

MULTINATIONAL CORPORATE ENTITIES: IS CORPORATE SOCIAL RESPONSIBILITY AN INDUCEMENT?

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A – INTRODUCTION

Over the past years, there have been lots of terminologies used for global corporations like multinational corporations, transnational corporations and multinational enterprises. In practice, there are no specific differences between them today^[1]. Muchlinski suggested some characteristic behaviours of MNEs. Firstly, they operate their assets and control their functions across national borders^[2]. Secondly, the managers of the MNEs have right to control the activities across national frontiers despite the different national identities. Thirdly, MNEs have liability to trade across national borders not only with the products but also some technical and managerial skills. Multinational enterprises choose to work with subsidiaries in the Host States. The companies are binded with the domestic company laws but the problem is which law do the belong to while they operating through their subsidiaries across the world and who will be responsible for the activities. In addition to this, there are three major areas of MNEs whose activities captured attention; issues relating to human rights, risks in international financial transactions and corporate social responsibility. In this part, corporate social responsibility will be mentioned with the legal issues of its effect on global conduct of business including international human rights law and international criminal law. Also, the question of whom or which company would be responsible for the harms cause by MNEs will be answered.

Corporate Social Responsibility is a concept, where companies decide to make a contribution to a better society and clean environment. Companies interact with stakeholders to prevent the social and environmental concerns of the society. They run with the social responsibility on volunteer basis. As the MNEs are the vehicles of globalisation, some activities of the company cause human rights abuses, environmental harms and other ethnical problems. It might be thought that multinational corporations do not pay enough attention to corporate social responsibility but some surveys show us that more corporations thinking of regulating their companies with corporate social reasonability^[3] by 2006. The aim of the companies are maximizing their profits and succeeding the company in the right way but they should not give harm or damage to the

[1] Olufemi O. Amao, The foundation for a global company law for multinational corporations, *International Company and Commercial Law Review*, (2010) 21(8), 275-288

[2] Muchlinski, P. T, *Multinational Enterprises & The Law*, Second Edition, Oxford University Press, 2007, p.7

[3] See Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey, conducted by John Ruggie, 2006, available at <http://198.170.85.29/Ruggie-survey-Fortune-Global-500.pdf>

society and environment while doing their jobs. The structure of corporate governance used to not focus on the values of social and economical matters. These were the concerns of CSR but the attention has been changing and in order to be a good company it is better to committed to CSR^[4]. It could be controlled by the companies or the governmental organizations. Also there are some organizations around the world controlling the activities of the big companies like how the product is produced, especially the conditions of the workers and the environment and its process.

It is better to start with distinguishing the terms between ‘relational responsibility’ and ‘social activism’. The first expression refers to steps of promoting the groups such as employees, customers and who are affected by the actions of the company activities. It includes keeping the image of the company and acting fairly between the groups^[5], which the company needs for carrying out the business. Social activism is beneficiary act of the company for the society or interest groups but not the scope of the company. As a result of regulation of MNEs, they would have to take into consideration of international human rights and not to commit a crime. It could be accepted that enough attention was not paid to international human rights in the past years but countries have adopted their legislation to protect human rights in the recent years. Also, some penalties are stated by the international organizations if the companies commit a crime in the cross-borders. Companies Act is strengthening this proposition because it has some sections stating the duties of directors and what kind of rules whether they have to obey while doing their job. In section 172(1(b)) and (d) it is said that:

“A director of a company should act in faith and promote the success of the company and regard to the interest of workers and the impact of the company’s operations on the community and the environment^[6].”

It is meant that the companies are forced to obey the human rights and not to pollute the environment. Also, the sections stated that companies should provide good working conditions and reasonable pay for their work for the company. In my opinion, this could be an extension of Corporate Social Responsibility.

