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978-1-107-01362-9 - Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption

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Excerpt

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Introduction

Anti-corruption is a corporate social responsibility (CSR) issue. Until quite recently, however, corruption was not typically associated with CSR. This may be because corruption is seen as an issue primarily addressed by hard laws and regulations, while CSR is seen as a voluntary corporate-led initiative promoting self-regulation. Corruption typically meant public corruption, with the spotlight focused on public officials and governments. The United Nations Global Compact (UNGC), which seeks to advance responsible corporate citizenship, added anti-corruption as the tenth principle in 2004, four years after the other nine principles were launched.¹

CSR as a potentially useful approach for combating corruption has been underexplored.² The many instances of corporate bribe payments which impact on economic, political and social aspects of society, especially in developing countries, call for a serious examination of the role CSR can play in the fight against international corruption. CSR can be defined as the broad set of responsibilities corporations face over and above profit maximisation. It requires the use of both binding and non-binding rules to ensure corporate compliance with these responsibilities. Currently, the major approach towards the application and implementation of CSR standards has been through the use of soft laws which are non-binding voluntary initiatives.

This book explores the soft and hard laws applicable to corruption as a CSR issue. It focuses on the supply side of corruption, an issue

¹ See UN press release, 'Global Compact summit concludes with emphasis on need to fight corruption', www.un.org/News/Press/docs/2004/eco70.doc.htm.

² See Indira Carr and Opi Outwaite, 'Surveying corruption in international business' (2008) 5 *Manchester J Int'l Econ. L* 3, 28.

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which international business has been associated with. The role corporations play in fuelling the engines of corruption is best addressed under CSR. The hope is to provide a fresh outlook on avenues for eliminating corruption, especially in developing countries, and increase scholarship in the area of corruption and CSR.

Corruption covers a wide range of issues including transnational bribery (or international corruption), embezzlement of public funds, trading in influence, and the concealment and laundering of the proceeds of corruption. The terms ‘international corruption’ and ‘transnational bribery’ will be used interchangeably in this book. They both refer to the offer or provision of money, goods or other benefits to a foreign public official in order to influence favourable business deals. The focus of the book is limited to transnational bribery because attempts to curb this are primarily directed at corporations, especially multinational corporations (MNCs). Transnational bribery has a negative impact especially on developing countries.

A rationale for curbing transnational bribery from a developed-country point of view prevalent in the early 1980s to late 1990s was to stop corruption as a barrier to trade. From this perspective, there is a need to prevent corrupt payments from causing economic inefficiencies, impediments to trade and investment in transitional markets, and impediments to the development of accountable democratic and market-oriented institutions in transitional markets.³ Since then, awareness has arisen of another rationale for curbing corruption. In addition to impeding investment, corruption undermines economic growth, burdens the poor and affects all aspects of development. On the adoption of the United Nations Convention against Corruption (UNCAC), Kofi Annan, then secretary-general of the UN, said ‘corruption hurts the poor disproportionately – by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign investment and aid’.⁴ This alternative rationale seems more discerning of the interests of both the developed and developing

³ Jeffrey P. Bialos and Gregory Husisian, *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies* (New York: Oceana, 1997), p. 5.

⁴ See Secretary-General’s Statement on the Adoption by the General Assembly of the United Nations Convention against Corruption, New York, 31 October 2003, www.un.org/apps/sg/sgstats.asp?nid=602.

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world. Effective deterrence of transnational bribery is needed not only to ensure competitiveness in international trade, but also to impact positively on development, economic growth and poverty reduction – issues developing countries are all too familiar with.

Part I of this book concerns the general subject of CSR and anti-corruption.

Chapter 1 discusses three issues at the heart of CSR: issues of profit maximisation versus broader responsibilities, the voluntary versus mandatory approach and the emergence of universal standards of CSR. The major problem evolving universal standards face is that of enforcement. Chapter 1 shows how soft laws emerged as the preferred norm for enforcing CSR. Chapter 1 also discusses the global changes taking place in domestic and international spheres aimed at improving CSR. These include changes in legal awareness of corporate power, public scrutiny, legal action and corporate awareness of the importance of CSR.

Chapter 2 outlines anti-corruption as a CSR standard. It discusses corruption and gives instances of international corruption implicating MNCs. The chapter then examines the soft and hard laws regulating international business in relation to corruption. The impact of such laws in improving CSR and eliminating corruption is discussed. Voluntary rules to curb international bribery developed by three non-state actors, namely Transparency International, World Economic Forum and the International Chamber of Commerce, are examined. Following the examination of selected voluntary rules, mandatory applicable national laws addressing transnational bribery in three selected countries, namely the United Kingdom, the United States and Nigeria, are considered.

