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## Corporate Social Responsibility: “What’s International Law Got to Do with It?”

By Suzanne A. Spears

“Damn it! There are hundreds of locals outside shouting at us to leave the country,” my client complained. “Another group has been camped out across the main road to the mine for a week. It’s costing us a fortune. They say we’ve been polluting their water supply and paying paramilitaries to rough up their leaders.”

What could be done using international law—as it is today—to help or to confront this company? The short answer is “not much.” The company might be able to argue that the host-government was failing to meet an obligation to provide full protection and security to the foreign-owned mine under an international investment treaty. But, if the company complained, the paramilitaries might turn up again, which would increase the risk to the company’s reputation and hits legal exposure. The company also might need to go to international arbitration, which would be embarrassing if the tribunal decided to take the community’s view of the situation or the company’s own behavior into account.

The community might argue that the host-government was failing to meet its obligation to protect the community from abuse by private actors under international human rights law. But the community would not be able to find an international forum in which to confront the company directly and it would have difficulty finding a basis on which to

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## The Social Responsibility of Lawyers

By Glenn P. Hendrix

In this issue of the *ILN* dedicated to CSR, a few words are in order regarding the social responsibility of lawyers. While our day-to-day work on behalf of clients is important and, for most of us, I think, generally fulfilling, we all benefit from stepping back and examining how we might contribute in a broader sense. As one attorney puts it: “[I]f lawyers cannot look at the society as a whole and say that certain aspects of their work . . . represent a plus for this society and for the world of our children, then they . . . should try to find a way to salvage what is worth doing out of their work and be influential in the production of what is going to happen next.” Martin Mayer, *quoted in*, Trevor C.W. Farrow, *Sustainable Professionalism*, 10 *OSGOODE HALL LAW L. J.* 1001 (2009).

There are many ways of doing this through the Section. You can seek to qualify as an expert in the Section’s International Legal Resource Center (ILRC), a joint venture between the Section and the United Nations Development Programme (UNDP), to provide a legal resource capability in support of UNDP

global governance programs and projects supporting legal reform and democratic institution. Or you might have an idea for a Section project. Two examples are the Section’s “International Models Project on Women’s Rights” (IMPOWR) and “Financial Engineering for Economic Development” (FEED) projects. IMPOWR involves the creation of a web-based databank of information to facilitate comparison of and collaboration among efforts undertaken by ABA and non-ABA entities on gender-related law reform. FEED provides resources to countries with emerging markets to assist them in creating the framework for functioning capital markets.

Policy work is another great way to give back. At the 2009 Fall Meeting, Section Council approved the following policy initiatives in which Section members were actively involved: recommendations that the ABA endorse U.S. ratification of the UN Convention on the Rights of Persons with Disabilities, the Comprehensive Test Ban Treaty, and the “Rotterdam

Rules”; a detailed set of comments on the Office of Foreign Assets Control’s Enforcement Guidelines; and support for ABA policy that would promote legislation to help ensure that the United States honors its treaty obligation in connection with the consular rights of foreign nationals. Other ongoing policy initiatives involve legal process outsourcing, advocacy in support of Section-initiated ABA policy regarding international arbitration, and much more. Some of these initiatives implicate issues of broad societal concern, while others involve nuts and bolts improvements that make the law function more fairly or efficiently. Either way, the participants are making an important contribution.

The regular work of the Section’s committees is also a way to contribute, whether through publishing a regular newsletter; making suggestions for “rule of law” letters in support of lawyers who are under threat in other jurisdictions; and so on. It all makes a difference. ♦



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## ABOUT THIS ISSUE

### Corporate Social Responsibility

By Russell S. Kerr, Editor-in-Chief

This is my first issue as editor-in-chief of the *International Law News (ILN)*, and I want to take the opportunity to thank our staff and editorial board for their outstanding contributions and assistance. I'd also like to express my gratitude to Marilyn Kaman, *ILN's* immediate past editor-in-chief, for her enthusiastic guidance and support. Marilyn is now our new Section publications officer.

With this issue, we welcome several new members to our editorial board, including Sara P. Sandford, Richard Field, Robin Fahlberg, and Johanna K.P. Dennis. We also introduce "World Bar News" by Nancy Kaymar Stafford, which we hope will become a regular column.

By way of introduction or perhaps caveat, let me disclose that I do not practice international law. My practice consists exclusively of representing plaintiff personal injury victims in southern California. My interest in international law began with a year abroad in Copenhagen during college. Years after establishing my civil practice I obtained an LL.M. degree in international human rights law and have since had the pleasure of serving as chair of the State Bar of California International Law Section, chair of the American Bar Association Section of International Law (SIL) Human Rights Committee, and division chair of Public International Law II. For the past several years I've been editor of the SIL Human Rights Committee's *e-Brief*, a weekly electronic newsletter.

With my background in human rights it's auspicious that the theme of my first issue is corporate social responsibility (CSR). This issue focuses attention on how corporations can best self-regulate and monitor their adherence to law, ethical standards, and international norms to voluntarily eliminate practices that harm the public.

In our cover story Suzanne A. Spears discusses how CSR can benefit clients in real-world situations. Spears illustrates how CSR can be used as a tool to evaluate a project's social, economic, and environmental costs and benefits and improve communication with those affected by its operations.

Against the backdrop of recent concerns about a global swine flu pandemic, Shelley Hayes offers her perspective on corporate responses to infectious diseases and other global health threats.

Also in this issue Michael A. Levine discusses corporate risk management in light of recent Alien Tort Statute (ATS) cases.

Brian W. Burkett and Jodi Gallagher address CSR initiatives from a post-recession perspective.

Sarah A. Altschuller discusses the often confused distinctions between CSR and corporate philanthropy.

Donald C. Dowling Jr. offers drafting advice for Global Codes of Conduct.

Paul M. Lalonde and Igor Abramov address CSR challenges in the extractive industries—mining, mineral resources, metals, and oil and gas.

Finally, from her perspective as a recent consultant for the World Bank, Kindra Mohr evaluates whether the World Bank's sanctions systems can keep companies honest while Roxane Peyser and Alexandra Filutowski illustrate the benefits of incorporating CSR into your legal practice to retain and attract clients and provide a competitive advantage differentiating yourself from the competition.

We hope you enjoy this issue of the *ILN*, and welcome your submission of articles, casenotes, and suggestions for upcoming issues. ♦

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## CSR

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argue that the company was breaching any international legal obligations.

With few options available under international law (or the domestic law of many host states), an international lawyer with a client facing such a situation might need to resort to the burgeoning, but as yet non-legal, field of corporate social responsibility (CSR). A practitioner of CSR would advise the company and the community to try to engage constructively with one another to resolve the crisis. Constructive engagement would entail consulting about the social, economic, and environmental costs and benefits of the mining project, and devising ways to accommodate the parties' respective concerns.

A lawyer following the tenets of CSR would also encourage both sides to do a number of things differently in the future. The mining company should adopt, implement, and communicate internal policies to govern its relationship with those affected by its operations; monitor and report on its progress; and participate in standard-setting initiatives. It should also conduct CSR-related due diligence; consult with affected communities or obtain their consent before embarking on future projects; and establish grievance processes for affected communities. Meanwhile, the community should seek education about its rights, acquire advocacy training, and consider obtaining assistance from non-governmental organizations (NGOs) to ensure that it is able to engage productively with the company and the government in the future.

All of this advice would reflect the fundamental premise that underlies CSR today, which is that companies that do good will do better—better at avoiding ugly confrontations with stakeholders and better at creating shareholder value. Given how many companies already accept that premise—and there are surveys showing that many of the world's biggest companies do—it is time for international lawyers to become practitioners of CSR. Besides, while it may not be international law yet, there are signs that at least some aspects of CSR may become international law in the not too distant future and it is up to international lawyers to prepare our clients for that future.

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## What Standards Apply to Corporations?

Multinational enterprises (MNEs) may find themselves subjected to legal obligations as a consequence of the implementation of treaties by states that are parties to them, but MNEs do not have any social or environmental treaty obligations of their own at present. All of the instruments with direct application to MNEs that have been promulgated by intergovernmental organizations, such as the OECD, ILO, and UN, contain mere recommendations and are non-binding. The UN has made several attempts to establish a legally binding framework convention applicable to MNEs, but none has been successful so far.

Thus, unless and until states take up the issue of a binding convention again, MNEs will continue to be governed at the international level solely by voluntary instruments and emerging norms of customary international law.

**Existing Voluntary Standards.** Many MNEs began to see CSR as a branch of risk management in the mid-1990s and as a source of competitive advantage more recently. As a consequence, many MNEs have voluntarily engaged in standard-setting initiatives individually and in consultation with others to help them manage the social and environmental dimensions of their operations.

Shell led the way with respect to individual efforts when, in 1997, it adopted a code of conduct to guide its operations. Almost all of the Fortune Global 500 companies have adopted codes of conduct since then.

