the social development work that must be carried out by the oil company. Since 2013,[173] for example, the Mexican models of petroleum contracts developed by the Mexican national oil company, Petróleos Mexicanos

[171] Ibid, 161-165; also see Appendix 2.
[172] Abbas Ghandi and Cynthia Lin, 'Oil and Gas Service Contract around the World: A Review' (2014) 3 *Energy Strategy Reviews* 63, 71.
[173] In 2013, Mexico has implemented significant institutional reforms in the energy sector. These reforms led to the amendment of Mexico's constitution to allow private investment in the petroleum sectors. These amendments, plus a series of laws enacted in 2014, end more than seven decades of monopoly held by two state-owned companies. The energy reform authorised the national oil company, Petróleos Mexicanos (Pemex), to carry out bidding rounds and enter into contracts with the private sector for exploration and production activities through its subsidiary. Pursuant to the new contracting authorities, Pemex developed different models of petroleum contract for each bidding round which were implemented in contracts for many fields by 2015. For an in-depth analysis of energy reform in Mexico, see Richard Vietor and Haviland Sheldahl-Thomason, 'Mexico's Energy Reform' (Case Study No 717-027, Harvard Business School, 23 January 2017); Tim Samples and Jose Vittor, 'Energy Reform and the Future of Mexico's Oil Industry: The Pemex Bidding Rounds and Integrated Service Contract' (2012) 7 *Texas Journal of Oil, Gas, and Energy Law* 215, 240.

(Pemex), includes provisions which explain and determine the requirements under the Mexican *Hydrocarbons Law* 2014 on issues related to CSR. To illustrate, Article 118 of this law states that infrastructure projects in the hydrocarbons industry must respect human rights and follow the principles of sustainability.[174] But the Law neither clarifies what 'the principles of sustainability' means nor what is required. In practise, clause 19(8) of the Mexican petroleum contract model stipulates that the Contractor must implement social and environmental responsibility programs, bearing in mind the contribution to sustainable development that benefits the communities located or close to the contract area.[175] Consultation with communities is required to prepare and monitor the CSR programs. The Contractor must spend on CSR programs, as a minimum, equivalent to 1 per cent of its annual budget.[176] Annex 13 of the Mexican petroleum contract model further explains that the objective of CSR programs is to build trusting relationships between the community, the National Oil Company and the Contractor that contributes to obtaining the social license to operate.[177] To achieve that, CSR programs must promote social benefit in the areas of education, health and sustainable productive projects; actions to support conservation, restoration and sustainable management of the natural resources; and enhance capacity-building, transfer technology, organisational development etc.[178] This contractual condition clearly explains what is required to contribute to the sustainable development of local

[174] *Hydrocarbons Law* 2014 (Mexico), art 118.
[175] Pemex Exploration and Production, *Modelo de Contrato para Producción de Hidrocarburos* [Contract Model for Hydrocarbon Production] (published 20 December 2012), 19(8) <http://contratos.pemex.com/Documentos%20CIEP/Chicontepec_Modelo%20de%20contrato.pdf>.
[176] Ibid.
[177] Ibid, Annex 13.
[178] Ibid. For this purpose, Annex 13 stresses that CSR programs should be in the form of direct investments in sustainable development projects and donations or cash contributions are not accepted.

communities to implement the provisions of CSR mentioned in the Mexican *Hydrocarbons Law* 2014.[179]

A second variation is that the CSR requirements in oil contracts may simply restate legislative requirements with the oil contract reconfirming those provisions. For example, in oil contracts, research and development investment obligation in Brazil derives from a combination of legal and contractual obligations. According to clause 24 of the Brazilian model of concession agreements, if production of oil or natural gas in a certain field reaches a specified volume of production, the concessionaire must invest an amount of 1 per cent (1%) of the production gross revenue of the field into research and development projects.[180] The amount required to be spent on research and development is calculated from the gross revenue of the production so that these costs are borne by the concessionaire according to the concession agreements provisions.[181] Up to half of that amount can be invested in the company's internal research and development projects or through private partners. The remaining amount has to go to non-profit institutions, universities and other research and development related institutions accredited by the National Petroleum Agency.[182] This clause set out CSR requirements restating the provision in Resolution No 33 of 2005[183] issued by the National Petroleum Agency.[184] Clearly, the contracting authority (National Petroleum

[179] Armando Chiang, 'Corporative Social Responsibility in the Mexican oil industry: The Social Impact Assessment as a tool for local development' (Paper presented at 4th International Conference on CSR, Sustainability, Ethics & Governance, Perth, Western Australia, 26–28 July 2017) 4 <http://www.promaco.com.au/events/csr2017/CSR_2017-Book_of_Full_Paper_Submissions.pdf>.

[180] Ministry of mines and Energy, *Concession Agreement for the Exploration, Development and Production of Oil and Natural Gas*, contract model, 2008, 24 <http://www.eisourcebook.org/cms/Brazil,%20Model%20Concession%20Agreement,%20ANP%2010th%20Rnd,%202008.pdf>.

[181] For instance, Clause 2(2) of the Brazilian model of concession agreements states that 'the Concessionaire shall always assume, in an exclusive manner, all costs and risks related to the performance of the Operations and its consequences, bearing, in return, the sole, exclusive ownership of the Oil and Natural Gas which might be effectively produced and received by it at the Production Metering Point, pursuant to this Agreement,…'. Ibid, 2(2).

[182] Ibid, 24(4).

[183] National Petroleum Agency, Natural Gas and Biofuels, *Resolution* No 33 of 2005.

[184] National Petroleum Agency, Natural Gas and Biofuels (*Agência Nacional de Petróleo, Gás Natural e Biocombustíveis* (ANP)) is a federal autarchy subordinated to the Ministry of Mines and Energy responsible for

Agency) includes these statutory obligations in contractual clauses. Similarly, the Ecuadorian Service Contracts models of 2011 and 2014 require the oil company to employ in the execution of services a minimum of 95 per cent of both Ecuadorian workers and administrative staff and 75 per cent Ecuadorian technicians. This is required by Article 31 of the Ecuadorian *Hydrocarbons Law*1978.[185]

The third alternative is that a direct CSR provision in the oil contract may be included by the host state authority for the purpose of ensuring contributions to sustainable development, and increasing the protection of stakeholder interests, particularly when local petroleum legislation is weak, insufficient, or non-existent. In the absence of legislation, the remaining option is to use oil and gas contracts to require IOCs to contribute to the community. In relation to Iraq, the inclusion of clauses in oil contracts may be the only avenue for Iraq to force IOCs to contribute to Iraq's development. Legislative solutions have little prospect of being passed. Iraq has not succeeded in passing the oil and gas law since it was first introduced into Parliament in 2007 (see discussion on the *Draft Oil and Gas Law* at 2.5.2). The Iraqi government's strategy has been to include CSR provisions in oil and gas contracts. Such clauses with limited reach were included in the first bidding round hold in 2010 and subsequent bidding rounds (see discussion on the Oil and Gas Licensing Rounds at 2.2.2). Current Iraqi oil contracts require the contractor to allocate, as a minimum, an annual amount of USD 5 million to the Training, Technology, and Scholarship Fund.[186] This is important in building capacity and expertise for Iraqi workers. But as will be seen, (at 6.3.2), there is

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the regulation, contracting and monitoring economic activities of the petroleum industry in Brazil. See *The Regulation of the Petroleum Industry in Brazil* 1997, No 9.478, arts 7, 8.

[185] Ecuadorian *Hydrocarbons Law* 1978, No 711.

[186] There is no signed oil contract publicly available but a contract model is available. See Technical Services Contract for the Rumaila Oil Field between BP, CNPC and Iraq, a contract model from the first bidding round, (2010) art 26 <http://iraqieconomists.net/ar/wp-content/uploads/sites/2/2016/01/Clean_copy__BP_CNPC_comments__27_July__on_PCLD_draft_dated_01.pdf >; Exploration, Development and Production Contract, a contract model from the fifth bidding round, 2018 art 26 <https://oil.gov.iq/upload/upfile/ar/659.pdf>. Extracts from those two contracts model provide in Appendix 2.

evidence that the full amounts have not been spent nor has it led to the upskilling and recruitment of greater numbers of Iraqi workers. These provisions and criticisms are discussed in greater detail in the next chapter (see 6.3).

5.7 Conclusion

This chapter examined the alternative approaches to CSR at both the international and domestic levels for the purpose of proposing a legal framework to implement CSR in the Iraqi oil and gas industry. At the international level, international instruments address CSR issues by setting norms, creating standards for best practice, and promoting policies in the areas of social, labour, and environmental protection. Many countries, including Canada, Brazil and EU, have included obligations to promote CSR in Trade Investment Agreements to achieve a balance between the social and ecological impact of foreign investor's activities and guarantees and rights they receive under these agreements. The Brazilian model of agreements has been used to illustrate because it explicitly identifies the concept of CSR and addresses interests of the host state. The inclusion of CSR clauses in the international trade and investment agreements provides a new avenue to encourage corporate social and environmental behaviour beyond the current reliance on voluntary initiatives and national legislation.[187] CSR codes set out in the international instruments are increasingly shaping investment policies at the national and international levels, particularly where they enforced by national law.[188]

At the national level, governments have become increasingly proactive in promoting CSR and are the major CSR driver.[189] Government policies and programs for CSR vary in their

[187] Peels and Echeverria, above n 33.
[188] United Nations Conference on Trade and Development, above n 10, 35.
[189] Jeremy Moon, 'Government as a Driver of Corporate Social Responsibility', above n 35, 17; Lozano et al, above n 35, 42; Peters and Röß above n 36; Steurer, 'The Role of Governments in Corporate Social Responsibility', above n 37.

regulatory strength ranging from endorsing, facilitating, partnering,[190] to legal requirements either through legislation or under contract requiring corporations to act responsibly.

As indicated in the introduction to this chapter, CSR is defined in the thesis as voluntary activities which contribute to society by 'doing the right thing.' As noted, some jurisdictions do not rely on altruistic behaviour but legislatively require corporations to respect human rights, ensure appropriate labour conditions and contribute to community development. These provide important exemplars for Iraq. As will be explained at 6.3, there is little evidence that IOCs will voluntarily engage in substantial CSR, absent any formal obligation to contribute to the community. The specific issues addressed by the US *Dodd-Frank Act 2010*, the California *Transparency in Supply Chains Act 2010* and the UK *Modern Slavery Act 2015* dealing with labour practices and supply chains are less important in the Iraqi context of IOCs. The legislation does demonstrate that the protection of workers is considered sufficiently important not to be left to the voluntary conduct of Corporations.

The other area where governments have legislated is in relation to social and environmental programs that enhance sustainable development. India, Nigeria and Tanzania provided examples of this type of legislation. Nigeria and Tanzania are particularly interesting as they specifically deal with oil and gas corporations. However, while they offer a comprehensive legal framework for local content and value adding by oil and gas industry corporations, they lack a nuanced definition of what constitutes a CSR obligation. For this we have to look at the Indian legislation which defines CSR activities and excludes self-serving expenditure by companies, see above. This is its strength. It is suggested that the definition of CSR found in the Indian legislation be adopted alongside a mandatory requirement of a percentage of 'gross profit' or, still better, barrels of oil/crude extracted. Nevertheless, the problems confronting Iraq may be much more basic and, therefore, insurmountable given the influence of IOCs and

[190] Fox et al, above n 39, 6; Knudsen et al, above n 40.

the Parliamentary gridlock in being unable to pass reforming oil and gas legislation. This last issue is discussed in 6.2.

This chapter has also discussed oil contracts as a basis for contributions to the community. Brazilian petroleum contracts provide a model approach for requiring IOCs to contribute to the environment and community welfare. Whether Iraq should further develop its oil contracts to make similar provision is discussed at 6.3.

CHAPTER SIX

IMPLEMENTING CORPORATE SOCIAL RESPONSIBILITY IN IRAQ

6.1 Introduction

This chapter argues that corporate social responsibility (CSR) should form an integral part of the operations of international oil companies (IOCs) investing in Iraq but the role of corporate social responsibility should complement rather than be an alternative to legislation protecting the environment and the community. This argument builds on the earlier discussion in chapter two setting out the Iraqi context, the role of oil and gas sector in the Iraqi economy, and the strengths and weakness that hinder investment stability and economic prosperity. It also builds on the earlier arguments in chapter four as to why international oil companies should undertake CSR, and the international experience in responding to corporate responsibility in chapter five. It has been argued in chapter two (see 2.7) that Iraq has substantial reasons for promoting CSR in the oil and gas industry. The issue examined in this chapter is to decide what the most appropriate mechanism to achieve this. The choice depends on the efficiency of the Iraqi legal system, the nature of institutions, the role of the financial market, and public awareness on social and environmental issues.[1]

It was argued in chapter four (see 4.6.3) that the current status of the Iraq Stock Exchange and the fact that international oil companies are not listed on the Iraq Stock Exchange effectively prevents the adoption of the approach in many countries that requires listed companies to report CSR based on the comply-or-explain regime. The comply-or-explain approach is more likely to be effective where discipline is exercised by the financial market,

[1] Suzanne Young and Magalie Marais, 'A Multi-level Perspective of CSR Reporting: The Implications of National Institutions and Industry Risk Characteristics' (2012) 20(5) *Corporate Governance: An International Review* 432, 450.

where there is strong shareholder activism and a critical financial press which create a market sanction rather than a legal one.[2] Thus, the accountability mechanisms which might have been implemented through listing rules are not an option for Iraq, and therefore, alternative approaches need to be considered.

Chapter five discusses jurisdictions where Corporations are statutorily required to protect the stakeholders (see 5.4) and contribute to development and community welfare (see 5.5). This provides possible models for Iraq. If a legislative approach is adopted, it could impose formal obligations on oil companies to carry out particular activities for the benefit of the community or stakeholders. Iraq has imposed legal obligations on IOCs through oil and gas contracts for development and community welfare. This chapter examines the potential role of CSR as a voluntary mechanism in the oil industry and the possibility of imposing formal obligations on IOCs, whether thorough regulation and/or oil and gas contracts, to carry out particular activities for development and community welfare. However, monitoring IOCs compliance with these obligations is crucially important in Iraq because of political influence in the oil industry and corruption risks.

The chapter starts by addressing the suitable approach for implementing CSR in Iraq. Then, it examines a framework of CSR in the oil industry in responding to the Iraqi context. This includes corporate governance and stakeholder protection, training, local content and development projects for community welfare. Finally, the chapter recommends a framework for monitoring IOC compliance with legal requirements and implementing voluntary CSR in the oil industry.

[2] Ramin Gamerschlag, Klaus Moller and Frank Verbeeten, 'Determinants of Voluntary CSR Disclosure: Empirical Evidence from Germany' (2011) 5(2-3) *Review of Managerial Science* 233, 262; Sridhar Arcot, Valentina Bruno and Antoine Grimaud, 'Corporate Governance in the UK: Is the Comply or Explain Approach Working?' (2010) 30 *International Review of Law and Economics* 193, 201.

6.2 Legislative and Contractual Approaches

As noted previously CSR style obligations imposed by law do not qualify as CSR as defined in this thesis. Nevertheless, with relation to particular negative externalities (such as environmental protection) and contributions to development and welfare, States have effectively forced corporations to act as good citizens. This section examines whether the imposition of legal obligations, through legislation or contractual obligations, provide the most appropriate approach fort Iraq. This is based on the view that oil companies have not voluntarily undertaken responsibility for the negative externalities created by their activities and have not significantly and meaningfully contributed to the community. Legislation should make oil companies responsible for the harm caused to stakeholders and the community as a consequence of their operations, see discussion below at 6.3.1. Rather than a comply-or-explain approach, which is unlikely to be effective in Iraq (see 4.6.3), sanctions and penalties should apply for breach. This can be done through environmental law, petroleum law as well as petroleum contracts. Legislation may be the preferred option for many reasons including gaps in the existing petroleum legislation, corruption and lack of judicial experience. These aspects are discussed below.

