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CORPORATE SOCIAL RESPONSIBILITY: AN HONEST DUPLICITY

ABSTRACT

Business activity - which is dominated by corporations - through the provision of investment, jobs and tax payments, is central to the provision and protection of Human Rights. Simultaneously, there is copious evidence that business activity is a direct source of Human Rights violations and undermines numerous States ability to protect and provide Human Rights. Hence governments face a tension between encouraging investment and asserting authority over business activity to limit corporate excess and ensure business works for rather than against humanity. The challenge in the globalised world is how governments can best assert that authority. This essay will contend that a voluntary approach through Corporate Social Responsibility is currently the dominant approach to limiting corporate excess but will argue this approach is fundamentally flawed and cannot be relied upon to protect and enhance the provision of Human Rights.

Introduction

“Familiarity may breed contempt in some areas of human behaviour but in the field of social ideas it is the touchstone of acceptability” [p7 Galbraith 1999]

Human Rights, it is almost universally agreed, are the standard by which governments’ performance regarding their citizens well-being is, or at least should be, gauged¹. Human Rights are expensive² to protect and provide hence governments need funds for structural investment, jobs to enable citizens to provide for themselves (e.g. food) and tax receipts to maintain and extend existing Human Rights provision.

¹ Human Rights as outlined by multi-lateral treaties (for example: International Convention on Civil and Political Rights (1966), the International Convention on Economic and Social Rights (1966), and the United Nations Convention on the Rights of the Child (CRC) (1989)) and interpreted by international, regional and national courts, and Treaty Bodies, are universal and indivisible [Freeman 2002]. They are intended to protect every human being from the excessive use of state power and, where business practice is concerned, to ensure the state protects human beings within their jurisdiction, as far as is reasonably possible, from that which is out of an individual’s control (e.g. environmentally destructive business practice [ICESCR Art 122(b)] and forced labour [ICCPR Art 8]). They also confer ‘positive’ rights on people, for example the rights to education [ICESCR Art 13], health [ICESCR Art 12], social security [ICESCR Art 9], freedom of association [ICCPR Art 22 and ICESCR Art 8] and more broadly the right to an adequate standard of living [ICESCR Art 11], and work [ICESCR Art 6] in a fair and safe manner [ICESCR Art 7]. No multi-lateral Human Rights treaty has been ratified by every state but almost every state has ratified at least one treaty which recognises that Human Rights exist [Ignatieff 2003, Freeman 2002].

² The above (FN1) obligations require for example, effective governmental bureaucracy, the provision of national infrastructure (e.g. for transport and communication), schools, hospitals, housing police, and a justice system.

The most viable and sustainable sources³ of investment, jobs and tax receipts are Multi-National Corporations, Trans-National Corporations (MNCs, TNCs) and their supply chains⁴. Governments and the countries they lead, therefore, are competing with each other for investment, jobs and tax receipts that can be provided by MNCs/TNCs in order to meet their Human Rights obligations and other governmental priorities (e.g. defence) [Stiglitz 2002, 2006, Reich 2008, Galbraith 2004, Zammit 2003, Rodrick 2007, Sen 1999, Bakan 2004].

Given the fact of uneven distribution of resources and the prevailing neo-liberal economic dogma [Stiglitz 2002, 2006; Reich 2008], governments are pressured to compete vigorously and where possible to 'stack the game' in their favour. If a government is able to persuade an MNC/TNC to provide jobs and to pay tax in their state by compromising their principles (e.g. reducing operational costs by reducing regulations), they are, arguably, obliged to make that compromise. How else can they generate the investment and tax required to pay for health care, education, and the infrastructure necessary for the Human Rights they are obligated to provide and protect⁵? This process has been labelled the 'race to the bottom' [Klein 2000, Bakan, 2004]. It is often argued a significant consequence of this process is a shift in power from governments to businesses (primarily MNC's/TNC's) [T. Friedman 2005, Scholte 2005, Galbraith 2004, Beck 1997]. The power in question relates to both sovereignty and which organisation (i.e. the government or the corporation) is most able to provide the resources necessary to protect or provide for Human Rights.

Hence, it is undeniable that the impact of business on Human Rights, both positively and negatively, is central to any discussion relating to the future well-being of humanity and effective policies must be identified that will ensure businesses work for humanity not against it⁶. To quote the Secretary General's Special Representative on the issue of Human Rights and transnational corporations and other business enterprises, John Ruggie:

³ See: <http://www.globalissues.org/article/59/corporate-power-facts-and-stats> (accessed 22/08/2010) to compare the size of corporate 'economies' with national economies in 2000.

⁴ This essay will not distinguish between transnational corporations, multinational corporations, privately owned businesses or cooperatives and partnerships because they all compete directly with each other and are required therefore to operate similarly competitive business models. In fact, one would struggle to find a business of any sort that is not engaged in the global supply chain. John Ruggie's remit as the Secretary General's Special Representative on the issue of Human Rights and transnational companies and other businesses enterprises is similarly broad [A/HRC/8/5 (2010)]

⁵ NB: Sen argues that although poor states need investment TNCs/MNCs short-termist methodologies specifically undermine a State's ability to provide education, health care etc. [1999]. Scholte demonstrates that although life expectancy has improved literacy has decreased and general poverty is static [2005]

⁶ Although it is often asserted that Adam Smith and his disciples (e.g. Milton Friedman) argued that free markets and limited regulation will ultimately lead to "opulence for all" [T Friedman 2005, Muller 2002] a broader analysis of their work recognises the tendency to monopoly and the commoditisation of humanity which were and are both seen to represent challenges for society [Muller 2002, Heilbroner 1953, Galbraith 1998, Smith(ed.2008) , Friedman 1962].

“...19. It stands to reason that Human Rights should be at the very centre of these concerns [about the effects of business on humanity]. Whatever other differences may exist in the world, starting with the 1948 Universal Declaration Human Rights have been the only internationally agreed expression of the entitlements that each and every one of us has simply because we are human beings. Thus, securing respect for Human Rights must be a central aim of governance at all levels, from the local to the global, and in the private sector no less than in the public.” [E/CN.4/2006/97, p7]

Countless trees are felled and terra-bytes of data stored in an effort to prove that Corporate Social Responsibility⁷ (CSR) is an appropriate and effective response to the unbridled power exhibited by MNCs and TNCs in their legally determined single-minded pursuit of profit⁸. It has become a feature of conventional thought within business and government⁹ that socially responsible businesses are the future. A socially responsible business will not, it is assumed, exploit people and destroy the environment abroad nor would it adopt business strategies that lead to, for example, the Great Depression.

This essay will outline briefly why CSR can be considered the dominant method of controlling corporate excesses globally and identify key criticisms which suggest CSR is an inherently flawed method of achieving this objective. Topics discussed are the myth of positive stakeholder influence, the primacy of PR¹⁰ over operational change, the reality of corporate decision-making and, finally, a brief description of the psychological process that may explain why regular, responsible, moral and rational people can make business decisions that cause pain and suffering for communities and individuals. Inherent in this latter description is the assertion that voluntary change of the type envisioned by politicians¹¹ through CSR is unlikely to occur.

A frequent criticism of CSR and CSR led policies within the Human Rights arena has revolved around its failure to provide sufficient monitoring and measurement [Zammit 2003] rather than the concept in principle¹². This essay will not discuss monitoring or measurement because it assumes such monitoring, unless entirely independent, is likely to

⁷ CSR incorporates corporate agreement to and implementation of voluntary codes of conduct, corporate philanthropy and staff engagement strategies.

⁸ See: M. Friedman [1962], Strine [2008], Ratner [2001/2] for a more detailed explanation of corporate obligations to generate profit

⁹ See: <http://www.newstatesman.com/uk-politics/2012/01/economy-capitalism-market> for introduction to Conservative conception of ‘moral capitalism’ and <http://www.smf.co.uk/assets/files/resources/Ed%20Miliband%20speech%20to%20Social%20Market%20Foundation.pdf> for a speech by the Labour leader covering similar ground (both accessed 10/03/12).