Kofi Annan, the Secretary-General of the UN, led the way with respect to collective efforts when, in 1999, he announced the formation of the Global Compact, an initiative in which companies voluntarily agree to support nine principles that encompass human rights, labor, and environmental concerns. The UN Global Compact is now the world's largest CSR initiative, with some 5,200 participating companies. A number of other intergovernmental organizations have, as mentioned above, also developed voluntary standards for MNEs, such as the OECD Guidelines for MNEs and the ILO's Tripartite Declaration of Principles Concerning MNEs.

Governments have also launched a number of collective initiatives, including the Extractive Industries Transparency Initiative and the Voluntary Principles on Security and Human Rights. Trade associations have launched a number of others, including the Fair Labor Association for the apparel industry, the Kimberley Process Certification Scheme for the diamond industry, the Equator Principles for the commercial banking sector, and the International Council on Mining and Minerals' Sustainable Development Framework. Several governments, NGOs, and trade

unions have also published CSR standards.

Some NGOs are skeptical that these voluntary or “soft-law” initiatives reflect anything more than corporate public relations or strategies to deflect mandatory regulation with higher standards. They continue to call for a legally binding instrument backed by enforcement mechanisms. Some academics respond that soft-law instruments may in fact represent a new type of regulation, “regulation by information.” They assert that, to the extent that soft-law instruments become the standards by which companies’ actions are judged by society, they will no longer be truly voluntary.

**Emerging Customary Norms.** In the mid-1990s, plaintiffs began trying to use a federal statute passed in 1789 to hold MNEs accountable in the United States for violations of customary international law overseas. The statute, the Alien Tort Claims Act (ATCA), gives U.S. district courts original jurisdiction over civil actions by aliens for torts “committed in violation of the law of nations or a treaty of the United States.” Although the U.S. Supreme Court has not decided whether corporations in addition to individuals can be held liable under ATCA and no corporation has been held liable yet, the fact that a number of U.S. circuit courts of appeal have allowed ATCA cases against corporations to go forward provides the clearest evidence to date that customary international law might be evolving to impose some obligations on MNEs.

In its only ATCA decision so far, *Sosa v. Alvarez-Machain*, the U.S. Supreme Court established demanding principles for proving the existence of customary international law norms: they must be “specific,” “universal,” and “obligatory.” Lower courts have held that these norms include slavery, genocide, crimes against humanity, war crimes, torture, human trafficking, cruel, inhuman or degrading treatment, forced labor, summary execution, prolonged arbitrary detention, apartheid, and forced disappearance.

Apart from the jurisprudence developing under ATCA and a growing body of expert opinion, there are at least two other signs that customary international law may be evolving to apply to MNEs. First, criminal laws that theoretically permit MNEs to be tried for some international crimes are now in place in a number of countries. That was the conclusion of a study by the Fafo Institute, which observed that, where national legal systems already provide for the criminal punishment of corporations, the incorporation into domestic law of the three crimes covered by the Rome Statute of the International Criminal Court (ICC)—genocide, crimes against humanity, and war crimes—may have extended liability to companies. Universal jurisdiction

statutes in a handful of countries may also make it possible for MNEs to be prosecuted for those crimes.

Second, while there is no law like ATCA outside the United States that provides civil redress for international crimes, plaintiffs are able to characterize violations of international law in terms of domestic civil harm in a number of jurisdictions. The success of such lawsuits is limited at present, but it appears that their numbers are increasing.

### How Are Standards Monitored and Enforced?

There are no judicial enforcement mechanisms at the international level to hold corporations accountable even for the limited range of international obligations that they arguably possess. This remains the case even after the establishment of the ICC, as the parties to the Rome Statute, which entered into force in 2002, did not extend the ICC’s jurisdiction to juridical persons.

At present, voluntary CSR standards are enforced through regulation by information (i.e., naming and shaming), while the limited range of mandatory CSR obligations are enforced through domestic judicial systems. There are reasons to believe, however, that investment treaty arbitration may be starting to play a role in regulation by information and that CSR obligations may begin to play a role in determining whether an investor is entitled to protection under international investment law.

**Non-Judicial Complaints Procedures.** Most soft-law instruments have no substantive enforcement mechanisms at all. The only verifiable step participating companies must take under the Global Compact is to publish a “Communication on Progress” (COP) on an annual basis. Failure to publish a COP results in delisting from the Global Compact, but this is not a substantive judgment of the company’s conduct. While 1,000 companies have been delisted, the only known attempt by a third party to get a company delisted—the effort by Investors Against Genocide to get PetroChina delisted for alleged abuses in Sudan—was not successful.

The OECD’s Guidelines for Multinational Enterprises have substantive enforcement mechanisms, although their visibility and effectiveness vary from country to country. Governments that adhere to the Guidelines must establish National Contact Points (NCPs) to hear allegations by individuals or organizations regarding violations of the Guidelines. NCPs mediate disputes and make determinations of whether the Guidelines have been breached, but their findings are only recommendations and they do not provide redress to those who have been harmed by violations.



As an example of how the process works, in October 2009 the UK government's NCP issued a scathing report on FTSE-100 company Vedanta Resources, accusing it of disrespecting the rights of indigenous people over its plans to build an open bauxite mine near the holy mountain of Niyamgiri in the Indian state of Orissa. The NCP upheld Survival International's allegation that Vedanta had breached Chapter V(2)(b) of the OECD Guidelines, which requires MNEs to communicate and consult with the communities directly affected by their projects. The NCP's report concluded that: "[a] change in the company's behaviour" is "essential."

Although the report is not binding, the NCP process has been embarrassing and potentially costly for Vedanta. In July 2009, the Church of England announced that it was reconsidering its estimated £2.5 million investment in Vedanta. A week after the NCP report was released, the UK's Treasury Department was forced to explain before the High Court, in a case brought by environmental campaigners under the 2006 Companies Act, why it had permitted the publicly owned Royal Bank of Scotland to invest in a company so strongly criticized by another arm of government.

**Domestic Judicial Enforcement.** As yet, no corporate defendant has been held criminally or civilly liable for committing or complicity in the commission of international crimes in the United States or elsewhere. Although the possibility of this happening eventually remains quite real, significant challenges face foreign plaintiffs trying to hold companies accountable in their home jurisdictions for alleged abuses committed overseas.

The U.S. Supreme Court has not resolved the questions of whether complicity (called "aiding and abetting liability" in the United States) is a theory available under ATCA and, if it is, what standard applies. But, in 2007, the U.S. Court of Appeals for the Second Circuit ruled in *Khulumani v. Barclays Nat. Bank Ltd.* that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under ATCA." In October 2009, the same court, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, held that aiding and abetting liability under ATCA requires that the defendant purposefully provide substantial assistance in the commission of a criminal act.

By holding that the standard for aiding and abetting liability is "purpose" rather than "knowledge" alone, the Second Circuit set the bar very high for ATCA plaintiffs. The only previous circuit court judgment on the subject, the Ninth Circuit's 2002 decision in *Doe v. Unocal*, set the bar lower by adopting a knowledge standard, but that ruling was vacated when the parties settled the case.

Although their holdings differed, the Second and Ninth Circuits both purported to apply a standard for aiding and abetting liability derived from customary international criminal law. By contrast, in other jurisdictions in which plaintiffs are able to characterize violations of international criminal law in terms of domestic torts, courts apply a tort law standard requiring knowledge alone. Most other jurisdictions also do not draw distinctions between primary and secondary actors for the purposes of civil liability.

The lower knowledge standard will soon be tested in the United Kingdom by plaintiffs who allege that a British mining company is civilly liable for the torture, sexual abuse, arbitrary detention, and other abuse inflicted upon them by Peruvian police during an environmental protest at the mining site. Plaintiffs in the case, *Mario Alberto Tabra Guerrero & Others v. Monterrico Metals PLC and Rio Blanco Copper SA*, allege that the company knew that, by calling in a police force known to abuse protesters, it was exposing them to the risk of human rights violations. On October 16, 2009, the High Court issued a freezing injunction obligating Monterrico to keep at least £5 million of its assets in the United Kingdom pending the outcome of the case.

**International Investment Arbitration.** International investment arbitration tribunals do not have jurisdiction to adjudicate claims against investors, but they are increasingly called upon to consider the impact of investments on host societies. This has spurred two developments in the field with implications for the enforcement of CSR norms.

First, investment arbitration is becoming more transparent and thus a vehicle for regulation by information. A NAFTA tribunal led the way in 2001 by accepting *amicus curiae* submissions in the case *Methanex v. United States*. In 2003, the North American Free Trade Commission issued a statement confirming that NAFTA tribunals are competent to accept such submissions. Since then, a number of NAFTA tribunals have exercised this authority, including the tribunal in *Glamis Gold v. United States*, which admitted the submission of the Quechan Indian Nation regarding the environmental and cultural impact of a proposed mining project.

After a handful of International Centre for Settlement of Investment Disputes (ICSID) tribunals followed the NAFTA example, the ICSID Arbitration Rules were amended in 2006 to expressly authorize tribunals to accept *amicus curiae* submissions. An ICSID tribunal recently took the next step in *Piero Foresti, Laura de Carli and others v. Republic of South Africa* by granting non-disputing party petitioners the opportunity to view documents filed by the parties before making their own written submissions.

