ABA Section of International Law
Your Gateway to International Practice

January 2010

The CSR Journal

Legal Perspectives on Corporate Social Responsibility

A publication of the Corporate Social Responsibility Committee
of the International Section of the American Bar Association

Welcome to the latest edition of The CSR Journal. This installment seeks to inform the reader about a wide range of issues in Corporate Social Responsibility ("CSR") and Sustainability (hereinafter CSR and Sustainability are collectively referred to as "CSR"). The first article, *Corporate Social Responsibility: A "Cutting Edge" Policy for Employers*, written by JD Chesloff, Deputy Director of the Massachusetts Business Roundtable, describes the efforts that the Massachusetts Business Roundtable has taken towards promoting the social and economic welfare of the community through education. In the second article, *Japan Society's Innovators Network Focuses on CSR*, Betty Borden, Director of Japan Society Policy Projects, of Japan Society, recounts the recent roundtable discussion attended by Japanese and U.S. business leaders who came together to discuss entrepreneurship, CSR, and philanthropy in their respective countries. Third, John Sherman, Senior Fellow of the Mossavar-Rahmani Center for Business and Government, John F. Kennedy School of Government, Harvard University, and Amy Lehr, of Foley Hoag LLP, co-wrote *Human Rights Due Diligence: Is It Too Risky?* The article assesses aspects of human rights "due diligence" by businesses as part of their efforts to protect human rights. Next, in *CSR and Disclosing Your Greenhouse Emissions*, Roxanne Peyser, CEO and President, maurgood, LLC, and one of the CSR Committee's Vice-Chairs, identifies some of the issues and concepts of which businesses should be aware in order to support their advancement as well as some important concepts for attorneys. *In Individual, Markets & Human Rights*, Ethan S. Burger, Adjunct Professor of Law at the Georgetown University Law Center, considers how collective stakeholder action may affect political and human rights issues. Further, Kwasi Bosompem, Executive Director of the Let's Go Africa Foundation, discusses a recent educational conference on water and resource scarcity conducted for middle school students at the Embassy of Ghana in Washington, DC. Finally, Devin Stewart, Program Director and Senior Fellow of the Carnegie Council for Ethics in International Affairs, wrote *A Rallying Cry for CSR*, which discusses a recent presentation about key risks for 2010, including an evaluation of Google's decision to censor search results obtained by Google.cn users.

There are many more issues related to CSR efforts than could be tackled in one newsletter. Further information about CSR issues will appear in future editions of The CSR Journal. Readers and attorneys who are interested in CSR are invited to join the American Bar Association and to become members of the International Law Section's Corporate Social Responsibility Committee. For information about membership or future article submissions, please contact CSR Committee Co-Chairs Michael Levine (mlevine@ebglaw.com) or Jessica Ulm at (ulmjessica@gmail.com).

Corporate Social Responsibility: A "Cutting Edge" Policy for Employers

by JD Chesloff

The Massachusetts Business Roundtable (MBR) is a statewide public policy organization of Chief Executive Officers and area executives whose mission is to apply the managerial expertise of its members towards resolving complex public policy issues. Through research, evaluation and communication, MBR meets this mission by developing and articulating long-term views, programs and policies that promote the social and economic vitality of Massachusetts.

MBR's agenda includes five primary policy areas, developed solely based upon the interests and ideas of our members. These areas are: education and workforce development; health care; transportation and infrastructure; fiscal policy; and the most unique area, Corporate Social Responsibility (CSR). MBR's focus on CSR is atypical because few business associations have identified it as a priority agenda area. In fact, MBR presented its CSR work at the recent Annual Meeting of the 20 state roundtables from around the country. Although other states may vary in terms of how highly they prioritize CSR as an policy initiative, in Massachusetts, via the MBR, employers engage in CSR as they perceive it to be a "cutting edge" public policy area.

CSR: Application to the Business Model

MBR's Board of Directors voted to establish a Corporate Social Responsibility Task Force (Task Force) in 1999 to consider how the quantity and quality of charitable giving in Massachusetts could be enhanced. More recently, the Task Force has focused on strategies for encouraging, managing and improving CSR efforts in Massachusetts in the face of rapidly changing corporate leadership. MBR has released reports and held public forums across the state to engage stakeholders in a wide variety of these conversations.

Through the Task Force, the MBR explores corporate philanthropy issues, and it shares those findings with the broader business community. In 2000, MBR released a "Primer for Strategic Corporate Philanthropy," which provides a compilation of best practices that reflects the experiences, insights and corporate giving philosophies of some of Massachusetts' largest employers. This past spring, MBR issued another report entitled, "Corporate Social Responsibility and Employee Recruitment and Retention: A Primer (the CSR Primer)," which not only confirms that CSR is an important element to the recruitment and retention of talent, but also provides case studies that may be useful for employers who are looking to use CSR policies more strategically as an integral part of their business plans.

The CSR Primer, developed in collaboration with the Emerging Leaders Program, an executive training program at University of Massachusetts, in Boston, concludes that "[a]s more and more companies try to differentiate themselves from their competitors, they must treat Corporate Social Responsibility as far more than charity. CSR must be a core component of their business model." In the past, businesses large and small may have engaged in philanthropy based upon a sense of responsibility to their community. Today, with greater competition for customers and for talent both nationally and internationally, CSR is proving to be a powerful tool not only for community engagement but for bottom line success.

CSR: Recommended Best Practices

The CSR Primer is based upon interviews with 20 Massachusetts companies, ranging from 500 to 400,000 employees, and representing a cross-section of industries. This report compiles current CSR best practices and provides a variety of examples of how employers are using CSR standards more strategically as an integral part of their business plans. The report recommends five key best practice findings:

I. ***Create and maintain a clear link to the company's mission and secure executive endorsement.*** Corporate leaders emphasize that CSR policies are central to their corporate cultures. Philanthropic decisions are inextricable from the companies' business decisions, and these decisions flow from the top down and rise from the bottom up.

A good example comes from the experience of **Wainwright Bank & Trust Company**. For over two decades, Wainwright has remained steps ahead of other banks in the industry by following a socially progressive agenda. Unlike many of the other 14,000 banks in existence that devote themselves to maximizing only the financial bottom line, Wainwright adheres to a different set of principles. Since its founding in 1987, Wainwright has implemented a strategy that depends not only on doing well, but also on doing good. Both the business platform and social justice platform (the Bank's second bottom line) fuel each other in a mutually supportive way. These progressive initiatives that push Wainwright ahead have helped it acquire assets worth over $820M.

II. ***Engage employees at all levels as decision makers and leaders in regard to CSR targets and activities.*** Corporate philanthropy and volunteer programs are opportunities for employees from throughout the company to become engaged citizens, both within their communities and among each other. Well designed programs provide mechanisms for garnering input from employees and giving employees choices as to how they might contribute to the success of the corporation. Recognizing that executive leadership will set the general direction for a corporation's CSR program, employees should help define and refine these programs. This may be done by employees identifying specific projects worthy of corporate investment; providing constructive feedback once a CSR program is launched; witnessing its impact and considering how the program might be improved.

Over the past ten years, **IBM** has been one of the largest corporate contributors of cash, equipment and people to nonprofit organizations and educational institutions across the U.S. and around the world. One of its strategies is to team up with employees to support organizations they care about in the communities in which they live and work. IBM provides support to employees who volunteer their personal time to community projects. Employer support encourages and sustains corporate philanthropy through volunteerism.

III. ***Leverage employees' skills and ability to make positive contributions to the community.*** Employees gain confidence by using their skills in ways that benefit the community. Their positive contributions help the community see the efforts of the employees and the corporation in a new light.

At **Unistress Corporation**, part of Petricca Industries, "in-kind" contributions have enabled a sense of ownership in the organization's CSR strategy by leveraging the company's biggest asset, its employee skill base. As a manufacturer of precast/prestressed concrete products and specialists in road construction and large-scale highway infrastructure, Petricca's employees have unique skills in construction and heavy equipment operation. Employees are often called upon to utilize their experience in non-traditional ways to benefit their communities. Whether clearing land or constructing playgrounds, Petricca employees are encouraged to volunteer by leveraging their expertise as machinery operators and engineers. Not only do Petricca's employees feel proud of the contributions they made to their hometown of Pittsfield, Massachusetts, community members witness first hand the skill required to operate heavy machinery – and see these crewmen and Petricca Industries, with new appreciation.

IV. ***Provide opportunities for employees to develop new skills.*** CSR programs provide valuable opportunities to engage employees in new ways. When employees take on roles that are different from those held at their corporation, they learn new skills and recognize the different strengths of their coworkers that might not be apparent in the workplace. CSR may contribute to helping make a company a workplace of choice.