There had been some attempts to make law for considering responsibility for companies in mid 1950s and the states started to involve the regulation of MNEs. Contrary to the past years, according to deregulation and economic liberalisation, the context of global conduct of business had a big variation. It has paid attention to self-regulation to prevent the concerns of the public but

[4] Adeyeye, A, The limitations of corporate governance in the CSR agenda, Company Lawyer, 2010

[5] Parkinson, J.E., Corporate Power & Responsibility: Issues in the Theory of Company Law, Clarendon Press, 2002, p.267

[6] S. 172(1(b)), 172(1(d)) Companies Act, 2006

this conduct make some questions appear in the mind of the society like who will be responsible for the harms of the companies^[7]. In the English tradition it is said that the directors of the company would be liable for the damages but there is a distinction of the subject. If the directors acted in good faith and could not predict the result of their work, they would not be responsible. In the case *Bell Houses Ltd v City Wall Properties Ltd*^[8], the court held that directors would not be responsible for their duties if they are honest in the Home State because they would get that power from the shareholders. On the other hand, if the directors' duties are breach of international human rights or commit a crime and the issue is relevant to their liabilities, then they could be judged in the courts.

Another issue is about the responsibilities of other personalities in the company like shareholders, shadow directors and the employees whether they could be constrained to account in the courts of Home State or Host State. The shareholders of the company could only take part in the procedure of selecting the directors so in my opinion; they do not have direct liability. Shadow directors are same in the situation like directors but a damage or harm could not be attributed to the employees unless it is a personal duty. The problem about the place whether the person or the board would be responsible is either home or host state. It could be a possibility of putting directors of MNEs into account in front of the courts in the Home State, because of abusing human rights or committing a crime. On the other hand, there are some authorities of courts in the Host States for judging. In the case, *Multinational Gas and Petrochemical Services Co v Multinational Gas and Petrochemical Services Ltd*^[9], the Court of Appeal rejected the jurisdiction of parent companies and held that the place of action is important for the jurisdiction so the claim could be bought in the state of subsidiary. All of the problems rise from a main point. Are the MNEs subject to international law because if they are not, the best way to protect the human rights with national legislation in either host or home states. Also international criminal law fills the gap between the human rights and corporate social responsibility. International criminal law in the subject of corporate social responsibility is a small area. Genocide, crimes against humanity and war crimes can be counted as codes of it^[10].

Under the lights of the issues, which are mentioned above, corporate social responsibility has started having an important role for the companies which

[7] Jenkins R., "Globalisation, Corporate Social Responsibility and Poverty, *International Affairs*, 2005, 81(3), 525, 526 and 527

[8] [1966] 2 QB 656

[9] [1983] 2 All ER 563

[10] Larissa van den Herik, Jernej Letnar Cernic, *Regulating corporations under international law: from human rights to international criminal law and back again*, *Journal of International Criminal Justice*, 2010

work across the borders. The society has become concerned about the pollution of the environment and abuse of human rights but it is still debatable that who will be responsible for the harms of MNEs and which courts have jurisdiction to take them into account.

B – REVIEW OF A CASE

After discussing the role of corporate social responsibility in the context of the global conduct of business by multinational corporations, we can start identifying the issues in the case. In the case, there is a mining company called Wrangham & Salerno Plc (WSP Plc), which is incorporated in England & Wales and listed in London Stock Exchange. This company has lots of subsidiaries around the world so WSP Plc could be considered as the parent company. In June 2006, incorporation of a company was agreed between the board of directors of WSP Plc, and it was called WSP Chile SA. WSP Texas and WSP Idaho, which were the shareholders of WSP Chile, were the two subsidiaries of WSP Plc. After entering the business in Chile, some damages and harms were seen like the contaminations of the supply of water some of the villages. Also, the workers were forced to work in hard conditions and some of workers were at the ages of 13. In my perspective, WSP Chile did not pay enough attention to their responsibilities including environmental responsibilities and human rights.

The disappearance of a reporter from a newspaper while visiting the mine in February 2008 forced Carlina Barros, who was a reporter from the same newspaper to go into action. She could not find anyone to talk both the workers and management of WSP Chile, but she found out that, many of the workers have cigarette burns on their parts of the body. This could be considered as crime against the workers because there was a possibility that these crimes could be done by the company. Then, she asked for advice to a lawyer in Chile against the company for a possible claim for prosecution and compensation for the workers and villagers. There are some issues caused by the company including child labour, forced labour, environmental damage and torture.