Second, arbitral tribunals are starting to consider the behavior of investors in determining whether they merit protection under investment law. For instance, the tribunal in *World Duty Free v. Kenya* took into account allegations that the investor had procured its investment on the basis of a bribe, while the tribunal in *Plama Consortium Limited v. Republic of Bulgaria* focused on misrepresentations made by the investor as it sought state approval for its investment. Both ICSID tribunals reasoned that they needed to consider the investor's behavior, even though the relevant treaty did not establish any obligations for investors, because the subject matter of the arbitration implicated "international public policy."

It might follow that customary international law would be implicated if an investor was accused of serious wrongdoing in relation to human rights violations or environmental degradation. The ICSID tribunal in *Phoenix Action Ltd. v. Czech Republic* implied as much when it found that investment protection "should not be granted to investments made in violation of the fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs." Such reasoning indicates that investment arbitration may come to play a role in indirectly enforcing certain CSR norms.

### What Is the Future of CSR?

As this brief survey has shown, the CSR landscape is still evolving. To guide that evolution with respect to human rights the UN Secretary-General's Special Representative (SRSG) on the issue of human rights and MNEs, John Ruggie, issued a report in 2008 in which he proposed an overarching policy framework for the international community. The SRSG posited three core principles: (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) the need for access to appropriate remedies for human rights abuses.

After his use of the term "responsibility" raised concerns for some corporations and their counsel, the SRSG clarified that he sought to draw a distinction between the "duties" (i.e., legal obligations) that already exist for states and the "responsibilities" (i.e., moral obligations) that are emerging

for companies on the basis of societal expectations. Thus, the "duty to protect" refers to states' obligations under international law to prevent, investigate, redress, and punish abuse by private actors, including businesses, within their territories and/or jurisdictions. The "responsibility to respect" refers to society's expectation that corporations respect all internationally recognized human rights.

The SRSG also created controversy by suggesting that, in order to fulfill their responsibility to respect, companies must conduct due diligence to identify, prevent, and address human rights impacts. Some corporations and their counsel objected to the idea, arguing that, if corporations conducted human rights due diligence, they would be required to compensate for the human rights deficiencies of the countries in which they conduct business and to monitor those countries' compliance with international human rights instruments.

Others accepted the SRSG's suggestion, noting that companies from some countries are already required to conduct human rights due diligence. In the United States, fiduciary and reporting obligations require boards and managers to be aware of, manage, and properly disclose material risks to companies (though not necessarily to communities). In the United Kingdom, Section 172 of the 2006 Companies Act requires directors to "have regard" for the impact of the company's operations on the community and environment. At least in principle, companies cannot fulfill these obligations without investigating human rights related risks.

It remains to be seen whether states will transform the corporate responsibility to respect that the SRSG identified into international law through custom or by treaty. But it is clear that the policy issues addressed in the SRSG's framework are not going to go away. My client was not the first and will not be the last company to find its project protested, delayed, occupied, or otherwise blocked by community opposition. Barely a day goes by without news of another company's reputation and, in turn, its bottom line being seriously damaged by allegations of involvement in environmental harm or human rights abuse overseas.

Thus while CSR may not have much to do with international law yet, CSR has much to offer us as international lawyers—namely as a way to practice preventive lawyering. ♦

### Help Us Prepare the New ABA Guide to Foreign Law Firms

The Section is preparing the fifth edition of *Guide to Foreign Law Firms*. James R. Silkenat and William M. Hannay, editors of the *Guide*, urge members to assist their efforts to collect information on firms in approximately 150 jurisdictions by submitting basic data about foreign law firms that they have used (and would use again)—whether for transactions, cases, or other matters in foreign countries. Suggestions for more than one law firm in a country would be appreciated. The editors have provided a convenient questionnaire, which can be found on the Section website at [www.abanet.org/intlaw/pubs/home.html](http://www.abanet.org/intlaw/pubs/home.html).



## What Is Corporate Social Responsibility and How Can I Incorporate It into My Practice?

By Roxane Peyser and Alexandra Filutowski

Perhaps the first question you might ask is: Why should we even be bothered with this? The answer: Because it will help you retain clients, attract new ones, lead to your competitive advantage by differentiating you from your competition, and add to your bottom-line benefits.

Perhaps the next question you might ask is: Why should my clients care? Not surprisingly, the answer is remarkably the same: Because it will help them retain and attract top talent; provide positive brand benefits by promoting their reputation for being responsible; create a competitive advantage that allows them to differentiate themselves from the competition in an economy with shrinking market shares and eroding profit margins; and enhance the bottom line through proven return on investment (ROI).

### What Is CSR?

The concept of corporate social responsibility (CSR) has been around for decades, embracing notions of corporate philanthropy, protecting human rights, and observing labor standards among some of the more salient ones. The term itself, however, has been around for only about the last two decades, and has grown to include environmental, ethical, and governance components, as well as others.

The expanded definition of CSR is largely attributable to the convergence of several critical events and a progression of negative corporate behaviors. They include environmental disasters, such as Chernobyl and Bhopal, having devastating effects on large populations and reaching across international borders; accounting and governance debacles such as Enron and WorldCom a decade ago; the more recent economic debacle blamed in part on the absence of ethical

or governance standards that Sarbanes-Oxley did not cover; and human rights violations implicating U.S.-based global corporations for everything from child-labor violations and sweatshop conditions to shooting protesters. These negative impacts fall basically into three categories: environmental, social, and governance, or what's commonly referred to as ESG or the triple bottom line (TBL). Putting aside the debate over the inadequacy of those terms, practitioners should consider that the CSR experience is different depending on where one is located geographically.

Concepts of CSR can vary from one geographic area to another. To those residing outside the United States, CSR is often synonymous with human rights and fair labor standards. For those in the United States, the principal driver of CSR has been environmental initiatives. By the same token, ethical and governance concerns are also an increasing priority, given the financial scandals and market crises during the last two decades.

For many in the public sector, CSR is often identified with the concept of sustainable development. This identification began to emerge at about the same time that sustainable development was defined by the Brundtland Commission. (The Brundtland Commission was convened by the United Nations in 1983; it was created to address concerns about the deterioration of the human environment and natural resources, and the resulting deterioration of economic and social development. It published a report of its activities and conclusions in 1987.)

According to this commission, sustainable development involves meeting the needs of the present without compromising the ability of future generations to meet their own needs. Sustainability as a concept has often been used as a stand-in for CSR, and the recent ascendancy of the green movement has not helped in the effort to clarify any of these terms because the dominant perception of green is environmentally focused. However, like the Brundtland definition, the definition of green (at least for many purposes) has grown to include concern not only for the accelerating deterioration of natural resources and the environment, but for economic and social development as well.

Everyone agrees that CSR applies to businesses of all types and sizes, not just corporations, and responsibilities

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extend beyond the social sphere—whether it's human rights, human resources, labor standards, indigenous rights, or preserving culture. It also includes ethical standards and environmental practices and policies—though many would consider solely the latter to constitute the definition of sustainability.

The best view is that sustainability is inherently comprehensive, integrated, and holistic. It takes into consideration not just environmental impact, but social, cultural, and ethical concerns as well. Accordingly, it might then be better to think of CSR as BR, or business responsibility, meaning a set of best practices and policies, which, if followed, will lead to sustainability. This makes more sense because business sustainability is about incorporating strategies for a business that will promote its longevity. In the 21st century, that means taking into consideration all of your impacts—no matter what business you're in.

### Principal Drivers

Though it may be counterintuitive to some business leaders, moving beyond compliance is profitable and increasingly required by the supply chain and other stakeholders. It is an increasingly hard reality that many businesses must operate within the virtual restrictions of a “social license” to do business, which empowers the average individual through social media mechanisms. A powerful illustration of this point is the case of the musician whose guitar was damaged by a major airline company. When, after a year, the company failed to compensate the customer-musician for a loss its employees caused, the musician used the power of YouTube to spotlight the company's neglect through a satirical ditty, bringing worldwide adverse attention to the company. As a result, the company not only then promptly compensated its customer, but also began revising some of its internal policies and procedures—for the better.

Other realities driving this movement include: (1) regulatory uncertainty; (2) reputational risk; (3) the increasing difficulty of retaining and attracting top talent; (4) the intensification of competition, thus eroding market share and increasing the need for differentiation; (5) shrinking profit margins; (6) supply chain pressures; (7) the availability of more and improved metrics to measure ROI; and (8) heightened respect for and prestige of diversity.

### Lawyers Are Risk-Averse

Some lawyers tend to tell you only what you can't do. We would call these “gate-keeping lawyers.” Other lawyers have a more multi-directional view; they tend to wear two

hats: the legal hat and the business hat. Wearing the business hat allows them to understand what clients want to do and figure out a way to “get there legally” while managing risk exposure. Gate-keeping lawyers can often take the view that CSR/sustainability is laden with excessive risk. They can try to restrict the operation of CSR in a misguided attempt to hermetically seal off the risks of innovation. This is a tendency that threatens the strategic objectives of CSR. A more receptive, and less “closed,” perspective on CSR can have business effects that are themselves positive, potentially lucrative, and quality-of-life enhancing.