Part II of this book focuses especially on mechanisms for curbing international corruption through the lens of CSR.

Chapter 3 explores the role of global governance. Global governance and the emergence of global administrative law are significant concepts in the fight against corruption. The link between global governance, anti-corruption and development from a CSR point of view is explored, as is the manner in which global governance can reduce international corruption for the benefit of development. Hitherto, links between corruption and development have usually been addressed from international development or governance (government) perspectives.

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Chapter 4 considers international law. It advances the discussion, introduced in Chapter 2, of the limitations of both soft laws and domestic hard laws in the fight against corruption. What impact does international law have in the fight against corruption? This chapter examines international laws categorised as regional and multiregional laws. The chapter then reviews the approach of current international law towards corporate liability and jurisdiction for prosecuting international corruption. In light of the failure of states to hold corporations liable for transnational bribery, the chapter considers the justification, criticisms and consequences of holding corporations directly responsible for the international crime of corruption.

Chapter 5 explores the role of civil liability as a potential deterrent in the fight against corruption. The chapter examines the application of the law of contract, specifically illegality, and the approach of English courts towards the enforceability of corrupt contracts and arbitral awards. It discusses the recent trends in international arbitration regarding the role of arbitrators in addressing international corruption. It considers the application of tort laws such as breach of fiduciary duties and interference in economic advantages used in the UK and US courts, which may serve as deterrents against corrupt corporate practices. Most approaches to transnational bribery see it as a crime warranting state prosecution and seldom consider the relevance of civil law.

Chapter 6 explores the role of corporate governance. Many writers believe corporate governance is relevant for addressing CSR and needs to be revamped. The chapter considers the current status of corporate governance in relation to broad or external CSR issues, particularly international corruption. It examines derivative actions which fall under the umbrella of corporate governance, arguably as an example of how corporate governance impacts on CSR. It considers the usage and impact of derivative actions in compelling corporate responsible behaviour in matters involving international corruption. The chapter attempts a comparative study of the use of derivative actions in the US and the UK. The recent changes in the UK law pertaining to derivative actions and the relevance of these for CSR and transnational bribery are also considered. Finally, the increasingly important role of institutional investors is examined.

Chapter 7 concludes the book.

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PART I

*Corporate social responsibility
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CHAPTER I

Corporate social responsibility

DEFINITION AND SCOPE OF CSR

CSR covers a wide spectrum and there is no consensus on the meaning of the term. It emerged from the need to address wrong corporate behaviour regarding social issues or issues which do not directly impact on the business bottom line. Such issues include environmental, labour and human rights abuses external to the company (broad or external CSR issues), particularly abuses occurring in developing countries. CSR was seen as the voluntary actions businesses take to address these issues. Many CSR-related codes, guidelines and initiatives evolved and were adopted by companies to prove they were committed to social responsibility.

CSR has also been related to the philanthropic and charitable activities companies carry out in order to give the impression that they are good corporate citizens. Just as good citizens who can afford it give charitably, so corporations began to give charitably but perhaps on a larger scale. Such charitable giving is not without questions. Proponents of capitalism have questioned the right of executives to give away money which does not belong to them.¹ CSR was understood to be about companies' measures to regulate business activities because they believed it was the moral thing to do and would improve public perceptions of their style of business and ultimately improve their bottom lines. Thus a direct relationship between CSR and profit maximisation was proved.

However, it soon became clear that CSR is not really about improving a company's bottom line. It is about the relationship

¹ Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962).

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between business and society. If this relationship is marred by either party, there will be consequences. In the case of business, there are repercussions for wrong company action which affect societal expectation. These consequences may not merely give rise to legal sanctions; they may affect the very right of corporations to freely pursue their business activities. For instance, the total loss of confidence between Shell and the Ogoni people as a result of environmental protest, which led to the killings of Ken Saro-Wiwa and eight others by the Nigerian military in the late 1990s, has led to Shell being removed as an operator in Ogoniland.²

This chapter will address three main issues at the heart of CSR: whether corporations have broad responsibilities other than profit maximisation; whether CSR is beyond rules or subject to voluntary or mandatory rules; and whether universal standards of CSR are evolving.

Do corporations have broad responsibilities?

There are two main schools of thought regarding this issue, traditional and emerging. The traditional school says the only responsibility corporations have is that of maximising profits to shareholders. A well-known author associated with this view is Milton Friedman. In his book *Capitalism and Freedom* (1962), which was based on a series of lectures he gave in 1956, he said:

the view has been gaining widespread acceptance that corporate officials and labor leaders have a 'social responsibility' that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the *rules of the game*, which is to say, engages in open and free competition, without deception or fraud.³

The CSR issues Friedman was concerned with included philanthropy, production and labour costs. Examples of CSR cited by Friedman

² See G. Timothy, 'Shell to leave Ogoniland by December – Yaradua', *All Africa Global Media*, 5 June 2008. See also Andrew Walker, 'Fresh start for Nigerian oil activists?' BBC News, 11 August 2008.