Since 2000, **EMC Corporation** has supported programs in the U.S. that encourage K-12 grade students, especially girls and underrepresented minorities, to pursue their interest in science and technology. Through its partnership with North High School in Worcester, Massachusetts, EMC is the corporate partner to the Technology and Small Business Community. As corporate partner, EMC provides volunteer assistance in the classroom and sponsors other educational programs, such as robotics partnerships, across the state. These initiatives allow employees to develop skills outside their professional expertise and provide EMC a valuable experience with the next generation of potential employees.

V. ***Encourage teamwork through group volunteer programs.*** Group volunteer programs allow team members to work with each other in new ways. By working together on projects outside of the office, employees may gain a better understanding of their coworkers and appreciate talents that may not be apparent within the work environment.

Blue Cross Blue Shield of Massachusetts (BCBSMA) has a longstanding legacy of community giving and community partnership development. For example, with their bright blue t-shirts and BlueCrew logo, at more than 1,000 volunteers strong, the BCBSMA volunteer corps is a familiar sight and highly sought-after team. Over the years, the BlueCrew has built a Habitat for Humanity house, helped City Year run a school vacation camp,

helped a community health center hold a women's health summit, provided mentoring services for the Blue Scholars program, decorated elder care residences, and raised money for dozens of organizations. These experiences have brought BCBSMA employees together in new ways to their benefit and the benefit of BCBSMA and the community.

Corporate Citizenship Components

In addition to defining these best practices, the report suggests components of corporate citizenship that may help maximize the impact of a company's CSR efforts, including:

I. *Forming Meaningful Partnerships with Nonprofits.* When companies and charities form partnerships, the results may be more visible to the employees and yield significant benefits both for the non-profit and the larger employer.

II. *Using Core Competencies – Donate Skills as Well as Money.* There are many cases in which employees can leverage unique skills that may often be out of reach for many non-profits and has the added benefit of being a tangible, visible contribution.

III. *Working with Nonprofit on Issues that Align with Business Objectives.* For organizations that are just beginning to explore a formalized CSR program, it is recommended that they first focus on issues that align well with their business objectives.

IV. *Learning from Mission-Driven Organizations.* For some organizations, the social mission mirrors the corporate mission. Current CSR thought leaders suggest that an innovative transformation where corporations refocus resources on social needs is already underway.

Conclusion

Developing best practices requires commitment on the part of the corporation. In the best cases, stakeholders within the corporation should be the driving force for developing formal initiatives that engage all employees in the corporation's philanthropic and volunteer programs. Strategically minded business leaders recognize that a well thought-out and implemented CSR program will have a positive impact on the recruitment and retention of employees, on the community, and on the company's bottom line.

JD Chesloff is the Deputy Director of the Massachusetts Business Roundtable and can be reached at jdchesloff@maroundtable.com.

Japan Society's Innovators Network Focuses on Corporate Social Responsibility

by Betty Borden

Through the *U.S.-Japan Innovators Network*, Japan Society, a New York based education and cultural institution, is creating opportunities for Japanese and Americans committed to creating a better world to come together for dialogue, collaboration and problem solving. We work to bring multidisciplinary groups of people together to share ideas and brainstorm, and to address shared problems that affect not only the U.S. and Japan, but countries around the world.

One issue central to the *Innovators Network*, and one that comes up regularly in the retreats and symposia we have organized, is corporate social responsibility. We have found is that traditional corporate social responsibility is being replaced by next-generation business models that more effectively blend social value into the bottom line. A new generation of business leaders in both the U.S. and Japan recognize that economic value and social value are two sides of the same coin. At the same time, many college students and young adults are no longer satisfied with the traditional role of business, and are looking for ways not only to make money, but also to do good. Universities, and in particular business schools, around the world are responding with programs on social entrepreneurship.

It is at this exciting meeting point—where making a profit and doing good come together—that we find great opportunity for bringing the next generation of leaders together for dialogue. Recently, we hosted a small group of emerging business leaders from Japan who were selected for an exchange program commemorating the 100th anniversary of a groundbreaking visit to the U.S. by Eiichi Shibusawa, considered the father of Japanese capitalism, and a group of Japanese business leaders. Working with the Shibusawa Eiichi Memorial Foundation, we brought these emerging Japanese business leaders together for a roundtable discussion on entrepreneurship, corporate social responsibility and philanthropy with their American counterparts. The delegation was led by *Innovators Network* member Ken Shibusawa, Founder and Chairman, Commons Asset Management, Inc. and a Member of the Board of the Shibusawa Eiichi Memorial Foundation.

We spent some time talking about one of the hottest topics in corporate social responsibility: *being* green. But more than being green, we talked about the problem of

green washing. It was interesting and at the same time disturbing to note the cynicism that has developed around this issue. It was also a perfect example of how companies serious about their rhetoric on protecting the environment might be better served with incorporating this social good into their bottom line by making it central to their business practices.

We also discussed the end of lifetime employment in Japan: the golden salary man myth is not only gone, but it is no longer attractive to many recent college graduates. This complemented nicely a related conversation on how, in the 1980s, all college graduates wanted to do was join investment banks, and how today this has been replaced by real excitement for social entrepreneurship. If companies want to attract the best and the brightest among recent college graduates, their greatest appeal may lie in their ability to show that they too are interested in not only making a profit, but also doing good.

Betty Borden is Director of Japan Society Policy Projects at Japan Society and can be reached at bborden@japansociety.org or (212) 715-1214. For more information on the U.S.-Japan Innovators Network, please check out our pages on the Japan Society website http://www.japansociety.org/innovators_network.

Human Rights Due Diligence: Is It Too Risky?

By John F. Sherman, III and Amy K. Lehr [i]

Due diligence is a familiar business tool, designed to enable companies to manage risk and reduce liability. It requires companies to ask tough questions about the risks of major transactions, projects, and ongoing operations. The answers may reveal unwelcome facts, requiring the company to take action to avoid or mitigate risks previously unappreciated. Since few people like bad news, companies must often overcome a reluctance to ask questions, the answers to which they may not like, in order to perform the process effectively.

Due diligence can and should now be used to assess and reduce a business risk that was only explicitly recognized as a risk quite recently—corporate involvement in human rights abuse. This is the conclusion of a 2008 report to the UN Human Rights Council by Harvard Kennedy School Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights (SRSG).[ii] The report, entitled "Protect, Respect, Remedy," articulates an interdependent, three part framework that notes: (1) states have a duty to protect human rights, (2) business has a responsibility to respect human rights, and (3) there is a need for greater access to remedy for human rights violations.

Under this framework, the business responsibility to respect human rights requires companies to conduct human rights due diligence. This means adopting a human rights policy, conducting human rights impact assessments, integrating the policy into the company's operations and culture, and tracking and monitoring performance. The SRSG's framework has enjoyed significant uptake by business, civil society, and governments, including most recently, the strong endorsement of the Presidency of the European Union. [iii]

In his subsequent 2009 report, the SRSG identified the concern, raised by some corporate counsel, that rather than reduce risks for companies, human rights due diligence could actually increase a company's risks of liability.[iv] This concern may reflect a natural reluctance to ask questions about previously unappreciated risks, exacerbated by the relatively new appearance of human rights risk on the business agenda. The short and sufficient answer is that human rights due diligence enables a company to identify potential human rights risks and address them before they occur, which should reduce the company's exposure to litigation of all kinds, and help the company defend against human rights claims that might be filed.

Due Diligence and Risk Management

Human rights due diligence is designed to enable a company to lower its business and legal risks relating to human rights. The due diligence process described by the SRSG has much in common with other due diligence processes, such as the U.S. Sentencing Guidelines for Organizational Defendants, the internal controls derived from COSO (the Committee of Sponsoring Organizations

i The views expressed in this memo are solely those of the authors, and do not necessarily reflect the views of the Kennedy School, National Grid, Foley Hoag, BLIHR, or the SRSG.

ii Protect, Respect, and Remedy: A Framework for Business and Human Rights, A/HRC/8/5 (April 2008), http://tinyurl.com/4snzhm.

iii Protect, Respect, Remedy – Making the European Union take a lead in promoting Corporate Social Responsibility, http://bit.ly/3dVgVn.

iv Business and human rights: Towards operationalizing the "protect, respect, and remedy framework", A/HRC/11/13 (April 2009), http://tinyurl.com/cqz384.

of the Treadway Commission), as embodied in Section 404 of the Sarbanes Oxley Act,[v] and the enterprise wide risk management processes set forth in the UK Turnbull Report.[vi] Each of these processes requires a company to identify, analyze, and mitigate risk, which requires turning over rocks and looking for problems.

Conducting due diligence provides corporate boards with strong protection against mismanagement claims by shareholders, usually in the form of derivative lawsuits, as the Chancery Court of Delaware (home to most major U.S. companies) determined in its 1996 *Caremark* decision.[vii] Just as due diligence can help a company manage and reduce the business and legal risks of criminal wrongdoing, a human rights due diligence process helps a company to reduce its business and legal risks of and from human rights abuses. Compared to a company that does not seriously attempt to manage its human rights risks, a company that conducts human rights due diligence is better able to resist a claim by shareholders that it incurred loss by mismanaging human rights issues.