Lawyers with broader vision know there is no such thing as an airtight “elimination of risk”: no airtight contract, airtight lawsuit, airtight defense, or airtight policy. In-house counsel tend to understand these principles better than outside counsel, given that much of what is done in-house involves interacting with multiple business units that do not follow zero-risk tolerance policies and practices. Exceedingly low- or no-tolerance risk policies inhibit business and ultimately profits; business is inherently about taking some calculated risk.

### Think in Terms of Guiding Rather than Concrete Answers

Advising clients in the 21st century will invariably entail thinking about how legal advice fits into the wider picture. Therefore, there is no one-size-fits-all solution. Your counsel will depend not just on the size and type of company you are advising, but also on knowing its culture. If, as in many companies, CSR/sustainability is embedded in the marketing department, your client may be neglecting litigation risk exposure should marketing representations be proved false—or even if they prove true.

We probably all understand how making false representations would expose us to litigation, but how could a company be liable for a true representation? This is being played out currently in the climate-change context, in which many corporations make public declarations—whether in CSR/sustainability reports, websites, or elsewhere—that climate change is a risk to which they are responding with new products or services. What is evolving is a theory of liability that asserts that if you mention climate change as a risk in your public documents, but then fail to disclose it as a material risk in your U.S. Securities and Exchange Commission (SEC) filings, you could be liable for fraud, among other things.

The lesson in that is that lawyers have the opportunity to better help their clients by identifying new areas not just of risk exposure, but also for business opportunity.



### How to Guide Your Clients

The three basic approaches to helping your clients get down to the business of sustainability are (1) identifying the appropriate framework; (2) determining the baseline; and (3) initiating incremental implementation.

**Identifying the appropriate framework** means simply that you help the client better organize goals and objectives by enhancing its ability to reduce risk and increase rewards according to a plan. Such a plan expands the scope of business-as-usual (BAU) activities and provides metrics to measure progress, and can be thought of as a type of enterprise risk management (ERM).

The difference between traditional risk analysis and ERM is that the traditional mode of analysis looks essentially at conventional risk versus benefit and cost versus benefit. The refined ERM framework also considers the following: risk versus reward; the implications of an expanded network of stakeholders; systems-thinking versus functional-thinking; integrated strategies; and brand sensitivity. These are especially important in an era in which social media allow one individual to have a detrimental impact on your reputation, and thus your profits.

The ERM framework offers a broader variety of metrics by which to measure your progress, enhance your success, and improve on your vulnerabilities; a broader conceptual plan that unifies the many disparate, fragmented, and isolated parts of the organization; a logical structure that links together all the pieces of the enterprise (values, goals, missions, strategies, operations, etc.) into an integrated whole; and a better result with an improved bottom line than traditional risk management.

The ERM framework helps clients identify both risks and opportunities. A simple case study illustrates how the BAU model exposes companies to higher risk and resulting loss. Several years ago, the Federal Trade Commission (FTC) hit ChoicePoint (CP) with a \$10 million fine, the largest civil penalty in the agency's history. The FTC charged that CP illegally gave credit histories to people who were not authorized to obtain them, and failed to have reasonable procedures to verify the identities of those who requested the information and how the data was to be used.

The CP BAU model neglected to consider the possibility that con artists could enter unnoticed through the front door. The CP assumptions were based on older thinking patterns that only perceived the vulnerability of fraudulent actors entering through the back door—hackers and the like. The CP operations process for approving business partners was vulnerable as criminals were officially

becoming business partners by exploiting CP's business process and practices that relied on historical data and traditional BAU models.

What this teaches is that information and commitment should never be mistaken for investigative knowledge. What ERM would have done for CP is to uncover more relevant vulnerabilities by using risk assessments that are conducted with a keener view of operational reality. It also would have added increased protection and more to the bottom line. Because the ERM framework is more rigorous and thorough than traditional risk management, it yields more effective and valuable results. ERM would have also provided enhanced rewards through process-driven software with embedded frameworks that help create a repeatable and sustainable process.

**Determining the baseline** means conducting a gap analysis and an expanded SWOT analysis. (A SWOT strategy refers to "strengths, weaknesses, opportunities, and threats," but should also include the factors we are discussing here.) For example, if a company is choosing to focus on the environmental component of CSR/sustainability, it might consider choosing its "carbon footprint" as the starting point for gauging its activities. This could provide the company with the baseline on which you assess strengths, weaknesses, opportunities, and threats. This assessment also helps the organization decide which emissions sources they want to target for reduction: Will it stay with stage I sources, or move beyond that?

**Initiating incremental implementation** means developing your overall strategy, setting modest but substantial targets, and choosing which metrics you will use to measure your progress. It means identifying your stakeholders (both internal and external), and engaging key parties of interest. This stage involves establishing goals and targets including timetables, objectives, baseline year, and possibly types of emissions. It also means developing a short-term (often, five year) plan that might include developing and implementing financial mechanisms for carbon management (e.g., carbon credits, offsets, etc.), or more community involvement with indigenous cultures. It also entails long-range plans (five to ten years out), and invariably includes incorporating standards beyond compliance to meet supply-chain pressures.

### The Green You Take Is Equal to the Green You Make

*Green* also means business responsibility. It embraces all the elements of CSR and sustainability, no matter how anyone defines those terms. Green fatigue may be a fact

in some corners, but it should not be an inhibiting factor for those organizations following the three approaches described. Like it or not, the *green* moniker remains the most accurate common shorthand way of expressing CSR and sustainability.

Green is also a stand-in for money. Therefore, lawyers (in every field) have the opportunity to advise their clients (in any field) to use the liability risks of doing CSR as a baseline. This means also considering the risk of *not* doing CSR, potentially an even larger risk. ♦

## Distinctions with Differences: The Lawyer's Role in Distinguishing CSR and Corporate Philanthropy

By Sarah A. Altschuller

Lawyers are trained to understand the power of language and the dangers inherent in imprecise terminology. We are therefore particularly well-suited to provide advice to clients on the distinctions between corporate social responsibility (CSR) and corporate philanthropy. The two terms are often used interchangeably in the popular media and in business publications: most frequently, specific instances of corporate philanthropy are deemed to be representative of a company's commitment to CSR. While acts of corporate philanthropy can certainly be indicative of a company's support of social causes, such efforts should not be considered to be reflective of a company's attitudes on CSR. The failure to understand the contemporary distinctions between philanthropy and social responsibility can leave companies ill-prepared to respond to the demands of the stakeholders who are increasingly pushing companies to manage the social and environmental impacts of their operations. A lack of capacity to acknowledge and respond to stakeholder expectations may leave companies vulnerable to legal and reputational risk.

### CSR and Corporate Philanthropy

Ultimately, CSR is about how companies are managed, not about the ways in which they choose to allocate profits. CSR is about the core business functions of a company, and about the increasing demands of company stakeholders that companies be held accountable for the social and environmental impacts of their operations. A

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company's stakeholders include employees, shareholders, consumers, and the communities in which that company operates. The expectations of those stakeholders are expressed in forms ranging from legislation and regulation to shareholder resolutions and disruptive protests. CSR is a strategic response to the changing nature of those expectations: stakeholders increasingly expect companies to abide by a wide range of proscriptive and normative standards.

Against this backdrop, there are risks for companies that claim to have embraced CSR and then point to the glossy reports of their company foundation to demonstrate the degree of their commitment. Imagine a company that provides significant philanthropic support for the digging of wells in the communities in which it operates. Undoubtedly, the wells provide community members with increased access to safe drinking water. The company may receive reputational benefits from its actions, and some observers may view the company as a good "corporate citizen." In addition, the language of the company's environmental standards may be fully compliant with all applicable legislation and regulations and may in fact exceed the requirements of those standards.

Imagine the impact if that same company, as part of its profit-generating business in the same country, engages in activities that could adversely affect groundwater supplies. In the event of an emergency that pollutes the groundwater, an unwelcome contrast would emerge between the company's intended philanthropy and its actual operations. Whether or not such an emergency actually came to pass, the company may have failed to develop the internal policies and mechanisms necessary to ensure that local managers are held accountable for following safe environmental



practices. The lack of internal oversight and management may leave local resources, and the communities that depend on them, vulnerable to contamination. The company itself may be exposed to the risk of future reputational damage as well as fines and other punitive costs, including the costs associated with potential litigation. Regardless of the extent of the company's philanthropic contributions, the company cannot be said to have fully incorporated CSR into the management of its operations.

In the above scenario, company managers may be tempted to respond to those who accuse the company of failing to protect local groundwater supplies with references to the company's support for local water access initiatives. References to good deeds, however, do not mitigate against the risks associated with lack of internal commitment and oversight. Corporate philanthropic commitments do not ensure the existence of internal management capacity to manage social risk; a company with a strong internal commitment to CSR will have systems in place to manage the social and environmental risks associated with its operations.

### The Evolution of the Distinction

Contemporary confusion about CSR and corporate philanthropy reflects the substantial evolution of CSR in recent decades. In its earlier incarnations, CSR was largely understood as reflective of corporate willingness to make voluntary contributions. Companies operated as social benefactors, offering financial and in-kind support to support a wide range of social causes. These efforts were, in fact, largely philanthropic and thus the earliest forms of CSR were indistinct from contemporary corporate philanthropy.