Despite the significance of petroleum resources including oil and gas for the government revenue and the whole economy (see chapter two at 2.2.1), the government has been unable to enact a modern law that sets up specific technical and management requirements for the sector. The problem is twofold: first, the difficulty in passing legislation relating to oil and gas law and second, the content of the possible law. Since 2007, the government has submitted a draft on oil and gas law to the Parliament multiple times.[3] A political stalemate and other obstacles (discussed at 2.5.2) prevented the proposed law being passed. This is not expected to be solved in the near future. If the potential for the imposition of legal obligations

[3] Draft *Oil and Gas Law*, 2007.

in relation to negative externalities or positive contributions to the community in amendments to the oil and gas law is not likely, other alternatives need to be considered. The Draft *Oil and Gas Law* makes no mention to CSR. If the barriers to enactment of a modern oil and gas law are overcome, this would provide a suitable vehicle for including provisions for the environment, labour and community protection, local content and general development.

The second barrier to implementing a legislative solution for CSR is corruption. The Corruption Perception Index shows that Iraq, over a decade, is perceived as one of the ten most corrupt countries in the world[4] and in 2018 was ranked as one of the worst with a ranking of 168th out of 180 countries.[5] The Transparency International Organisation suggests that wars, political instability, internal conflicts and terrorism are some of the reasons for the increase in corruption in Iraq, particularly political corruption.[6] This is relevant to the question whether CSR could be implemented through financing social programs that are implemented by the IOCs themselves. If CSR is in the form of monetary payments, corruption is a serious risk if IOCs are required to pay for CSR initiatives to the government or state-owned companies. It must also be investigated whether the funding and implementation of CSR programs by IOCs ensures the quality and the efficiency of those programs. Although IOCs have the financial and technical capacity to implement social and environmental programs, unless there is formal accountability and monitoring there is no certainty that the objectives of any CSR programs will be achieved (see discussion below at

[4] Iraq's rank on the Transparency International Corruption Perceptions Index was 178 out of 180 countries in 2008 and 166 out of 176 countries in 2016. See, Transparency International Organisation, *Transparency International Corruption Perceptions Index 2008* <http://media01.commpartners.com/acc_webcast_docs/TI_CP_Index_2008.pdf>; Transparency International Organisation, *Transparency International Corruption Perceptions Index 2016*, <http://www.ey.com/Publication/vwLUAssets/EY-Transparency-International-Corruption-Perceptions-Index-2016/$FILE/EY-Transparency-International-Corruption-Perceptions-Index-2016.pdf>.

[5] Transparency International Organisation, *Corruption Perceptions Index 2018* <https://www.transparency.org/files/content/pages/2018_CPI_Executive_Summary.pdf>.

[6] Transparency International Organisation, *Transparency International Corruption Perceptions Index 2016*, above n 4.

6.3.2 about IOCs implementing training requirements and at 6.3.3 about IOCs implementing local employment requirements).

The third problem is where accountability mechanisms are incorporated into legislation enforceable through the judicial system. The judicial system lacks resources and experience.[7] There is a lack of experience and knowledge of international law and standards, environmental protection, human trafficking, legal empowerment mechanisms, money laundering and arbitration.[8] The Iraqi Judiciary, like other official bodies, also suffers from slow and cumbersome procedures.[9]

Although the Iraqi Constitution guarantees judicial independence, political and sectarian identity continues to influence appointments and decisions.[10] Members of the judiciary are often exposed to significant pressure including physical threats, particularly in pursuing corruption cases.[11] With relatively inexperienced judges, cronyism, intimidation, and slow and cumbersome procedures, the judiciary in Iraq is unlikely to play an effective role in enforcing CSR where there is mandatory legislation or awarding adequate compensation to victims in the event of any petroleum accident.

These challenges must be taken into consideration when deciding the best options for Iraq in relation to CSR. These difficulties might be lessened if clear and explicit CSR obligations are set out in both the oil and gas law and in oil contracts. Lack of judicial expertise could be

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[7] There is a broad consensus, among officials, advisors and experts that courts in Iraq need more judges with specific expertise. See, Jim Freedman and Abbas Balasem, 'Iraq - Support to the Rule of Law and Justice Project Final Project Evaluation' (United Nations Development Programme, August 2012) 16 <file://ad.uws.edu.au/dfshare/HomesPTA$/90928758/Downloads/Iraq%20-%20Support%20to%20the%20Rule%20of%20Law%20and%20Justice%20Project%20Evaluation%20Report%202012%20(5).pdf>.

[8] Ibid.

[9] Ibid.

[10] Australian Government: Department of Foreign Affairs and Trade, 'DFAT Country Information Report Iraq' (26 June 2017) 27 <http://dfat.gov.au/about-us/publications/Documents/country-information-report-iraq.pdf>.

[11] Maxime Agator, 'Iraq: Overview of Corruption and Anti-corruption' (Transparency International, Report No 374, April 2013) 7 <https://knowledgehub.transparency.org/assets/uploads/helpdesk/374_Iraq_overview_of_corruption_and_anticorruption.pdf>.

addressed by extensive training programs on emerging issues in Iraq such as environmental pollution, protection of cultural heritage, protection against enforced labour, achieving gender equity and so on.[12]

As noted in the introduction, the objective of this chapter is to identify a suitable CSR framework for Iraq's oil and gas industry. The next section will discuss the content and enforceability of CSR provisions.

6.3 Corporate Social Responsibility Framework for the Iraqi Oil and Gas Industry

The previous section examined approaches to implementing corporate social responsibility for the Iraqi oil and gas industry. This section investigates the content of CSR for this industry. As mentioned above, the Iraqi government's strategy has been to include 'CSR' type obligations for IOCs through oil contracts.[13] The government has followed this strategy since the first bidding round held in 2009, see 2.2.2. The Technical Services Contract (TSC) model usually incorporates such a provision, see 2.5.3 and Appendix 2.[14] The problem is that although there have been provisions in oil contracts requiring IOCs to provide training etc, the requirements are very limited and modest amounts set aside for these purposes have not been fully expended with no monitoring mechanisms in place. Under the model Technical Services Contract currently used in Iraq (see Appendix 2) IOCs undertake obligations in relation to training, local content and development projects (see below).

Viewing these contractual obligations as CSR assumes that CSR is not limited to purely voluntary undertakings by IOCs but extends to contractual commitments intended to benefit stakeholders and community interests. This is contrary to the accepted view that CSR involves voluntary conduct, see chapter 4. Nevertheless, it is a mechanism whereby IOCs can

[12] For further discussion on training Iraqi judges and recommendations for future programs see Freedman and Balasem, above n 7, 43-44.
[13] They are not technically CSR as they are obligatory, see 4.2.
[14] An overview of these contracts is given at 2.5.3 and extracts from this contract model provide in Appendix 2.

be forced to act as good corporate citizens. But it is apparent that even in relation to contractual obligations, for example in relation to training, these have had modest success. This calls into question whether imposing CSR style obligations under contract has any greater chance of success.

At the very minimum, CSR can be seen as requiring the corporation to eliminate negative externalities caused by its activities (see 4.2.1 and 4.3.1). This is because, as noted in chapter 3 (see 3.3), it is in the long-term interests of the company and its shareholders to do so. It is one thing to require companies to address negative externalities caused by their operations, but should CSR extend to companies engaging in activities which promote community welfare? This section examines the experience of other countries in implementing CSR in the petroleum industry discussed in chapters four and five, and are now considered in the Iraqi context. The discussion includes corporate governance and stakeholder protection, training, local content and development projects.

6.3.1 Corporate Governance and Stakeholder Protection

In Iraq protecting the environment and communities is a particular concern because, as noted in chapter two, oil and gas facilities in Iraq are widespread and go through areas with high biological diversity, high population and areas of cultural heritage (see 2.7.1and Figure 2.2). Thus, any oil pollution, even small amounts, may cause serious harm. Many Iraqi giant oil fields are located on or close to the southern marshlands which are places of international cultural heritage. Chapter four provided examples of the negative impacts of oil company's operations on communities and the environment and specifically mentioned the negative impacts of oil activities on the southern marshlands (see 4.3.2). To protect the environment and key stakeholders, this section argues that corporate social responsibility should form an integral part of the operations of oil companies operating in Iraq.

Protecting the environment and other stakeholder should not just be a matter of choice for oil companies where their operations cause damage to the environment. It is argued that corporate social responsibility should complement rather than be an alternative to legislation protecting the environment and the community.[15] In relation to environmental harm, governments usually impose legal obligations, specifically in the extractive industry, to reduce the risks of damage from oil activities and thus internalising costs to the corporation. These obligations are enforced by law. In developed countries, international oil companies usually comply with this mandatory environmental and social legislation.[16] In developing countries, however, even if there are existing legal regulation to protect the environment and society, enforcement is a serious problem. This is particularly because the high levels of corruption that impede meaningful enforcement of existing legislation, see discussion at 4.4.1.

Iraq has also imposed legal obligations to protect the environment and communities in both the *Environmental Protection and Improvement Law* 2009[17] and in oil and gas contracts.[18] However, the difficulty lies in enforcing these obligations and monitoring IOCs compliance. For example, two oil spill incidents occurred in April and August 2012 from a gas separation station in the Zubair oil field. The responsible companies for those two incidents were Ente

[15] Forest Reinhadt, Robert Stavins and Richard Vietor, 'Corporate Social Responsibility through an Economic Lens' (2008) 2(2) *Review of Environmental Economics and Policy* 219, 239; see also, Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibilities*, COM/366 final (18 July 2001) 7 <http://csdle.lex.unict.it/Archive/LW/Data%20reports%20and%20studies/Reports%20and%20%20communication%20from%20EU%20Commission/20110830-103712_com_2001_366enpdf.pdf>.

[16] Elin Boasson et al, for example, found that all the nine major oil companies (from eg US, UK, Norway, Canada and France) in their survey complied with mandatory social and environmental legislation. Elin Boasson, Jorgen Wettestad and Maria Bohn, 'CSR in the European Oil Sector: a Mapping of Company Perceptions' in Regine Barth and Franziska Wolff (eds), *Corporate Social Responsibility in Europe : Rhetoric and Realities* (Edward Elgar, 2009) 65, 67.

[17] see *Environmental Protection and Improvement Law* No 27 of 2009, art 21.

[18] Technical Services Contract model (2010), art 41. There is no signed oil contract publicly available. Only the model of a Technical Services Contract for the first bidding round is publicly available, see <http://iraqieconomists.net/ar/wp-content/uploads/sites/2/2016/01/Clean_copy__BP_CNPC_comments__27_July__on_PCLD_draft_dated_01.pdf > Extracts from this contract model provide in Appendix 2.

Nazionale Idrocarburi company (Italian oil and gas company) and its partner the Basrah Oil Company (a state-owned company, previously known as South Oil Company) who jointly invested in the Zubair oil field. Despite the significant damage caused by these pollution incidents, the measures taken by the government to force companies to clean up were inadequate,[19] and oil companies were slow to clean up following these incidents.[20] This is attributed to weak enforcement of existing regulations for environmental protection (whether general environmental regulations, or oil and gas contracts). Moreover, the clean-up of the pollution was not reported. This demonstrates lack of monitoring of IOCs environmental responsibilities. Iraq should develop the necessary institutional framework to monitor compliance with environmental legislation and contractual obligations and ultimately protect the environment and other stakeholders. This is further discussed below at 6.4.

In addition, Iraq should enact specific provisions to protect the southern marshlands considering their national and international significance and other cultural heritage areas. At the same time, oil and gas contracts should also include provisions that are consistent with regulations. These provisions should hold oil companies responsible for harm caused by their activities to the environment and the community.

[19] The Iraqi government action in those two cases was limited to imposing a fine (ID 8.300 thousand equal to USD 6.95 thousand) for each incident on Basrah Oil Company (the state-owned company) only for each month of delay in the removal of the pollution according to *Environmental Protection and Improvement Law* No 27 of 2009, art 33(2). Those two cases show that the Iraqi authority did not impose fine on the Italian oil company, Ente Nazionale Idrocarburi. The reason for this is not clear. See Man Ali, 'An Economic Analysis of the Oil Environmental Pollution, with Special Reference to Basra Governorate' (Arabic version) (2015) 31(25) *Gulf Economist* 179, 213 [author's trans].

[20] Environment Protection and Improvement Council in Basrah province has asked oil companies several times during 2015 to treat the pollutants caused by their extractive and exploration processes. However, companies do not remove these pollutants quickly. See Ali, above n 19.

6.3.2 Training

As mentioned above, Iraq regulates relationship with international oil companies operating in Iraq through oil contracts, namely, the Technical Services Contract (TSC). This type of petroleum contract is intended to provide for long-term development, capacity building and knowledge transfer. Training of nationals is one of the contractor's substantial commitments that must be implemented in good faith. The TSC contract model requires the contractor(s) to allocate, as a minimum, an annual amount of USD 5 million to the Training, Technology, and Scholarship Fund (referred to hereinafter as the Training Fund).[21] The Training Fund must be used for two purposes: first, financing academic education and on-the-job training and practical experience in petroleum operations both inside and outside Iraq; and second, supporting oil and gas related technology and research including the establishment or upgrading of research institutes inside Iraq.[22] The amount paid to the Fund is not recoverable as costs of production, namely, these costs are borne by the international oil company and the government is not obliged under the contract to refund these costs to the IOC.[23] In comparison with petroleum contracts in Afghanistan and Indonesia,[24] the Iraq's oil contracts are advanced in terms of allocating a large amount of money for training and petroleum education paid for by the IOC. This is a significant achievement for knowledge transfer and capacity building if properly implemented. A contractual obligation does not, however, qualify as CSR as formally defined, see 4.2.1. It suggests that the preference for the Iraqi

[21] See Technical Services Contract model, above n 18, art 26; see Appendix 2.
[22] Ibid.
[23] Ibid, art 26(3) and art 19(5)(d).
[24] For example, petroleum contracts from Afghanistan and Indonesia required the contractor to fund training programs, but training expenses are considered as recoverable costs. Afghanistan's Production Sharing Contract for Amu Darya Basin requires the contractor to spend USD 50 thousand on its training programs in the first year; this amount will increase by USD 5 thousand annually in the years thereafter. But the training costs are recoverable from the government. Another example is from Indonesia's Production Sharing Contract for the Ganal Block. Although this contract did not specify an amount that should spent on training programs, it included training costs and expenses as operating costs. See, Tim Boykett et al, *Oil Contracts: How to Read and Understand a Petroleum Contract* (Times Up Press, 2012) 138 <http://www.eisourcebook.org/cms/January%202016/Oil%20Contratcs,%20How%20to%20Read%20and%20Understand%20them%202011.pdf>.

government is to create binding obligations for training rather than rely on voluntary contributions to community welfare by oil companies as part of its corporate social responsibility programs.