Alien Tort Statute Claims

One potential source of concern about conducting human rights due diligence might be the discovery of facts that might increase the company's exposure to tort liability claims by victims against companies for redress for alleged human rights abuses. Although the U.S. is not the only country to incorporate international human rights principles into domestic law and apply them to companies,[viii] the U.S. Alien Tort Statute ("ATS"), 28 USC §1350—which grants aliens the right to sue in U.S. federal courts for violation of the law of nations—represents so far the largest body of domestic law on the subject. Although ATS claims have been filed against companies in recent years, leading to a number of settlements, that body of law is embryonic. It is based on a Jeffersonian-era statute that has no legislative history and began to be used only in recent years as the basis for human rights claims against companies. So far the statute has resulted in only three jury trials, which resulted in two verdicts in favor of the defendants and one for the plaintiffs.[ix]

In his 2008 Report, the SRSG stated that "the corporate responsibility to respect human rights includes avoiding complicity,"[x] which "refers to indirect involvement by companies in human rights abuses—where the actual harm is committed by another party, including governments and non-State actors. Due diligence can help a company avoid complicity." ATS claims often are based on complicity theories, such as aiding and abetting. Although the case law so far is limited, for aiding and abetting claims under ATS, courts have required: (1) assistance by an act or omission with a substantial effect on the commission of an international crime by a third party (*actus rea*); and (2) depending on the legal standard applied, knowledge or intent (*mens rea*).

As to the *actus rea* requirement of assistance, the claimant need only show that its assistance facilitated the crime, not that it caused the crime. In an ATS case arising out of alleged corporate support for South African Apartheid, the District Court required a close causal link between the assistance and the commission of the international crime, distinguishing between products that were specially tailored to help support various aspects of apartheid, and others that were fungible commodities.[xi] If this standard is applied in future cases, plaintiffs could likely prove that the company provided such specifically tailored assistance whether or not the company discovers these facts in due diligence. There is no reason for the company to stay in the dark, since the linkage will be proven afterwards in any event.

The major uncertainty is the second requirement, regarding the state of mind, or the *mens rea*. The question is whether the test is knowledge or intent. The Supreme Court has not ruled on this point, and the lower court decisions are in disagreement.[xii] Whether the standard is intent or knowledge, however, conducting human rights due diligence is a highly prudent decision.

Under the intent test, proof that a company exercised due

---

v 17 U.S.C. §762.

vi U.S. Sentencing Guidelines, http://tinyurl.com/l9orqe; COSO internal control framework, www.coso.org; Turnbull Guidance, http://tinyurl.com/lc7ttn.

vii In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

viii Ramastry and Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries, Fafo Report 536 (2006), available at http://tinyurl.com/mef97k.

ix These jury trials involved claims against Chevron arising from its use of security forces to protect its oil platforms in Nigeria (http://bit.ly/i77K8), against Drummond Coal Company arising from killings at its mines in Columbia (http://bit.ly/145Hr), and against a Bangladeshi company for its role in the arrest and torture of a business rival by a paramilitary (http://tiny.cc/DGpbu).

x SRSG April 2008 Report, supra, p. 20.

xi In re South African Apartheid Litigation, 617 F.Supp. 2d 228, 262 (S.D. NY 2009).

xii Compare Presbyterian Church of Sudan v. Talisman, 582 F.3d 244 (2d Cir. 2009) (intent standard) with Doe I v Unocal, 395 F.3rd 932, 947 (9th Cir. 2002) (knowing assistance standard). The Unocal opinion was withdrawn following the grant of an en banc petition for review and settlement by the parties. Cook, Tentative Settlement of ATCA Human Rights Suit Against Unocal, American Journal of International Law (April 2005), pp. 497-498.

diligence to prevent human rights crimes can be used to counter an allegation of wrongful intent. For example, in *Talisman v. Presbyterian Church*, the District Court followed an intent-based standard in an ATS claim against an oil and gas company arising out of human rights crimes committed by the Sudanese government; in granting summary judgment to the defendants, the court noted that the company had advocated unsuccessfully several times for the government to adopt better human rights practices and to stop using the company's air strips.[xiii]

A knowledge standard should be relatively easy for plaintiffs to demonstrate in ATS cases, which typically involve crimes affecting large numbers of people and information that is in the public arena anyway. The District Court in the Apartheid litigation concluded that knowledgeable employees need not be managers or more senior executives in the corporate structure.[xiv] If future courts follow this approach, then senior managers have every incentive to understand what is going on at all levels of the company with respect to human rights, since the company will be charged with the knowledge of all employees.

Moreover, knowledge need not be actual; it can be constructive. Thus, the company need only know sufficient facts to make a reasonable person conclude that such a crime likely has been or will be committed. For instance, in the *Unocal* case, which involved allegations of corporate complicity in international crimes against Burmese villagers by the Burmese military, the record showed that Unocal could be charged with knowledge of such crimes from numerous sources.[xv] In cases involving such widespread abuses, it is unlikely that due diligence will discover evidence of company knowledge that is not already available through other sources.

In addition to aiding and abetting claims, plaintiffs may also bring agency law claims under the ATS. For example, in *Bowoto v. ChevronTexaco*, plaintiffs alleged that Nigerian government security forces, which committed various international crimes in responding to a protest on one of Chevron's offshore oil platform in that country, were acting as agents of Chevron's Nigerian subsidiary, which in turn was acting as agent of two of Chevron's U.S. companies.[xvi] Although plaintiffs ultimately lost the jury trial, their claims survived motions to dismiss and for summary judgment.

To date, most of the courts that have interpreted agency claims under ATS have applied the U.S. federal common law of agency,[xvii] which requires proof that the principal asked the agent to act on the principal's behalf, that the agent agreed to so act, and that the principal retained the right to control the activities of the agent. Such a relationship can be inferred by the parties' conduct, and its existence is highly fact-specific.[xviii] In addition, the injury inflicted by the agent must be within the scope of the agent's authority in order for the principal to be liable. [xix]

Conduct is within an agent's scope of authority if it is reasonably related to the tasks that the agent was required to perform or reasonably foreseeable in the light of the principal's business or the agent's job responsibilities. Even misconduct that violates a company policy, or doesn't benefit the company, may still be within the agent's scope of authority if the action was committed in the course of a series of acts authorized by the principal, or the conduct arose from an inherent risk created by the work. Furthermore, even if the misconduct was outside the scope of the agent's authority, the principal can ratify it afterwards if it knows, or should have known, of material facts relating to the conduct and then ratifies, adopts, or approves it. Thus, a company can ratify, and become liable for, the actions of an entity that was not its agent at the time that the event took place. Finally, the failure to take adequate steps to investigate or remedy the misconduct can constitute ratification.[xx] It is not fanciful to predict that in a future case, human rights due diligence, as described in the SRSG's framework, will be cited as the standard for such a response.

In short, whether an ATS claim is filed against a company on an agency or an aiding and abetting basis, knowledge of human rights risks is a company's friend, not its enemy.

Negligence Claims

In addition to bringing an ATS claim, plaintiffs can also assert a company's indirect liability under common law claims, such as negligence, on the grounds that it failed to use reasonable care to protect another from foreseeable harm, resulting in injury.[xxi] Commonly accepted social

---

xiii Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp.2d. 633, 657 (S.D.N.Y. 2006), affirmed 582 F.3d 244 (2d Cir. 2009).

xiv In re South African Apartheid Litigation, supra, 617 F.Supp.2d at 262 n. 184.

xv Doe I v. Unocal, 110 F.Supp.2d 1294 (C.D. Cal., 2000), reversed by, in part, affirmed by, in part, and remanded, 395 F.3rd 932 (9th Cir. 2002) (opinion withdrawn following settlement and prior to en banc ruling). This withdrawn opinion is not precedential, but nevertheless provides guidance regarding how courts will approach aiding and abetting liability.

xvi Bowoto v Chevron Texaco, 2007 WL 2349536 (N.D. Cal. 2007), pp. 15-16 ("Bowoto 2007").

xvii In re South African Apartheid Litigation, supra, 617 F.Supp.2d at 271.

xviii Bowoto 2004, supra, 312 F.Supp.2d at 1239.

xix Bowoto 2004, supra, 312 F.Supp.2d at 1239-1240.

xx Bowoto v Chevron Texaco, Instructions to Jury, Case 3:99-civ-0506-SI, Doc. 2252, November 28, 2005 ("Bowoto Jury Instructions"), pp. 29-33, 37-39. See also, Restatement (Third) of the law of Agency, sec 4.06 (Ratification), comment d.