¹⁰ In this context PR mean managing the reputation of the business in relation to customers, investors, and current/future employees

¹¹ FN9

¹² See also, <http://www.hrw.org/news/2000/07/27/corporate-social-responsibility> for HRW criticism of the Global Compact (accessed 10/03/2012). See also FN74.

be flawed¹³, because many civil, social and cultural rights cannot be easily measured and because the measurement issue has been discussed at length elsewhere. Moreover, effective policy should focus on harnessing corporate power to facilitate Human Rights provision and discourage violations. If Human Rights violations can be monitored and measured; it is too late.

A further criticism on CSR and CSR led policy is that it represents a democratic deficit [Reich. 2008]. Reich argues even if one accepts that businesses can or do operate within an ethical framework, value based decisions and compromises will regularly and necessarily be made¹⁴ and it is not controversial to state as fact that Corporations have no political legitimacy to wield such power. Many supporters and critics of globalisation and neo-liberal economic policy argue that this democratic deficit is an uncomfortable reality within a globalised world which citizens should either embrace [T. Friedman 2005] or revolt against [Shiva 2010, A McIntosh 2000, Klein 2000] but that governments in their present form in the developed democratic economies are unable to change.

This paper will assume that sovereign governments retain the potency required to harness corporate power. Ultimately States allow businesses to operate within their jurisdiction [Reich 2008, Easterly 2005]. If a State determines the costs of corporate intrusions are not worth the benefits, they are free to reject the global market place and the influence of the Bretton-Woods organisations [Stiglitz 2002,2006; Easterly 2005]¹⁵. Also, crucially, the States from which many of these businesses emanate (i.e. US, EU and Japan) have very strict regulations regarding labour rights, pollution, health and safety and product quality. In short, although the challenge may appear insoluble, it is within the power of politicians to affect the change necessary to secure the provision and protection of Human Rights for all [Stiglitz 2006, Stiglitz and Charlton 2005, Easterly 2006, Reich 2008].

This essay will conclude that by focussing on CSR, the global community (i.e. the UN) and its constituent governments have chosen an approach to containing corporate excess which is doomed to failure and prioritised economic growth of human well-being. If States take their responsibilities to help the governments of developing economies meet their Human Rights responsibilities (Art. 2 ICESCR) seriously they should reconsider their policy emphasis and seek alternative solutions.

The dominance of CSR

At the 22nd meeting of the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations High Commission of Human Rights [UNHCHR] in 2003,

¹³ See Mulligan [2002] for Rio Tinto case-study and the challenges around measuring both risk and impact.

¹⁴ Ibid [HRW] also identifies lack of clarity within the standards.

¹⁵ See Easterly [2005] and Stiglitz [2006] for a detailed case-study of Botswana who successfully ignored international pressure to secure a genuinely beneficial deal for the exploitation of the countries diamond reserves.

the Sub-Commission adopted the, Norms on the responsibilities of transnational corporations and other companies with regard to Human Rights. The 'Norms' asserted that:

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect Human Rights recognized in international as well as national law, including ensuring transnational corporations and other companies respect Human Rights. Within their respective spheres of activity and influence, transnational corporations and other companies have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect Human Rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.
[E/CN.4/Sub.2/2003/12/Rev.2].

The 'Norms' also state that no business enterprise should benefit from "*war crimes, crimes against humanity, genocide, torture, forced disappearance, forced... labour ... arbitrary executions...violations of international law or... international crimes against the person*" [para 3]. That business enterprise should respect the rights of workers as outlined by the various UN and ILO Treaties, should not attempt to corrupt the practices of governments [para's 10-12], and "*shall take all necessary steps to ensure the safety... of the goods... they provide*" [para 13]. Significantly, they assert that companies "*shall generally conduct their activities in a manner contributing to the wider goal of sustainable development*" [para 14].

The Norms were an authoritative step by the UNHCHR to set the tone for Human Rights engagement with business which could have laid the ground-work for binding legal obligations in the future [HRW website (accessed 14/08/2010)]. However, "*[m]ost developing countries were not keen on intrusive regulations and most developed countries felt the Norms were either unnecessary or over-reaching*" [Steiner, 2009, p1404-5]. The UNHCHR decided not to adopt the Norms [CHR res 2005/69].

In 2006, Ruggie, in his interim report [E/CN.4/2006/97] stated that "*[a]ny fair-minded discussion of standards inevitably will cover some of the same ground [as the Norms]*" [para 57] but that "*by adopting treaty-like language, which sets out Human Rights principle...*" [para 56] "*the Norms exercise became engulfed by its own doctrinal excesses*" [para 59] because they do not follow any international legal principles and therefore "*[have] little authoritative basis in international law – hard, soft or otherwise*"¹⁶. In Ruggie's view, States Parties should look to developments such as the Kimberley Process¹⁷ [para 47], other

¹⁶ See: Ratner for an alternative view.

¹⁷ See: <http://www.kimberleyprocess.com/> (accessed 14/08/2010). See also recent reports that the Kimberley Process has been tarnished by inaction regarding Zimbabwean diamonds accessing the global market from Global Witness (<http://www.globalwitness.org/library/kimberley-process-lets-zimbabwe-hook-again> (accessed

voluntary schemes [e.g. the UN Global Compact (UNGC)¹⁸] [para 48] and Human Rights impact assessments [para 35] to ensure business practices do not violate Human Rights.

Firstly, Ruggie's principle objections to the 'Norms' are unconvincing. The 'Norms' clearly state that States are responsible for implementing and enforcing legal limitations on business operations¹⁹ and it certainly is not controversial to suggest businesses should operate within those laws. Moreover, while the 'Norms' did impose an undefined obligation on business to promote Human Rights and sustainable development, Ruggie's framework requires business to establish codes of conduct and remedial processes which could be equally onerous [A/HRC/8/5 (2010)] and therefore do not address the identified issue.

Regardless of the above criticism, the result of Ruggie's work has been to bolster a voluntary approach to ensuring business respect and protect Human Rights, therefore emphasising Corporate Social Responsibility (CSR) as the dominant method of controlling the negative impacts of business practice globally and suggesting there will be no attempt to create a binding international legal framework²⁰ in the foreseeable future. This approach has been endorsed by many states²¹ and influential companies²² although a sceptical analysis would suggest it is little more than the status quo to suggest states should legislate to protect citizens against Human Rights violations and companies should not act illegally.

There are examples of NGOs disagreeing with the focus on CSR and some of these organisations attempt to utilise national legislation to hold businesses to account (e.g. ATS cases in the US) and these efforts have achieved some moderate success [Davis 2008]. Equally, a number of academics [e.g. Stiglitz and Charlton 2005] and development NGO's [e.g. Oxfam 2002] have sought to focus on binding international instruments or trading agreements. When compared to CSR, none of these ideas represent mainstream thought and few benefit from significant media attention or political capital. The purpose of this

04/03/2012) and Human Rights Watch (<http://www.hrw.org/news/2011/06/28/zimbabwe-kimberley-process-brink>) (accessed 04/03/2012))

¹⁸ There is a multiplicity of voluntary codes which companies can sign-up to and which confuse the average consumer (See: <http://www.hrw.org/en/news/2004/09/29/un-norms-towards-greater-corporate-accountability>) (accessed 14/08/2010). The UNGC specifically references Human Rights which makes it unique amongst the multiplicity (excepting the Sullivan Principles which focussed on Apartheid in South Africa and is defunct). See: McIntosh et. al [2003] and Aaronson [2001] for summaries of codes and their content.