Based on these contractual training requirements most IOCs in Iraq carry out such training programs for existing employees to undertake on-the-job training (reservoir and production engineering, excavation engineering, oil and gas production, etc) that require higher qualifications and skills, as well as training staff for management positions. For example, Rumaila Operating Organization (a joint management committee consisting of BP, PetroChina and the government owned Basra Oil Company was established to supervise and control the petroleum operations in the Rumaila oil field)[25] has provided a comprehensive training curriculum through the Rumaila Academy. The Rumaila Academy program focuses on training the local workforce (Rumaila project's workforce is seconded from Basra Oil Company) by undertaking job-specific courses relating to wells, subsurface, operations, projects, and finance to transfer expertise and knowledge from BP and PetroChina and other international contractors in these fields. The program also covers leadership, English language and IT training aimed at developing the capacity of the next generation of Iraqi managers.[26] Similarly, Lukoil set up its training centre for Iraqi nationals in Basra. Graduates of the centre have been hired for various specialised jobs at West Qurna-2 oil field developed by Lukoil.[27] Total signed an agreement with Iraq's Ministry of Oil, in 2009, to provide training to the Ministry's administrative staff. Based on this agreement, four training sessions

[25] Rumaila Operating Organization was established according to the article 13 of oil contract between BP, PetroChina and Basra Oil Company (previously known as South Oil Company) for Rumaila oil field signed in 2010. The joint management committee is described in chapter two at 2.5.3; see also Appendix 2.
[26] Rumaila Operating Organization, 'Rumaila Operating Organization Celebrates Five Successful Years of Partnership' (12 August 2015)
<http://www.rumaila.iq/english/img/news-press-releases/Rumaila_5-years_EN.pdf>.
[27] Lukoil, 'West Qurna-2: Key Facts and Figures' (March 2014) 7.

for approximately 70 managers from the ministry are scheduled quarterly every year.[28] Total also partners with universities and many technical institutes in Iraq and has developed and implements various educational programs that benefit more than 250 people every year.[29]

However, there are issues relating to the expenditure of an annual sum of USD 5 million per oil field to the Training Fund. There appears to be no formal monitoring of programs or expenditure to make sure that IOCs fully implement their training obligations and that the fund achieves its objectives. IOCs do not spend the entire amount required under the contract to be allocated to the Training Fund. The Iraqi Extractive Industries Transparency Initiative (IEITI) recorded that most IOCs over six years (2010 to 2015) of contracting in Iraq did not spend even half of the training budget amount (see Table 6.1 below).[30] For example, out of USD 30 millions of total training budget for each company (5 million a year), Lukoil spent about USD 18 million, USD 14 million for Petronas and USD 11 million for BP. Likewise, Exxonmobile and Shell almost spent USD 5 million and USD 9 million respectively[31] out of USD 29 millions of total training budget.[32] Table 6.1 shows that IOCs failed to meet their contractual obligations for the Training Fund. Moreover, actual expenditure for training appears is excessive having regard to the small number of Iraqi participants over six years as indicated in the Table below. This demonstrates the difficulties in ensuring that oil companies comply with their legal obligations. It suggests even greater difficulties if oil companies are left to voluntarily undertake activities for the benefit of the community.

[28] Total, 'Total in Iraq: Facts and Figures' (November 2014) <https://www.total.com/sites/default/files/atoms/files/total_in_iraq_en_ara.pdf>.
[29] Ibid.
[30] Iraqi Extractive Industries Transparency Initiative, *Extractive Activities in Iraq 2015* (December 2016) 17 <https://eiti.org/sites/default/files/documents/2015_iraq_eiti_report.pdf>.
[31] Ibid.
[32] The total training budget of Exxonmobile and Shell is different from other companies due to their shares in the contract or maybe because of the date of the contract entered into force.

Table 6.1: IOC's Training Program Amounts for the years (2010 to 2015)

IOC's	Budgeted Amount (USD)	Actual Spent (USD)	Remaining Amounts (USD)	Number of Participants
Lukoil Company (2010 –2015)	30,000,000	18,119,811	**11,880,189**	64 participants/ One workshop (5 participants)
ENI Company (2010 –2015)	29,328,765	10,360,593	**39,689,358* (18,968,172)**[33]	135 participants
Petronas Company (2010 –2015)	30,000,000	14,187,202	**15,812,798**	80 participants /One workshop (2 participants)
Exxonmobile (2010 –2015)	29,200,000	5,155,826	**24,184,174**	39 participants
BP Company (2010 –2015)	30,000,000	11,352,937	**18,647,063**	175 participants
Shell Company (2010–2015)	29,166,667	9,533,305	**19,633,362**	107 participants /7 workshops (63participants)
Exploration no 9 (2013–2015)	2,916,000	0	**2,916,000**	-
Exploration no 10 (2013–2015)	3,000,000	1,998,145	**1,001,855**	64 participants
Exploration no 12 (2013–2015)	3,000,000	0	**3,000,000**	-
Kuwait Energy (2011–2015)	4,500,000	1,357,355	**3,642,644**	10 participants

Source: *Iraqi Extractive Industries Transparency Initiative* (2016) (emphasis added)

* This number is taken from the report see footnote 33.

There may be a number of different reasons for failure to implement the Training fund commitments. First, the terms of the oil contract do not stipulate in detail the mechanism for disbursing the amounts allocated for training nor determine the share for each category of the fund (training, technology, and scholarship). This has allowed companies to design and implement training programs (if any) according to their interests rather than Iraq's actual needs. It may also allow them to finance just one category. For example, companies may prefer to fund academic scholarships rather than on-the-job training for Iraqi employees. Sending employees to schools and colleges is useful but it may be more important to give

[33] There is an error in this table as it adds rather than deducts the amount expended from the budgeted amount. Unless there are other variations, the amount remaining should be (18,968,172).

them the hands-on experience working alongside experienced foreign workers. Thus, there is a need to review the provisions of the Training Fund, mainly, in term of designing training programs and monitoring them (see below).

Secondly, weakness in monitoring the work of IOCs may be the other reason for not fully implementing their training commitments. Evidence from the actual practice supports this claim. According to the Technical Services Contract, the parties are required to establish a joint management committee (JMC) for the purpose of general supervision and control of petroleum operations that consists of equal numbers of members representing the IOC(s) and the state-owned oil company as a government partner[34] (the joint management committee is described in detail at 2.5.3). The JMC is authorised to approve training programs for Iraqi personnel as required by the contract and supervising the implementation of approved programs.[35] That is, the JMC has an exclusive power to plan, carry out training programs and supervise the implementation of such programs. In other words, planning and implementing training programs is managed by the JMC without external monitoring or reporting requirements. Although the Iraqi authorities participate in the JMC through a state-owned oil company (as a government partner in the oil contract), however, it appears that state-owned oil company does not play an active role –or it has failed for some reason– in preparing a suitable training plan or supervising the implementation of the agreed training program. Since the state-owned oil company is a contractual partner, then its performance should be subject to third party monitoring similar to the IOCs.

[34] Technical Services Contract model, above n 18, art 13(1); see Appendix 2.
[35] Ibid, art 13(2)(f).

The government has responded by amending the provisions governing the Training Fund in the oil contracts for the fifth bidding round held in 2018.[36] Under the amended contract IOC(s) are required to pay the annual amount allocated for the Training Fund into a bank account established and managed by the Ministry of Oil (through the state-owned oil company); and the fund's amount should be aggregated if not paid annually.[37] Consequently, this method may force IOCs to pay the full amount allocated for training fund to a bank account created for this purpose. However, there remains the issues relating to that is the quality and quantity of the training. It may also create governance problems because the bank account will be completely managed by the government partner. As explained previously (see 6.2 above), weak transparency and inadequate monitoring of the Ministry of Oil and state-owned oil companies opens up corruption risks. Therefore, creating a special unit to monitor the Training Fund and ensuring that the purpose of the fund is achieved is urgently needed. For monitoring purposes IOCs may be required to report to the oversight agency on their training programs in term of plans and achievements. The IOCs training performance may also be subject to public monitoring by interested agencies such as NGOs, unions, local community and press (this is discussed at 6.4).

It is vital to ensure sound management of the Training Fund so as to achieve its purposes as part of long-term development and capacity building. The fund should be used to transfer knowledge and build the capacity of state-owned oil companies' personnel in respect of both petroleum operations and administration. If this is achieved, then state-owned oil companies may not only invest in local natural resources based on the latest oil technology and sound governance, but they can extend their operations to invest overseas. Past experience shows

[36] Exploration, Development and Production Contract, a contract model from the fifth bidding round, 2018. There is no signed oil contract publicly available. Only a model of this contract is publicly available, see <https://oil.gov.iq/upload/upfile/ar/659.pdf>; Extracts from this contract model provide in Appendix 2.
[37] If the amount is not paid by contractor (IOC), then the state-owned oil company has the right to deduct the aggregated amount from the invoices submitted by contractor; ibid, art 26(2).

that many national oil companies can benefit from cooperation with foreign oil companies to transfer knowledge and build domestic capacity, and provide opportunities for running successful global oil investments such as PetroChina, the Malaysian Petronas, and Norwegian Statoil, to name but a few.[38]

As a proposal for sound management of the Training Fund, the annual sum of USD 5 million to the Training Fund could be partially reallocated. Instead of spending that entire amount on petroleum training that has not been particularly successful in practice (see above); part of it can be allocated for research and development in other sectors. For example, the Training Fund can be used to support Iraq's universities and upgrading other educational institutions. In this way oil investment will increase the general development in the country rather than developing the oil industry only. As discussed before (see chapter five at 5.6), this approach has been used in the Brazilian petroleum industry. For instance, the Brazilian model of concession agreements required the concessionaire to invest an amount of 1 per cent (1%) of the production gross revenue of the field into research development projects.[39] Up to half of that amount can be invested in the company's internal research and development projects and the other half has to go to non-profit institutions and universities.[40]

It is also suggested that training should be extended to cover wider categories beyond petroleum operations. This will assist in increasing skilled labour in Iraq and in turn reduce unemployment. Part of the Training Fund can also be used to fund vocational training programs for local communities. For instance, many families from villages located within or

[38] See Silvana Tordo, Brandon Tracy and Noora Arfaa, 'National Oil Companies and Value Creation' (Working Paper no 218 volume 2 (Case Studies), The World Bank, March 2011) <http://siteresources.worldbank.org/INTOGMC/Resources/336099-1300396479288/NOC_Vol_II.pdf>; Bruce Gale, 'Malaysia's National Oil Corporation' (1981) 21(11) *University of California Press* 1129, 1144.
[39] *Concession Agreement for the Exploration, Development and Production of Oil and Natural Gas*, a contract model, 2008 (Brazil) art 24 <http://www.eisourcebook.org/cms/Brazil,%20Model%20Concession%20Agreement,%20ANP%2010th%20Rnd,%202008.pdf>.
[40] Ibid, 24(4).

around oil fields live in poverty, with few opportunities for a better life. Offering vocational training and qualifications for them can help locals to gain employment, support their families or establish their own business. In this way, oil companies increase employment opportunities for residents living in the community near oil fields. This is important to achieving sustainable development and building strong relationships with local communities. Consequently, oil development could be used to contribute to the development of other sectors and supporting economic development that enhances sustainability as argued in chapter two at 2.7.2.

Some IOCs have already engaged in training in local communities. For example, Rumaila Operating Organization (consisting of BP, PetroChina and Basra Oil Company, see above) provided training to the community of Qarmat Ali village in Basra (a village near Rumaila oil field). Rumaila Operating Organization funded a women's training centre in August 2015.[41] By 2016, over 400 local women, most of whom were the main breadwinners for their families, have completed voluntary training courses to learn new skills. Many of those women have gone on to set up their own businesses.[42] In addition, men from surrounding villages have also benefited from a vocational training program, undertaking certified training courses in welding, construction, and electrical work.[43] According to Rumaila Operating Organization, these initiatives were decided following consultation with local communities such as the Rumaila Community Committee.[44] This initiative supports the long-term development of local communities and enhances collaboration with them. It is not clear from available information whether these training programs are funded by the Training Fund set

[41] Al-Khora Community Centre for Women is located in Qarmat Ali and has teaching classrooms that offer a range of courses such as sewing, design, hairdressing, beauty, and craftworks, as well as lessons in literacy, computer usage, and human rights. See Rumaila Operating Organization, *Making a difference – the Al Khora Community Centre for Women* (2018) <http://www.rumaila.iq/english/story-community-centre-for-women.php>.
[42] Ibid.
[43] See Rumaila Operating Organization*, Working with Our Community* (2018) <http://www.rumaila.iq/english/social-welfare-fund.php>.
[44] Ibid.

out in the oil contract or by BP and PetroChina as voluntary initiatives as part of their voluntary CSR programs.[45]

6.3.3 Local Content

Many countries have implemented a local content policy in the extractive industries, especially in the petroleum industry. As explained in chapter five (see 5.5) Nigeria, Tanzania, and Ecuador have implemented strong local content policies in their petroleum industry. However, as will be seen from the discussion below, Iraqi oil contracts (the main source of IOCs' legal obligations with no modern oil and gas legislation) do not include suitable local content policies that are compatible with the size and importance of oil for the Iraqi economy. This chapter argues that Iraq must develop a comprehensive framework for local content in the oil and gas industry and set out governing policies that enhance the contribution of the oil and gas industry to the country's long-term development and value creation. According to Iraqi oil contracts, the local content, including local goods and services and the use of Iraqi employees, is regulated as follows.

In relation to local goods and services, Article 30 of the Iraqi oil contract states that preference should be given to locally manufactured and/or available goods, materials, equipment and the like, if 'their technical specifications, availability, prices, and time of delivery are comparable to those available in the international market.'[46] Similarly, in terms of services performed in Iraq, preference should be given to Iraqi entities and firms if 'their relevant capabilities and prices are competitive with those available in the international market.'[47] A general stipulation like this does not serve Iraq's interest in promoting non-oil

[45] According to Rumaila Operating Organization, these training programs were paid for by the Rumaila Operating Organization's Social Welfare Fund, money that set aside to invest in local initiatives to aid communities in and around the oil field. Ibid.
[46] Technical Services Contract model, above n 18, art 30(2); see Appendix 2.
[47] Ibid, art 30(1).

sectors through oil investments.[48] The reasons are, as previously explained in chapter two (see 2.7.2), that Iraqi industry was destroyed due to wars and sanctions, and consequently local goods and services are unlikely to be competitive in terms of price, quality and quantity. Additionally, there is not a level playing field because IOCs and their foreign subcontractors are exempt from fees while Iraqi subcontractors are not.[49] This makes goods provided by Iraqi suppliers more expensive than those offered by foreign suppliers. So IOCs, with no adequate monitoring, will find reasons for non-compliance with this requirements and Iraq cannot force them to do so.

In relation to the employment of local employees, Iraqi oil contracts do not require IOCs to employ a certain percentage of Iraqi nationals in technical or administrative positions; the number of Iraqi employees is left to the preference of these companies. Article 26(1) of the model Iraq oil contract states:

> Without prejudice to the right of Contractor and Operator to select and employ such number of personnel as, in the opinion of the Contractor or Operator, are required for carrying out Petroleum Operations in a safe, cost effective and efficient manner, Contractor and Operator shall, *to the maximum extent possible*, employ, and require Sub-Contractors to employ, Iraqi nationals having the requisite qualifications and experience.[50]

The contract does not set numerical requirements but uses the phrase as 'to the maximum extent possible.' There is no explanation of what this phrase means or how it can be met.[51] Without specific terms in the oil contract to employ certain number of Iraqis, IOC may prefer

[48] Similarly, the Draft *Oil and Gas Law* 2007 requires that preference should be given to 'Iraqi products and services whenever they are competitive in terms of price, comparable in terms of quality and available on a timely basis in the quantity required.' Draft *Oil and Gas Law* 2007, art 15(B).
[49] See *Law of Exempting Foreign Companies and Foreign Subcontractors Contracted in Licensing Rounds from Fees* (Arabic Version) No 46 of 2017 [author's trans].
[50] Technical Services Contract model, above n 18, art 26(1) (emphasis added).
[51] Similarly, the Draft *Oil and Gas Law* 2007 requires the IOCs to undertake 'to the maximum reasonable extent' to employ Iraqi citizens having appropriate qualifications. But the bill went further and required IOC to undertake to train and prepare potential candidates towards this objective. Nevertheless, it does not explain how to identify the 'maximum reasonable extent'. Draft *Oil and Gas Law 2007*, art 15(C).

to use foreign employees rather than local. Practical evidence supports this argument. For instance, in 2015, 29 per cent of the total employees in the Iraqi oil fields from bidding rounds were foreign.[52] In some oil fields the number of foreign employees is very high. For example, in the Badra oil field[53] and the Garraf oil field[54] the percentage of foreign employees in 2015 was 90 per cent and 63 per cent respectively (see Table 6.2).[55] What makes it very difficult for Iraq is that the high salaries and remuneration of foreign employees are petroleum costs [56] which are deducted prior to determining final payments to IOCs.[57] This effectively doubly disadvantages Iraq who bears the burden of high petroleum costs and national employment opportunity loss. Furthermore, without imposing responsibilities on IOCs to employ a certain percentage of Iraqis in the technical and administrative positions, or requiring IOCs to train and prepare potential candidates for these positions (see below), the possibility of building local capacity and skilled employees is decreased. Obviously, the current Iraqi local content policy in the oil industry is weak and not adequate to promote long-term development and capacity.