xxi Bowoto Jury Instructions, p. 20; Prosser and Keeton, The

standards such as industry custom, administrative regulation, or legislative statute can serve as the standard. There is no need to demonstrate the breach of an international criminal law, as there is in an ATS case. The test is not knowledge or intent, but whether the company "should have known" that it was breaching its duty of care to the plaintiff.[xxii]

For example, Exxon Mobil and its Indonesian subsidiary were sued under various tort theories arising out of killings and torture committed by Indonesian public security forces that the company had hired to protect its facilities. The court found sufficient evidence to entitle plaintiffs to a jury trial on whether the defendants were directly liable for negligently hiring, retaining, and supervising the security forces.[xxiii] Similarly, in *Bowoto v. Chevron Texaco*, Chevron's Nigerian subsidiary was sued for negligence under California law on the grounds that it failed to train and supervise the Nigerian security forces and local police it called in to suppress protests against Chevron, resulting in injury to the plaintiffs.[xxiv]

Human rights due diligence is relevant to the standard of care owed by a company to victims, and has received recognition as an international standard of conduct for handling disputes involving multinational companies. For example, in 2008, the U.K. National Contact Point (NCP)—responsible for determining the adherence of U.K. companies to the OECD Guidelines for Multinational Entities—determined that a U.K. importer of minerals mined in the Democratic Republic of the Congo, "did not apply sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labor in the mines or to take steps to influence the conditions of the mines."[xxv] Similarly, in 2009, the U.K. NCP noted that Vedanta Resources had failed to exercise adequate human rights due diligence in its operations in India.[xxvi] Although these NCP decisions were not binding legal determinations, they evidence growing high level acceptance of human rights due diligence as a standard of care owed by companies to those impacted by its business.[xxvii] At some point, therefore, it is not inconceivable that human rights due diligence may be cited by a court as a standard of care in a negligence case.

Misrepresentation Claims

Another possible concern with due diligence relates to misrepresentation claims. This arises from the requirement to harmonize public statements about the company's human rights conduct with what the company knows already, or learns from due diligence. The failure by publicly traded companies to harmonize such statements could be costly, resulting in misrepresentation claims by shareholders. This is not so much a risk of due diligence as an argument in its favor, however, since prompt discovery and full disclosure of risks protects investors, and thus the company. Indeed, in the United States, under the Private Securities Litigation Reform Act of 1995, listed companies that accompany forward-looking statements (*e.g.*, predictions of future growth and earnings) with meaningful cautionary language identifying factors that qualify the forward-looking statement (*e.g.*, human rights risks), are immunized from suit for such statements, should their predictions turn out to be inaccurate.[xxviii]

Customers also rely upon a company's public statements about human rights, and have the right to expect that those statements are correct. For example, a retail company may have advertised that it doesn't use child labor, but subsequent due diligence may show that this statement isn't fully true for all of its suppliers. One well-known claim was brought against Nike for exaggerating its success in ending labor abuses in its supply chain under the California consumer protection statute, resulting in a $1.5 million settlement.[xxix] Despite the threat of such litigation (or perhaps because of it), the courts have not been flooded with a huge volume of such litigation based on human rights issues. Furthermore, companies are able to limit the risk of such suits by making accurate and demonstrable statements regarding their human rights and labor

---

Law of Torts, sec. 30 (5th Ed., 1984).

xxii Ruggie, Clarifying the Concepts of "Sphere of influence" and "Complicity", A/HRC/8/16 (May 15, 2008), p. 6.

xxiii John Doe, et al v. Exxon Mobil Corp., et al, 573 F.Supp. 2d 16 (D.D.C. 2008) (federal statutory claims against Exxon, including ATS claims, were earlier dismissed), dismissed under a seldom-used doctrine denying standing for non-citizens, 2009 U.S. Dist. LEXIS 90237 (D.D.C. 2009). Plaintiffs have appealed the case.

xxiv Bowoto 2007,supra pp. 23-24.

xxv Final Statement by the U.K. Nat'l Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd., P 58-62 (Aug. 28, 2008), www.berr.gov.uk/files/file47555.doc.

xxvi Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Vedanta Resources plc (Sept 25, 2009), www.berr.gov.uk/files/file53117.doc.

xxvii Backer, Rights and Accountability in Development ('RAID') v DAS AIR and Global Witness v Afrimex: Small Steps Towards an Autonomous Transactional Legal System for the Regulation of Multinational Corporations, 2009 Melbourne Journal of International Law, Vol. 10 (awaiting publication, available at http://ssrn.com/abstract=1427883).

xxviii Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109, Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2000)); Sommer, The PSLRA Decade of Decadence: Improving Balance in the Private Securities Litigation Arena with a Screening Panel Approach, 44 Washburn Law Journal 413 (2005).

xxix Brown, No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?, 26 Yale L. & Policy Rev 367, 391-393 (2008) ("Brown").

practices.

In any event, reviewing marketing material for possible misrepresentation is a process that companies must undertake every day. If a company wishes to promote its human rights due diligence process in order to gain the goodwill of customers, then it needs to make sure that its public statements about its human rights performance are accurate. There is nothing remarkable or burdensome about this.

Confidentiality Concerns

Although conducting human rights due diligence reduces risk, companies still need a confidential space in which to investigate and evaluate the information it discovers in private. Complete transparency may chill the willingness of companies to investigate difficult problems and evaluate them candidly and realistically, and communicate internally in order to fix the problems.

The courts do recognize, however, the need to keep corporate investigations into potential legal liability confidential under legal privilege and the work product rule. [xxx] Legal privilege protects communications between the attorney and the client from discovery and use at trial, unless the client waives the privilege. The privilege applies only to the confidential communication itself, but not to the underlying facts. Thus, plaintiffs could, for instance, rely on NGO reports to demonstrate that human rights abuses occurred, even if those abuses were also discussed in privileged company communications with legal counsel. The work product rule provides more limited protection to investigative reports conducted by or for lawyers, and can be overcome by a showing of need by adversaries, such as their inability to get the information in any other reasonable way. These protections are not, however, boundless. They cannot be abused to "allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."[xxxi]

Although the responsibility to respect human rights is not hard law, its principles have significant potential legal impact. As the reflection of a global social consensus on how business should behave, it is part of a dynamic matrix of "international soft and hard law, national law, and transnational custom and customary frameworks (institutionalized or not)"[xxxii] that converge into an emerging "*lex mercatoria*" or "law merchant" of human rights.[xxxiii] This hybrid legal and normative system guides and drives business behavior in the absence of a central global command and control governance structure.

Given the potential risks of legal liability for failing to engage in human rights due diligence—e.g., shareholder mismanagement claims, tort suits, claims under the ATS, etc.—it would be highly prudent for companies to assemble a legal team to investigate the underlying facts where allegations of company involvement in human rights abuses have occurred, or likely will occur. In such a case, appropriate assertion of legal privilege and work product would not be incompatible with human rights due diligence, since those protections do not apply to underlying facts communicated, and even investigations conducted under attorney work product may be disclosed upon an appropriate showing of need. In fact, legal privilege and attorney work product protections provide an important space in which clients and counsel can have candid discussions regarding human rights problems and how they can be addressed that otherwise might not occur.

Communication to legal counsel about human rights risks, or their discovery by legal counsel during investigations, therefore, does not relieve the company of the need to address the risk, and where appropriate, disclose information about the risk publicly. Even where assertion of the privilege is justified, a reflexive resort by companies to invoke legal protection wherever possible may be in tension with the need to head off or reduce problems by building relationships with external stakeholders based on mutual trust. This requires being candid and open about problems and taking responsibility when things go wrong.[xxxiv] In the end, the decision to assert legal privilege should not be reduced to a simple on or off switch. Deciding whether to assert the privilege with respect to human rights due diligence investigations or waive it requires sound judgment, but that is no different for human rights due diligence than it is for other due diligence investigations that companies undertake every day.

Another potential protection is the so-called "self evaluation privilege" which, like the attorney client privilege and work product rule, restricts the discovery and evidentiary use of information, but is aimed at voluntary self-analysis intended to fix problems. A number of U.S. courts have recognized such a privilege under the common law in a variety of contexts,[xxxv] but there is considerable disagreement about whether such a privilege exists and, if so, when it applies.

---

xxx See Upjohn v. United States, 449 U.S. 383 (1981).

xxxi Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 324 (7th Cir., 1963)

xxxii Backer, supra, p. 36.

xxxiii Steinhardt, The New Lex Mercatoria in Alston (ed.), Non-State Actors and Human Rights (Oxford University Press. 2005), pp. 221-6; see also, Kerr, Janda and Pitts (ed.), Corporate Social Responsibility: A Legal Analysis (LexisNexis 2009), pp. XX.

xxxiv Susskind and Field, Dealing with an Angry Public: The Mutual Gains Approach to Resolving Disputes (Free Press, 1996), pp. 160-177.

xxxv Brown, supra, at p. 381.