¹⁹ See: Vienna Convention on the Law of Treaties [1969] [VCLT] article 26 *pacta sunt servanda* (i.e. good faith) and article 53 which affirms that states cannot derogate from peremptory norms (e.g. criminalisation of torture) [Dixon and McCorquodale, 2003, p202])

²⁰ See: Nowak [2007] for discussion of a world court to adjudicate over business activities

²¹ For example, the UK appointed a Minister for Corporate Responsibility in 2004 and delivered a Corporate Social Responsibility - Draft International Strategic Framework soon thereafter (see: http://webarchive.nationalarchives.gov.uk/tna/+http://www.dti.gov.uk/sustainability/weee/corp_soc_resp.p df/ accessed 13/08/2010). NB: the Con-Lib coalition has not yet created a commensurate ministerial role.

²² See: http://www.shell.com/home/content/environment_society/reporting/external_voluntary_codes/ (accessed (14/08/2010))

discussion is to demonstrate that these and other ideas should be considered more seriously because CSR alone cannot create the Human Rights oriented business model the global community requires.

The mythical positive stakeholder

A core assumption within CSR is that business is fundamentally incompatible with Human Rights violations²³. The understanding is that consumers will not purchase goods that are associated with bad business practice and that investors would prefer to invest in companies with good practices. McIntosh et. al. argue that *"[t]o realise the opportunities... of the globalization process there is a clear need to address the unequal distribution of benefits, imbalances in rule making and the unsustainable use of natural resources"* [2003, p128]²⁴. The implication being that responsible business practice is a precursor to successful exploitation of the global supply chain.

This assumption may be rooted in the concept of Stakeholder Theory. Stakeholder Theory, as defined by Edward Freeman [1984, Philips and Freeman 2003, Freeman, Wicks and Parmar 2011] is proposed as 'alternative' to the 'standard account' of 'shareholder capitalism'²⁵ which *"has come under much recent criticism"* [p52]. In the view of Freeman Wicks and Pamar [2011] Stakeholder Theory is *"... a more useful way to understand the essence of capitalism [than the standard account]", "...[should] be seen as a theory about how business actually does and can work"* [p52] and *"... how to effectively manage a business... [to] create as much value as possible"*.

The reasoning underpinning Stakeholder Theory is straight-forward. Firstly, the 'Separation Fallacy', asserts that it is must be inaccurate to conceive of business decisions lacking any ethical and consequently most business decisions must have ethical content. Secondly, if we accept that most business decisions have ethical content, a series of open questions can be posed²⁶ about those decisions and it is asserted, therefore, that business requires a general theory which answers those questions. The authors recognise that the answer could be 'only shareholder value counts' but they assert that *"... such an answer would have to be enmeshed in the language of ethics as well as business"*. This analysis is then summarised by the Integration Theses (I and II) which, in summary, state ethical concerns are implicit in business decisions and business concerns are implicit in ethical concerns hence it is not logical to separate business decision from ethical decision.

²³ See: Robinson [1998 p. 14].

²⁴ See also Jenkins 2002, Zadek 2001, Aaronson 2001 and Elkington [1998]

²⁵ i.e. that a corporation's activities are dominated by their legal obligation to generate maximum profit for their shareholders.

²⁶ Paraphrased: 1. For whom is value created or destroyed? 2. Who is harmed or benefitted? 3. Whose rights and value are enabled (and vice versa)? [Freeman, Wicks, Parmar p53]

Finally, Freeman, Wicks and Parmar outline the Responsibility Principle which is “implicit in most reasonably comprehensive moral views” [p52]. That is, “[m]ost people, most of the time want to and do accept responsibility for the effects of their actions on other”. The authors offer no hard evidence for ‘Separation Fallacy’ or the ‘Responsibility Principle’. The following analysis of Stakeholder Theory in relation to business practise and Human Rights will not query the rigour or circularity of the above theorisation. It will simply identify a few self-evident but referenced realities of business practice in the globalised era.

Firstly, the value of a global supply chain for any businesses is the improved differential between production costs and the final product value in the market place when compared to the differential facilitated through regional and national supply chains. These costs are reduced if workers are not unionised and if occupational health, safety and environmental regulations are weak [Harvey 2010, Stiglitz 2006, Reich 2008, Bakan 2004, Galbraith 2004]. If the “imbalances” in the system were equalised, as suggested by McIntosh et al above, companies would make less profit hence it would not be in their best interests²⁷.

Recent disagreements between the US and Chinese governments regarding currency valuation provide a useful context for this discussion. The standard explanation of why China will not allow its currency to appreciate on the international currency exchanges is to keep production costs comparatively low to maintain China’s status as the workshop of the world²⁸. Nevertheless, opinions are surfacing that increasing labour costs are already beginning to make production in China too expensive and MNCs/TNCs are looking to move manufacturing elsewhere²⁹. In fact, if we consider garment manufacture, MNCs/TNSs have been producing goods in, for example, Vietnam³⁰ and Bangladesh³¹ for many years simply because it is cheaper than producing them in China³². Furthermore, a large proportion of garments sold in the US are produced in Mexico³³, despite its relatively high cost of living³⁴, because the combined cost savings provided by geographic proximity and the willingness of Mexican authorities to unofficially overlook unfair labour practices including human trafficking make it cost effective [Vulliamy 2010]. It is difficult to identify any ethical content in these business decisions other than those relating to a business managers fiduciary duty

²⁷ There are undoubtedly examples of industries where it is demonstrably counter-productive to undertake questionable business practices but this does not appear to reflect the macro decisions made by corporate business leaders.

²⁸ See: http://www.economist.com/blogs/freeexchange/2010/10/chinas_currency (accessed 11/03/12)

²⁹ See: http://www.huffingtonpost.com/2011/10/07/china-manufacturing_n_1000305.html

³⁰ See: <http://www.economist.com/node/18775499> (accessed 14/04/12)

³¹ See: <http://www.bbc.co.uk/news/business-14971258> (accessed 14/04/12)

³² See: <http://www.nytimes.com/2010/07/17/business/global/17textile.html?pagewanted=all> (accessed 14/03/12)

³³ See: <http://www.fibre2fashion.com/industry-article/29/2818/mexican-textile-industry-a-report1.asp> (accessed 14/04/12)

³⁴ See: http://www.numbeo.com/cost-of-living/rankings_by_country.jsp (accessed 14/04/2012)

to share-holders. Consequently, the profit imperative which drives business decisions, on this analysis, can be inversely associated with the protection and provision of Human Rights.

Secondly, we should consider the issue of companies colluding with governments with bad Human Rights records. Google³⁵ and Yahoo³⁶, for example, have aided the Chinese governments' efforts to limit access to information and encroach on individual's freedom of expression³⁷ in order to gain a licence to operate within the fastest growing internet market amongst the major States [HRW 2006]. If either business takes a principled stance they lose the opportunity to profit from China's economic development. If they choose to operate in China, they must agree to collude to violate individual's Human Rights³⁸. As previously identified, companies listed on the various globally significant stock exchanges are legally obliged to seek out the maximum available profit³⁹, consequently it can be argued that regardless of some stakeholder pressure (e.g. a portion of consumers in the US, NGOs and some journalists), both firms should collude with China's government in order to maximise profit for shareholders [M. Friedman 1962, Reich 2008]. Hence we can evidence again that capitalist profit imperative can be inversely associated with the protection and provision of Human Rights.

An alternative view is that by operating in states with bad Human Rights records, companies have the opportunity to influence positively state practice [Allen 2000]. However, as we know from the above experience and companies operating in Apartheid South Africa [Truth and Reconciliation Committee Vol. 4 Ch 2 (1998) (TRC)], it is at least equally likely that companies will become complicit in Human Rights violations rather than facilitating change. Nevertheless, we should not overlook entirely Adam Smith's assertion that trade will ultimately lead to more freedom and higher standards of living which was evident during the enlightenment [Heilbroner 1953] and may be evidenced to some extent today [Meyer 1998].