It could be said that WSP Chile was the subsidiary company and WSP Plc was the parent company. In traditional law the State has all the rights. Conversely, the individuals are also responsible for human rights^[11]. It is understood that not only the states but also companies and people could be responsible for the damages. In addition to this, home states have some responsibilities to control their multinational corporations not to give damage or harm to host states. It is still arguable by some states but it is stated that this duty has to be taken by

[11] Joseph S., *An Overview of the Human Rights Accountability of Multinational Enterprises*, in Menno T. Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2002, p.75

home states for the international community^[12]. There are three possibilities for a claim in Chile, USA and England & Wales. Chile was the host state because it is incorporated by the parent company. England & Wales was the home state of the company because the company is listed in London Stock Exchange.

The best place to make a claim against the company is Chile because the damage is occurred in Chile and all of the workers and directors of the company are nationals of Chile. The damage to environment and human rights abuses – child labour, forced labour and torture – could easily be investigated by Chilean courts. In addition to this, international law could also be applied by the courts if necessary because it could be accepted that MNEs are subject to international law but in customary law MNEs are mostly subject to domestic law so they could only be judged by domestic courts. It could be firstly applied to the domestic courts, which is Chilean courts, to define the dispute and resolve it according to local substantive and procedural law.

Another claim could be brought to England & Wales. The parent company WSP Plc has to control the activities of the subsidiary in Chile. The Chilean company was not working apart from the decisions, which made by the parent company incorporated in England & Wales. Also, it could be said that English courts have jurisdiction to make decisions for both WSP Plc and WSP Chile because the control mechanism is located in England. In the case, *DHN Food Distributors Ltd v London Borough of Tower Hamlets*^[13] the judgement of the English court prove my ideas. It is held by the court that, the subsidiary and the parent company should be accepted as a whole and if a harm or damage is given by the subsidiary, then parent company would be regarded as responsible. It should be counted as a single economic entity so if a claim is submitted in the English courts, in my opinion, there is big possibility for winning the case, because the parents companies should be regarded as responsible for the actions of its subsidiaries^[14].

Last option for the claim is to be brought to the USA. As we mentioned above that the shareholders of the company are WSP Texas and WSP Idaho, which are the subsidiaries of the parent company WSP Plc. It might be thought that the shareholders of the company do not have responsibility for the damages and harms because in company law the directors, which are selected by the shareholders, are mostly responsible^[15]. On the other hand, the shareholders of WSP Chile are considered as companies and also, they could be considered as responsible under Alien Tort Claims Act in the USA and a claim can be

[12] Sornarajah, M. *The International Law on Foreign Investment* (2nd edition) Cambridge University Press, 2004, p.184

[13] [1976] 3 AER 462

[14] *Lubbe v Cape Plc* [2000] 4 All ER 268

[15] Grantham, R. & Rickett, C., (eds.), *Corporate Personality in the 20th Century*, Hart Publishing, 1998, p.101-105

brought to the courts by the individuals who are affected by the actions of a company. The courts have jurisdiction of any civil action by an alien tort in connection of national laws or a treaty of the USA^[16]. It would be possible for Carlina Barros to sue WSP Chile in the USA under the Alien Tort Claims Act for obtaining compensation for the workers and villagers.