As set out in chapter two (see 2.7.2), Iraq has to develop appropriate local content framework in the oil and gas industry that supports the enhancement of long-term development and value adding. Iraq has two options. The first is to adopt a local content policy and requirements for local goods and services, and requiring the employment of Iraqis in all phases of oil development including management positions. This approach has been implemented in many developing oil-producing countries, such as Nigeria, Tanzania, Kazakhstan and others. For

[52] It is not clear whether foreign employees were just in the senior positions of management and engineering or in jobs that do not need specific qualifications.
[53] Badra oil field is operated by JSC Gazprom Neft, Korea Gas Corporation, PETRONAS CarigaliSdn. Bhd, and Türkiye Petrolleri Anonim Ortakligi since 2011, see Appendix 1.
[54] Garraf oil field is operated by Petronas and Japan Petroleum Exploration since 2010, see Appendix 1.
[55] Iraqi Extractive Industries Transparency Initiative, above n 30, 123.
[56] Petroleum costs are 'recoverable costs and expenditures incurred and/or payments made by Contractor in connection with or in relation to the conduct of Petroleum Operations…' Technical Services Contract model, above n 18, art 1(63); see Appendix 2.
[57] Ibid, art 19.

example, in Nigeria all companies operating in the oil and gas industry are required to employ only Nigerians in junior or intermediate positions, and for management positions only 5 percent of foreigners is allowed.[58] In Kazakhstan, the minimum requirement for the employment of nationals is 95 per cent.[59] All oil companies in Angola require employing at least 70 per cent of Angolan nationals and foreign workers can only be employed when no Angolan worker with the equivalent qualifications is available.[60]

Table 6.2: Total Number of Iraqi and Foreign Employees in the Oil Fields in 2015

Oil Fields	Number of Iraqi Employees (1)	Number of Foreign Employees (2)	Total Number of Employees (1+2)	Ratio (1 / Total Employees)
Ahdab Oil Field	2,013	1019	3,032	66%
Badra Oil Field	266	2480	2,746	10%
Helfaya Oil Field	630	416	1,046	60%
Missan Oil Field	411	218	629	65%
Rumaila Oil Field	7,458	503	7,961	94%
Zubair Oil Field	2,749	206	2,955	93%
West Alqurna (1)	1,664	248	1,912	87%
West Alqurna (2)	633	546	1,179	54%
Majnoun Oil Field	676	811	1,487	45%
Garraf Oil Field	275	460	735	37%
Seiba Oil Field	139	6	145	96%
Total	16,914	6,913	23,827	71%

Source: *Iraqi Extractive Industries Transparency Initiative* (2016)

From the experience of these countries, Iraq can develop local employment policies that require IOCs operating in Iraq to employ Iraqi nationals. The Table above suggests that requirements should reflect the level of employment attained by the best performing oil fields. It is suggested that Iraq can require IOCs to employ 70-80 per cent Iraqi in the first year at all phases of petroleum operations, to be increased up to 95 per cent by three years. This flexibility would solve the problem when insufficient numbers of Iraqi nationals have

[58] *Nigerian Oil and Gas Industry Content Development Act* 2010, s 35.
[59] Isabelle Ramdoo, 'Local Content Policies in Mineral-rich Countries: an Overview' (Discussion Paper No 193, European Centre for Development Policy Management, May 2016) 4 <http://ecdpm.org/wp-content/uploads/ECDPM-Discussion-Paper-193-Local-Content-Policies-Mineral-Rich-Countries-2016.pdf>.
[60] Ibid.

the requisite qualifications and experience. The second phase of the suggested policy is that IOCs must undertake training programs to prepare potential Iraqis candidates for future employment as well as training staff members for skills and management positions (assuming they have the qualified degree) to achieve the proposed percentage (95 per cent mentioned above) of Iraqi employees by the end of the third year. This suggested policy does not give training and local employment priority over protection of the environmental and wildlife. It is recommended because Technical Services Contracts, the current Iraqi model, has been used to provide for long-term development, capacity building and knowledge transfer. Thus, training of nationals, local employment technology transfer are a contractor's primary commitments that must be implemented in good faith.

For that purpose, IOCs must annually submit to the oversight agency (this is discussed at 6.4 below) for approval a detailed program for training and employment. They must also report annually on the implementation of the training program including their commitment to establish management and technical capabilities, maximise technology transfer and skills relating to petroleum and gas industry for Iraqis who are employed in this sectors, and steps taken to close any identified training gaps.[61] Reporting to an oversight agency would help ensure that IOCs fulfil their obligations and that the state's targets in term of training and knowledge transfer are achieved. Otherwise, the number of foreign employees in the oil and gas industry is likely to remain high (see Table 6.2 above) at the time when there is high unemployment in Iraq.[62] This proposal depends upon legal obligations for training and employment. It does not depend upon voluntary CSR by oil companies. In taking this

[61] See eg Tanzanian's experience with local employment requirements as discussed at 5.5.3; See also Tanzanian *Petroleum Act 2015*, ss 220, 221.

[62] The unemployment rate in Iraq is conservatively estimated at 15 per cent with higher levels for youth. World Bank, *Iraq Economic Monitor from War to Reconstruction and Economic Recovery* (2018) 10 <http://documents.worldbank.org/curated/en/771451524124058858/pdf/125406-WP-PUBLIC-P163016-Iraq-Economic-Monitor-text-Spring-2018-4-18-18web.pdf>.

approach, it suggests that it is not realistic to expect that oil companies will voluntarily engage in significant relevant projects which benefit the community.

In relation to local goods and services, developing oil-producing countries may also impose local content requirements. For example, Mexico requires a domestic content target of 25 per cent for 2015, increasing to 35 per cent by 2025 for shallow water projects.[63] In the Nigerian oil industry, local content targets for some goods and services are set between 80 and 100 per cent with exclusive consideration given to Nigerian companies for providing specific categories of goods and services.[64] Iraq could adopt similar provisions by requiring oil companies to purchase a certain percentage of domestic goods and services. This could be done either by provisions incorporated into oil contracts or by regulation.[65] It should specify the level of Iraqi content to be achieved per activity or input used by operators in the oil and gas sector.[66] Where goods and services are not available in Iraq or not available competitively (quality, quantity, and price) as set out in Article 30 of the TSC contract (mentioned above, Appendix 2), Iraq could require (either by regulation or oil contract) that such goods and services provided by a foreign supplier, but under a joint venture arrangement with a local company. In other words, any foreign supplier must enter into a partnership with an Iraqi company to supply the petroleum sector with goods and services. In this case, the local company must hold no less than 50 per cent of the shares in such joint venture company. This approach is implemented in the petroleum industry in Tanzania as discussed in 5.5.3.[67] Then the consequence of such provisions is that local content requirements would support industrial development, job creation, value addition, and maximise national benefit. It could

[63] This includes local goods and services, and national employees. Ramdoo, above n 59, 5.
[64] *Nigerian Oil and Gas Industry Content Development Act, 2010*, Schedule A.
[65] See eg *Nigerian Oil and Gas Industry Content Development Act*, *2010*, Schedule A.
[66] Consideration can be given to locally manufactured and/or available products such as floating products, storage, steel pipes and plates, cables, cement, bricks; and services such as geographical survey services, offloading vessels, drilling, transport, insurance, banking and so on.
[67] In Tanzania, for example, the local company must hold no less than 25 per cent of the shares in a joint venture company established with a foreign company for the purpose of providing the petroleum sector with goods and services. See Tanzanian *Petroleum Act 2015*, s 219(3).

also lead to stimulating the development of non-oil sectors as partnerships with international companies can result in technology transfer, reputation enhancement, and developing competence for Iraqi companies. As a result, the goal of enhancing the contribution of the oil and gas industry to the development of sectors other than petroleum, and overall economy, can be achieved (see the arguments set out in chapter two at 2.7.2). But, as noted earlier, the choice is to legislatively or contractually require oil companies to contribute to development in Iraq rather than leave this to voluntary benevolence. Although as noted in chapter three, it may be in the long-term interests of shareholders and sustainability of corporations to take into account interests of stakeholders, and to avoid negative externalities, corporations' responsibilities do not include general welfare. The proposals set out above recognise that unless oil companies are required to contribute to local development, they will see their duties as primarily to their shareholders with recognition of stakeholder interests where this is important to longer term interests of the company and its shareholders, see 3.3.1 and 3.3.2.

An issue that needs to be considered is whether local content requirements may violate World Trade Organization (WTO) agreements.[68] Iraq, however, is not yet a WTO member,[69] so Iraqi policymakers still have some room to implement local content policies. Moreover, Iraq can be a signatory of the WTO Agreements without being a party to the Government Procurement Agreement. Nevertheless, WTO agreements provide a certain degree of flexibility to developing countries if this is needed to help them address their development concerns.[70] Furthermore, countries that become WTO members may have years to adapt their

[68] See eg *General Agreement on Tariffs and Trade*, signed 30 October 1947, (entered into force 1 January 1995) art III; *Agreement on Trade-Related Investment Measures*, signed 15 April 1994, (entered into force 1 January 1995) art 2.

[69] Iraq applied for observer status in January 2004 and was accepted in February 2004. World Trade Organisation, General Council, 'Minutes of Meeting' (11 February 2004) [21].

[70] Isabelle Ramdoo, 'Local Content, Trade and Investment: Is there Policy Space Left for Linkages Development in Resource-rich Countries?' (Discussion Paper No 205, European Centre for Development Policy Management, December 2016) 15 <http://ecdpm.org/wp-content/uploads/DP205-Local-Content-Trade-Investment-Ramdoo-December-2016.pdf>; Miriam Weiss, 'The role of local content policies in manufacturing

national regulations to WTO requirements. So, if Iraq acceded to the WTO, which is not expected to occur soon, Iraq could ask for a transitional period to eliminate the local content requirement. For example, when Kazakhstan acceded to the WTO Agreement in 2015, the Government of Kazakhstan agreed not to require local content in procurements of goods when signing new contracts with investors.[71] However, for existing contracts, Kazakhstan requested a significant transitional period (around 6 years) to enable investors to remove their local content commitments in the procurement of goods starting from 1 January 2022.[72]

6.3.4 Development Projects

A further step in ensuring that oil wealth benefits Iraq is the proposal to mandate a specific amount or a percentage of annual revenues for each oil project to fund development projects in the local area of the oil companies' operations. As argued earlier in chapter two (see 2.7.2), oil and gas are of such fundamental importance to the Iraqi economy, so investments in this sector must be for the benefit of all citizens. Further, IOCs have profited significantly from investing in oil in Iraq (see 2.7.3). Oil companies can contribute to local communities by financing some important development projects. Since, Iraq has not been able to provide basic infrastructure needs to its citizens due to UN sanctions and massive destruction resulting from wars, imposing CSR on oil and gas companies assists in meeting those needs (see 2.7.3).

In 2014, some IOCs agreed to finance development projects for the benefit of communities surrounding oil fields or exploration areas up to USD 5 million annually for each oil

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and mining in low- and middle-income countries' (Working Paper No 19, United Nations Industrial Organization, 2016) 9
<https://www.unido.org/sites/default/files/2017-01/UNIDO_Working_paper_Local_content_policies_FINAL_15803__0.pdf>.

[71] *Accession of the Republic of Kazakhstan*, WTO Doc WT/L/957 (30 July 2015) (Decision of 27 July 2015).

[72] *Accession of Kazakhstan*, WTO Doc WT/ACC/KAZ/87 (8 September 2014) (Additional Questions and Replies) para 675.

contract.[73] This amount is in addition to the USD 5 million set out annually for the Training, Technology, and Scholarship Fund discussed above at 6.3.2.[74] In contrast to the money allocated to the Training, Technology, and Scholarship Fund that is not recoverable by the government, the money allocated for development projects is considered as petroleum costs paid by Iraq.[75] This means it is the government who actually bears this cost, not the IOC.

For the first time in Iraq, the oil contract model for the 2018 fifth bidding round requires the IOC to establish an Infrastructure Fund in addition to the Training, Technology, and Scholarship Fund mentioned above.[76] IOCs are required to deposit annually in a bank account designated by the state-owned oil company (as the government partner) an agreed amount for the Infrastructure Fund. If the agreed amount is not deposited in any given year, the IOC is obliged to deposit an aggregated amount.[77] If it is not paid, it can be deducted by the state-owned oil company from the invoices submitted by the IOC.[78] Once again, the money allocated for the Infrastructure Fund is considered as petroleum costs, so ultimately the government bears the costs of this development fund, in contrast to the Training Fund. Effectively the IOC is simply the vehicle to carry out local development which is reimbursed by government.[79] As noted in chapter five at 5.5, this is contrary to the approach adopted in many oil producing countries which require IOCs to contribute and pay for local development. Such a provision would require the government to amend the provisions of

[73] The Energy Committee of the Council of Ministers allowed the Ministry of Oil to negotiate with IOCs to allocate an amount up to USD 5 million annually for each oil contract to finance development projects but the amount is considered as petroleum costs paid by the Iraqi government. See the decision of the Energy Committee No 139 (23 December 2013) (This document is not available online).
[74] Allocating USD 5 million for development projects is provided for in a separate agreement between the Iraqi Government and the relevant IOC in 2014 to amend the oil contract from various bidding rounds. While the original oil contract is not publicly available, the Technical Services Contract model (extracted in Appendix 2) used in this thesis is based on the 2010 version.
[75] See footnote n 56 above.
[76] See Exploration, Development and Production Contract, above n 36, art 26(5). Extracts from this contract model provide in Appendix 2.
[77] Ibid.
[78] Ibid.
[79] The government used this method maybe because the provisions of the oil contract allow the government to spread the petroleum costs over years (based on agreement) rather than immediately, so IOCs can pay for development projects and the government will repay the costs later.

existing oil contracts or at least insert similar provisions in future oil contracts. If in the future, the amount spent on development projects is not to be counted as petroleum costs, this could be a significant step towards requiring IOCs to positively contribute to community welfare.

To increase accountability in the oil industry, the next section discussed a framework for monitoring IOC compliance with legal requirements and implementing voluntary CSR in the oil industry.