³⁵ See: <http://news.bbc.co.uk/1/hi/uk/4787917.stm> (accessed 13/08/2010) for summary of internet censorship debate and the role of search engines. See: <http://news.bbc.co.uk/1/hi/world/asia-pacific/8582233.stm> (accessed 13/08/2010) for up-to-date summary of the tumultuous relationship between Google and the Chinese Government. See:

<http://online.wsj.com/article/SB10001424052970203436904577155003097277514.html> for Wall Street Journal article outlining Google's decision to expand operation in China.

³⁶ See: <http://www.nytimes.com/2005/09/07/business/worldbusiness/07iht-yahoo.html> (accessed 13/08/2010) to read about Yahoo supporting Chinese prosecutions of dissidents

³⁷ ICCPR Art 19(2) "*this right shall include freedom to seek, receive and impart information and ideas of all kinds... through any choice of media*"

³⁸ Since agreeing to collude with the China government, Google has attempted to circumvent China's restrictions in a response to hacking of Gmail accounts but the search engines results are still censored in mainland China hence Google despite is still tacitly colluding with censorship (see: <http://news.bbc.co.uk/1/hi/8582233.stm> accessed 14/04/2012).

³⁹ See recent arguments between News Corporation and its major shareholders regarding management appointments and business strategies [see: <http://www.guardian.co.uk/media/2012/feb/29/news-corp-shareholders-james-murdoch> (accessed 11/03/12)]

Thirdly, we should consider the stakeholder group which evidently holds most sway in corporate decision making; the shareholders. In order to understand whether a company's shareholders are likely to enable a company to avoid violating Human Rights, it is important to ascertain who the majority of company shareholders are. Spencer identifies that *"... around 70% of shares in UK public companies... are owned by institutional investors... who, as a result of their own profit-making obligations, are not going to call for companies to be more responsible and make less profit..."* [2004, p8] which somewhat stymies suggestions that investors are likely to force businesses to change profitable practices to improve their Human Rights record.

There is some evidence that certain categories of institutional shareholders will make ethical decisions about their investments. For example, some US State employee pension funds, famously but not exclusively CalPERS, have determined not to invest in some businesses and to divest their interests in others because they believe some business practices, which are negative regarding Human Rights, will ultimately undermine the value of the businesses they invest in⁴⁰. Although this approach is laudable it should be noted that such decisions, CalPERS governance principles make clear⁴¹, are based on a broad interpretation of investment risk (i.e. one that includes climate change), the principle of sustainable business growth⁴² and a commitment to compliance with State directives regarding specific corporate activities (e.g. trade with Iran or Sudan⁴³) rather than a Human Rights based or otherwise defined ethical framework.

Most significantly, these institutional investors do not shape the overall investment market because they do not represent the majority of the market. Most insurance companies, banks and pension providers are publically listed hence their managers have fiduciary duty to their shareholder. Indeed, using a counterfactual scenario, it is entirely feasible to conceive of a circumstance where publically listed institutional investors would not want to invest in businesses that CalPERS or similar funds invest in because their criteria for investment could undermine the profitability of that business. In such circumstances, given that CalPERS et al do not represent the majority of institutional investors in the market place, the rational 'business decision' would be to refuse to accede to CalPERS demands⁴⁴ and secure finance elsewhere. In the long run, this could weaken CalPERS

⁴⁰ See: <http://www.calpers-governance.org/> (accessed 03/03/2012)

⁴¹ See: <http://www.calpers-governance.org/docs-sof/principles/2011-11-14-global-principles-of-accountable-corp-gov.pdf> (accessed 11/03/12)

⁴² See: <http://www.calpers.ca.gov/index.jsp?bc=about/press/pr-archive/pr-2009/mar/restructure-hedge-fund.xml> (accessed 04/03/2012)

⁴³ CalPERS put pressure on companies to stop aiding Human Rights violators [Crilly 2010] by operating in Sudan (<http://articles.latimes.com/2005/dec/13/business/fi-calpers13> (14/08/2010)) prior to the US governments Sudan Accountability and Divestment Act (2007) See: <http://www.gao.gov/products/GAO-10-742> (accessed 04/03/2012).

⁴⁴ See: <http://www.guardian.co.uk/business/2004/jun/10/oilandpetrol.news> (accessed 14/04/2012)

position regarding its own investors because fewer strong investment opportunities were available to it.

Fourthly, a key group of stakeholders for many businesses is the consumer. If consumers stop buying a product because of human right violations they would not be achieving maximal profitability and would have to change practice. It is frequently asserted that companies like Nike introduced CSR policies to 'manage out' bad practice and head-off potentially disastrous consumer backlashes resulting from stories about garments made in sweatshops which violate Human Rights⁴⁵ [Jenkins 2002, Zadek 2001, Aaronson 2001].

There is, however, little evidence such pressure exists *en masse*⁴⁶. A survey of consumers in Canada in 2000 indicated that only 5% would be willing to pay more for ethical products [Jenkins, 2002, p29] and while The Fairtrade Foundation suggests this view may be pessimistic⁴⁷, the recent success of Fairtrade products in the UK has been secured by 'mainstreaming' Fairtrade status without increasing consumer costs⁴⁸ rather than motivating consumers to pay more for ethical products. This is significant because unless consumers demonstrate they are prepared to accept higher prices in order to maintain corporate profit margin, that corporate is not likely to change its practices and risk losing market share.

It should be noted, also, that many businesses are insensitive to consumer choice pressures [Hepple 1999]. Trafigura, for example, sells its services to corporations that, through their profit imperative, are legally obliged to minimise operating costs hence seek the lowest supplier costs possible. If Trafigura can lower their costs by breaking/avoiding environmental regulations they appease their customers and their investors. Unsurprisingly, Trafigura has demonstrated operational practices that disregard the Human Rights (e.g. the right to health) of the citizens of countries they operate in or near⁴⁹.

In summary, it is asserted that it is in business' best interest to have effective CSR policies because their key stakeholders demand it and Stakeholder Theory was developed to

⁴⁵ Sweatshop manufacture can be considered a Human Rights violation when one refers to "[t]he core ILO Conventions such as... the 1948 Convention Concerning Forced or Compulsory Labour, the 1949 Convention concerning the Application of the Principle of the Right to Organise and to Collectively Bargain, and the 1981 Convention Concerning Occupational Safety and Health and the Working Environment [which] provide basic rights for workers" [Subedi, 2003, p192] and ICCPR Art 22(1). See: Rodriguez-Garavito [2005] for a recent description of working practices within Nike's global supply chain.

⁴⁶ See: Reich [2008], Ch8, which compares the distinction between the fair deal *citizens* often espouse with the cheapest price a *consumer* wants and the highest return an *investor* wants. He explains that if you take retirement funds into account most people occupy all three personas but that the latter two affect individuals directly and therefore take precedence.

⁴⁷ See: http://www.fairtrade.org.uk/business_services/why_offer_fairtrade.aspx (accessed 14/08/2010)

⁴⁸ See: <http://www.co-operative.coop/food/ethics/Ethical-trading/Fairtrade/> (accessed 18/08/2010)

⁴⁹ See: <http://www.guardian.co.uk/environment/2009/may/13/trafigura-ivory-coast-documents-toxic-waste> (accessed 14/04/2012)

support this analysis. There is copious evidence to suggest that in practice, customers want cheap products and the majority of shareholders want companies to meet their fiduciary obligations and maximise their return. Hence it is reasonable to argue that the influence of the ethical stakeholder as expounded by the CSR community, governments and the UN is overstated.