The last issue in the case is about the problem between the parent company WSP Plc and its subsidiaries WSP Texas and WSP Idaho. WSP Plc agreed that the dividends would be remitted to the USA the equivalent amount of money which they receive from WSP Chile and WSP Idaho and WSP Texas agreed to buy mining equipment from WSP Plc to sell it to other companies in the corporate group. However, the agreement is breached by WSP Plc and they refused to remit the money to the USA. First of all, the parent company and its subsidiaries should be regarded as separate personalities and have limited liability to recourse the shareholders^[17]. It could be accepted that the owner of the subsidiaries are the parent company but this would not prevent the separate personality of subsidiaries. Lifting and piercing the veil of incorporation could be made carefully in the company law because companies are the result of the statutory provisions, the artificial creation of legislation and the creation of public law^[18]. The governing law of the incorporation about WSP Chile should be identified clearly. If the governing law is English then, the parent company could be sued in the English High Court. In English law, it is stated that when an application is received about lifting the corporate veil, the doctrine of *lex fori*^[19] is applied by the courts so if the governing law is not English law, the parent company still could be sued in the English High Court for breaching the agreement.

C – DISCUSSION & CONCLUSION

In Part C, the relationship between part A and part B and the similarities and discrepancies will be discussed. Corporate Social Responsibility is the similarity between the parts A and B. In Part A, it is told that Corporate Social Responsibility has no effect on the global conduct of business by MNEs but it is explained that it has been changing while the society is paying more attention to this behaviour of MNEs. Moreover, not only national responsibility but also international responsibility of the MNEs' is a real fact on the global business because MNEs are working across borders^[20]. There are some acts made by countries

[16] S. 1350 Alien Tort Claims Act 1789

[17] *Salomon v Salomon* [1897] A.C. 22

[18] Grantham, R. & Rickett, C., (eds.), *Corporate Personality in the 20th Century*, Hart Publishing, 1998, p.67-69

[19] *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296

[20] Pedamon, C., *Corporate Social Responsibility: a New Approach to Promoting Integrity*

for their individuals like companies to control their activities around the world or some principles stated by international organizations to limit the activities of companies. For an example, England government enforced Companies Act (2006) to control the duties of the workforce and activities of companies. If a harm or damage caused or a crime is committed by the corporations, then the liability would be a big problem to be solved for states and companies. In part B, the case is an evidence of how Corporate Social Responsibility is not regulated by the MNEs. There are breaches for both international human rights and international criminal law. A company could be sued under the domestic law either in the country of the subsidiary or in the country of parent company because responsibility could be attributed to all of them. Also, the responsibility about the directors is another issue mentioned above. In Part A, it is accepted that the directors are mostly responsible for the actions of the companies and they are delegated by shareholders to maximise the profits^[21]. On the other hand, it is mentioned that despite having separate legal personality of subsidiaries and the parent company, both of them could be accepted as a whole in some conditions. Then, we can come up to a problem in company law. In Part A, it is stated that the behaviour of multinational corporations is putting their directors in front of the Home State courts to give an account for the breaches of international human rights and international criminal law, but in part B, it could be understood that host state of the companies also have jurisdiction^[22]. Companies are investing sustainability, social and environmental goals by regulating corporate social responsibility in the business.

There is not a big connection between Part A and Part B in the subject of accountability. Some problems can also occur not only outside the companies but also inside the companies. As being not subject to international law, the companies are subject to domestic laws and in the corporate group all of the companies including parent company and its subsidiaries could have relations between them so breach of agreements and some legal issues might arise between them. This is another problem to be solved in the international law how and where these kind of problems could be solved.

To sum up all the ideas, Corporate Social Responsibility is either an obligation or voluntary regulation for companies and it is still arguable. Some companies choose self-regulation firstly, to have a good image on the consumers and be respectful to human rights but some companies do not pay enough attention to corporate social responsibility and solve this problem only obeying national

and Responsibility, *Company Lawyer* 2010, Vol. 31, No. 6

[21] Slaughter, C. M., *Corporate Social Responsibility: a new perspective*, *Company Lawyer*, 1997, Vol.18 No.10

[22] Art. 2, *Draft Articles on State Responsibility*, 2006

and international laws. Hence, the activities of companies are controlled by governmental or non-governmental organizations whether a damage or harm is given to the society or a crime is committed because if an issue is determined by these organizations they can be punished and the reputation of the companies might go down immediately. Government regulation could not always guarantee that multinational corporations act in fair but non-governmental organizations are growing day by day as the society are more enlightened and concerned about human rights and environment.

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