6.4 Monitoring Corporate Social Responsibility in the Oil Industry

The above discussion argues that Iraq should not rely on oil companies operating in Iraq to engage in voluntary and meaningful corporate social activities. This is because there is no evidence that IOCs operating in Iraq have acted so as to avoid negative externalities caused by their activities. Additionally, even in relation to contractually required obligations, the evidence suggests that these contractual obligations have not been fully honoured, at least in relation to training, see 6.3.2. It is argued that IOCs should be required to contribute to community welfare. This can be achieved either by primary oil and gas law or by specific legislation with an official unit or an oversight agency to monitor compliance.[80]

The proposed oversight agency should be independent or attached to the Cabinet (see 2.3). This would give it the necessary status and authority to monitor the Ministry of Oil and related state-owned oil companies and international oil companies.[81] This agency must have

[80] For example, in India the Ministry of Corporate Affairs monitors the implementation of s.135 of the Indian *Companies Act, 2013* that regulates corporate social responsibility, see 5.5.1. The Niger Delta Development Commission established in 2000 monitors IOCs operating in the Niger Delta. Similarly, the Nigerian Content Development and Monitoring Board established in 2010 has a broad authority to guide and monitor the implementation of local content requirements by foreign oil companies and empowered to impose penalties against non-compliant companies. This is further discussed in chapter five at 5.5.2.

[81] This could also eliminate the overlap between the executive authorities of the Ministry of Oil (as the Ministry of Oil through a state-owned oil company shares in the oil contract) and its regulatory authorities (as the Ministry of Oil through a state-owned oil company participates with the IOC in the joint management committee of the oil field).

oversight of the implementation of CSR in the oil industry. This is because neither IOCS nor state owned oil companies are listed on the Iraqi Stock Exchange. This means that the most effective method of monitoring their operations is to force them to report to an independent oversight agency as discussed earlier (see discussion at 4.6.3). The oversight agency must have powers to enforce of obligations imposed by statute. The oversight agency should consist of experts representing ministries of oil, finance, industry, commerce, and environment. It may also include representatives of local governments of provinces producing oil and/or gas, labour unions and civil society. This wide diversity will bring together the key stakeholders in one formal agency which facilitates the process of formulating comprehensive development, training and local content policies as well as assessing the negative and positive impacts of oil investment on the economy, the environment, employees and society. The oversight agency would operate by a voting system in which the government has the majority voting rights. The agency can also be a link between the federal government and the local governments of provinces producing oil and/or gas which will contribute to develop a national unified CSR policy that considers the real needs of local communities.

The proposed agency could also be given the role of reviewing and approving social responsibility plans submitted by international oil companies that are competing in a bidding round for an oil or gas investment. The social responsibility plans may include environmental impact, training and technology transfer, employment, local content and general development. Examining CSR plans during the bidding round process could influence the selection of IOC(s) that have the best corporate social responsibility programs in addition to its other oil-specific capacities. Including CSR programs in the license conditions would encourage the IOCs to undertake social responsibility more seriously and adopt well-designed CSR policies to obtain the investment license. Likewise, the oversight of CSR

during the investment period can be achieved by monitoring the implementation of CSR plans set forth in the bidding round and measuring the effectiveness of these plans in practice. For this purpose, IOCs should be required to report to this agency annually on the progress of implementing their contractual and legislative obligations discussed above (see 6.3.2 and 6.3.3) as well as their voluntary CSR programs. This would help the government to ensure that IOCs are fulfilling their legal obligations and measuring the potential role for corporate social responsibility initiatives in promoting the overall development.

6.5 Conclusion

As chapter two addresses multiple rationales for implementing corporate social responsibility in the oil and gas industry in Iraq, this chapter examined the feasibility of a legal framework for implementing and monitoring CSR in this industry. Corporate social responsibility requires IOCs to voluntary act to prevent the negative consequences of oil activities on the environment and communities, and also requires IOCs to engage in positive activities to improve the lives and prospects for the Iraqi community. However, the protection of the environment and other stakeholders should not just be a matter of choice for oil companies where their operations cause damage to the environment. The discussion set out above recognises that voluntary CSR is not an effective mechanism to ensure that IOCs pay for the costs their activities cause to their stakeholders and the community. The preferred outcome is that contractual obligations and/or statutory requirements require IOCs to internalise the costs of their activities. Contractual and statutory obligations do not, however, qualify as CSR as formally defined, see 4.2.1.

It is further recommended that IOCs also contribute to development and community welfare through training, local content and community development activities as part of the costs of engaging in oil activities in Iraq. The discussion shows that unless oil companies are required to contribute to local development, they will see their duties as primarily to their shareholders

with recognition of stakeholder interests where this is important to longer term interests of the company and its shareholders. Although one purpose for using the Technical Services Contract in Iraq in preference to other types of petroleum contracts is to promote long-term development and capacity building, the training and local content requirements in this contract are weak and inadequate. It is argued that Iraq must develop a comprehensive framework for training and local content (Iraqi employees, goods and services) in the oil and gas industry and set out governing policies that enhance the contribution of the oil and gas industry to the country's long-term development and value creation.

Iraq could require IOCs (either by regulation or oil contract) to purchase a certain percentage of domestic goods and services similar to other oil-producing countries. Where goods and services are not available in Iraq, or not available competitively (quality, quantity, and price), it can be provided by a foreign supplier, but under a joint venture arrangement with a local company. This would support industrial development, job creation, value addition, and maximise national benefit. It could also lead to stimulating the growth of non-oil sectors because partnerships with international companies can result in technology transfer, capacity building, reputation enhancement, and developing competence for Iraqi companies.

However, without adequate monitoring it would be difficult to ensure that oil companies are complying with their legal or contractual obligations. There are even greater difficulties if oil companies are left to voluntarily undertake activities for community benefit.

Although the Iraqi authorities participate in the Joint Management Committee through a state-owned oil company (as a government partner in the oil contract), it appears that state-owned oil companies do not play an active role in supervising the implementation of the oil contract (the reason for this is unclear). It is recommended that Iraq should establish an oversight agency consisting of experts and key stakeholders to monitor IOCs operations. For

this purpose, IOCs should be required to report to this agency annually on the progress of implementing their contractual and legislative obligations as well as their voluntary CSR programs. This would help the government to ensure that IOCs are fulfilling their legal obligations and measuring the potential role for corporate social responsibility initiatives in promoting the overall development.

The following chapter will draw together the threads of the argument set out in this thesis by summarising the key findings and make recommendations for future policy in Iraq.

CHAPTER SEVEN

CONCLUSION

7.1 Introduction

This thesis examines Corporate Social Responsibility (CSR) in the context of international oil companies operating in Iraq. International Oil Companies (IOC) are the focus for consideration of CSR in Iraq as the oil and gas industry is the backbone of the Iraqi economy and the primary source of income for the Iraqi people, see chapter two at 2.2.1 and 2.7.2.

As chapter four indicates Corporate Social Responsibility requires the corporation to voluntarily act as a good corporate citizen. At the very minimum, the corporation should be accountable for negative externalities, that is, the harm created by its activities in relation to which the public rather than the corporation pays. Effectively, the corporation should internalise the costs of harm caused by its activities.[1] But since the experience in Iraq is that voluntary CSR has not resulted in IOCs taking steps to avoid negative externalities, formal legislation is required for the protection of stakeholders, in particular the environment and the community. These obligations could, alternatively or additionally, be included in oil and gas contracts, see 6.3. The problem, however, is one of enforcement which is addressed below, see 7.3.5.

Whilst a corporation should be responsible for the harm caused by its operations, should it also contribute positively to community welfare? This is answered by reference to the key theories of corporate governance. Modern corporate governance rules incorporate such views requiring corporations to act in the longer-term interests of shareholders and corporations, see

[1] Berger-Walliser, Gerlinde and Inara Scott, 'Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening' (2018) 55(1) *American Business Law Journal* 167, 218.

3.3.1. But what these theories don't do is to require the corporation to voluntarily devote substantial corporate profits to general welfare unrelated to the long term interests of shareholders and the corporation. Contributions to community welfare intended to overcome negative publicity and reputational damage can be considered to be in the long term interests of the corporation.[2] There is a clear relationship between these views and voluntary CSR, see discussion at 4.2.2. CSR activities that are unrelated to the long term interests of the corporation or its shareholders breach the duties of directors of the corporation and are a breach of director's fiduciary duties to its shareholders and the company, 3.3.1. This means that if the Iraqi government wishes IOCs to contribute to general welfare or development, there must be legal obligations imposed on corporations to this effect. Corporations, and their directors, must obey the law. As indicated above these obligations would ideally be imposed through legislation as well as oil and gas contracts. Chapter 5 provided examples of jurisdictions where this has been done. There is sector specific legislation requiring IOCs to contribute to development such as in Nigeria, see 5.5.2.[3] In contrast, the Indian legislation imposes obligations more generally on large corporations to positively contribute to community welfare. What is unique about the Indian legislation is that it defines in general terms what qualifies as 'CSR' and also excludes certain types of activities as not qualifying as CSR for statutory purposes, for example, where the company stands to benefit from the activity, see 5.5.1.

Legislation to make IOCs accountable for negative externalities as well as requiring positive contributions to community welfare faces almost insurmountable hurdles. There are serious

[2] David Spence, 'Corporate Social Responsibility in the Shale Patch' (2017) 21(2) *Lewis and Clark Law Review* 387, 425; Prakash Sethi, Terrence Martell and Mert Demir, 'Building Corporate Reputation Through Corporate Social Responsibility (CSR) Reports: The Case of Extractive Industries' (2016) 19(3) *Corporate Reputation Review* 219, 243.

[3] For example, Shell-operated ventures contributed USD 202 million in 2014 alone to the Niger-Delta Development Commission as required by law. Shell Nigeria, 'Shell Emerges Best Company in CSR Innovation at 2015 Seras' (23 November 2015) <https://www.shell.com.ng/media/2015-media-releases/shell-emerges-best-company-in-csr-innovation.html>.

issues in relation to the ability of the Iraqi Parliament to legislate nationally in relation to the oil and gas industry. This is because of constitutional difficulties in relation to the Kurdistan region and also because of the inability of the Assembly to pass new oil and gas laws, see 2.5.2. Consequently, it is doubtful whether legislation can be enacted which will protect stakeholder interests, particularly the environment, or require positive contributions to development or community welfare. The alternative to legislation is to impose these requirements under oil and gas contracts, 2.5.3. But in relation to existing contractual requirements, such as training, there has been limited success, despite the participation of state-owned oil companies in joint management committees responsible for these programs, see 6.3. As argued below, this means that in order for contractual conditions to effectively provide for protection of stakeholders and contributions to community welfare, there must be effective oversight and monitoring of contractual compliance, see 6.4.

The key issue is whether promoting voluntary CSR or legislative or contractual requirements to contribute to development and avoid negative externalities are the only possible approaches. Taxation is a more general mechanism which can achieve these outcomes. But for Iraq, the influence of IOCs, coupled with the risks of corruption, make this less appealing. It is arguable that the benefits of targeted welfare closely monitored with greater transparency and accountability could be the preferred response. What is clear is that existing contractual arrangements have not, so far, been particularly successful in the limited areas where they have operated, see 6.3. As argued what is needed is a skilled oversight committee which monitors compliance and in relation to which there is both transparency and accountability, see 6.4.

The next section will provide an overview of Corporate Social Responsibility in the oil industry and suggest recommendations for IOCs accountability in Iraq to protect key stakeholders and maximise benefits and social welfare from massive natural resources.

7.2 Overview

Corporate social responsibility requires corporations to voluntarily act to protect stakeholders from the negative impacts of their operations by identifying, preventing and mitigating the possible adverse impacts of their operations.[4] This involves two aspects, prevention and response to harm when it occurs. Under the preventive aspect, the company takes proactive steps to avoid causing harm to society by anticipating the externalities that may arise from its activities and takes pre-emptive measures (due diligence initiatives) to address them.[5] In contrast, the responsive aspect is concerned with the way the company reacts to negative externalities after they have occurred,[6] see 4.3.1.

Chapter three discussed the modern developments of the shareholder primacy theory. Accordingly, enlightened shareholder value requires corporations to take into account stakeholder interests where this is in the long term interests of the company and its shareholders, see 3.3. This principle is captured in the UK *Companies Act 2006*, s 172 (1), in the US in the concept of 'corporate constituency'[7] and in the Indian *Companies Act 2013*, s 166 (2) (discussed at 3.3.1). More recently, it has been argued that shareholders' interests reach beyond dividends to broader interests in sustainability, the environment and the community, the shareholder welfare approach.[8] The consequence is that companies in acting for the long term interests of the company and shareholders must take into account stakeholder interests.[9] A further step is proposed under the *Accountable Capitalism Bill*

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[4] Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower, 2012) 36; Commission of the European Communities, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM/681/Final (25 October 2011) 6 <http://www.accessibletourism.org/resources/csr_communication_ec_com2011681.pdf>.
[5] Mujih, above n 4, 45.
[6] Ibid.
[7] Edward Adams and John Matheson, 'A statutory Model for Corporate Constituency Concerns' (2000) 49(4) *Emory Law Journal* 1085, 1135.
[8] Oliver Hart and Luigi Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' (2017) 2(2) *Journal of Law, Finance, and Accounting* 247, 275.
[9] Marshall Magaro, 'Two Birds, One Stone: Achieving Corporate Social Responsibility Through the Shareholder-Primacy Norm' (2010) 85 *Indiana Law Journal* 1149, 1167.

which would impose additional obligations on large US companies to act as good corporate citizens (see 3.3.1). These modern elaborations of shareholder primacy take into account stakeholder interests in so far as it is in the long term interests and sustainability of the company and its shareholders. Chapter four discussed the negative impacts on the environment and communities arising out of IOCs operations (see 4.3). It is in the long term interests of oil companies to protect stakeholders by preventing negative externalities associated with their operations and undertake due diligence initiatives to mitigate risks caused by their operations. The difficulty lies in getting IOCs to recognise responsibilities to stakeholders and how the government should respond if this does not occur.

Although CSR is concerned with voluntary conduct, modern corporate governance rules, either legislatively or through stock exchange listing rules, require corporations to take into account the interests of stakeholders, see 3.3.2. Corporations need to do both, to be proactive against the risk of damage and to have appropriate measures to deal with damage when it occurs. CSR is also recognised by the international community, through its relevant institutions (eg the United Nations, the International Labour Organization, the Organization for Economic Cooperation and Development), who have accepted as a norm that companies should act in a responsible and sustainable manner. This has been expressed in many international instruments that set the norms for corporate social responsibility such as the UN Global Compact, the OECD *Guidelines for Multinational Enterprises*, ISO 26000, and many others.[10] There is also a growing trend for international instruments to incorporate CSR covering a wide range of issues including health and safety matters, environmental protection, respect for human rights, anti-corruption and bribery,[11] see 5.2.1 and Appendix 3. It is argued that Iraq should also seek to incorporate similar CSR clauses in future bilateral trade agreements, see 5.2.2 and 7.3.2 below.

[10] See generally, Deborah Leipziger, *The Corporate Responsibility Code Book* (Routledge, revised 3rd ed, 2017).
[11] See, *Directive 2014/95/EU of the European Parliament and of the Council* [2014] OJ L 330/1.

It is argued in this thesis that it is not sufficient to just consider negative externalities but that IOCs should contribute positively to community welfare.[12] This can be in the form of education and health care programs for local communities or investments in local infrastructure like roads, electricity, sanitation and housing, see 4.5.1.[13] The motivations for developing CSR policies in developed countries may be different to that of developing countries. Developed countries usually have a stable political, economic and investment environment, as well as high levels of general public awareness. In this environment it is usual for legislation to impose mandatory requirements preventing negative externalities resulting from companies' operations such as, for example, strong environmental protection legislation. In these countries CSR usually has as its focus strengthening the protection of companies' stakeholders rather than legislating for positive contributions to community welfare.[14]

In contrast, in developing countries, legislation may, to a smaller or greater degree, provide some or inadequate protection against negative externalities. This legislation may not adequately address negative externalities with the further difficulty that enforcement may be weak. Despite problems of lack of enforcement, developing countries (eg India, Nigeria) may by legislation demand that large corporations contribute to community welfare and development, see 5.5. Legislation may, in addition, impose obligations on companies to support local content and local employment or give preference to local goods and services (eg Tanzania, Ecuador, and Nigeria),[15] discussed at 5.5. The thesis argues that IOCs should, in

[12] Ibid, Mujih, above n 4, 36.
[13] David Spence, 'Corporate Social Responsibility in the Shale Patch' (2017) 21(2) *Lewis and Clark Law Review* 387, 425.
[14] Jonathan Doh and Terrence Guay, 'Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective' (2006) 43(1) *Journal of Management Studies* 47, 73.
[15] World Trade Organization agreements limit the use of local content policies but there are still avenues available for developing countries, see Miriam Weiss, 'The Role of Local Content Policies in Manufacturing and Mining in Low- and Middle-income Countries' (Working Paper No 19, United Nations Industrial Organization, 2016) 9; Isabelle Ramdoo, 'Local Content, Trade and Investment: Is there Policy Space Left for

addition to contributing to the development of host communities, be required to contribute through regulations which address technology transfer, employment of a certain percentage of Iraqis in technical and administrative positions and local content requirements be imposed through legislation and oil contracts, see 6.3.

