

Examining corporate social responsibility of multinational corporations: The validity of international guidelines

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Abstract

This paper will begin with a discussion of the concept of Corporate Social Responsibility, what it entails and the inapplication of the concept to cross-border issues.

Secondly, the discussion will lead into an analysis of Multinational Corporate Entities, focusing on ways in which the parent company can be held liable in the courts of the home state.

The Corporate Social Responsibility (CSR) concept presents not only a picture of theories but also a number of approaches, which are disputable, vague, complex and ambiguous. This article critically analysis the concept of CSR in relation to the liability of Multinational Corporate Entities.

By examining the main CSR hypothesis and related approaches under four pillars:(a) are corporations only interested in wealth creation (b) are there enforceable laws or guidelines under OECD and International Law as to establish liability of corporations(c) can Multinational Corporate Entities be held criminally liable (d) moral theories, based on ethical responsibilities of corporations to society.

Multinational Corporate Entities operate in what has been described as “a vacuum between ineffective national laws and non-existent or unenforceable international laws”. (Corporate Social Responsibility Human Rights and the Law, Amao Olufemi,2011)

Under International Law the MCEs are narrowly recognized and usually not directly bound by International Law. The effort as to the way MNEs operate with regard to Corporate Social Responsibility have resulted in soft laws and/or self-regulation.

Moreover, it is imperative to address the role of MNEs in developing countries in relation to the pivotal impact in their economies. The need for such economic injections has overlooked the necessary steps that such corporations are required under soft laws or international guidelines to follow. Governments should not believe that they are helping businesses by failing to provide adequate directions or instructions as to human rights impact of corporate activities. All states have a legal obligation to protect human rights.

As the concept of CSR has been evolving so has the criticism. It is from an economic perspective that CSR has been criticized for being vague in its aims set for itself and alienating Foreign Direct Investment from developing countries which economies greatly rely on as to the quality of life for their citizens.

While from a legal dimension of CSR considers the concept as a means of accommodating legal changes to accomplish CSR objectives.

Keywords: Corporate, Social, Responsibility, Entities.

Introduction

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Areas where applied the Canon of Benda

The concept of 'Corporate social responsibility' is not a new one as it can be traced back to 1909 to the famous words of President Theodore Roosevelt, i.e. "corporations must recognize their responsibility not merely to the shareholders but to the community at large" (Vincke & Dieux, 2005, p.)

There is no universal definition as such but various organizations and authors have attempted to define the concept. According to Parkinson, corporate social responsibility refers to "the responsibility of the company with respect to the society where it operates" (Parkinson, viti 1993).

CSR has also been defined as "the continuing commitment by business to behave ethically and contribute to economic developments while improving the quality of life of the workforce as well as of the local community and society at large" (World Business Council for Sustainable Development, viti 2000).

An ongoing debate has been whether a company has responsibilities towards the society as a whole or the shareholders only. It has been held that "the social responsibility of business is to increase its profits" and that spending money on CSR would mean that the company would no longer be attractive to investors (Friedman & Parkinson, viti 2000).

However, it is widely accepted that this perception of CSR has considerably changed (CSR – The Oxford Handbook of corporate social responsibility – Abigail McWilliams, Deborah E. Rupp, Donald S. Siegel, Donald S. Siegel, Gunter K. Stahl, david A. Waldman, viti 2019).

Now there is greater awareness that goes beyond the profit maximization philosophy. The focus has shifted to a community approach that asks the businesses to consider the impact of their actions on the society, community and environment at large. Emphasize on s172-enlightened shareholder concept- codification-directors duty businesses need to consider their impact on the society, community, and environment.

1. Legal Instruments Governing CSR

The legal instruments available under international law to combat multinational human rights abuses and environmental damage are the OECD Guidelines for Multinational Enterprises revised in 2000 and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises. (Fifth Edition- mars 2017)

The OECD guidelines are voluntary recommendations aimed to the MCEs operating

in the 42 countries that are part of this initiative.

These guidelines endorse a number of issues in relation to corporations such as, environmental protection, human rights, bribery, and taxation act. To enforce the guidelines the OECD has created National Contact Points NCPs which deal with complaints under the guidelines. However, it cannot enforce decisions and cannot impose penalty. (Muchilincki, 2007,)

Whereas the ILO Principles address employment, non-discrimination, wages, working conditions and health and safety related issues. (The teeth of the ILO – The impact of the 1998 Ilo Declaration on Fundamental Principles and Rights at Work)

In 2000 the UN produced a set of guidelines, 9 principles that address issues such as human rights labor standards and environmental protection. (United Nations guiding principles on business and human rights, viti 2015)

It is very important to indicate that these guidelines impose no legal sanctions as they are voluntary and not binding. This clarifies the point that CSR, through such codes, does not have the capacity to control MCEs in relation to the damage they cause.

For most parts, these codes remain weak and lack credibility. (Pedamon, 2010)

Although multinational corporations do have an international character, in the way they operate, they are no subject of international law and therefore are under no obligation under International Law.

It is suggested that a legal framework should be introduced in order to make corporations accountable for non-compliance with the rules. (Pedamon, 2010)

Historically the human rights obligations have been responsibilities of the State. However there has been a shift in this view.

One important instrument that requires mention here is the Universal Declaration on Human rights which imposes obligations on states and ‘other organs of society’. (Universal Declaration of Human Rights – United Nations, 2015)

It has been argued that the other organs of the society involves corporation and the UN Human Rights Norms for corporations set human rights standards for MCEs in the international level (Although states are having the primary responsibility to promote human rights, TNCs are also responsible for promoting and respecting human rights. Preamble UN Norms).