In recent years, CSR has developed a broader, more complex meaning. The self-directed voluntary commitments of the past have given way to a wide range of corporate behaviors that are directly responsive to societal expectations. At the same time, societal expectations have grown to reflect the significant power of companies to impact communities at the local, national, and international level.

In an era of globalization, companies are seen by many stakeholders as having a range of duties and obligations parallel to the duties and obligations of more traditional public actors. CSR has expanded in the space that exists between unenforceable public rights and nonexistent private rights and company stakeholders have mobilized to demand greater levels of accountability from corporate actors.

CSR has evolved to the point where companies are no longer making social commitments in a normative vacuum. Companies will find that their initiatives are evaluated against a wide variety of standards ranging from local

and national laws to voluntary guidelines established by groups ranging from industry associations to the United Nations. The principles and guidelines established by such documents as the Voluntary Principles on Security and Human Rights and the core Conventions of the International Labour Organization have also placed high-profile normative frameworks around corporate activity.

Most recently, the work of the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations has resulted in a clear statement that companies have a responsibility to respect human rights. Companies must carefully consider a wide range of factors when assessing their potential accountability or liability for human rights abuses, including the specific local contexts in which they operate; the capacity and human rights commitments of the public authorities in those local contexts; and the complex ways in which company interactions with business partners, contractors, and other state and non-state actors may contribute to human rights abuses.

### The Role of the Lawyer

What is the role of the lawyer in talking to companies about CSR? At the outset, lawyers should not underestimate the degree to which corporate philanthropy is also a strategic and valuable endeavor. Many companies have well-developed philanthropic programs, and strategic philanthropy allows companies to invest in human potential in ways that benefit communities and companies alike. However, when talking with clients, lawyers must be careful to emphasize that philanthropic commitments are distinct from the internal and external commitments that contemporary notions of CSR demand.

Company confusion between CSR and philanthropy may be reflected in the ways in which specific management responsibilities are assigned within the company. Corporate philanthropic officers should not be tasked with managing the social and environmental risks of a company's operations. Clear functional distinctions should be drawn between those responsible for corporate philanthropy and those responsible for CSR. These distinctions will provide managers and employees with greater clarity as to their individual areas of responsibility and accountability.

When considering a company's capacity to distinguish between CSR and corporate philanthropy in practice, lawyers should also be aware of the company's existing processes for responding to community grievances. Companies may have developed strong community engagement processes with establish grievance mechanisms, but local

managers may still be inclined to respond to community protests through the allocation of philanthropic dollars. In some contexts, philanthropic commitments may forestall immediate community protests, but they do not ultimately mitigate the risks of poor community engagement policies and a failure to operate in a socially responsible way.

Lawyers can assist clients in developing policies and standards that reflect the company's true commitments as well

in formulating implementation guidelines that reflect actual issues that come up in their business operations. Lawyers can help clients understand the distinctions between corporate philanthropy and CSR, as well as the nature and scope of specific CSR commitments, in order to ensure that the companies develop standards that can be effectively implemented rather than adopt standards that represent empty and discretionary commitments to boilerplate language. ♦

## Can the World Bank Help Keep Companies Honest?

By Kindra Mohr

Practitioners in the field of international development cringe at the word "corruption." To them it means the diversion of precious resources from their intended uses and into the pockets of unscrupulous public officials and development contractors. Whether corruption involves kickbacks under the table or fraudulent bid proposals to win a development contract, it ultimately results in more public skepticism and underdevelopment in countries that are in desperate need of economic growth. These days, with massive amounts of global resources being invested in Iraq and Afghanistan, it is especially important that we have oversight and accountability to ensure the success and sustainability of development projects on the ground there.

Corporate social responsibility (CSR) undoubtedly plays a critical role in preventing companies from engaging in illegal or, at the very least, unethical business conduct. In particular, the implementation of a robust code of ethics and corporate compliance program not only demonstrates a company's commitment to "playing by the rules," but it can also enhance its reputation as well as its sales. However, these forms of corporate self-regulation are not ironclad. Indeed, the enforcement and strengthening of laws such as the Foreign Corrupt Practices Act (FCPA) are necessary to give real meaning to these codes of ethics and compliance programs. Yet, within the business of international development, other enforcement mechanisms are needed to give companies incentives to take their own

CSR programs seriously and fill the void when the FCPA is not applicable or when the judicial system within a given country is too fragile or corrupt to take action.

This is where sanctions procedures within multilateral development banks (MDBs) come into play. To give a simple overview, MDBs, like the World Bank, Inter-American Development Bank, Asian Development Bank, and others, are major sources of development funds, which they loan to member governments for specific projects. Attached to these loan agreements are conditions to ensure that the funds are not misallocated or tied to corruption or other misconduct. Thus, once a company submits a bid to the government to complete a project with these funds, it is bound to procurement or contractor anti-corruption provisions. If the company bribes a public official or submits a fraudulent bid to win the government's project contract, the World Bank, for example, has the authority to investigate and sanction that company for its actions. This may mean permanent disbarment from bidding on all future World Bank-financed projects.

The sanctions system at the World Bank ([www.worldbank.org/sanctions](http://www.worldbank.org/sanctions)) involves a multi-phase investigatory and adjudicatory process to assess whether a company (or individual) has engaged in corrupt, fraudulent, collusive, coercive, or obstructive practices. These practices cover a wide range of corporate misconduct, such as making misrepresentations on bid documents, providing forged bid materials, submitting mischarges for contracted goods or services, bribing public officials, or even impeding the course of an investigation. In brief, the World Bank's Integrity Vice Presidency (INT) begins this process with an investigation into the alleged misconduct and forwards the case for its review to the Office of Evaluation and Suspension if there

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is sufficient evidence of any of these practices. The Evaluation and Suspension officer then evaluates the evidence and determines whether to issue sanctions against the company. If the company wishes to contest the Evaluation and Suspension officer's decision, it can appeal to the Sanctions Board, which has the authority to render a final decision on the case. While space prohibits a more thorough description of this process, this basic outline should illustrate that the sanctions system at the World Bank, and its counterparts at other MDBs, is vital in the global fight against corruption and to the implementation of *effective* CSR programs.

Because the sanctions system within the World Bank applies to private entities rather than public officials, it puts the pressure squarely on companies to comply with the anti-corruption provisions that are attached to development funding. In turn, the possibility of sanctions and their associated reputational damage can help motivate a company to adopt ethical and responsible business practices, even in countries where corruption is known to be a fact of life.

By no means does this suggest that the World Bank's or other MDBs' sanctions systems will eliminate corruption in international development. It would be naive to propose that these enforcement mechanisms alone prevent companies from using corruption or similar tactics to win a contract or turn a profit, particularly when it appears that all the major players are engaging in corporate misconduct of this kind. However, together with other enforcement mechanisms and the FCPA, these sanctions systems serve as building blocks to foster a global business environment in which corruption is not tolerated, and where those companies that only pay lip service to CSR programs will ultimately suffer the economic and reputational consequences. In other words, in a world where vast sums of money make their way from MDBs to the marketplace, their sanctions systems are part and parcel of holding companies accountable in international development projects and keeping them honest about how they conduct business operations.

As more companies are subject to international scrutiny in their business practices and can no longer afford to ignore enforcement mechanisms like the World Bank's sanctions system, it will become more difficult for any one company to engage in corruption and escape detection. For if one company is suspected of corrupt practices, the natural tendency of its competitors will be to report the misconduct to ensure that all players follow the same rules. Although World Bank sanctions are unlikely to resolve the collective action problem in its entirety, they are certain to diminish its prevalence within its financed development projects.

It is worth highlighting that the World Bank's sanctions system is not only an important component in dampening the corporate supply of corruption, but it can play a powerful role in reducing the demand and expectation for such misconduct on the part of public officials as well. For instance, in developing countries with weak and unaccountable judicial institutions, governments may be unwilling or unable to investigate or prosecute companies that engage in corruption or other corporate misconduct, let alone compel them to adopt effective CSR programs. However, if a company concedes that the World Bank will commence sanctions proceedings against it for its misconduct in connection with a World Bank-financed project, it will be less inclined to submit a fraudulent bid or bribe a public official. It follows that as the number of companies that refrain from bribing public officials rises, these officials will soon find that the supply of illicit payments has withered away. In turn, as the expectation of corruption diminishes, it will become easier for companies to fully commit to CSR in their operations. Thus, sanctions systems can have an overall impact on the supply of and demand for corporate misconduct in the international development setting.

This said, there is always room for reform and improvement of enforcement mechanisms like the sanctions systems within MDBs. In fact, many will argue that the World Bank has not been as effective or relentless as it needs to be to deter corruption and affect corporate behavior in any large-scale way. Although this may be true, the World Bank and other MDBs are gaining more corporate attention for their anti-corruption efforts and will only continue to increase their vigilance, especially in the wake of the financial crisis and some of the more recent corporate scandals involving companies like Siemens and BAE Systems.