The primacy of PR⁵⁰ over substantive operational change

The analysis in the previous section argues that business, in general, seeks to keep its consumer prices competitive to maintain market share and profits high to maintain investor confidence. Yet we know that businesses have developed highly evolved CSR policies and sign up to CSR initiatives such as the UN Global Compact⁵¹. Businesses and commentators agree that this is because businesses care what consumers think but they cannot afford to amend their operation practice and become uncompetitive in the consumer market place⁵². Consequently we can see a contradiction between the image a business wants and the operational practice a successful market-oriented business needs.

In 1970, Milton Friedman discussed the issue of CSR in the New York Times Magazine when he suggested that: “... *in practice the doctrine of social responsibility is frequently a cloak for actions that are justified on other grounds rather than a reason for those actions*” and went on to say that CSR:

“... may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects” and that “[i]t would be inconsistent of me to call on corporate executives to refrain from this hypocritical window-dressing because it harms the foundations of a free society. That would be to call on them to exercise a “social responsibility”! If our institutions, and

⁵⁰ i.e. reputation management. See: <http://www.cipr.co.uk/content/careers-cpd/careers-pr/what-pr> (accessed 14/04/12) for a definition and explanation of PR.

⁵¹ Jerbi describes companies signing up to the UN Global Compact as ‘blue rinsing’ which implies companies gain public absolution for previous malfeasance by supporting a voluntary scheme with no monitoring or powers of enforcement [2009]. See also Human Rights Watch criticism of the Global Compact: <http://www.hrw.org/en/news/2000/07/27/corporate-social-responsibility> (accessed 14/04/2010).

⁵² Hence although Nike have made the public aware of their CSR policy and support positive projects (see: <http://www.nytimes.com/2010/07/18/business/global/18shirt.html?scp=3&sq=nike%20factory&st=cse> (accessed 13/08/2010)) it required public pressure for them to provide redundancy support to workers in Honduras (see: http://www.nytimes.com/2010/07/27/business/global/27nike.html?ref=nike_inc (accessed 13/08/2010) who were victims of aggressive cost-cutting measures (http://www.nytimes.com/2009/12/18/business/18nike.html?ref=nike_inc (accessed 13/08/2010)). See also Rodriguez-Garavito [2005]. NB: even if Nike had created a model global supply chain other major garment manufacturers have not (See: <http://www.guardian.co.uk/world/2010/aug/08/gap-next-marks-spencer-sweatshops> (accessed 15/08/2010)

*the attitudes of the public make it in their self-interest to cloak their actions in this way, I cannot summon much indignation to denounce them*⁵³.

In essence, CSR is a valid business practice if motivated by profit rather than ethics.

There are two key points to elaborate here. Firstly CSR for the purposes of good PR (or the other benefits listed by Milton Friedman) is not necessarily negative as regards Human Rights. Companies support charities/NGO's – many of which operate in the Human Rights field - in a variety of ways and often create tangible improvements. Whether through funding new projects which the government is unable to support without proven outcomes⁵⁴, meeting funding gaps created by cuts in government funding⁵⁵, providing expertise lacking in the third sector⁵⁶, providing Gifts-in-Kind⁵⁷, providing funded volunteers to support projects⁵⁸ or even helping to build brand awareness by association with household names⁵⁹; there are both tangible and intangible benefits to be achieved for voluntary organisations. While we should be careful not to overstate the value of this in relation to the bottom-line or turn-over of a business [Reich 2008], from the beneficiary organisation's perspective, this support is often vital⁶⁰.

Secondarily, business practice appears to match Milton Friedman's argument. For example BP, has spent considerable monies to rebrand itself as a green energy company⁶¹. BP adopted a new logo which gave the public a softer image and created a new corporate language which separated BP the globally trusted corporate citizen from British Petroleum the oil company⁶². On one hand, BP states:

"...[o]ur reputation, and therefore our future as a business, depends on each of us, everywhere, every day, taking personal responsibility for the conduct of BP's business". The BP code of conduct is an essential tool to help our people meet this aspiration. The code summarizes our standards for the way we behave. All our

⁵³ See: <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> (accessed 13/10/2010). It is worth noting that Milton Friedman's considered CSR to be anti-democratic [1962 p133-136] which Reich agrees with [2008].

⁵⁴ See Ford Foundation which has a commitment to supporting untried solutions to existing problems. See: <http://www.fordfoundation.org/> (accessed 26/08/2010)

⁵⁵ Especially relevant in the UK today where government funding through programmes like Supporting People is set to cut dramatically (See: <http://www.communitycare.co.uk/Articles/2010/06/07/114665/cutbacks-under-way-as-councils-prepare-for-slashing-of-grants.htm> (accessed 14/08/2010)

⁵⁶ Business in the Community - <http://www.bitc.org.uk/> (accessed 14/08/2010) - to see the variety of practical ways businesses support charities/NGO's

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ See: The Ford Foundation: <http://www.fordfoundation.org/> (accessed 14/08/2010) which distributed more the \$450m in 2009.

⁶¹ See: <http://news.bbc.co.uk/1/hi/business/849475.stm> (accessed 14/08/2010)

⁶² Ibid

employees must follow the code of conduct. It clearly defines what we expect of our business and our people, regardless of location and background. Ultimately it is about helping BP people to do the right thing.” [BP Website⁶³]

On the other, BP has a particularly bad record of environmental and health and safety conduct⁶⁴. Leaks in Alaska⁶⁵, fatal explosions in Texas⁶⁶ and the recent fatal and environmentally destructive disaster in the Gulf of Mexico⁶⁷ demonstrate the distinction between corporate image and corporate practice. Importantly until the Gulf of Mexico disaster, lower profile events made little or no impact on the company’s profitability⁶⁸ although undoubtedly the various oil price spikes have aided this process⁶⁹.

The issue is not limited to BP, all major oil companies have well funded CSR programmes often imbued with Stakeholder Theory and well developed ‘positive communications strategies’ but, as demonstrated by Ghazvinian’s survey of oil production in Africa, few if any show a consistent operational commitment to Human Rights [2007] despite many being members of the UN Global Compact (e.g. Shell Plc, BP Plc, and Total⁷⁰). Similar observations can be made of most industries ranging from garment manufacturers⁷¹ to food producers [Schlosser 2001, Richter 2001], and technology firms⁷² [Klein 2001]. It appears that business leaders are taking Milton Friedman’s advice and working to give the impression of ethical practice while seeking to maximise profitability.

The Business Decision

The explicit theme within the above two sections of analysis is that business of all hues is bottom-line focussed. Hence, it is extremely difficult to evidence the positive impact stakeholders can have whilst it is straight-forward to evidence examples where businesses

⁶³ See: <http://www.bp.com/sectiongenericarticle.do?categoryId=9003494&contentId=7006600> (accessed 14/08/2010)

⁶⁴ See: <http://www.publicintegrity.org/articles/entry/2085/>, <http://www.guardian.co.uk/environment/2010/may/05/congressman-bp-safety-oil-spill>, & http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?_r=1 (all accessed 14/08/2010)

⁶⁵ See: <http://www.independent.co.uk/news/world/americas/bps-oil-spill-in-alaska-blamed-on-costcutting-449167.html> (accessed 14/08/2010)

⁶⁶ See: http://news.yahoo.com/s/nm/20100812/bs_nm/us_bp_refinery_texas_city_osh & <http://www.msnbc.msn.com/id/16653673/> (both accessed 14/08/2010)

⁶⁷ See: <http://www.guardian.co.uk/environment/2010/jul/16/bp-oil-spill-leak-stopped> (accessed 14/08/2010)

⁶⁸ See: http://www.wikinvest.com/stock/BP_%28BP%29 (accessed 14/08/2010). See also Muchlinski [2001]

p40

⁶⁹ See: http://inflationdata.com/inflation/images/charts/Oil/Inflation_Adj_Oil_Prices_Chart.htm (accessed 14/08/2010)

⁷⁰ NB: US oil firms generally have not joined the UN Global Compact

⁷¹ <http://www.guardian.co.uk/world/2010/aug/08/gap-next-marks-spencer-sweatshops> (accessed 15/08/2010) and Vulliamy [2010]

⁷² See: <http://www.telegraph.co.uk/news/worldnews/asia/china/9006988/Mass-suicide-protest-at-Apple-manufacturer-Foxconn-factory.html> (accessed 14/04/2012)

seek to benefit from CSR oriented PR whilst making few substantial changes to their operations. It is cheap to compose a code of conduct or to discard a 'rogue' supplier but it could prove disastrous for a business to jettison or undermine the advantage of a bottom-line focussed global supply chain⁷³.