Courts that recognize the self-evaluative privilege require the company to show that the prospect of discovery and use of a confidential self-audit would stifle a critical self-evaluation that would otherwise serve the public interest. Thus, where the company is conducting the self-analysis to determine whether it complying with its legal obligations, some courts will deny the privilege on the ground that the sanctions for legal misconduct provide a strong enough incentive to conduct the audits anyway. [xxxvi]

It has been suggested that adoption of a special self-evaluative privilege could protect efforts by a company to determine whether it is in compliance with voluntary human rights and other policies.[xxxvii] The stated need for such a privilege is premised on the view that aspirational codes of conduct are voluntary, meaning that legal privilege and work product protection would not apply. As we discussed earlier, however, the hybrid legal and normative impetus behind the responsibility to respect human rights, and the potential for legal liability for not conducting human rights due diligence, ought to prompt companies to obtain legal advice as matter of prudence, and do so in confidence. Thus, a significant part of a due diligence investigation would be covered by existing legal privilege and work product doctrines, enabling companies to shield confidential communications—but not underlying facts—from discovery.

Immunities

It has been suggested that due diligence should immunize companies from liability, in order to encourage them to conduct due diligence robustly, and overcome the reluctance—whether or not justified—to ask tough questions that reveal unpleasant facts about the company's human rights risks, and to take actions to mitigate them.

One commentator has suggested that the courts should recognize a business judgment rule type of immunity for companies that would bar suits by victims under the ATS, as long as the companies conduct human rights due diligence in good faith.[xxxviii] Analogizing to the business judgment rule in shareholder mismanagement cases, it is argued that as long as companies follow the SRSG's human rights due diligence process, they should automatically be immunized from suit even if they make the wrong decision.[xxxix]

This proposal is problematic, however, since the ATS involves claims that are very different from claims made by investors that the company mismanaged the business, resulting in financial loss. A mismanagement claim alleges that management abused its extremely broad discretion to run the business of the company without being second-guessed by shareholders. A claim by victims under the ATS is markedly different. It is about whether the company's behavior fell below the most basic norms established by international law and global society, resulting directly or indirectly in a violation of human rights that is so severe and universally condemned that it is a violation of the laws of nations. Compared to investors, the victims of human rights abuses are far more vulnerable, and the harm is more permanent and shocking to the conscience. Indeed, the SRSG's third pillar of the framework – increased need for access to remedy—is premised on this very point. When human rights are at issue, a company should not be entitled to the same broad degree of protection that the business judgment rule grants to directors in financially managing a company.

Outside the human rights context, a number of commentators have argued for a "due diligence" defense in criminal prosecutions of corporations, which would avoid the stiff consequences imposed by the rule of *respondeat superior*—an agency doctrine that makes an employer responsible for the criminal acts of any employee committed in the scope of their employment, even where the employee acts contrary to corporate policy and a robust compliance program.[xl]

The District Court in the *In re South African Apartheid Litigation* acknowledged and approved the *respondeat superior* doctrine in the ATS context, concluding that knowledge by employees of substantial assistance in committing human rights crimes should be imputed to the employer if the employees acted in the scope of their authority, even where the company prohibited the conduct.[xli] Recent Supreme Court cases, however, have allowed companies to prove their good faith as an affirmative defense in order to avoid punitive damages in civil cases, opening a potential path to asserting a good faith defense.[xlii]

The need for a good faith defense for human rights due diligence is not entirely clear, since, as we have shown, human rights due diligence reduces many more risks than it generates. But since the issue of a good faith defense for due diligence—human rights or otherwise—is already

xxxvi Id., at p. 383.

xxxvii Brown, supra, at pp. 401-413.

xxxviii Dhooge, Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute, 22 Emory Int'l L. Rev. 455 (2008).

xxxix Id., pp. 476 et seq.

xl Weissman, supra, p. 3-4.

xli In re South African Apartheid Litigation, supra, 617 F.Supp.2d at 262 n. 184; United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir. 1989).

xlii Weissman, supra, pp. 7-10; Burlingham Industries v Ellerth, 524 U.S. 742, 765 (1998).

a subject of public debate, we offer three suggestions on how such a defense, if implemented, could be shaped to minimize adverse impacts on human rights.

First, a good faith defense should only be applied to claims for noncompensatory damages. Using this defense as a shield against claims for compensatory damages would run counter to the need for greater access to remedy by those harmed by business-related human rights abuse—the third pillar of the Protect, Respect, Remedy framework. The purpose of noncompensatory damages, however, is to punish the defendant and deter future misconduct, not to compensate the victim. Using evidence of due diligence to reduce noncompensatory damages would be similar to the acknowledgement in the U.S. Sentencing Guidelines for Organizational Defendants that a company's due diligence to prevent criminal misconduct is a reason to reduce the severity of criminal sanctions against the company. It potentially creates a positive incentive for companies to conduct due diligence and avoid misconduct in the first place.

Second, the defense should be available only to avoid company responsibility for the actions of lower-level employees acting contrary to enforced company policy on human rights. Where the actions of higher-level company officers are at issue, the defense should not apply. This aligns with how commentators have proposed that the good faith defense should apply outside the human rights litigation context.

Finally, the good faith defense must not lead to a tick-the-box approach, which elevates form over substance, which awards processes that do not result in better human rights outcomes.[xliii] This concern might be mitigated if the protection is conditioned upon independent third party certification as to the effectiveness of the process, in much the same way that Section 404(a) of the U.S. Sarbanes Oxley Act requires qualified and independent third party auditors to verify the effectiveness of a company's internal financial controls.

As noted earlier, the human rights due diligence process has much in common with other due diligence processes used by companies to manage financial and other risks. For example, Section 404(a) of the Sarbanes Oxley Act—which the U.S. Congress passed in 2002—requires publicly-traded companies to self-assess, and independent third party auditors to report on, the effectiveness of the company's internal control structure and procedures.[xliv] In making such assessments, most U.S. companies and their external auditors have used the internal controls framework of the Committee of Sponsoring Organizations of the Treadway Commission (COSO).[xlv]

Such certification might be based upon a number of mechanisms, including an ISO standard or a multistakeholder auditing umbrella organization that oversees the auditors' practices and helps develop standards for them. It would be critical that civil society, governments, and business see the certification process to be legitimate and rigorous. To gain such legitimacy, the standards should be developed through a transparent multi-stakeholder process.

Conclusion

In the end, due diligence is about preventing and limiting risk. This article asks: is human rights due diligence too risky? The analysis boils down to one answer: not conducting due diligence is too risky, for both business and society.

John F. Sherman, III is a Senior Fellow at the Harvard Kennedy School and was formerly deputy general counsel of National Grid. Amy Lehr is part of Foley Hoag 's CSR practice group, and was legal advisor to the UN Special Representative on Business and Human Rights.

xliii Huff, Note: The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 Colum. L. Rev. 1252, 1275-1276 (1996).

xliv 17 U.S.C. §762(a).

xlv The COSO principles are available at www.coso.org. See also, Sarbanes-Oxley 404: A Guide for Management by Internal Controls Practitioners, The Institute of Internal Auditors, 2d ed. (January 2008), p. 10, www.theaia.org.

CSR and Disclosing Your Greenhouse (GHG) Emissions:

A primer on what your clients need to know to protect and grow their businesses AND what you need to know about the expanding legal scope

by Roxane Peyser

A growing number of businesses, from large corporations to small companies, are realizing the benefits of calculating and reducing their carbon (or GHG) footprint – and then disclosing their efforts.

Their return on investment (ROI) is proven. For example, the ROI has averaged roughly between 25%-45% within a 2-4 year period, realized as a result of improving energy efficiency in connection with lighting, HVAC and motor systems.

But the benefits of implementing a carbon reduction program and then disclosing those efforts – especially voluntary disclosure in corporate social responsibility (CSR) reports or other publications - exceed those realized from grabbing the lower hanging fruit of improving energy efficiencies.

Companies increasingly are finding that integrating carbon management throughout an organization's processes and operations produce much more than lower energy bills. The benefits include: improving business efficiency and customer service, increasing competitive advantage, reducing costs and reputational risk, retaining and attracting top talent, reducing exposure to regulatory uncertainty, managing short and long term risk, and improving cost and product.

What Disclosure Means

There are two types of disclosure: *mandatory* and *voluntary*.

Mandatory disclosure includes legal compliance, but extends beyond the traditional legal scope. In this context, it means what you are required to report in order to continue doing business with a party (e.g., being a vendor in the Wal-Mart supply chain); or what you are mandated to report after voluntarily joining a carbon initiative or reduction regime (e.g., the Chicago Climate Exchange).