Corruption still infiltrates the private and public sectors in both developed and developing countries. Nevertheless, the sanctions systems within the World Bank and other MDBs are essential elements in establishing and enforcing anti-corruption standards with a global reach and making companies live up to their promises of CSR in international development projects. Indeed, the enforcement mechanisms within these systems cannot alone rid the world of corruption, but the work of the World Bank and other MDBs certainly helps curtail dishonesty in the corporate setting and serves a crucial function in global anti-corruption efforts. So long as these enforcement mechanisms continue to play a prominent role in combating corruption and corporate misconduct, companies must give real meaning to CSR. ♦

## Managing Legal Risks through CSR in Light of Recent Alien Tort Statute Decisions

By Michael A. Levine

Risk management is an important goal that corporations seek to achieve by implementing corporate social responsibility and sustainability (hereinafter collectively referred to as CSR) standards (code of conduct, or code) and programs. More specifically, corporations face an array of legal risks related to their business operations. One specific type of legal risk, particularly for companies with global operations and a U.S. presence, relates to potential claims under the Alien Tort Claims Act (ACTA), also called the Alien Tort Statute (ATS).

The ATS provides district courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. Companies that operate within the United States may be subject to ATS litigation for acts that occur wholly outside the United States’ geographical confines. By way of brief background, and in substance, the U.S. Supreme Court in *Sosa v. Alvarez-Machain* recognized that under certain circumstances a plaintiff may obtain relief under the ATS for violations of customary international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004). Recently, there has been a series of ATS decisions that will become part of the calculus of legal risk management for multinational corporations, and they are discussed below.

Over the past few months, U.S. federal courts on the circuit and district court levels have handed down decisions affecting and interpreting exhaustion and standing requirements; venue; jurisdictional scope; pleading standards; and requisite *mens rea* for accessorial liability, among other issues, in ATS litigation. On balance, most of the decisions are favorable to company-defendants, as these courts have generally taken a tougher position on

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pleading and venue requirements. On the other hand, one circuit court has allowed an ATS litigation to proceed without requiring the plaintiffs to have first exhausted all remedies within the country in which acts complained of allegedly occurred.

### Jurisdiction

#### Standing

***Doe VIII, et al. v. Exxon Mobil Corp.*** Eleven anonymous Indonesian residents alleged that Indonesian soldiers, acting as security personnel for Exxon Mobil, committed violent acts while under the direction of Exxon. *Doe VIII, et al. v. Exxon Mobil Corp.*, No. 07-1022 (RCL), 2009 WL 3112823, at \*1 (D. D.C. Sept. 30, 2009). The plaintiffs claim they were terrorized by soldiers hired by Exxon to protect a natural gas plant in the region. *Id.* at \*2. The defendants moved to dismiss the case under eight separate theories, one of which was lack of standing. The issue before the court was whether non-resident aliens have standing to sue in U.S. courts. In this particular case, the plaintiffs’ ATS claim had been dismissed in 2001, leaving the case to proceed only on state law issues. The court found the plaintiffs lacked standing because they were non-resident aliens and did not address other alleged bases for dismissal. The court reasoned that “where a non-resident alien is harmed in his own country, he cannot and should not expect entitlement to the advantages of a United States court.” *Id.* at \*4. In this case the court reasoned the parent subsidiary, a U.S. corporation, was insufficiently connected to the location where the events occurred; therefore, the plaintiffs lacked standing to bring a claim before a U.S. court.

#### Exhaustion of Remedies

***Sarei v. Rio Tinto.*** Mining company Rio Tinto PLC has appealed a U.S. District Court ruling allowing class action plaintiffs to pursue their claims in the United States without having to exhaust remedies in Papua New Guinea, where the plaintiffs reside and the alleged incidents, including allegations of racial discrimination, war crimes, and crimes against humanity, giving rise to the claims that allegedly occurred during a civil war on Bougainville Island. See *Sarei v. Rio Tinto, PLC*, No. 02-56256,



2008 U.S. App. LEXIS 25279, at \*1 (9th Cir. Dec. 16, 2008, notice of appeal filed Aug. 28, 2009).

Rio Tinto is appealing the decision in *Sarei v. Rio Tinto*, No. CV 00-11695, (C.D. Cal. July 31, 2009). In the decision, Judge Margaret M. Morrow declined to impose a prudential exhaustion requirement on several of the ATS claims against Rio Tinto. Applying the *Sosa* test, the court concluded that the “nexus” between the claims and the United States was weak. *See Sosa*, 542 U.S. at 703. The court agreed with the *en banc* plurality of the Ninth Circuit holding that courts should carefully consider prudential exhaustion with respect to claims that do not involve matters of “universal concern.” *Sarei*.

The court reasoned that because the plaintiffs’ claims concerning alleged crimes against humanity, war crimes, and racial discrimination were of “universal concern,” the exhaustion requirement did not apply to them. On the other hand, the court held that it would apply a two-step prudential exhaustion analysis to the plaintiffs’ other claims (which it did not find to be of universal concern) for alleged violations of “the right to health, life, and security of the person; cruel, inhuman, and degrading treatment; international environmental violations, and a consistent pattern of gross human rights violations.” The court gave the plaintiffs 30 days to file a status report indicating whether they intend to pursue any or all of the claims.

In response to the district court’s ruling, the plaintiffs filed a status report indicating their intent to abandon their environmental tort claims to which defendants responded by filing the above-mentioned notice of appeal.

#### Personal Jurisdiction

**Bauman v. DaimlerChrysler.** On August 28, 2009, the Ninth U.S. Circuit Court of Appeals upheld a lower court decision in favor of Germany-based DaimlerChrysler AG (DCAG) in an ATS lawsuit featuring allegations that a DCAG subsidiary committed human rights violations in Argentina during the 1970s and 1980s. *Bauman v. DaimlerChrysler Corp.*, \_\_\_ F.3d \_\_\_, No. 07-15386, 2009 WL 2634795, at \*1 (9th Cir. Aug. 28, 2009).

In 2004, the plaintiffs, Argentinean residents and citizens, sued DCAG in the Northern District of California under the ATS, alleging that military security forces had kidnapped, detained, or tortured them or their relatives at the direction of an Argentina-based DCAG subsidiary.

Writing for the Ninth Circuit, Judge Dorothy Nelson stated that the Northern District of California correctly dismissed the case for lack of personal jurisdiction, but noted that the appellants could file claims in Germany and

Argentina. *Id.* According to Judge Nelson, while a subsidiary may be considered the agent of its parent for jurisdictional purposes, personal jurisdiction over the parent will lie only when the parent exerts “pervasive and continual” control over the subsidiary, and, if so, only when the subsidiary performs a domestic function that the parent would otherwise perform itself. *Id.* at \*5-6.

Under this test, the court concluded that the plaintiffs had failed to establish that DCAG exerted “pervasive and continual” control over its U.S. subsidiary, which the court found to be largely autonomous in distributing vehicles in this country. *Id.* at \*28. Judge Nelson noted that it was the subsidiary, not the parent company, that decided where to distribute its products. *Id.* at \*17. Moreover, even assuming that DCAG did exert pervasive control over its subsidiary, the plaintiffs nonetheless failed to demonstrate that DCAG would undertake to perform substantially similar services in the absence of its subsidiary. *Id.* at \*32.

#### Forum Non Conveniens

**Turedi v. Coca-Cola.** In *Turedi*, the plaintiffs, who are Turkish citizens, sued Coca-Cola, Coca-Cola Export Corp., and Coca-Cola Icecek (CCI) under the ATS and various other statutes. On November 2, 2006, however, the Southern District of New York dismissed the complaint on *forum non conveniens* grounds. *See Turedi v. Coca-Cola Co.*, 460 F.Supp.2d 507, 509–11 (S.D.N.Y. 2006). The Second Circuit affirmed the dismissal on July 7, 2009. *Turedi v. Coca-Cola Co.*, No. 06-5464-cv, 2009 WL 1956206, at \*1 (2d Cir. July 7, 2009).

The Second Circuit agreed with the district court’s inference that plaintiffs had engaged in forum shopping, given that CCI, a Turkish company, had its principal place of business in Istanbul, and the plaintiffs had not alleged contact by CCI with the United States. *Id.* at \*5. Further, the alleged injuries stemmed from alleged assaults and arrests by the Turkish police arising from their labor dispute with Trakya and CCI in Istanbul, Turkey. *Id.*

Additionally, the court rejected the plaintiffs’ contentions that the Turkish justice system is corrupt and found that Turkey was an alternative and adequate forum for plaintiffs’ claims. *Id.* at \*6. Upon reviewing the U.S. Supreme Court’s *Gilbert* factors, which balance public and private interests in a *forum non conveniens* inquiry, the Second Circuit concluded that the factors strongly favored adjudicating the dispute in Turkey. *Id.* at \*8; *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (affirming the district court’s decision to dismiss a warehouse owner’s action for damages against an oil company based on *forum non conveniens*, when jurisdiction was

appropriate, but venue was not), *distinguished by*, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434–35 (2007) (deciding whether a federal court may dismiss a case based on *forum non conveniens* before definitively ascertaining its own jurisdiction).