With this perspective in mind, efforts have been made to prove that unethical business practices can and do affect the profitability of a business. In a recent CEO Briefing produced by the UNEP Finance Initiative, Human Rights Workstream [2008] the case was made thus:

*“Companies that are perceived as being implicated in Human Rights violations **may** be targeted by NGOs or the press, with consequent impacts on their brand or reputation, their share prices, their ability to access markets, and their ability to recruit the best employees. Conversely, organisations with a good Human Rights record **should** be able to achieve a range of commercial benefits such as enhanced reputation and image, more secure ‘licence to operate’, improved employee recruitment and retention, reduced risk of litigation, opportunities for new business and better stakeholder relationships. There **may** also be broader social benefits as a consequence of businesses operating in a responsible manner such as increased trust between business and the community or, depending on the country, a decline in social unrest.” [p4]*

The primary concern with this analysis - which is fundamental to if not always explicit within critiques of Stakeholder Theory and CSR - is that such commercial benefits and risks are not categorical or straightforwardly quantifiable. Importantly, the above passage is concluded with the following sentence: “[d]espite the potential benefits of having a good Human Rights record, the business case is not clear cut; there **may** be trade-offs between short-term costs (e.g. the risks of losing some business to competitors with lower standards) and these longer-term benefits” [p4]. Hence in a document designed to persuade Chief Executive Officers of businesses that have a macro affect on the provision and protection of Human Rights the only reference to a business case for action concludes with a sentence which asserts there is no business case for a Human Rights oriented business model and that such a model may affect your profits negatively in the short-term while long-term benefits are both unquantifiable and uncertain. While honest and realistic such an approach is unlikely to engender change in businesses that are legally obliged to maximise profit. Nevertheless, this line of thought requires further pursuit.

⁷³ FN51

Distinct from but related to Human Rights, growing concerns about the environment - its general health and the limited resources therein – have prompted academics⁷⁴ and others⁷⁵ to apply statistical methods to estimate tangible costs of environmental degradation caused by both routine and irresponsible business practice (i.e. the method of 21st century living). In his watershed report, Sir Nicholas Stearn summarised and explained the resulting data and conclusions as evidence of a market failure which required pro active policy making and business cooperation to ameliorate.

This argument is then extended further with the concept of Universal Ownership which is outlined in the UNEP Finance Initiative document Universal ownership: why environmental externalities matter to institutional investors [2010]. The concept of Universal Ownership is straightforward. Institutional investors invest considerable sums in a variety of businesses and other assets. Consequently while they may profit from one business in their portfolio degrading the environment that degradation may undermine the profits generated by other aspects of their portfolio. For example, the operations of the extractive industries can undermine the profits of businesses that invest in real estate or tourism and one fund may own holdings in all three types of businesses. Alternatively, unpredictable weather caused by 'Global Warming' could destroy crops from a major agricultural business or decrease profits margins in supermarket chains.

More enigmatically, the above document states:

*“Institutional investors are exposed to rising costs that contribute to economic and market risks. These costs **could** affect asset values and fund returns. Reducing environmental externalities would reduce net costs in the economy and ultimately benefit Universal Owners.”*

And:

*“Most large equity funds invest in many companies with significant environmental impacts. Findings suggest that reducing environmental costs from listed companies held in diversified equity portfolios **could** significantly reduce global externalities, boosting economic output overall.” [p10]*

On the face of it, the logic that environmental externalities could undermine profitability may be similarly credible within the dialogue around business and Human Rights. The 'Arab Spring', for example, exemplifies what can happen in countries where Human Rights are not properly protected or provided for and turmoil of this nature undeniably affects businesses. Specifically within the most recent chapter of the 'Spring' in

⁷⁴ N. Stearn, The Stearn Review on the Economics of Climate Change (London, HM Treasury, 2006)

⁷⁵ The UK government commissioned the above research

Syria, major MNCs/TNCs, especially oil companies⁷⁶, have collaborated with the governing regime for many years and now risk losing their investment income in the short term and, if the regime does fall, potentially losing the legitimacy to operate within Syria in the future.

There are, however, a number of fundamental oversights within this analysis. Firstly, it assumes the argument is credible regarding the global warming debate. As outlined above in the discussion around CalPERS, although there are certainly examples of institutional investors that take climate change seriously, there are plenty that do not. In fact, within the Universal Ownership document adjacent to the above quotes a Director of an investment fund business states:

“[w]e see the Universal Ownership concept as an absolutely essential part of our investment philosophy – addressing externalities is crucial. Markets that are not working properly destroy value for participants and have inefficiencies. If a company is constantly externalising costs it is less efficient than its rivals. If the former is outperforming the latter this is not in the interests of the company owners.” [Paul Lee, Director, Hermes Equity Ownership Services, p10]

It is difficult to interpret this quote definitively because we are not sure what impact Hermes' investment philosophy has on its investment practise. However, Paul Lee appears to suggest that a business which externalises costs and consequently outperforms its competitors is not operating in the interests of its owners. Is Paul Lee suggesting Hermes would not invest in a business that was outperforming its rivals? This seems doubtful. Moreover, although the answer to that question is uncertain, it is certainly true that Hermes, the business Paul Lee represents, has an award winning Commodities Team⁷⁷ which invests in, amongst many other things, oil. This speculation drives up prices and increases profits for oil prospectors, refiners and distributors⁷⁸ thus encouraging trade in a product that is contributing to the environmental challenges humanity faces.

Secondly, the impact of environmental degradation and climate change can be quantified albeit including substantial margins for error [Stearn 2006] because material change cause material costs which relate directly to existing income and expenditure. If oil prospecting and refining is becoming increasingly challenging due to scarcity we can safely predict increased fuel costs which increase operating costs of every business [Brown 2009]. Similarly, if climate change increases the risk of floods, that risk can be calculated and

⁷⁶ See: <http://www.reuters.com/article/2011/12/02/syria-eu-sanctions-idUSL5E7N21KG20111202> (accessed 10/03/2012)

⁷⁷ See: <http://www.hermes.co.uk/NewsEvents/DisplayFullPost/tabid/548/PostID/147/language/en-US/Default.aspx> (accessed 04/03/2012)

⁷⁸ See: <http://www.guardian.co.uk/business/2012/feb/02/shell-profits-up-54-percent-oil> and FN67

insurance premiums for building, stock and means of production increase proportionally (or as far as the market will allow)⁷⁹.

In contrast, where Human Rights are concerned, it is exceedingly difficult to conceive of the credible risk calculations which could be taken into account by business strategists and decision makers. On one hand, it is true, as outlined above, that TNCs and MNCs will lose money on investments made in Syria at least in the short-term. Yet similar investments in many African States with atrocious Human Rights records where businesses necessarily collaborate with corrupt and brutal governments [Ghazvinian 2009] consistently deliver substantial and reliable profits. Similar evidenced is identified above relating to businesses operating in China.