Voluntary disclosure is typically a business decision based on one or both of two drivers: (1) your vendors prefer you to measure and report on it (the underlying expectation being that you will mitigate your carbon emissions); (2) your assumption or experience, or both, is that there is a proven ROI and it is good for business.

Mandatory Disclosure

There is no legislation that currently mandates disclosure of your carbon emissions. However, on September 22, 2009, the U.S. Environmental Protection Agency (EPA) issued a final rule requiring reporting of GHGs from specified sources above the threshold amount from all sectors of the U.S. economy. The rule requires reporters (i.e., those sources and emitters required to report), to begin monitoring their GHGs on January 1, 2010. Disclosures will begin next year with the first reports due on March 31, 2011.

Related to this is the December 7, 2009 finding by EPA Administrator Lisa Jackson that GHGs pose a public health risk. Jackson's report lists six specific GHGs: carbon dioxide (CO2), methane, nitrous oxide, hydrofluorocarbons (HFCs), perfluorocarbons, and sulfur hexafluoride. A full list of GHGs can be found on the IPCC's website.[i]

According to Jackson's report, these particular GHGs present the following dangers to human health and the public welfare:

- Sea level rise leading to flooding of coastal areas
- Air quality concerns
- Increase in the number of adverse weather events including floods, drought, and wildfires, and an increase in intensity of hurricanes in the Atlantic Ocean
- Increases in food and water borne pathogens
- Damage to infrastructure from adverse weather events
- Damaging effects on crop yields
- Negative effects on wildlife and natural ecosystems including problems with invasive species

It is because of these impacts that GHGs have on the environment in general, and climate in particular, that emissions disclosure has widely been referred to also as *climate risk disclosure.*[ii]

It is also these same threats – regulatory and legal, shareholder resolutions, business, political and activist-related – that offer opportunities to business of all types and size. The opportunities are essentially centered on carbon emissions mitigation. In order to take advantage of

---

i *See* Intergovernmental Panel of Climate Change, http://www.ipcc.ch/ (last visited Jan. 21,2010).

ii Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 40 C.F.R. § 6560.50 (2009).

the opportunities, companies need to first measure their emissions and assess the risks.

THE RISKS

The chief risks companies face in connection with their GHG emissions fall basically into the following categories:

- Regulatory/legal
- Business
- Activism / Shareholder Resolutions

Regulatory/legal

The only regulation currently active is the previously mentioned EPA rule that requires regulated companies with emissions above specified levels to measure GHG emissions and start reporting in March 2011. No other regulation or legislation at this time mandate measurement and reporting. However, risk management best practices require giving heightened attention to the following:

1. **SEC (Securities and Exchange Commission) disclosure:** Multiple parties – including State Attorneys General, shareholders, institutional investors, and many others - have been very active over the last several years in asking the SEC to clarify climate-related disclosure obligations for publicly traded corporations, while others have demanded such disclosure requirements.[iii]

2. **Insurers:** In May 2009, the National Association of Insurance Commissioners (NAIC) announced a model rule that would require insurance companies to file annual disclosures related to the financial risks they confront associated with climate change, in addition to their response to climate risk.[iv]

3. **Regional and state initiatives and requirements** (e.g., WCI): Regional and state requirements exist of which companies need to be mindful. For example, the Western Climate Initiative (WCI) is a collaboration of jurisdictions cooperating to identify, evaluate and implement policies at a regional level to reduce GHG emissions and promote CleanTech development. Central to the WCI's implementation is a cap-and-trade program, which will be fully active in 2015. It is expected to cover about 90% of the GHG emissions in WCI states and provinces. Under the WCI (and similar initiatives), regulated sources will be subject to a rigorous reporting requirement under which they will be held accountable for ensuring accurate and complete data.[v]

4. **Cap-and-Trade Legislation**: There are far too many different proposed cap-and-trade bills at the federal level to enumerate and analyze here. One of the more important bills to gain traction was Waxman-Markey (otherwise, H.R. 2454, American Clean Energy and Security Act of 2009), which was passed by the House in June 2009 and sent on to the Senate. To date, the Senate has taken no action with respect to cap-and-trade or energy legislation since the House passed the bill. Alternative proposals have since surfaced, though there has been no significant movement on the national level since June 2009. Still, energy legislation of some kind can be expected within the next year or two. Whether it will contain a cap-and-trade program is debatable. Prudent risk management and best risk management practices dictate careful monitoring of developments related to passage of federal legislation.

THE OPPORTUNITIES

Though many companies are required to measure their GHG emissions beginning January 2010, those companies who are or will be initially exempt from measurement and reporting requirements will find – or already have found – that voluntary measurement and reporting of carbon emissions is good for business.

This is so for two principal reasons: (1) the supply chain is increasingly demanding companies to measure and report emissions in order to continue doing business; and (2) many business leaders have discovered voluntary disclosure as a brand-booster adding directly to the bottom line.

Putting aside the debate over the causes and severity of climate change by some skeptics, it is crucial to your business – no matter the size – to know how to take advantage of the opportunities.

Many companies since the 1990s have found that measuring, managing and reducing their GHG emissions has been a profitable business decision.

For one thing, the most efficient and effective way for many companies to reduce their carbon emissions is to conduct an energy audit. The result of such an audit can reveal many inexpensive ways to cut energy consumption and slash utility bills, while simultaneously reducing their carbon output.

iii Beth Young et al., *Climate Risk Disclosure in SEC Filing: An Analysis of 10-K Reporting by Oil and Gas, Insurance, Coal, Transportation and Electric Power Companies*, CERES, June 2009, *available at* http://www.ceres.org/Document.Doc?id=473.

iv Frederick R. Bellamy et al., *NAIC Requires Insurer Climate Risk Disclosure: Legal Alert*, SUTHERLAND, May 12, 2009, *available at* http://www.sutherland.com/files/News/247cf0da-76e0-4499-8879-41c3c36bcdac/Presentation/NewsAttachment/ed609407-1209-4519-8230-047659efd2a6/CorporateAlert5.12.09%20.pdf.

v Western Climate Initiative, http://www.westernclimateinitiative.org (last visited Jan. 21, 2010).

Another consideration may be to use carbon emission disclosure as a differentiator. As consumers become increasingly educated about environmental issues and sensitive to corporate responsibility (whether or not the business is a formal corporation), demonstrating social and environmental responsibility can add to the bottom line.

Consider the following recent data:

- Gen Y/Millennials (1977 – 1995): 15-38 yr olds: Represent 60 million people with spending power of approx. $172B
- Nearly 100% have some environmental education vs. 19% of Boomers
- 69% consider a company's social and environmental commitment when deciding where to shop
- 74% are more likely to pay attention to a company's messages if the company has a deep commitment to a cause
- 84% of Gen Y are actively concerned about the climate crisis – and say the green movement relates to their career choices
- In 2008 KPMG reported that over 80% of Global Fortune 250 companies disclose their sustainability performance in 'sustainability' or 'corporate responsibility' reports
- According to a recent survey conducted by the Aberdeen Group, 59% of companies said sustainability does or will soon guide major parts or the entirety of their corporate strategy.
- According to a 2009 Retail Systems Research survey, 92% of those surveyed see a real opportunity for their facilities; 88% see the opportunity in the supply chain; 47% experienced ROI after one year and reported that simple changes in procedures can create sizeable return on the bottom line
- According to the European Responsible Entrepreneurship Bulletin (2009), SMEs worldwide are achieving a competitive advantage by showing leadership in sustainability issues – they stand out from the crowd & have better access to new markets and capital

One leading program that many S&P 500 companies have joined is the Carbon Disclosure Project (CDP). The CDP is an NGO that represents several hundred institutional investors who manage more than $57 trillion in assets. The CDP asks senior management to disclose climate change opportunities and risks. These disclosures are currently not required in the U.S., yet the practice of making such extensive disclosures continues to grow.[vi]

vi Leslie Kaufman, *Emission Disclosures as a Business Virtue*, N.Y. TIMES, Dec. 28, 2009, at B1.

RECOMMENDATIONS

Some of the more salient levers for reducing costs and CO2 emissions include:

Sustainable Packaging: Reducing packaging on a product is proving to be one of the most successful ways to reduce the cost of a product and its environmental impact. Companies are devoting more resources to figuring out how to redesign their packaging and reduce their overall impacts.

LCAs: Lifecycle management deals with the entire lifecycle of a product, from its design, through manufacture, packaging and its afterlife. Evaluating a product's LCA is one way companies are increasingly finding reduces costs, cuts emissions, and boosts their brand and bottom line.

Transportation and supply: In addition to cutting GHGs by reducing shipment distances, local sourcing is proving to offset any higher costs associated with buying from local vendors. Companies that add local sources to their supply chain are finding that: (1) it also benefits local communities, promoting both business and community sustainability; (2) it helps to expand a company's social license to do business in a community, especially for larger chains looking to develop their presence in smaller communities that are increasingly resisting large retailers; (3) it promotes brand prestige; and (4) it reduces exposure to certain supply chain risks such as long and unreliable lead times, volatile fuel prices, weather uncertainties, security issues, and currency exchange risks - all in addition to reducing both overall emissions and total supply chain cost.