Chapter two set out the arguments as to why IOCs should do more than just pay the costs for the harm caused by their operations. The principal reason is the huge profits obtained by IOCs and the view that the Iraqi people have not adequately shared in the benefits of their natural resources. It may reflect the inability of the government to obtain a fair deal in negotiating or amending oil contracts whereby the Iraqi government, but not IOCs, suffered huge losses with the downturn in oil prices, see 2.7. It may also reflect Iraq's inability to get essential legislation relating to the oil and gas industry through Parliament, 2.5.2, and the difficulty in ensuring compliance with contractual terms see 6.2. The problem remains whether there is any real prospect of passing legislation requiring contributions to development and welfare. The avenue likely to be more fruitful is through the new bidding rounds for oil contracts with much stronger monitoring of compliance.

As explained previously in chapter five, states use various mechanisms for establishing corporate social responsibility regimes. These include national laws, general companies' law, stock market listing requirements, non-financial disclosure and reporting, or sector specific laws.[16] There may be specific provision in petroleum legislation as well as provisions in oil and gas contracts, as explained at 5.5 and 5.6 respectively. This method mostly exists in the extractive industries. The issue for Iraq is whether the best approach is through formal legislative regimes. Any proposals to this effect must take into account the lack of success in enacting modern oil and gas legislation in Iraq. One of the most critical obstacles to

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Linkages Development in Resource-rich Countries?' (Discussion Paper No 205, European Centre for Development Policy Management, December 2016) 15 <http://ecdpm.org/wp-content/uploads/DP205-Local-Content-Trade-Investment-Ramdoo-December-2016.pdf>.

[16] For example the UK *Modern Slavery Act 2015* and *California Transparency in Supply Chains Act of 2010*.

developing the oil industry in Iraq is the absence of modern petroleum legislation that sets up specific technical and management requirements concerning the sector. Although the *Oil and Gas Law* was drafted in 2007 and redrafted multiple times, the law has not yet been enacted. The main obstacles are the outstanding political issues and the different interpretation of the constitutional provisions.[17] In the absence of a national oil and gas law, the remaining option for the Iraqi government is to impose obligations on oil companies through oil contracts. However, a close examination of oil contracts shows that the contract obligations are inadequate to protect the environment and society from the adverse impact of oil operations or to increase the benefits of society. Although oil contracts require IOCs to develop training and education programs and set aside USD 5 million a year for that purpose, evidence shows that IOCs are not adequately implemented these requirements, see 6.3.2. This is largely due to weak accountability mechanisms and lack of government monitoring.

The next section makes recommendations for future policy to implement CSR in the oil industry.

7.3 Recommendations

This section proposes a framework for CSR in the oil and gas industry. This involves a multi-stage response beginning with developing a national CSR policy, including requirements in the oil and gas law and other necessary legislation, improving the oil contract model and contractual conditions as well as promoting the monitoring mechanisms and raising public awareness about CSR issues.

7.3.1 Developing a National Policy to Implement Corporate Social Responsibility

First of all, Iraq needs to establish a clear and comprehensive national policy to protect a wide range of stakeholders who may be affected by oil activities as well as policies to

[17] For fuller discussion on the Draft *Oil and Gas Law* see chapter two at 2.5.2.

increase social welfare for host communities. This may require the government to impose legal obligations on international oil companies to ensure that the community is not paying for the adverse effects of their operations, negative externalities. It may also decide that oil companies should positively contribute to community welfare, particularly for host communities, by requiring them to commit a certain level of expenditure for particular types of development. This could take the form of legislation such as in Nigeria (see 5.5.2) or the more broadly based Indian provisions (see 5.5.1). The purpose is to ensure that natural resources are managed in a sustainable manner. This requires Iraq to have an explicit CSR vision to support the overall development and promote the benefit to its citizens from oil and gas assets. In recent years, governments have become the drivers for corporate social responsibility[18] compared to business, society, and even the international organisations.[19]

Iraq should adopt an integrated package of consistent measures for the oil and gas industry which are directed to addressing shared priorities of the government and the community (economic, environmental, and welfare/development), promoting economic growth and enhancing sustainable use of natural resources, namely ensuring the rights of present and future generations to these resources. Iraq can learn from the experience of other developing countries such as India, Tanzania, Ecuador, and Nigeria.[20] This is further explained in the following recommendation on stakeholder protection and social welfare, see 7.3.3.

Once the policy framework has been established, implementation can be achieved through a variety of legislative or executive tools. The suggested CSR framework might be implemented at different levels of government through related projects and programs. It may

[18] Josep Lozano, Laura Albareda,Tamyko Ysa, Heike Roscher and Manila Marcuccio, *Governments and Corporate Social Responsibility : Public Policies Beyond Regulation and Voluntary Compliance* (Palgrave Macmillan, 2008) 42; Reinhard Steurer, 'The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe' (2010) 43(1) *Policy Sciences* 49, 72; Jeremy Moon, 'Government as a Driver of Corporate Social Responsibility: The UK in Comparative Perspective' (Research Paper No 20-2004, International Centre for Corporate Social Responsibility, 2004) 17.
[19] For fuller discussion see chapter five, section 5.3.
[20] For fuller discussion about the approach implemented in these countries see chapter five, section 5.5.

also apply to foreign trade policy and international relationships, namely Bilateral Investment Agreements.

7.3.2 Corporate Social Responsibility in Bilateral Agreements

Iraq can also consider whether to include CSR requirements in all future trade and investment agreements such as has been done in the Iraq-EU Partnership and Cooperation Agreement. This confirms the commitment to CSR under those types of agreement.[21] This is however, likely to be only a minor aspect for Iraq.[22] As noted previously, see 5.2.2, typically investment treaties dealing with CSR only obligate contracting states to use their best endeavours which falls well short of enforceable legal obligations. There are, in addition, international guidelines such as the OECD Guidelines, UN Global Compact, UN *Guiding Principles on Business and Human Rights*; and those specific industry standards like ISO 26000 Guidance on Social Responsibility and *EU Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (see 5.2.1). It is to be noted that these are Guidelines for action and the focus is on human rights rather than development and consequently may not, even if domestically legislated, achieve the proposed objectives of the Iraqi government. A further limitation is that Iraq has little experience in entry into free trade agreements so that incorporation of such provisions into free trade agreements is not likely to take matters very far.

7.3.3 Stakeholder Protection and Social Welfare

As recommended above, the Iraqi government should develop a national policy for stakeholder protection and enhancing social welfare particularly for the oil industry. This

[21] For fuller discussion on regulating CSR in the Trade and Investment Agreements see 5.2.2.
[22] The problem is that developed nations have standard provisions in free trade and regional agreements and so negotiability of terms may prove difficult for Iraq. There is the further issue that companies may incorporate in countries without similar free trade agreement provisions and so avoid the CSR obligation.

policy should be translated into legal obligations in the oil and gas regulations or other special legislation issued for this purpose as well as contractual obligations, see below 7.3.4.

The government must develop modern oil and gas law that is adequate to achieve comprehensive development in the oil industry in particular which will benefit the whole economy. This requires the government to enact an oil and gas law which includes clear and precise provisions protecting the environment and society from the adverse impact of oil companies' activities as well as requiring oil companies to contribute to the welfare of host communities. Given that oil and gas activities create a wide range of negative impacts on the environment and communities during each phase of operation, Iraq needs to have hard law to protect the environment and local communities. IOCs should be mandated by the law to undertake due diligence initiatives to mitigate any possible risks caused by their operations on the environment and the negative consequences on the local communities and cultural heritage in the areas of their operations (see discutient at 4.4). Therefore, Iraq should increase corporate accountability to hold oil companies responsible for their actions by issuing strong environmental protection regulations whether contained in general environmental regulations or specific oil and gas regulations. These regulations must include specific provisions to protect the southern marshlands considering their national and international significance and other cultural heritage areas. These recommendations do not see the voluntary engagement in CSR as providing an adequate approach to protecting the environment and communities against negative externalities caused by oil companies operations. This does not mean that CSR has no role to play at all. It can be seen as a complement to legal obligations by encouraging IOCs to further promote community welfare.[23]

[23] Forest Reinhadt, Robert Stavins and Richard Vietor, 'Corporate Social Responsibility through an Economic Lens' (2008) 2(2) *Review of Environmental Economics and Policy* 219, 239; see also, Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibilities*, COM/366 final (18 July 2001) 7

Furthermore, Iraq can consider the experience of other oil producing countries (eg Brazil, Mexico, Nigeria and Tanzania) discussed at 5.5 and 5.6. These countries have exploited the investment in the natural resources to develop other related and non-related sectors, building the capacity of individual and communities, addressing urgent social problems and enhancing overall development. In addition, Iraq can benefit from the Indian experience and require large oil companies to spend a minimum percentage of their profit on programs to enhance sustainable development.[24]

7.3.4 Corporate Social Responsibility Clauses in Oil and Gas Contracts

In the absence of modern oil and gas legislation, and in the light of the Iraqi government's political difficulties passing the national oil and gas law,[25] the only feasible approach to make oil companies accountable for the harm caused by their activities (negative externalities) and to contribute to social welfare is through oil and gas contracts. Even if there is oil legislation, oil and gas contracts should also include provisions that are consistent with regulations.[26] It could be argued that this is in the long term interests of oil companies and their shareholders based on the modern elaborations of shareholder primacy which take into account stakeholder interests. The promotion of host community-industry relations provides legitimacy and a stable investment environment.[27] To this end, the local community should be actively involved in the process of designing and implementing community projects etc, given that the

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<http://csdle.lex.unict.it/Archive/LW/Data%20reports%20and%20studies/Reports%20and%20%20communication%20from%20EU%20Commission/20110830-103712_com_2001_366enpdf.pdf>.

[24] For a full discussion on Indian experience to mandate contributions to community welfare see 5.5.1. But the Indian legislation operates on a 'comply-or-explain' basis which may not be suitable in the Iraqi context, see the discussion at 6.3.1.

[25] For fuller discussion on the barriers that prevent enacting the oil and gas law see chapter two at 2.5.2.

[26] Andrews Doku and Benjamin Appiah-Kubi, 'Internalizing the Negative Externalities of Mining in Ghana: Should Corporate Social Responsibility Be Voluntary?'(2014) 4 (15) *Developing Country Studies* 76, 83.

[27] Uchechukwu Nwosu, 'Corporate Social Responsibility of EXXON-Mobil in Akwa Ibom State, Nigeria and Community-industry Relation: a Sociological Jurisprudence Prism' (2017) 4(2) *International Journal of Peace and Conflict Studies* 164, 179; Jedrzej Frynas, *Beyond Corporate Social Responsibility: Oil Multinational and Social Challenges* (Cambridge University Press, 2009) 117-120.

success of these initiatives depend on the level of community participation in such projects.[28] In addition to contract clauses, Iraq can use the bidding rounds tender process (see 6.4) and negotiations to take into account as a key factor IOCs undertakings in relation to community development and service, in selecting the preferred bidder. IOCs would be required to submit a development plan for the contract area before bidding. As noted above the monitoring of the implementation and outcomes in relation to these plans should be undertaken by an oversight agency, discussed next.

7.3.5 Monitoring Corporate Social Responsibility in the Oil Industry

The above proposal suggests stronger environmental protection legislation and requires IOCs to make positive contributions to the lives and prospects for the Iraqi community. If legislation is not possible, these obligations should be imposed by contract. It is argued that this should not be left to voluntary benevolence and that any legislative or contractual obligations should also set up an official unit to oversight the implementation of corporate social responsibility in the oil industry either by a primary oil and gas law, by specific legislation or failing that through oil contracts. This agency should monitor all companies operating in the oil industry in Iraq, including national and international oil companies as discussed in the previous chapter.

Ideally, the oversight agency should consist of elected group representing the key stakeholders. This formal agency would be responsible to facilitate the process of formulating a comprehensive CSR policy and officially assesses the negative and positive impacts of oil investment on the economy, the environment, employees and society.

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[28] Frynas, above n 27, 124-126; Eghosa Ekhator, 'Corporate Social Responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: An appraisal' (2014) 28 *Cadernos de Estudos Africanos* 119, 140; O Alabi and S Ntukekpo, 'Oil Companies and Corporate Social Responsibility in Nigeria: An Empirical Assessment of Chevron's Community Development Projects in the Niger Delta' (2012) 4(2) *British Journal of Arts and Social Sciences* 361, 374.

The proposed agency must exercise its oversight function not only during the life of the contract but also during the bidding process by reviewing and approving social responsibility plans submitted by international oil companies competing for an oil or gas investment. This would assist the government in ensuring that IOCs are fulfilling their obligations and measuring contributions to overall development, see 6.4.

7.4 The Way Forward

Iraq should establish institutional, well-developed and sustainable policies to manage the oil and gas industry because these massive natural resources are the backbone of the Iraqi economy and the primary source of income for the Iraqi people (see chapter two at 2.2.1 and 2.7.2). The continuing stabilisation of Iraq, reduction in conflict and improved conditions for democratic processes provide the foundations for a stronger government hand in managing the oil industry.

Despite reductions in demand for oil in the face of growing use of solar and clean energy, Iraq is still a very important player in the global oil supply[29] and makes a significant contribution to the stability of global oil markets.[30] The Iraqi national oil policy should aim to achieve growth and development in the oil industry as well as in other related sectors (eg, mining, cement, bricks, drilling, transport and so on), see discussion at 2.7.2 and 6.3.3. Developing sectors other than oil would assist in reducing reliance on oil revenues as the main source of the country's income and help to buffer the economy from the risks of falling

[29] Iraq has approximately 10 per cent of the world's proven oil reserves. World Bank, *Iraq Systematic Country Diagnostic* (Report No 112333-IQ, 3 February 2017) 13 <http://documents.worldbank.org/curated/en/542811487277729890/pdf/IRAQ-SCD-FINAL-cleared-02132017.pdf>; see also, Iraqi Extractive Industries Transparency Initiative, *6th Report of the Iraqi Extractive Industries Transparency Initiative 2014* (April 2016) 16 <https://eiti.org/sites/default/files/documents/iraq-eiti-report-2014.pdf>.

[30] International Energy Agency, *Iraq Energy Outlook: World Energy Outlook Special Report* (9 October 2012) 119 <https://www.iea.org/publications/freepublications/publication/WEO_2012_Iraq_Energy_OutlookFINAL.pdf>.

oil prices.[31] It should also take into account the long-term negative impacts of oil activities and the protection of the environment and other stakeholders including traditional communities (see discussion at 2.7.1 and 6.3.1).