***Aldana et al. v. Del Monte Fresh Produce N.A. Inc.*** On August 13, 2009, the Eleventh U.S. Circuit Court of Appeals affirmed a lower court's dismissal of this ATS case on *forum non conveniens* grounds, holding that Guatemala was an available alternate forum for the claims asserted, and the location of all the relevant evidence. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2460978 (11th Cir. Aug. 13, 2009).

The plaintiffs filed suit against their former employer, Del Monte, and its wholly owned Guatemalan subsidiary, asserting ATS and Torture Victim Protection Act (TVPA) claims based on events alleged to have taken place in Guatemala during a labor dispute. The U.S. Southern District of Florida dismissed the action for failure to state claims for which relief may be granted, which the plaintiffs appealed to the Eleventh Circuit. The Eleventh Circuit, affirmed in part, vacated in part, and remanded. On remand, the district court dismissed the action again, this time on *forum non conveniens* grounds, and the plaintiffs appealed again. On appeal, the Eleventh Circuit held that the district court did not abuse its discretion in dismissing the action on *forum non conveniens* grounds. *Id.*

Writing for the court, Judge Stanley Marcus stated that the district court correctly applied the *forum non conveniens* test, which he noted is used by Florida state courts, federal courts, and has been adopted by the Florida Supreme Court. The Eleventh Circuit held that the district court correctly determined that there was an adequate alternate forum in Guatemala which possessed jurisdiction over the whole case; that all relevant factors of private interest favored the alternate forum; that public interest factors further tipped the balance of trial in favor of the alternate forum; and that the plaintiffs would not suffer undue inconvenience or prejudice in the alternate forum. *Id.*

### Pleadings

A Higher Standard

***Sinaltrainal v. Coca-Cola.*** The plaintiffs, the Columbian union, Sinaltrainal, and other labor leaders, brought ATS and TVPA claims against Coca-Cola, its Columbian subsidiary, and the parent companies and owners of two bottling companies, Panamco, LLC and Panamco Industrial de Gaseosas, S.A. The plaintiffs alleged that the defendants collaborated

with paramilitary forces or the local police, resulting in the murder and torture of union leaders employed by the bottling plants. The plaintiffs' claims against the defendants and Coca-Cola were based upon conspiracy, agency, aiding and abetting, and vicarious liability theories.

The U.S. District Court for the Southern District of Florida dismissed the four consolidated cases, which Sinaltrainal promptly appealed to the Eleventh Circuit. The Eleventh Circuit affirmed the dismissal based on the plaintiffs' "failure to sufficiently plead allegations to connect the paramilitary forces, who perpetrated the wrongful acts, with the Columbian government." *Sinaltrainal v. Coca-Cola*, No. 06-15851, 2009 WL 2431463, at \*1 (11th Cir. Aug. 11, 2009). The Eleventh Circuit also noted that the complaint "failed to sufficiently plead factual allegations to connect the Panamco Defendants to actionable torture." *Id.*

The complaint contained allegations of persecutions and murders of over 4,000 Columbian trade unionists since 1986. The complaint, however, did not state that the defendants caused the violence; instead, the plaintiffs claimed that the defendants should be held liable for "capitaliz[ing] on [the] hostile environment in a bid to rid their bottling factories of unions." *Id.* at \*21.

When dismissing the case at the district level, the court found that the allegations in each of the four complaints failed to invoke the court's subject matter jurisdiction under the ATS. According to the Eleventh Circuit, in order for the lower court to have properly asserted subject matter jurisdiction over these ATS claims, the complaint had to contain pleadings sufficient to alleged that the paramilitaries were "state actors" or that they were acting under the "color of law" and that the defendants conspired with the state actors in carrying out the tortious acts. *Id.* at \*3. Moreover, the court held the "war crimes exception" that allows ATS claims to be brought against a non-state actor did not apply to this case because the plaintiffs did not allege that the attacks occurred during a Columbian civil war.

In its decision, the Eleventh Circuit relied in part upon two recent Supreme Court cases that drastically modified Rule 8(a) of the Federal Rules of Civil Procedure in connection with notice pleading requirements. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 585 (2007).

The State Secrets Privilege

***Mohamed v. Jeppesen Dataplan.*** On August 31, 2009, the Ninth Circuit Court of Appeals reversed and remanded a case brought by a plaintiff who alleged ATS violations



against Jeppesen Dataplan, a Boeing Company subsidiary. The plaintiffs alleged that U.S. Central Intelligence Agency (CIA), alongside other government officials and agencies, operated an “extraordinary rendition program,” which gathered intelligence by apprehending suspected foreign nationals and transferring them in secret to other foreign countries, where they were detained and interrogated. The plaintiffs cited publicly available materials in support of their pleadings. Further, according to more publicly available materials, plaintiffs alleged that Jeppesen Dataplan provided the CIA with “flight planning and logistical support services to the aircraft and crew on all flights transporting” the plaintiffs. *Mohamed v. Jeppesen Dataplan*, No. 08-15693, 2009 WL 2710198, at \*7 (9th Cir. Aug. 31, 2009). Accordingly, the plaintiffs alleged that Jeppesen played an “integral” role in conduct that they claimed violated the ATS, and that Jeppesen provided this assistance with actual or constructive knowledge of what would happen to the plaintiffs. *Id.* In sum, the plaintiffs alleged that under the ATS, Jeppesen is liable for actively participating in alleged abductions and acting as co-conspirator to alleged acts of torture allegedly committed in violation of customary international law and therefore cognizable under the ATS.

Before Jeppesen filed an answer, the U.S. government intervened, asserting that the state secrets privilege required that the case be dismissed. The district court agreed with the United States and dismissed the complaint. The plaintiffs appealed to the Court of Appeals for the Ninth Circuit arguing that the state secrets privilege doctrine had been misapplied. The Ninth Circuit reversed and remanded the case, concluding that the subject matter was not a state secret and that “Federal Rule of Civil Procedure 12(b)(6) precludes prospective consideration of hypothetical evidence.” *Id.* at \*4.

The U.S. government argued that the plaintiff would not be able to establish a prima facie case without using privileged evidence. The Ninth Circuit rejected the argument based on the fact that Jeppesen had not filed an answer, discovery had not yet begun, and because the appeal before the court was based on a 12(b)(6) motion that begs for a limited review. *Id.* at \*24. The Ninth Circuit was not asked to determine whether the plaintiffs would ultimately prevail on the merits, but solely to rule upon whether the plaintiffs had properly stated a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).

In advising the district court on remand, the Ninth Circuit clarified that the government must first assert privilege concerning secret evidence sought to be discovered

or presented, and only then could the district court consider whether first, the evidence was privileged, and second, whether the evidence was indispensable either to the plaintiff’s prima facie case or to a valid defense. The court concluded that the case should only be dismissed if the evidence in issue was found to be indispensable to either party. *Id.* at \*26.

### Accessory Liability: Purpose, Not Just Knowledge, Required

#### *Presbyterian Church of Sudan v. Talisman Energy Inc.*

In a decision that will severely limit the viability of certain ATS claims, on October 2, 2009, the Second Circuit raised the *mens rea* standard for finding aiding and abetting liability under the ATS, from mere knowledge to purposeful acts. In *Presbyterian Church of Sudan v. Talisman Energy Inc.*, the Second Circuit ruled that “liability can be imposed only where it is shown that a defendant purposefully aided and abetted a violation of international law.” *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 07-0016-cv, 2009 U.S. App. LEXIS 21688, at \*40 (2d Cir. 2009). In *Talisman*, Sudanese plaintiffs alleged that Talisman Energy Inc., a Canadian corporation, worked with the Sudanese government to create a “buffer zone” around its oil fields, build all-weather roads and infrastructure, and improve the airstrips, which helped the government displace civilians. *Id.* at \*53. The court held that under the *Sosa v. Alvarez-Machain* principles articulated by the Supreme Court, “the standard for imposing accessory liability under the ATS must be drawn from international law.” *Id.* at \*6. The court reasoned that if the standard was mere knowledge, then the ATS would provide the plaintiffs with a means of imposing embargos or international sanctions through civil actions in the United States. *Id.* at \*55. Here, the plaintiffs failed to provide sufficient evidence to show that Talisman acted “with the purpose of facilitating” the conduct at issue. *Id.* at \*41. Therefore, although the plaintiffs were able to show that the Sudanese government may have violated customary international law, they were nonetheless unable to provide evidence that Talisman acted with the purpose of supporting the government’s activities. The *Talisman* decision, coupled with the higher pleading requirement articulated in *Iqbal*, place a heavier burden on plaintiffs bringing ATS claims.