CONCLUSION

Market transitions invariably yield winners and losers. The long-term winners in the new marketplace will be those businesses that recognize that creating and implementing sustainable business practices is central to cutting costs, reducing emissions and boosting the bottom line. Companies that fail to prepare now put their own sustainability at risk.

Roxane Peyser is CEO and President at maurgood, llc and can be reached at rpeyser@maurgood.com.

Individual, Markets & Human Rights

Ethan S. Burger, Esq.

Traditionally, in the first few sessions, most introductory microeconomics courses taught at institutions of higher education begin the semester by focusing on the role of the individual in the market. According to most "pure" (and "antiquated") economic theories, individuals have a critical role in our economic system. Collectively, they determine the supply and demand for products and services, and if there is perfect competition, (i.e. easy barriers to enter a particular market, which usually is not the case), they influence what prices will be charged (after accounting for the suppliers' costs of production). Other intangibles (i.e. factors difficult to measure) are frequently overlooked by economists when they are producing their models, such as the impact of greed, the role of government regulators, the power of "interest groups" in the political process, and "white" collar crime and behavior.

In upper-level courses, the professor may raise matters such as the role of advertising, corporate governance, corruption (both in the public and private sectors) and intangibles (advertising, cultural differences, fads, etc.). In fact, these are topics of considerable research and some day may even be fully integrated into business and economic models. The present economic and political situation is in large part a product of the so-called "free-rider" problem. Put simply, there is a high cost for individuals to organize (who have limited time and financial resources). In addition, over time it is difficult for most people to sustain interest in political matters (particularly, if they have a full-time job and/or a family for which to care). In contrast, corporations and other "special interest groups" have a greater ability to organize. Most individuals feel powerless to influence events at the international, national, and local levels. This is understandable, particularly in the international arena. A person may refuse to vacation in a politically-repressive state or purchase goods from countries that fail to observe internationally-recognized worker rights standards. The same individual may even be able to encourage like-thinking persons to do the same - but the impact is minimal.

Yet, people should not accept their apparent impotence and insignificance as meaning they have no voice (unless they have significant financial resources). Although at times there may be close elections in countries that actually make a good-faith effort to count all ballots cast, a single vote by itself has little effect, particularly if one considers the frequency of counting errors that might occur in "free" elections.

This is why it is important not to ignore the potential significance of the so-called "Iranian Cyber Army" that recently attacked the web page of Baidu, China's largest Internet service provider. Individuals, or small groups of individuals, are coming to the aid of other human rights activists or opponents of oppressive regimes. It is an example of democracy in its purest form. Internationally, there is a well-intentioned debate concerning whether supporters of Iran's so-called nascent "Green Revolution," should be lending assistance to bring about change in that country. Many Iranian supporters of change feel betrayed by the world's democracies. At the same time, persons such as Stephen Walt writing in *Foreign Policy* contend, that the opposition would be compromised if it were to receive foreign support.[i] Indeed, this is a topic where there is no clear answer and is open to honest disagreements. Google, not surprisingly, is discovering that the Chinese government seems unwilling to permit it to operate freely by blocking "undesirable" websites (i.e. those containing information about developments in China and human rights issues in general). Individuals, unlike the majority of corporations and governments, have the luxury of being able to promote causes they believe are morally right usually without severe consequences. In a perfect world there would be neither governmental censorship nor hackers of others' websites; that day has yet to arrive.

Several years ago, the International Olympic Committee selected China as the site for the 2008 Summer Olympics, after the Chinese Government allegedly committed itself to allow Chinese people access to the foreign press (not to mention presumably make an effort to observe the Universal Declaration of Human Rights). The Committee later selected Russia as the site for the forthcoming Winter Olympics in 2014, presumably after receiving similar assurances. Governments whose countries are selected to host this international sports event, apart from

---

i Stephen M. Walt, *On the unrest in Iran: Don't just do something, stand there!*, FOREIGN POLICY, Dec. 27, 2009, available at http://walt.foreignpolicy.com/posts/2009/12/27/on_the_unrest_in_iran_dont_just_do_something_sit_there.

generating revenue from tourism, also make use of their selection for domestic propaganda purposes. Such as the 1936 Summer Olympics held in Berlin.

Corporations may choose to be Olympic sponsors to promote sales. Accordingly, members of their Boards of Directors, employees, individual shareholders, and other

stakeholders are unlikely to take a public stance in opposition to this action. Even if they do, it will be highly unlikely that they will succeed. Small numbers of tourists if they nonetheless choose to attend with the desire to defy government imposed restrictions do not usually speak the local language which hinders their effectiveness and are easily "handled" by the host governments. Thus, they cannot participate in an exchange of views, establish real friendships or promote human rights.

Today, the Internet is a two-edge sword with respect to the promotion of human rights. It makes businesses more efficient and probably allows them to make do with fewer employees as a result, giving rise to increased unemployment not only in the U.S., but abroad as well. The Internet can make governments more efficient in the manner in which they function, not merely in providing services to their citizenry, but also, unfortunately, in suppressing its opponents' communications disseminating "undesirable" information and maintaining databases on "politically unreliable" citizens or "dangerous foreigners." When developing their policies, most national governments have to consider a myriad of factors, most commonly economic. The Internet gives everyone a potential to have some impact in today's world beyond posting to a blog, which usually does not influence others' behavior and may not be even read.

Ethan S. Burger is an Adjunct Professor of Law at Georgetown University Law Center and can be reached at esb34@law.georgetown.edu.

The Embassy of Ghana Hosts Educational Conference on the Sustainability of African Resources, and related CSR Efforts

By Kwasi Bosompem

On January 20, 2010, more than 120 high school and middle school students from the Washington, D.C. area participated in an educational workshop about sustainability efforts and CSR programs in Africa. The Embassy of Ghana hosted the event, *A Conference on Acute Water Problems in Africa and Sustainability of Environmental Resources*, which was the third of an educational series on sustainability and CSR efforts in Africa organized by the "Let's Go Africa Foundation ("Let's Go Africa")," a non-profit organization.

Picture: The moderator addresses the audience *Picture by Let's Go Africa Foundation 2010*

Social justice forums have become popular among schools, colleges, and religious organizations. Indeed, today's students are discussing a range of issues affecting Africa, including ethics, fair labor, HIV/AIDS, education, child labor, and environmental pollution. Let's Go Africa's series of educational conferences seek to draw upon students' interest in these topics, and to foster a greater awareness of efforts to address issues, such as socially responsible investment programs, the U.N. Global Compact, the Global Reporting Initiative, and the Equator Principles. Let's Go Africa also engages multinational corporations to demonstrate their sustainability and CSR efforts in Africa. Given lax government regulation and enforcement in Africa, along with the lack of effective social justice groups, the need for awareness on sustainability and CSR issues becomes all the more critical. Thus, at the conference, the attending students

learned about challenges posed by the scarcity of Africa's natural resources, and were exposed to a variety of social responsibility, sustainability, and corporate investment programs in Africa.

Speaking at the conference, the Ambassador of Ghana to the United States, Dan Agyekum, recognized the efforts being made by the Government of Ghana to strengthen investments in its natural resources: "[w]e, as Ghanaians, understand the importance of supporting the hundreds of families depending on these resources." Mr. Agyekum highlighted the sustainability and social investment efforts of mining companies such as Newmont Mining in Ghana and called for an effective and balanced management of natural resources.

Michael Levine, a shareholder in Epstein Becker & Green, P.C., and the Chair of its CSR and Sustainability practice, moderated the conference, and provided a brief overview of the legal framework, principles, and existing multilateral guidelines on sustainability and CSR programs, and discussed some recent examples of CSR efforts.

Denise Knight, Environmental and Sustainable Agriculture Manager, for the Coca-Cola Company, provided a presentation on the Coca-Cola Water Stewardship in Africa program, and discussed the company's watershed management program.

Denise Knight, above highlighting Coca Cola's Water Stewardship in Africa.

Bill Kramer, of the International Rural Water Association (IRWA), touched upon the various sustainable assistance programs IRWA is providing globally to address acute water scarcity in developing countries, such as a program to build sustainable water treatment systems in Burkina Faso. Mr. Kramer highlighted how IRWA creates technological solutions to local resource challenges that are sustainable because IRWA develops local knowledge bases and the capacity to operate such systems which use locally available and relatively inexpensive materials.