This policy must be reflected in the specific oil sector legislation. However, since it is doubtful whether legislation can be enacted which will protect stakeholder interests, particularly the environment, or require positive contributions to the development or community welfare, 2.5.2, the alternative to legislation is to impose these requirements under oil and gas contracts, 2.5.3. As already noted above, the avenue likely to be more fruitful is through new bidding rules for oil contracts with much stronger monitoring of compliance. The new bidding rules for oil contracts should also include a mechanism to share with IOCs the risks of oil price fluctuations to avoid paying a high fixed amount where the price of oil has fallen. This is to restore the economic balance between the parties; ensuring a fair distribution of the wealth and profits from oil and avoid a repetition of the financial crisis in Iraq due to sharp drop in oil price in 2014, see discussion at 2.7.3.

To increase accountability in the oil industry, Iraq should take measures to monitor IOC compliance with legal requirements and implementing CSR in the oil industry. This may include, first, enhancing the role of state oil bodies on joint management committees to provide better oversight; and second, establishing an oversight agency that consisted of the key stakeholders to assess the negative and positive impacts of oil investment on the economy, the environment, employees and society see 6.4. This may require introducing better reporting mechanisms as well as measures to eliminate corruption. Iraq must also take measures to increase public awareness about corporate behaviour (what it does and what corporations should do), specifically in relation to environmental protection, safety issues,

[31] Oil price is usually governed by supply and demand rules (eg the US has reduced the reliance on oil by producing shale oil), but sometimes it may influence by the alteration in the political and security situation in the Middle East region and in the global in general.

human rights, indigenous communities, and CSR issues in general. Research shows that corporations do engage in CSR in response to stakeholder pressure.[32] This suggests that if civil society (including NGOs, unions, media etc) put pressure on corporations to engage in more CSR activities, oil companies may change their behaviour and act in ways conforming to responsible conduct expected by society. Implementing the recommendations proposed in this thesis can be a promising step in making international oil companies more accountable and socially responsible.

[32] Frynas, above n 27, 6; Herman Aguinis and Ante Glavas, 'What We Know and Don't Know About Corporate Social Responsibility: A Review and Research Agenda' (2012) 38(4) *Journal of Management* 932, 968.

APPENDIX 1

Table A-1: IOCs Awarded Oil Contracts in Iraq and their Participation[1]

	Bidding Round	Contract Area	Consortium	Contractors Participation	State partner and Share	Effective Date
1	Zero	Ahdeb	AL Waha Petroleum	75	SOMO 25%	10 Nov 2008
2	First	Rumaila	BP	47.63	SOMO 6%	17 Dec 2009
			Petro China	46.37		
3		Zubair	ENI	41.56	MOC 5%	18 Feb 2010
			Occidental	29.69		
			Kogas	23.75		
4		West Qurna (phase 1)	Exxonmobil	32.7	OEC 5%	1 March 2010
			Petro China	32.7		
			Shell	19.6		
			Pertamina	10		
5		Missan Fields	Cnooci	63.75	IDC 25%	2 Dec 2010
			Tpao	11.25		
6	Second	West Qurna (phase 2)	Lukoil	75	NOC 25%	1 March 2010
7		Majnoon	Shell	45	MOC 25%	1 March 2010
			Petronas	30		
8		Halfaya	Petro China	45	SOC 10%	1 March 2010
			Petronas	22.5		
			Total	22.5		
9		Garraf	Petronas	45	NOC 25%	10 Feb 2010
			JAPEX	30		
10		Badra	Gazprom	30	OEC 25%	18 Feb 2010
			Kogas	22.5		
			Petronas	15		
			Tpao	7.5		
11		Qaiyarah	Sonangol	75	SOC 25%	18 Feb 2010
12		Najmah	Sonangol	75	IDC 25%	18 Feb 2010

[1] Source: based on information presented in the Iraqi Extractive Industries Transparency Initiative, *Extractive Activities in Iraq 2015* (December 2016) 33- 41 <https://eiti.org/sites/default/files/documents/2015_iraq_eiti_report.pdf>

13	Third	Akkas	Kogas	75	NOC 25%	15 Nov 2011
14		Mansuriah	Tpao	37.5	OEC 25%	18 July 2011
			Kuwait Energy.co	22.5		
			Kogas	15		
14		Siba	Kuwait Energy.co	45	MOC 25%	1 July 2011
			Tpao	30		

APPENDIX 2

Extracts from Iraqi Oil Contract Models[1]

A. Extracts from Technical Services Contract Model[2]

Article 13 – Joint Management of the petroleum Operations

13.1 The Parties shall establish, within thirty (30) days from the Effective Date, a joint management committee, referred to herein as the "Joint Management Committee" or "JMC", for the purpose of general supervision and control of Petroleum Operations. The JMC shall consist of eight (8) members. The ROC shall nominate four (4) members, including the Chairman. Contractor shall nominate four (4) members, including the Deputy Chairman and the Secretary. The Parties shall also designate one alternate to each of their members and shall promptly inform each other in writing of any change of the members or alternates.

13.2 The JMC shall have the following duties and authorities related to Petroleum Operations:

(a) review and recommendation of Plans and any Revisions thereof;

(b) review and approval of annual Work Programs, Budgets and production schedules, and any Revisions thereof;

(c) review and approval of operating procedures prepared pursuant to Article 9;

(d) review and/or approval of the award of sub-contracts and purchase orders as applicable pursuant to Article 9;

(e) approval of training programs and Iraqization plans for developing Iraqi personnel pursuant to Articles 9 and 26;

(f) supervision and control of the implementation of approved Plans and Work Programs and the overall policy of Operator;

(g) review and approval of manpower strength and organisation chart of Operator;

[1] This Appendix includes selected articles from the Technical Services Contract model and the Exploration, Development and Production Contract model. These articles were selected because they were the most relevant articles to this research and mostly referred though the thesis.

[2] There is no signed oil contract publicly available. Only a model of Technical Services Contract for the Rumaila Oil Field between BP, CNPC and Iraq from the first bidding round held in 2010 is publicly available, see <http://iraqieconomists.net/ar/wp-content/uploads/sites/2/2016/01/Clean_copy__BP_CNPC_comments__27_July__on_PCLD_draft_dated_01.pdf >.

(h) review of Quarterly statements, annual accounts and other financial statements;
(i) review of periodical and other reports submitted by Contractor or Operator and issue of comments and recommendations to ensure proper implementation of Petroleum Operations; and
(j) recommendation of the appointment of the independent international auditor as per Article 20.

13.3 Decisions of the JMC shall be taken by unanimous vote of the members or their alternates present at the meeting or by proxy. In the event that the JMC is unable to reach unanimous decision in respect of any issue, then the issue shall be promptly referred to the senior management of the Parties for resolution. Quorum shall be at least three (3) members or alternates of each Party. Decisions taken by the JMC shall be recorded in official minutes signed by the members present and communicated by Operator to the Parties.

13.4 The JMC shall meet whenever necessary or expedient for the implementation of this Contract and at any time a Party requests a meeting to be held. In any event the JMC shall meet at least once every Quarter. A meeting of the JMC may be convened by either Party giving not less than twenty (20) days prior written notice to the other Party or, in a case requiring urgent action, by giving reasonable shorter notice, with decisions by way of circulated written resolutions. Operator shall prepare the agenda and necessary documents prior to such meetings and communicate the same to the members of the JMC. Either Party may add any matter related to Petroleum Operations not listed by Operator to any JMC meeting agenda.

13.5 The JMC may adopt such procedures as it deems appropriate regarding the conduct of its functions, meetings, and other related matters. For the purpose of facilitating the conduct of its functions, the JMC may appoint such appropriate sub-committees as shall from time to time be required.

13.6 All costs incurred by Contractor and approved by the JMC for carrying out JMC duties shall be considered as Petroleum Costs.

Article 19 – Supplement Fees and Service Fees

19.1 For the Petroleum Operations performed under this Contract, Contractor is entitled to Supplementary Fees and Service Fees. In accordance with this Article 19, Supplementary Fees shall be comprised of Supplementary Costs. Service Fees shall be comprised of Petroleum Costs and a Remuneration Fee.

19.2 Supplementary Costs

Contractor shall start charging Supplementary Costs to the Operating Account as from the Effective Date, in accordance with this Contract and Accounting Procedure but the same shall be due and payable according to the following:

(a) the signature bonus paid under Article 4 shall be amortized and recovered over twenty (20) equal Quarterly payments beginning with the ninth Quarter following the Quarter in which the Effective Date occurs;

(b) de-mining costs incurred pursuant to Article 7.3 shall be recovered over eight (8) equal Quarterly payments beginning with the first Quarter following the date on which de-mining costs start being incurred;

(c) costs or expenses incurred pursuant to Articles 10.6, 12.6, and 17.7 for additional facilities shall accrue and be payable beginning in the first Month of the Calendar Quarter following their payment date;

(d) costs or expenditures incurred pursuant to Article 41.16 for remediation of pre-existing environmental conditions shall accrue and be payable beginning in the first Month of the Calendar Quarter following their payment date; and

(e) outstanding balances on all Supplementary Costs shall bear interest at LIBOR plus one percent (1%) from the date when Supplementary Costs are incurred until the date when Supplementary Fees are received.

19.3 Supplementary Fees

The Supplementary Fees due to Contractor shall be paid in Export Oil at the Delivery Point or, at ROC's option, in cash, in USD, within sixty (60) days of the submission of an invoice pursuant to Article 9 of the Accounting Procedure. For payment in

Export Oil, the Export Oil Price shall be in accordance with Article 18. ROC shall notify Contractor of its election whether to pay Supplementary Fees in cash or in Export Oil within ten (10) days of receipt of Contractor's first invoice for payment of Supplementary Fees. Such election shall remain in effect for the remainder of this Contract, unless otherwise agreed by the Parties.

(a) Supplementary Fees shall be deemed to cover all amounts due to Contractor for Supplementary Costs.

(b) Supplementary Fees shall become due and payable as detailed in Article 19.2 and shall be paid to the extent of ten percent (10%) of the deemed revenues of the Baseline Production.

(c) Any due and payable Supplementary Fees that remain unpaid in respect of any Calendar Quarter shall be carried forward and paid in succeeding Quarter(s) until fully paid.

(d) ROC reserves the right at any time by notice to Contractor to decrease the amortization periods specified in Articles 19.2(a) and 19.2(b), and/or increase the percentage of Baseline Production specified in Article 19.3(b).

19.4 Petroleum Costs

Contractor shall start charging Petroleum Costs to the Operating Account as from the Effective Date, in accordance with this Contract and Accounting Procedure, but the same shall be due and payable only after the Service Fee Eligibility Date.

19.5 Remuneration Fee

Contractor shall become entitled to the Remuneration Fee and shall start charging the same to the Operating Account only after the Service Fee Eligibility Date.

(a) For each Calendar Quarter, commencing with the Calendar Quarter following the Quarter in which the Service Fee Eligibility Date occurs, the Remuneration Fee shall be an amount equal to the product of the Remuneration Fee per Barrel applicable to

such Quarter, multiplied by the Incremental Production applicable to such Quarter and subject to the performance adjustment in Article 19.5(e).

(b) The Remuneration Fee per Barrel of Crude Oil applicable for all Calendar Quarters during any given Calendar Year shall be determined on the basis of the R-Factor calculated at the end of the preceding Calendar Year for the Field as follows:

R-Factor	Remuneration Fee per Barrel (USD)
Less than 1.0	2.00
1.0 to less than 1.25	1.60
1.25 to less than 1.5	1.20
1.5 to less than 2.0	1.00
2.0 and above	0.60

(c) For the purposes of calculating Baseline Production and Incremental Production, the Baseline Production Rate for any Quarter, expressed to the nearest barrel of oil per day, will be calculated according to the product of the Initial Production Rate and a Decline Factor for that Quarter according to the formulae:

BPRn = IPR * DFn

and

DFn = D raised to the power ((n-1)/4)

where:

BPRn = Baseline Production Rate for Quarter n

IPR = Initial Production Rate

DFn = Decline Factor for Quarter n

n = Number of the Quarter following the Quarter in which the Effective Date occurs

[for Bai Hassan

n = Number of the Quarter starting with the Quarter after the Quarter in which the tenth (10th) anniversary of the Effective Date occurs]

D = 0.95

(d) The R-Factor achieved by Contractor as at the end of any Calendar Year shall be calculated by dividing the aggregate value of Cash Receipts from the Effective Date

up to and including that Calendar Year by the aggregate of Expenditure over that same time frame.

For the purposes of calculating the R-Factor:

Aggregate "Cash Receipts" of Contractor from Petroleum Operations as of the end of any Calendar Year is the aggregate value from the Effective Date up to and including that Year of:

(i) Service Fees paid to Contractor as provided in Articles 19.9; plus

(ii) any Contractor's incidental income (of the type specified in the Accounting Procedure) arising from Petroleum Operations; and

Aggregate "Expenditure" made by Contractor for Petroleum Operations as of the end of any Calendar Year is the aggregate value from the Effective Date up to and including that Year of:

(i) Petroleum Costs; plus

(ii) Training, Technology and Scholarship Fund as per Article 26. For the avoidance of doubt, this expense is included as Expenditures for purposes of determining the R-Factor, but shall not be Petroleum Costs.

(e) During the Plateau Production Period the Remuneration Fee payable in respect of any Quarter shall be adjusted by multiplying by the Performance Factor. However, any adjustment to the Remuneration Fee under this Article shall cease for so long as the following cases apply: (i) Government imposed production curtailment under Article 12.5; and (ii) where normal production is curtailed or suspended through failure of Transporter to receive the same at the Transfer Point through no fault of the Operator or Contractor.

19.6 Service Fees

(a) The Service Fees due to Contractor shall be paid without interest, preferably in Export Oil at the Delivery Point or, at Contractor's option, in cash, in USD, within sixty (60) days of the submission of an invoice pursuant to Article 9 of the

Accounting Procedure. For payment in Export Oil, the Export Oil Price shall be in accordance with Article 18. Contractor shall notify ROC of its election whether to receive Service Fees in cash or in Export Oil no later than the end of the Rehabilitation Period. Such election shall remain in effect for the remainder of this Contract, unless otherwise agreed by the Parties.

(b) The Service Fees shall be deemed to cover all costs, expenses, liabilities and remuneration to Contractor under this Contract. ROC shall not be obliged to pay any other compensation whatsoever to the Contractor for the fulfilment of its obligations under this Contract.

(c) Service Fees shall become due and payable starting with the first Calendar Quarter following the Quarter in which the Service Fee Eligibility Date occurs and shall be paid to the extent of fifty percent (50%) of the deemed revenues of the Incremental Production. It is understood that payment of due and payable Petroleum Costs shall have priority over the payment of due and payable Remuneration Fees.

(d) Any due and payable Service Fees that remain unpaid in respect of any Calendar Quarter shall be carried forward and paid in succeeding Quarter(s) until fully paid.

19.7 For the purpose of payment of Supplementary Fees and Service Fees, Baseline Production and Incremental Production of Crude Oil shall be valued at the average over the Quarter of the Export Oil Price, pursuant to Articles 17 and 18, taking the simple average of the Export Oil Price for different destinations where these exist.

19.8 Subject to Article 8, any due and payable Supplementary Fees and Service Fees that remain outstanding at the expiry or termination of this Contract shall become immediately due and payable within thirty (30) days thereof, or under such other terms as may be agreed by the Parties.

19.9 In case the Supplementary Fees or Service Fees are paid in Export Oil, ROC shall arrange with SOMO to deliver to Contractor at the Delivery Point an amount of Export Oil, at the relevant Export Oil Price, equivalent to the amount of Supplementary Fees or Service Fees owed and payable hereunder. Contractor's Quarterly lifting of Export Oil shall be estimated in advance on the basis of unpaid

Supplementary Fees or Service Fees carried forward, production schedule and estimated Export Oil Price. Contractor's final lifting shall be adjusted on the basis of actual amounts of Supplementary Fees or Service Fees owed as computed under this Article 19, and on the applicable Export Oil Price in accordance with the provisions of Article 18 and Addendum Four.