³ Friedman, *Capitalism and Freedom*.

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include the alleged social responsibility of business officials and labour leaders to keep prices and wage rates down in order to avoid price inflation, and claims that business should contribute to the support of charitable activities and especially universities. Friedman felt that a responsibility to keep prices and wage rates down would lead to product and labour shortages, grey markets and black markets. He said price controls, whether legal or voluntary, if effectively enforced would eventually lead to the destruction of the free-enterprise system and its replacement by a centrally controlled system, and would not be effective in controlling inflation. With regard to charitable activities, Friedman felt that such giving was an inappropriate use of corporate funds in a free-enterprise society.⁴

Corporate philanthropy should not be equated with CSR; it is but one aspect of it. Friedman's objective was to ensure that social responsibility does not affect the workings of a free-market economy adversely, specifically focusing on the market in America at the time. The issues of concern in recent times are more global in scope and include human rights, the environment, development and anti-corruption (broad issues). There are instances in which adherence to social responsibilities will conflict with a free-market economy and the ultimate corporate goal of profit maximisation. A close examination of these broad issues shows that Friedman's assertions can no longer hold true. In these areas, corporations increasingly have to consider other stakeholders.

Moreover, it would seem that the proponents of this school are not averse to state regulation or intervention for controlling many different areas of business activity. They simply want business to focus on making profits and to stay accountable to shareholders only. Indeed, in an article published in the *New York Times* magazine in 1970, Friedman made reference to the need for corporate executives, in carrying out their business responsibility for profit maximisation, to be mindful of the basic rules of society, embodied in law and ethical custom.⁵

⁴ See *ibid.*, pp. 134–6.

⁵ *Ibid.* See also Milton Friedman, 'The social responsibility of business is to increase profits', in W. Michael Hoffman and Robert E. Frederick (eds.), *Business Ethics: Readings and Cases in Corporate Morality* (New York: McGraw-Hill, 1995), pp. 137–41.

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In January 2005, *The Economist* published a survey on CSR which suggested profit maximisation should be the corporation's goal. The survey also suggests that CSR reflects a mistaken analysis of how capitalism serves society and will distract attention from genuine problems of business ethics that need to be addressed. In their view, getting the most out of capitalism requires lots of public intervention of various kinds such as taxation, public spending and regulation in many different areas of business activity. It also requires corporate executives to be accountable to shareholders.⁶ Despite Friedman's writings in 1962 and later, an analysis of the emerging school of thought and recent developments in CSR suggests corporations do have broader social responsibilities.

The emerging school of thought is shifting noticeably towards the concept of corporate social responsibility. It believes business has broader responsibilities that extend beyond owners and shareholders to include employees, customers, suppliers and host communities (multi-stakeholders). Proponents of this school believe businesses should be increasingly considered responsible because they are effectively the actors in society – producers, distributors, tax payers, polluters, investors, service providers etc. They are the most effective 'private forces to do both widespread good and widespread harm'.⁷ Christopher Stone, a well-known writer who believes corporations should be socially responsible, has challenged the fundamental assumption – that managers of corporations should be steered by profit and not societal values – underlying four related though separate propositions opposing CSR.⁸

⁶ See 'Survey: corporate social responsibility', *The Economist*, 20 January 2005, <http://economist.com>. Articles in the survey include: 'The good company'; 'The union of concerned executives'; 'The world according to CSR'; 'Profit and the public good'; and 'The ethics of business'. See also Friends of the Earth, 'Behind the shine: the other Shell Report 2003', www.foe.co.uk/resource/reports/behind_shine.pdf, quoting a *Financial Times* editorial of 5 April 2004, 'There is a respectable body of opinion that believes social responsibility is a costly distraction from companies' one true purpose of making a profit', p. 33.

⁷ Christopher Stone, *Where the Law Ends* (New York: Harper & Row, 1975).

⁸ *Ibid.*, pp. 80–7. The four related propositions are (1) the promissory argument – the supposed promise running from management to shareholders that it would maximise shareholder profits; (2) the agency argument – shareholders designated management as their agents; (3) the role argument – supposed consideration of the role of management; and (4) the polestar argument – if managers acted as they promised shareholders they would, this would be best for all. See also Christopher Stone, 'Why shouldn't corporations be socially responsible?' in W. Michael Hoffman and Robert E. Frederick (eds.), *Business Ethics: Readings and Cases in Corporate Morality* (New York: McGraw-Hill, 1995), pp. 141–5.