Charles Freeze, of the World Cocoa Foundation, which includes corporations members such as Hershey, Cargill, ADM, and others, spoke about efforts to adopt sustainable cocoa farming, and how such farming is strengthening communities in Africa. Rick Short, of the Renewable and Sustainable Companies (RASCO LLC), provided a presentation on how Integrative Distributive Utilities Network (IDUN) systems can assist in the delivery in developing countries of renewable energy for water, sanitation and electricity.

Exhibitors at the conference also included Newmont Mining, Proctor and Gamble, Etruscan Mining, IAMGOLD Corporation, Banro Corporation, and OM Group. Newmont Mining, for example, provide materials outlining its commitment to water safety, quality and environmental controls, including the Ahafo Social Responsibility program, the Agribusiness Growth Initiative, and the Livelihood Enhancement and Community Empowerment program, all of which take place in Ghana.

Picture: Kwasi Bosompem discusses Newmont Mining's Ghana water programs at the Conference

Nathan Graham, of the Proctor & Gamble Company, presented an exhibit about its Children's Safe Drinking Water Program, and demonstrated the operation and elements of the PUR Packet Clean Water process that has been implemented in several African countries. The OM Group, Inc. presented their social responsibility materials, which focused mainly on health, education efforts and related financial support within the Democratic Republic of the Congo ("DRC").

Several Canadian companies provided displays about their CSR and sustainability efforts. IAMGOLD exhibited information about its educational program in Tanzania, while the Banro Corporation offered a demonstration concerning its social development programs in DRC. Etruscan Resources Inc. produced materials about its sustainability reports and social responsibility programs taking place in four African countries.

Picture: Nathan Graham, of Proctor & Gamble, explaining the P & G PUR packet safe drinking water program in Africa

Other corporations, also provided copies of their sustainability reports which were displayed the conference. These corporations included the Cabot Corporation, The Halliburton Company, and Freeport McMoRan Copper & Gold, Inc.

In conclusion, resource scarcity and persistent development challenges exist in Africa and elsewhere in the developing world and compel a continued focus on CSR efforts and on social, environmental and economic sustainability. At the conference, however, we were able to see a variety of measures that are being employed in the public and private sectors to address these challenges. Let's Go Africa's next educational conference is expected to occur cepted some time in 2011.

Kwasi Bosompem

Mr. Bosompem is an Urban and Regional Planner with the law firm of Venable LLP, in the Washington.D.C. metropolitan area. His work is focused on land use matters. For over twenty-five years, he has worked with an array of local governments, civil societies, and private sector companies on major community development programs and comprehensive land use plans.

Mr. Bosompem served on the Technical Forecasting Committee of the Washington Metropolitan Council of Governments and has worked on several development projects in the Washington-Baltimore metropolitan area. He has extensive Community Development Planning experience in Ghana, Nigeria, Zimbabwe, Lesotho and South Africa.

The Let's Go Africa Foundation

Kwasi Bosompem is also the Executive Director of The **Let's Go Africa Foundation**, a non-profit organization created to improve the lives of disadvantaged populations in the inner cities of America and African Countries by promoting social and economic development and cultural exchange. For more information about Let's Go Africa, please visit: http://www.letsgoafrica.org.; email: letsgoafrika@aol.com

A Rallying Cry for CSR?

by Devin Stewart

On January 13, 2010, one day after Google's bold decision to stop censoring its Chinese search engine and possibly quit its operations in China, Carnegie Council held its annual "Top Risks and Ethical Decisions" panel for 2010. Google's announcement and the earthquake that hit Haiti, two unexpected events with moral consequences, guided much of the panel's discussion.

The salience of the Google announcement was heightened by the foresight of Eurasia Group president Ian Bremmer who had placed U.S.-China relations as the 2010's top risk in terms of likelihood of change. It also highlighted the ethical challenges of doing business in China and globally as well as the positive leadership role businesses can play. Bremmer told me before he presented his full list of risks that he predicted Google would indeed pull out of China given the company's wide range of appeal—from technologists to free marketers to human rights activists—and the Communist country's inability to credibly guarantee security from further cyber-attacks. Google, along with at least 20 other companies, had been hacked in December, and it is widely believed the attacks were in coordination with a Chinese government agency that was attempting to gather information on dissidents. If personal information were compromised, peoples' lives would be at stake. Business ethics are a very practical matter.

Bremmer wondered whether Google's moral stand might serve as a rallying cry for other companies to follow suit in China. Since Google's announcement, the company has been lauded, and the U.S. government has had to reverse its direction by stepping up its rhetorical pressure on China. In U.S.-China relations, the news came against a backdrop of tensions over possible UN sanctions on Iran, U.S. arms sales to Taiwan, and a Chinese test of a missile interceptor. It also occurs amid the longer-term trends Bremmer sees, specifically the acceleration of divisions between the world's developing and developed countries; free market economies and state capitalist economies; and the U.S.-led and multipolar worlds. Bremmer sees U.S.-China relations as the biggest risk for the year because "U.S. and Chinese economic systems are

fundamentally incompatible. Compromise is a possibility but let's not obscure the question." He also noted that it isn't clear how the world will square China's global responsibilities given its limitations and societal pressures.

The Google episode in China also underscores the gap between short-term profit-seeking and longer-term ethical concerns for companies and countries alike. Without an expansion of rights and freedoms in China, the government risks hindering economic development. Without free press, for example, China simply cannot stem corruption. Above all, Google's move has expanded the options and the debate on the Chinese market. Carnegie Council's approach toward exploring international issues has been precisely that: to expand the scope of options and to encourage people to ask ethical questions. In line with Andrew Carnegie's vision, the Council aims to create and disseminate knowledge and understanding in order to facilitate societal transformation toward world peace. The "Top Risks" event is part of an ongoing series that brings companies and civil society together to examine business ethics issues, such as human rights policies, the role of the media, trust in the financial system, green job creation, and the fight against corruption.

Michele Wucker, head of the World Policy Institute, posed one of these potentially transformational questions. Considering the ecological limits of the planet, how much consumption is enough? China has just become the largest automobile market in the world, but do we really believe that every person in China can own a car? If the United States moves away from naked consumerism, what will take its place? And, how do we avoid policy solutions that hurt the poor? Wucker also pointed to the extreme poverty in Haiti, which exacerbated the devastation from the recent earthquake, highlighting the fact that risk is often increased when more than one factor is in play. Wucker predicted that finding sustainable levels of consumption and a balance between short-term and long-term gains would be the most pressing moral questions facing businesses for the foreseeable future.

A major obstacle to finding this balance, however, relates to the very nature of individuals and institutions, something that *strategy+business* editor Art Kleiner has been following for years. He identified at least three "meta risks" for 2010. The first is that although the stakes are higher than ever, it is unclear whether governments possess the management capacity to deal with the riskiest challenges, such as climate change and terrorism. The second is what he called "the risk of transitional capability," meaning that not only are changes in the global business environment occurring more rapidly than ever, it is also uncertain whether organizations can adopt the best practices in time to keep up with the changes. Moreover, transition implies unintended consequences and thus more uncertainty. Finally, bringing it to the personal level, there is a plausible scenario in which the world addresses these problems, but it will require individuals to change their behavior. It is becoming increasingly difficult for people to lead a "normal life," so what do you do? Kleiner asked. "To the extent that human survival requires individuals to change, will enough people be willing to do it? Maybe," he said.

"Integration" has already become the buzzword in business and policy circles this year. In applying this concept, Georg Kell, head of the UN Global Compact, explained that integration means companies must be best in class in their products and services but that isn't enough. Companies must also be able to deal with non-financial risk, such as environmental, social, and governance risks. Ethics is the floor or baseline for international business because "going global means going local," and globalization has therefore become a test case for the question, "Can we live with one another?"

Kell was optimistic about humanity's prospects because he believed the 2008 financial crisis brought ethics back into business decisions in at least three ways. First, it highlighted the need to move from short-term to long-term value creation. Second, it showed the importance of bringing non-financial issues into decision-making. Finally, he saw a general shared sense of ethics as underpinning these trends. His research has shown that there is a universal sense of fairness and justice around the world that can also be observed in religious traditions, philosophies, and law. Kell concluded by advocating for the "traditional values," such as cooperation, that made the free market work in the first place.

The panel seemed to agree that only human innovation can pave the path toward global salvation in the face of ecological, security, social, and economic risks. Thomas Stewart, Booz and Company's chief knowledge officer, somewhat darkly concluded by encouraging people to find the courage to muddle through. He jokingly asked whether it is possible to avoid the future all together. Kleiner quipped, "There is always a way through by the skin of our teeth." The event also highlighted the large moral questions for the upcoming year, thus framing the fourth year of Carnegie Council's Workshops for Ethics in Business series programming, which is currently being expanded into a full-blown corporate membership program. If ethics matter to you and your organization, please contact us to get involved with this unique program.

Devin Stewart is program director and senior fellow at Carnegie Council for Ethics in International Affairs and can be reached at dstewart@cceia.org.