Article 26 – Employment, Training, and Technology Transfer

26.1 Without prejudice to the right of Contractor and Operator to select and employ such number of personnel as, in the opinion of the Contractor or Operator, are required for carrying out Petroleum Operations in a safe, cost effective and efficient manner, Contractor and Operator shall, to the maximum extent possible, employ, and require Sub-Contractors to employ, Iraqi nationals having the requisite qualifications and experience.

26.2 Through a Training, Technology and Scholarship Fund, Contractor and Operator shall offer and facilitate for an agreed number of Iraqi nationals, as designated by ROC, the opportunity, both inside and outside of the Republic of Iraq, for on-the-job training and practical experience in Petroleum Operations, and academic education. The Fund shall also be used for supporting oil and gas related technology and research including the establishment or upgrading of research institutes inside the Republic of Iraq.

26.3 As a minimum, Contractor shall allocate during the Term an annual amount of five million USD (US$ 5,000,000) to the Training, Technology and Scholarship Fund. The Fund payment shall not be recoverable as Petroleum Costs.

26.4 Not later than six (6) months after the Effective Date, Contractor shall, in consultation with ROC, establish and implement training programs for staff positions in each phase and level of Petroleum Operations including skilled, technical, executive and management positions, with a view to ensuring increased employment of Iraqi nationals and a commensurate reduction of expatriate employees.

26.5 The Companies shall separately negotiate, in good faith, technical assistance agreements with ROC whereby every Company may make available commercially

proven technology and information of a proprietary nature for use in the Republic of Iraq by the ROC and its Affiliates.

Article 27 – Participation

27.1 The State Partner shall have twenty-five percent (25%) of Contractor's total Participating Interest and the Companies shall have the remaining Participating Interest of seventy five percent (75%).

27.2 Companies shall pay for all of the State Partner's share of Petroleum Costs and Supplementary Costs during the Term and any extension thereto. The Companies shall have entitlement to all Petroleum Costs paid as Service Fees and Supplementary Costs paid as Supplementary Fees, while the State Partner will be entitled to receive twenty- five percent (25%) of any Remuneration Fee paid.

27.3 Participation shall further be subject to the provisions of Addendum One.

Article 30 – Local Goods and Services

30.1 Works and services performed in the Republic of Iraq through sub-contracts shall be carried out on a competitive basis. Preference shall be given to Iraqi entities and firms, or foreign firms in association therewith, provided that their relevant capabilities and prices are competitive with those available in the international market.

30.2 Preference shall be given to locally manufactured and/or available goods, materials, equipment, consumables and the like provided that their technical specifications, availability, prices, and time of delivery are comparable to those available in the international market.

30.3 Contractor and Operator shall ensure that sub-contracts with Sub-Contractors, agents, assignees and employees contain similar provisions of this Article 30.

Article 41– Protection of the Environment

41.1 In performance of this Contract, Operator shall conduct Petroleum Operations with due regard to concerns with respect to protection of the environment and conservation of natural resources and shall in particular:

(a) adopt Best International Petroleum Industry Practices in conducting and monitoring its Petroleum Operations and take necessary and adequate steps to:

(i) make all efforts to prevent environmental damage and, should some adverse impact on the environment occur, to minimize such damage and the consequential effects thereof on property and people;

(ii) prevent harm or degradation of livelihood or quality of life of surrounding communities and, should some adverse impact occur, minimize such impact and ensure proper compensation for injury to persons or damage to property caused by the effect of Petroleum Operations; and

(b) comply with the requirements of the Law and reasonable requirements of ROC.

41.2 If Operator fails to comply with the provisions of Article 41.1(a)(i) or contravenes any relevant Law, and such failure or contravention results in any environmental damage, Operator shall forthwith take all necessary and reasonable measures to remedy the failure and the effects thereof.

41.3 If ROC has good reason to believe that any works or installations erected by Operator or any operations conducted by Operator are not in accordance with the Law and are endangering or may endanger persons or any property of any person, or are causing or may cause pollution, or are harming or may harm fauna or flora or the environment to a degree which ROC deems unacceptable, ROC shall give notice to Contractor and Operator to promptly consider and develop for JMC approval a remedial action plan and measures to mitigate such environmental damage within a reasonable period as may be determined by ROC and to repair any such damage. If ROC deems it necessary, it may also require Operator to suspend Petroleum Operations in whole or in part until Operator has taken such remedial measures or has repaired any damage caused.

41.4 The measures and methods to be used by Operator for the purpose of complying with the terms of Article 41.1(a)(i) shall be determined in timely consultation with

ROC and Contractor upon the commencement of Petroleum Operations or whenever there is a significant change in the scope or method of conducting Petroleum Operations and shall take into account the international standards applicable in similar circumstances and the relevant environmental impact study carried out in accordance with Article 41.5. Contractor shall notify ROC and Operator, in writing, of the measures and methods finally determined by Contractor and approved in accordance with Article 12 and shall cause such measures and methods to be reviewed from time to time in the light of prevailing circumstances.

41.5 Contractor shall cause a person or persons with special knowledge on environmental matters, to carry out two environmental impact studies in order:

(a) to determine at the time of the studies the prevailing conditions relating to the environment, human beings and local communities, the flora and fauna in the Contract Area and in the adjoining or neighbouring areas; and

(b) to establish the likely effect on the environment, human beings and local communities, the flora and fauna in the Contract Area and in the adjoining or neighbouring areas in consequence of the relevant phase of Petroleum Operations, and to submit, for consideration by the Parties, methods and measures contemplated in Article 41.4 for minimizing environmental damage and carrying out site restoration activities.

41.6 The first of these environmental impact studies shall act as the baseline study for the purposes of Article 41.14 and shall be concluded promptly after the Effective Date but in any event before commencement of any fieldwork.

41.7 The second environmental impact study shall be submitted by Contractor as part of the Enhanced Redevelopment Plan.

41.8 The studies mentioned in Article 41.5 above shall contain proposed environmental guidelines to be followed in order to minimize environmental damage and shall include, but not be limited to, the following, to the extent appropriate to the respective study taking into account the phase of operations to which the study relates:

(a) proposed access cutting;
(b) clearing and timber salvage;
(c) wildlife and habitat protection; (d) fuel storage and handling;
(e) use of explosives;
(f) camps and staging;
(g) liquid and solid waste disposal;
(h) cultural and archaeological sites;
(i) selection of drilling sites;
(j) terrain stabilization;
(k) protection of freshwater horizons;
(l) blow-out prevention plan;
(m) flaring during completion and testing of Gas and Crude Oil Wells;
(n) abandonment of wells;
(o) rig dismantling and site completion;
(p) reclamation for abandonment;
(q) noise control;
(r) debris disposal; and
(s) protection of natural drainage and water flow.

41.9 Subject to the provisions of the Law on the protection of the environment, any new project or expansion or modernization projects for Petroleum Operations for which a proposal, other than a Plan, is submitted by Contractor, ROC shall consider the assessment of the project and convey a decision with respect to environment clearance within a period of ninety (90) days from the receipt of the requisite documents and data. Subject to receipt of the necessary environmental clearance, the JMC shall decide upon the proposal of Contractor within thirty (30) days thereafter.

41.10 Contractor and Operator shall ensure that:

(a) the pertinent completed environmental impact studies are made available to its employees and to its Sub-Contractors to develop adequate and proper awareness of the measures and methods of environmental protection to be used in carrying out Petroleum Operations; and

(b) the contracts entered into between Contractor and Operator and their Sub-Contractors relating to Petroleum Operations shall include the provisions stipulated herein and any established measures and methods for the implementation of Contractor's and Operator's obligations in relation to the environment under this Contract.

41.11 Operator shall, in cooperation with Contractor, prior to conducting any drilling activities, prepare and submit for review by ROC contingency plans for dealing with crude oil spills, blowouts, fires, accidents and emergencies, designed to achieve rapid and effective emergency response. The plans referred to above shall be discussed with ROC and concerns expressed shall be taken into account.

(a) In the event of an emergency, accident, oil spill or fire arising from Petroleum Operations affecting the environment, Operator shall forthwith notify ROC and Contractor and shall promptly implement the relevant contingency plan and perform such site restoration as may be necessary in accordance with Best International Petroleum Industry Practices.

(b) In the event of any other emergency or accident arising from the Petroleum Operations affecting the environment, Operator shall, in consultation with Contractor, take such action as may be prudent and necessary in accordance with Best International Petroleum Industry Practices.

41.13 Where the Contract Area is partly located in areas forming part of certain national parks, sanctuaries, mangroves, wetlands of national importance, biosphere reserves and other biologically sensitive areas passage through these areas shall generally not be permitted. However, if there is no passage, other than through these areas to reach a particular point beyond these areas, permission of the appropriate authorities shall be obtained by ROC for the benefit of Operator.

41.14 The obligations and liability of Contractor and Operator for the environment hereunder shall be limited to damage to the environment which:

(a) occurs after the Effective Date and prior to the expiry or termination of this Contract; and

(b) results from an act or omission of Contractor or Operator.

41.15 Except for cases of Gross Negligence and Wilful Misconduct on the part of Contractor and/or Operator, all costs incurred towards protection of the environment shall be treated as Petroleum Costs.

41.16 Any costs approved by the ROC and incurred by the Contractor in remediation of conditions existing prior to the Effective Date and identified in the first study noted in Article 41.6 shall be considered Supplementary Costs.

41.17 In the event that Petroleum Operations are delayed, curtailed or prevented due to extended delays in acquiring necessary environmental approvals, the Parties shall meet and agree an appropriate extension of the Term together with all rights and obligations hereunder, subject to the provisions of Article 8.

B. Extracts from Exploration, Development and Production Contract Model[3]

Article 26–Employment, Training, Technology Transfer and Scholarship Fund and Infrastructure Fund

26.1 Without prejudice to the right of Operator to select and employ such number of personnel as, in the opinion of the Operator but subject to Article 13.2, are required for carrying out Petroleum Operations in a safe, cost effective and efficient manner, Operator shall, to the maximum extent possible, employ and require Sub-Contractors to employ Iraqi nationals having the requisite qualifications and experience. Employment of Iraqi nationals shall be performed in a manner that engaged them in carrying out Petroleum Operations jointly with Operator and aiming to assume full responsibility of management and carrying out of Petroleum Operations by Iraqi nationals in accordance with Article 9.12 (a).

26.2 Starting from the first Calendar Year after Effective Date and throughout the Term, Contractor shall pay into a bank account established and managed by the Ministry of Oil / ROC, an annual amount of _____ US Dollars (US$____) for an Employment, Training, Technology and Scholarship Fund. Fund payments shall not

[3] There is no signed oil contract publicly available. Only a model of Exploration, Development and Production Contract from the fifth bidding round held in 2018 is publicly available, see <https://oil.gov.iq/upload/upfile/ar/659.pdf>.

be recoverable as Petroleum Costs, and if not paid annually, the Fund amount shall be aggregated, and if not paid by Contractor, ROC shall have the right to deduct the aggregated amount from the invoices submitted by Contractor.

26.3 The Employment, Training, Technology and Scholarship Fund shall be used for programs of on-the-job training and practical experience in Petroleum Operations, academic education and to support oil and gas related technology and research including the establishment or upgrading of research institutes inside the Republic of Iraq. Operator is required to coordinate with and provide the necessary support to ROC inside and outside Iraq in order to fulfill the Employment, Training, Technology and Scholarship programs.

26.4 In order to ensure employment of Iraqi nationals and the gradual and progressive reduction or replacement of expatriates, no later one (1) year after the Effective Date Operator shall, in consultation with ROC, establish and implement training programs for ROC employees to be qualified for and subsequently assume staff and other operational positions in each phase and level of Petroleum Operations including skilled, technical, executive and management positions.

26.5 Within thirty (30) days of the approval of any Work Program and Budget in accordance with Article 12, Contractor shall deposit in a bank account designated by ROC for the benefit of the Infrastructure Fund, an amount equal to ____ US Dollar (US$ ____), which shall be considered as Petroleum Costs. If such Fund shall not be deposited in the said bank account, it shall be aggregated, and if not paid by Contractor, it shall be deducted by ROC from the invoices submitted by Contractor.

26.6 Operator may establish, inside the Republic of Iraq, in consultation with ROC or its designated Iraqi entity a joint research center to provide technical support in respect of the Petroleum Operations. The cost of such center'sestablishment shall be part of the Employment, Training, Technology and Scholarship Fund as per Article 26.2, but if the said Fund is not sufficient, the additional cost incurred by Contractor shall be considered as Petroleum Costs.

APPENDIX 3

Table A-3: Themes of Corporate Social Responsibility

Economic	Social
	Labour and the Workplace
➢ Economic value created (e.g., revenue and retained earnings)	➢ Characteristics of workforce
➢ Economic value distributed (e.g., to employees, through community investment and donations , to governments – through taxes and royalties)	➢ Employee turnover
	➢ Employee benefits
	➢ Labour/management relations
	➢ occupation health and safety
	➢ Training and education
➢ Financial impacts of climate change	➢ Diversity and equal opportunity
➢ Coverage of pension plan	
➢ Financial assistance received from government	Human rights
	➢ Investment and procurement practices
➢ Wages	➢ Non-discrimination
➢ Employment of locales	➢ Freedom of association and collective bargaining
➢ Use of locale suppliers	
➢ Public infrastructure investment	➢ Child labour
➢ Public services rendered	➢ Forced and compulsory labours
	➢ Security Practices
Environment	➢ Indigenous rights
	Society
➢ Material use and recycling	➢ Community impact of operations from entering operating and exiting
➢ Energy consumption (e.g., efficiency, conservation, renewable *vs*. non-renewable)	➢ Corruption
	➢ Public police (e.g., government lobbying and political interactions)
➢ Water use and recycling	➢ Anti-Competitive behaviour
➢ Biodiversity impact and protection	➢ Compliance
➢ Polluting emission (e.g., greenhouse and ozone depleting)	
➢ Polluting effluents	
➢ Waste (both hazardous and nonhazardous)	*Product Responsibility*
➢ Environmental impacts of products and services	➢ Customer health and safety
	➢ Product and service labeling
➢ Environmental impacts of transport	➢ Marketing and communications
➢ Compliance with environmental laws	➢ Customer privacy
	➢ Compliance

Source: Michael Kerr et al, 2009[1]

[1] This table summarises CSR Issues addressed in the economic, environmental, and social performance indicators of the Global Reporting Initiative. Source: Michael Kerr, Richaed Janda and Chip Pitts, *Corporate Social Responsibility: A legal Analysis* (LexisNexis, 2009) 12.

APPENDIX 4

Article 9 of the Brazil-Malawi Agreements on Cooperation and Facilitation of Investments

2015

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.
2. The investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment:

a) Stimulate the economic, social and environmental progress, aiming at achieving sustainable development;
b) Respect the human rights of those involved in the companies' activities, consistent with the international obligations and commitments of the Host Party;
c) Encourage the strengthening of local capacities building through close cooperation with the local community;
d) Encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training;
e) Refrain from seeking or accepting exemptions that are not established in the legislation of the Host Party, relating to environment, health, security, work or financial incentives, or other issues;
f) Support and maintain good corporate governance principles, and develop and apply good practices of corporate governance;
g) Develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the society in which the operations are conducted;
h) Promote the knowledge of workers about the corporate policy, through appropriate dissemination of this policy, including programs for professional training;
i) Refrain from discriminatory or disciplinary action against the employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or violate the standards of corporate governance that the company is subject to
j) Encourage, whenever possible, the business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided in this Article; and
k) Respect local political activities and processes.[1]

[1] *Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi*, signed 25 June 2015 (not yet in force) art 9.

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