Thirdly, even if by utilising the principle of Universal Ownership institutional investors did decide not to invest in businesses because of their acquiescence to or participation in Human Rights violations, other aspects of their investment business may work to undermine these efforts. Again, Hermes' award winning Commodities Fund Team undertakes commodity speculation which is a key driver of increased food prices⁸⁰ fundamentally impact on States' ability to Article 11 of the ICESCR that stipulates there is a right to an adequate standard of living which incorporates "adequate food" [Art.11(1)] and that everyone has a right to be "*free from hunger*" [Art. 11(2)].

Fourthly, the operative word for our purposes in many of the above quoted passages (as highlighted in bold) references the lack of certainty in outcome. It is accepted within economics from Smith to Stiglitz that within the capitalist system the purpose of the capitalist through their business (either as entrepreneurs or managers) is to invest unutilised or underutilised funds (i.e. capital) for the purpose of increasing its value. As outlined by Galbraith, the social value or utility of a product made within capitalism is irrelevant because the role of the capitalist within the dominant economic model (i.e. free market capitalism) system is to facilitate growth⁸¹. It was this growth that led Keynes to declare that:

"...assuming no important wars and no important increase in population, the economic problem [i.e. the provision of absolute needs e.g. food], or be at least in sight of solution, within a hundred years. This means that the economic problem is not – if we look into the future – the permanent problem of the human race" [Essays in Persuasion, p197]

⁷⁹ See: <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jun/28/climate-change-climate-change-scepticism> (accessed 14/04/2012)

⁸⁰ See: <http://www.guardian.co.uk/global-development/2011/jan/23/food-speculation-banks-hunger-poverty> (accessed 04/03/2012)

⁸¹ See also David Harvey, The Enigma of Capital, [2010], for A Marxian analysis of capitalist systems requirement of compound growth.

In essence the foundation of the capitalist system is that businesses assess risk and make decisions with a myopic focus on profit to achieve growth and that in and of its self is positive. Essentially the capitalist system is envisioned by its prime theorists (from Smith to Keynes) to be a utilitarian approach to improving general well-being⁸². This objective is reinforced by the legal obligation of publically listed companies to focus on profit for shareholders. By-products of this profit are personal enrichment, returns for their investors, tax payments for the state, the provision of goods and services which citizens use, jobs, and environmental degradation and the exploitation of people. This explains the general focus on profit and where business expertise lies. A business is a bureaucracy [Galbraith 2004] whose expertise it to deliver consistent profits (i.e. growth) in an unpredictable world.

When contemplating an investment, the business decision-maker may well take seriously the risk of Human Rights violations and environmental degradation and, in line with various codes of conduct they will undertake assessments with a view to minimising the likelihood of those risks coming to fruition. However, unless it is probable that those risks will prevent the business investment making a profit, those risks will not prevent the business making the investment. To not invest in an opportunity that will provide near certain profit, is to make an ethical rather than a business decision thereby disregarding its fiduciary duty to its shareholders and confusing its role as risk synthesiser.

For example, Mulligan [2002] provides an investigation into environmental and Human Rights assessments used by Rio Tinto. His work focuses on a titanium dioxide mine in Madagascar and demonstrated that Human Rights risks which were deemed unquantifiable were rated as less important than the benefits that could be quantified (e.g. income and job creation). Mulligan recognised that although the potential impact on the environment and the Human Rights of the indigenous community that lived in the area were unquantifiable – it is probably impossible to evaluate the financial value of community life or ancient rituals – the project was highly likely to be catastrophic⁸³ [2002].

Given Rio Tinto's experience of similar projects elsewhere [Kirsch 2003], there were almost definitely individuals within the firm that understood the potential risks yet despite this, Rio Tinto, who considered this project to be one of a new breed of community oriented mines⁸⁴, and regardless of their code of conduct which recognises indigenous communities

⁸² FN5

⁸³ See also *Mining and Environmental Human Rights in Papua New Guinea* by Stuart Kirsch [Frynas and Pegg 2003] for an additional analysis of the incompatibility of mining and Human Rights

⁸⁴ See: http://www.riotinto.com/documents/Library/Review89_March09_A_promise_fulfilled.pdf (accessed 14/08/2010)

unique Human Rights needs⁸⁵; failed to give Human Rights including environmental concerns sufficient weight within their impact assessment. We know this because before the mine was fully operational many of the environmental and Human Rights concerns identified by Mulligan had come to fruition⁸⁶. The only certain method for Rio Tinto to avoid the inherent risk in this project would have been to cancel it [Kirsche 2003], which would have been an ethical rather than a business decision.

In summary, although there are numerous high-level efforts to change business assumptions and decision making, the basic business calculation where profit assumes primacy above all other concerns is inherent within every decision. Society cannot expect a business whose purpose is to make profit out of operating mines to make a decision not to open a mine which is definitely going to deliver a profit because a community or the environment might be damaged.

To quote Hinkley:

“Most government [action] fails to create corporate citizenship or social responsibilities because it does not recognise that corporations are not self-regulated by moral standards, a sense of right or wrong or human consciences. Such regulation often attempts to achieve its goals by threatening organisations that are legal creations and are incapable of being threatened as they are of being remorseful or shamed” [2000, p291].

Psychological Analysis

As consumers and investors we are detached from the impact our decisions make and may even feel powerless to affect the changes we may believe as citizens are correct [Fisher 2009, Reich 2008]. However, given that the vast majority of employed people work for businesses, it is members of the public that directly facilitate or contribute to Human Rights violations [Fisher 2009]. Yet we know the majority of people are family and community oriented law-abiding citizens who would not in normal circumstances choose to violate someone’s Human Rights [Reich 2008, Hamilton and Sanders 1999].

As stated by Freeman, Wicks and Parmar: *“[I]t’s not send business to the moral ghetto, so that in most of our lives we are complicated fathers and mothers, partners., lovers and citizens, yet in business we are greedy little bastards trying to maximise self-interest and best the other guy” [2011 p69].* Indeed it is difficult to believe in the Rio Tinto example

⁸⁵ See: Rio Tinto’s code of conduct
[http://www.riotinto.com/documents/ReportsPublications/The_way_we_work_2009.pdf (accessed 18/08/2010)] at p14

⁸⁶ See: Friends of the Earth media briefing
http://www.foe.co.uk/resource/media_briefing/mining_madagascar.pdf (accessed 14/08/2010)

above that all the decision-makers, planners and assessors were knowingly colluding to violate peoples' Human Rights and destroy the local environment.

This observation does not necessarily mean, as Freeman, Wicks and Parmar [2011] assert, that Stakeholder Theory is a better description of business. Rather, it is more likely these employees trusted the accepted business processes and cost/benefit analysis techniques more than their personal analysis. Hence, in contradiction to Freeman's Responsibility Principle outlined earlier, individuals do not take responsibility for their actions. According to Fisher, employees do not humanise business practice because they have tacitly accepted 'Capitalist Realism' [2009]; we accept the world is structured by the harsh rationale of economic efficiencies because it is, not because it has to be. Regardless of the philosophical explanation, there is clearly dissonance between personal 'moral' standards and work-place decision-making.

Since the Second World War, a series of psychological experiments and investigations were undertaken to understand how 'normal' people become embroiled in genocide and other in-human activities. From Festiga's [1959] work on cognitive dissonance, through Milgram's [2005] obedience experiments in the 1960's to Zimbardo's [2007] experiments modelling prison guard behaviours in the 1970's, we have developed a corpus of understanding that may shed light on business behaviours.

Festiga argued that people resolve atypical behaviours by, amongst other factors, subconsciously moulding their memories so their remembered behaviours more closely match their typical behavioural patterns [1959]. Milgram demonstrated that people can be encouraged to perpetrate heinous acts without physical threat or significant personal benefit and participants will frequently rationalise their actions *post hoc* [2005]. Zimbardo illustrated that once people have adopted an imposed behavioural pattern from an authority figure they frequently adopt it as their own and embellish it with their own behavioural flourishes which can often be worse than the initial instructions [2007]. Zimbardo also identified a feedback process where a subordinate's behavioural flourishes become accepted by the authority figure [2007].