Moreover, the UN norms that derive from the universal Declaration of Human Rights and other ratified conventions address: “equality of treatment, right of security, war crimes, torture, crimes against humanity and other crimes against the human person as identified under international law” (Muchilincki, 2007).

The ILO (Muchilincki, 2007) also calls for companies to respect Human Rights in relation to forced labour (Philip, 2005).

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises, addresses health and safety provisions, adequate food and drinking water and regards such provisions as Human Rights (Kammainga ,Menno & Zarifi, 2000).

Once again it must be borne in mind that these norms and principles are not binding and therefore their effectiveness is questioned.

2) CRS and Domestic Laws

With regard to the national level legislation it is argued that the US courts provide redress to international human rights victims affected by corporations. The claim can

be either US corporation or non-US corporation.

The initial case of *Doe v Unocal* (41 ILM 1367, 2002) established that a private claimant could bring an action against a parent company in the US in relation of acts giving rise to human rights abuses committed by its subsidiary, under the US Alien Tort Claim (ATCA). (41 ILM 1367, 2002)

The claim will be allowed as long as it can be shown that the corporation was involved in the human rights violations even if it has not directly committed the abuses. The human rights abuses that fall under the ATCA should be well established in international law (*Sosa v Alvarez Machain* 124 S Ct 2739, 2004). In the case of *Chevron Texaco Corp* (US Dist Ct ND Cal 22 March 2004), although the parties did not win they succeeded in bringing a case for human rights abuses under the ATCA (Alien Tort Claims Act). Nonetheless, it is submitted that it is still very difficult to find corporations liable for violation of human rights in international law. It is argued that only interference of international binding regulation would settle the issue. (Chambers, 2006).

There is no international criminal liability imposed on multinational corporations apart from self-regulatory guidelines found in the different international documents, which are of course not binding (Kremintzer, 2010).

It is very important to point out that the ICC (International Criminal Court) does not have jurisdiction over this issue. It is suggested that because of the powerful position that these global actors hold, they should be held criminally liable for any corporate abuses (Understanding The International Criminal Court).

The harm that they can cause is unlimited and therefore they should be punished. And that it is not enough for this legislation to be overseen by the states, It should be left in the hands of the ICC therefore to extend its jurisdiction to corporations. (Kremintzer, 2010)

It has been accepted that if MCEs can enjoy the protection of Human Rights, they should also have obligations to respect and protect human rights in the countries they operate. (Muchilincki, 2007)

Finally, is it for the home state to take jurisdiction and hold the directors of MCEs to account for acts they have committed in their host states.

There is no doctrine under English law in relation to the liability of an English based parent company for the acts of its subsidiary committed abroad.

However, the case of *Adam v Cape* (1 All ER 929, 1991) has at least clarified the issue of jurisdiction, it is now possible for a parent company to be sued in England even if there is a more appropriate forum as long as it can be shown that the host country lacks the structure in which justice can be achieved. (Muchilincki, 2002)

Conclusion

Finally, in terms of the accountability of MCEs in their home states, the circumstances in which such an action will be allowed have been to a certain extent clarified through case law.

In order for the parent to be held liable in the home state, one must overstep the doctrine of *Solomon v Solomon* that establishes the concept of separate legal entity.

This would involve the courts to lift the corporate veil and treat the parent and the subsidiary as the same entity. (Solomon v A Solomon and Co Ltd (1897) AC 22 case summary)

Holding the parent accountable has been possible in numerous cases.

A very significant case on the subject was the case of Adams v Cape Industries (1991) where it was held that only three situations a parent and subsidiary will be treated as one and those situations involve single economic unit, a corporate form is being used as a façade and the agency principle where it can be shown that the subsidiary is an instrument in the hands of the parent.

It must be noted that the bar for piercing the veil has been set high and the courts are reluctant to lift the veil in order to do justice. However, in the case of Kensington International Ltd v Congo (EWHC 2684, 2005), the court found that veil can be lifted if different transactions between a numbers of related subsidiaries were a sham and were designed to avoid liabilities.(CA 7 November 2007)

Many of the recent cases have involved the issue of tortious liability of the parent company for acts committed by the its subsidiary. One of the first cases to address the question was Connelly v RTZ Corp Plc (AC 854, 1998), here the courts assumed jurisdiction in England on the bases that justice could not be achieved in Namibia. Subsequently, in the case of Lubbe v Cape Industries (2000) continued the trend set by RTZ and here the courts assumed jurisdiction on the bases that South Africa lacked the appropriate court structure to deal with the case. It can be seen from the different outcome of a number of cases that there is no doctrine on the liability of a parent company for the acts of its subsidiary in English Law.

Companies therefore can only be held accountable ,in limited circumstances, under the agency principle (Adams v Cape),where it can be shown that the acts of the directors are attributed to the company allowing the company to be held liable. This only applies in cases of civil claims.(Corporate Social Responsibility, Human Rights and the Law- Olufemi Amao, 2011)

It is therefore submitted that there cannot be effective control, unless the home state of the parent company, controls the whole, by controlling the parent. To conclude this paper, a number of suggestions has been provided to improve the current position on accountability of multinationals.

One of them being the introduction of a Treaty (Zerk, Jennifer, Multinationals and Corporate social responsibility,Cambridge University press 2006,p.309) that allows lifting the veil in cases that do not amount to fraud or sham of documents and a further recommendation has been for companies, to be insured, in order to avoid the risk of lifting the veil entirely (Meeran, 1999).

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