These observed psychological mechanisms are supported by historical analysis [Browning 2005, Coster 1999] and psychological analysis of scenarios which have led to extreme Human Rights violations [Mann 2005, Staub 2003, Feshbach 1992]. The important point to note is that these behaviours are not typical of a particular type of person or peoples – in Milgram's case similar experiments have been conducted all around the world with similar results [Blass 2004] – they are human group behaviours which occur subconsciously and therefore can be considered relevant in a variety of circumstances (e.g. a company) [Hamilton and Sanders 1999].

This essay will not go further and provide a detailed psychological analysis of business culture and the social mechanism that enable 'normal' people to facilitate Human Rights abuses in the name of profit⁸⁷. This brief summary may, however, go some way to supporting the argument that it is unrealistic to expect people who work within a structured group environment, whose *raison d'être* is, and behaviours are, constantly and consistently affirmed and reinforced by external authorities (e.g. the media [Herman and Chomsky 1998]) to voluntarily change their behaviours [Kiesler & Kiesler 1970]. Importantly, it is equally feasible that the assumptions made by corporate employees facilitated by the organisation they operate within will infiltrate governmental decision-making if only because many political leaders have themselves experienced successful business careers and because businesses are able to influence government policy through, for example, political 'donations'.

Could a CSR manager decide and implement a decision the implication of which would prevent the business they represent from making billions of dollars profit? It is unlikely that they could. Yet they are still employed to make the business operate in a more humane manner hence cognitive dissonance occurs. Using the psychological analysis above, the CSR Manager would reason that the community will benefit in a measurable way, that reasonable steps have been undertaken to protect the community's Human Rights, that independent consultants⁸⁸ were employed at considerable expense to affirm their processes and that ameliorative action can be taken if 'mistakes' happen along the way. Of course, once the environment has been degraded and the community destroyed, ameliorative action is most likely too little, too late but the CSR Manager would have fulfilled their role while any resultant social or environmental downsides would be considered 'collateral damage', a symptom of our necessary endeavour for growth.

Adam Smith famously wrote: "*[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise process*" [WN I x.c. 27 p145]. Elsewhere Smith elaborated on this point by stating that merchants were able to use their proximity to power and economic means to make their "*sophistry and clamour*" [WN IV ii 43 p471, quoted in Muller 2003] more effective than their rivals in order to enforce their will. This is not to say that they are "*basterds*" [Freeman Wicks Pamar, 2011], rather, it is to make the

⁸⁷ See: Hamilton and Sanders [1999] and Deboub et.al [1995] for more detailed analysis

⁸⁸ See above reference to KPMG [FN92] with BAE and refer also to Arthur Anderson and ENRON (see: <http://news.bbc.co.uk/1/hi/business/2047122.stm> for evidence that consultants are likely to be complicit in poor corporate behaviours. Although Andersons is now defunct it seems unpersuasive that these were the actions of a few 'bad eggs' rather, it is likely to that employees of major corporate auditors, management consultants and CSR consultancies (which are generally divisions of the two previous types of business) are under the same psychological pressures as the employees within the businesses they serve. No business pays a management consultant large sums of money to tell them not to undertake a project in which they are almost certain to make considerable profit; that would be considered bad business advice.

point that there is an accepted wisdom within a group which assumes the furtherance of its own wellbeing is the right and appropriate action. Galbraith describes this phenomenon in his pamphlet The Economics of Innocent Fraud [2004] where he states *“this is not the contrivance of any individual or group but represents the natural, even righteous view of what serves personal or larger interest”* [p4-5] [...] *[w]hat prevails in real life is not the reality but the current fashion and the pecuniary interest”*[p5]. Hence the cognitive dissonance is dissolved and corporate employees are able to live comfortably with the contradiction between their actions at work and their moral framework.

In summary, the individuals that enable business to destroy the environment and exploit people are average people with the typical range of moral outlooks. Yet the fact of operating within a company or buying a product as a consumer separates individuals from reality by associating them with a group the behaviour of which is considered perfectly reasonable. Within this psychological framework it seems highly unlikely that voluntarily agreed CSR programmes would ever be able to promote the changes necessary in business practice to ensure that business operated with Human Rights oriented behaviours.

Conclusion

Business in the globalised world has managed to circumvent the shackles of regulation within the developed economies and seek greater profit margins and higher share-holder returns by participating in a ‘race to the bottom’ which undermines Human Rights protection and provision to varying degrees in all States. Conversely, business investment and activity are central to any State’s ability to meet its Human Rights obligations. Indeed the purpose of the business within the capitalist system is to synthesise risk and opportunity for the betterment of society.

It is clear that CSR has been identified as the primary method of controlling business excess and harnessing the power of business for the well-being of humanity. Yet it appears duplicitous to emphasise CSR whilst maintaining a business’s fiduciary obligations to its shareholders. By maintaining this theoretical position, States and the UN are implicitly prioritising economic development over Human Rights.

CSR professionals and academics have sought to prove this analysis is incorrect. Through the application of, amongst other theories, Stakeholder Theory and Universal Ownership Theory, CSR professionals and businesses ethicists have asserted that good business decisions require Human Rights to be taken into account. Yet there is considerable evidence that the business decisions which create the most value for shareholders frequently undermine this assertion. Customers have not demonstrated a consistent willingness to look beyond price when buying goods despite their distaste for business’

Human Rights violations and investors, in general, make business decisions based on their own fiduciary duties rather than utilising a moral framework.

Hence the appearance of CSR has taken precedence over practical implementation. It is frequently perceived, therefore, that business employees operate cynically with the intention of misleading society to facilitate their exploitation of people and the environment for their individual gain. Understandably, this argument faces tough opposition within the businesses community because it implies that corporate employees and decision-makers are “*basterds*” [Freeman Wicks Pamar, 2011] who prioritise profit over people. Indeed we can be reasonably certain that most people would not consciously prefer to make decisions that negatively impact humans or their environment hence it is probably unhelpful to personalise corporate behaviour, rather we should recognise that corporate employees do not make business decision under the aegis of their own moral frameworks.

It is this dichotomy which leads us to the nub of the issue. Business decision making necessitates conscienceless thought processes which are predicated on the utilitarian assumption that economic growth will increase living standards for all quicker than any other method. In contrast, Human Rights are designed to protect the individual against utilitarian decision making that imposes sacrifice on one for the greater good. Consequently business decisions frequently conflict with Human Rights standards which the majority of people would hope are applied to their lives. Thus, the typical corporate employee or consumer experiences cognitive dissonance between their personal moral frameworks and the Capitalist Realist framework they apply as an employee or consumer.

Psychological analyses of group behaviours which have enabled the worst examples of human behaviour (e.g. the Holocaust) go some way to explaining how corporate structures enable this dissonance to persist. Such analysis also implies that it is unrealistic to expect individuals within the group to change the assumptions and behaviours of that group. In short, it is unlikely that a CSR professional or a business decision-maker will put voluntary Human Rights oriented obligations above their fiduciary obligations and the general well-being of the social group they belong to.

If the global community of governments is to meet their Human Rights obligations and make business operate in a more socially responsible manner, they must recognise the reality of business decision-making processes. With this knowledge in hand, it is then possible to recalibrate the economic system to make human rights provision and protection a by-product of business activity. This recalibration will necessarily be affected by processes, incentives or regulations that directly and predictably effect business profitability and therefore managers’ fiduciary obligations which, ultimately, determine corporate behaviour and consequently business activity generally. In short, policy makers should heed Galbraith [1999] and jettison the familiar idea of fostering voluntarily responsible business

and solve this conundrum through bold actions which affect real rather than cosmetic change.

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