### Conclusion

Based on a review of the cases discussed above, it may be said that U.S. courts spent the summer and early fall rendering decisions that have further delineated the reach of ATS claims. The courts considered many factors that will

have a substantial impact upon whether ATS claims may proceed. First, in *Sarei*, the Ninth Circuit said that there must be a sufficient “nexus” between the claims alleged and the United States; however, it allowed plaintiffs’ claims to proceed without first requiring the plaintiffs to exhaust their remedies in the host country. Second, before a plaintiff may bring a foreign parent corporation to court in the United States based upon its U.S. subsidiary’s actions, the plaintiff must first show that the parent exerted “pervasive and continual” control over the subsidiary. *Bauman*. Third, the scope of cases brought on a Secondary Liability theory has been dramatically narrowed by the *Talisman* decision. There, the Second Circuit clarified and limited its own jurisprudence by raising the *mens rea* standard for accessorial liability from mere knowledge to purposeful acts. Fourth, in multiple jurisdictions, in order to avoid a dismissal based on *forum non conveniens*, the plaintiffs must demonstrate that either no other alternative forum exists or that undue inconvenience or prejudice will be suffered if it is not heard by the U.S. court in which the case is filed. *Aldana*; *Turedi*. Finally, courts have considered and heightened the pleading requirements for ATS claims. The *Sinaltrainal* court applied higher pleading requirements based on recently decided U.S. Supreme Court decisions. Courts will now evaluate whether the plaintiffs have sufficiently

pleaded factual allegations connecting the defendants to an allegedly actionable ATS violation under the stricter *Iqbal* standard. Moreover, when drafting their pleadings, plaintiffs must assess whether the state secrets doctrine is likely to be asserted in opposition to their case, and if so, must support their pleadings with publicly available evidence in order to defeat a defendant’s motion to dismiss on that basis. *Mohamed*.

ATS litigation risks are still significant for companies that have a presence within the United States and operate globally. CSR programs may serve to mitigate those risks but the complex lines between permissible and actionable conduct are constantly being re-drawn by ATS litigation and the judicial decisions that shape ATS jurisprudence. Now, more than ever, counsel has an important role in advising corporations with global operations. This includes counseling them about the likely impact of, and the risks posed by, their business processes, and providing real time, privileged assessments of emerging risks, including those presented by changes in the law. Stakeholders will continue to scrutinize corporate conduct in light of the judicial construction of the ATS. Accordingly, corporations, and their counsel, must periodically re-evaluate and may, on occasion, need to reset CSR programs and standards in light of these developments. ♦

## WORLD BAR NEWS

### Hong Kong Bar Association

By Nancy Kaymar Stafford

The Hong Kong Bar Association is governed by the Bar Council, which decides all matters of policy and is responsible for regulating and disciplining the conduct of barristers. The legal profession in Hong Kong is divided into two branches—barristers and solicitors.

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*The World Bar News is a new feature of International Law News. Edited by Nancy Kaymar Stafford, the World Bar News will provide information on different bar associations from around the world in each issue.*



## Global Code of Conduct Drafting Strategy

By Donald C. Dowling Jr.

**A** cornerstone of any multinational's corporate social responsibility (CSR) strategy is its global code of conduct. Indeed, most major multinational employers—particularly those based in the United States—seem already to have issued a global code of conduct that spells out certain rules governing worldwide operations.

But global codes of conduct vary substantially, in both purpose and content. According to the International Labour Organization's (ILO) website, "corporate codes of conduct do not have any authorized definition. . . . [T]here is a great variance in the way these statements are drafted." Indeed, "code of conduct" is not a term of art, but is merely a label affixed to a range of corporate and non-governmental-organization policies. As such, any multinational drafting and launching a global code needs first to decide what type of code of conduct it needs.

Many corporate policies labeled "codes of conduct" have little to do with employment relationships. There are professional association antitrust compliance codes of conduct, environmental-protection codes of conduct, and advisory codes of conduct on topics like intellectual property and computer programming. These codes—while vital—are only loosely connected to a multinational's global efforts at legal and ethical human resources compliance and CSR initiatives.

Anchoring our code of conduct discussion in the context of international employment and CSR, there are two very different types of codes to distinguish: *External supplier codes* chiefly protect employees working for a multinational's suppliers from so-called "sweatshop" conditions, whereas *internal ethics codes* chiefly impose compliance rules on a multinational's own employees across its worldwide workforces. In one sense, these two global codes of conduct are opposites: External supplier codes seek to *protect* employees not on the code issuer's payroll, while internal ethics codes seek to *restrict* (impose rules on) a code issuer's own employees. Some multinational codes of conduct try to combine these two types of document, but effectively doing so is difficult because both the goals and the intended audiences differ. As such, any multinational launching a global workforce "code of conduct" to further

its CSR goals should clarify which of these two types of code it needs.

### External Supplier (Sweatshop) Codes of Conduct

In the United States, multinational employers' supplier (sweatshop) codes of conduct first got traction in the 1990s when American human rights activists championed them to promote worker rights in the developing world, and teamed up with U.S. labor-union activists promoting job security for American workers. These activists continue to urge that multinationals selling third-world-sourced product to rich first-world consumers police the labor conditions of overseas workers who make the product.

Supplier codes of conduct are external in that they seek to protect employees of multinationals' unaffiliated suppliers. An external code's text often may reach a multinational's own employees, but internal compliance is rarely a primary concern. External codes' terms almost always reach suppliers worldwide—in developed and developing countries alike. But these codes implicitly focus on supplier employees in the developing world. (Labor law violations, of course, occur everywhere, but domestic "sweatshops" are not seen as a pressing social issue in, say, Canada, Denmark, or Japan.)

Multinationals that impose external supplier codes usually do so as appendices to supply contracts or sourcing agreements with factories around the world. External codes tend to require a multinational's suppliers to meet minimum basic labor protections set out in the code. Some codes offer specific lists of core labor protections, while others increasingly incorporate by reference ILO conventions, model industry code templates, or local employee-protection laws.

The issuers of robust supplier codes of conduct tend to be multinationals that source low-cost manufactured tangible products from the developing world. Think of athletic shoe companies like Nike and Adidas, retailers like Walmart and Target, clothing makers like Liz Claiborne and Kathie Lee Gifford, and sports equipment and toy makers like Reebok and Mattel. In addition, some oil companies and some global manufacturing conglomerates (General Electric, for example) also impose tough supplier codes. However, supplier codes remain rare among luxury goods companies that source product from developed countries, and supplier codes of conduct are rare among services

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*firms*: Until now, the supplier code of conduct movement has targeted institutional buyers of tangible products, even though most of the social, compliance, public relations, and business-case arguments for a supplier code of conduct apply equally to suppliers of services. The next frontier, perhaps, will be imposing supplier codes on outsourced call centers and other low-wage back-office services operations in the developing world.

The vast majority of customers have no practical ability to direct and monitor sellers' day-to-day human resources, let alone to monitor work conditions upstream, at the materials suppliers that supply the factory or service facility. Without supplier codes, a customer has little information or say about a seller's work conditions. Some lawsuits filed in U.S. courts have sought to enforce global supplier codes for overseas workers on a third-party-beneficiary theory. However, these lawsuits have been largely unsuccessful due to issues of *privity-of-employment-contract*.

#### Internal ("Ethics") Codes of Conduct

Completely distinct from external supplier codes of conduct but still within the context of international human resources are internal ("ethics") codes of conduct. These are internal human resources policies by which multinationals use human-resources enforcement tools to impose ethics rules and compliance standards on their subsidiaries' workforces worldwide—reining in employee misbehavior by sanctioning illegal, unethical, and inappropriate acts.

Successfully launching an internal "ethics" code of conduct requires attention to two disparate issues—code *content* versus code *roll-out*:

- **Code content.** Distinguish an internal code of conduct from an *employee handbook*. Employee handbooks tend to address everyday aspects of human resources that mostly differ from country to country, local topics that tend to be best relegated to local employee communications. A well-drafted global

code of conduct, on the other hand, focuses on minimum baseline compliance rules that apply across borders. A good internal code also propagates corporate culture and fosters compliance with ethical standards tailored to the specific needs of the issuing organization. Multinationals based in the United States tend to be particularly concerned that their internal codes address global rules on antidiscrimination/harassment, Sarbanes-Oxley and audit/accounting compliance, bribery and other improper payments, and adherence to data privacy, antitrust, and intellectual property standards—and that the code meets U.S. federal sentencing guideline standards.

- **Code roll-out.** Completely separate from code content is the distinct issue of the *process* for launching an internal code. Outside the U.S. employment-at-will environment, legal systems impose barriers to employers unilaterally imposing new work rules that could affect employees' "conduct." Because an international internal code of conduct is a set of detailed rules that subject violators to discipline, every code needs to get implemented consistent with local-law restrictions against unilaterally imposing restrictive new terms/conditions of employment. In rolling out any internal global code, be sure to address five key issues: multiple versions, dual employer, consultation and harmonizing with local work rules, translation, and distribution/acknowledgement.

U.S.-based multinational employers have a solid CSR and business case for issuing a global "code of conduct." Those multinationals with the economic clout to impose external supplier codes of conduct should consider their benefits, and all multinationals should consider the utility of internal codes. The challenge is determining what type of global code to issue, and then ensuring that both the code's content and the multinational's launch process comply with legal requirements and business imperatives. ♦



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## Health Threats to the Global Economy: Corporate Responses to Emerging and Reemerging Infectious Diseases

By Shelley Hayes

A commonly accepted definition of corporate social responsibility (CSR) is the alignment of a company's activities with the economic, environmental, and social expectations of its stakeholders. As more and more global corporations strive to become good corporate citizens by addressing stakeholder expectations, many are adopting CSR programs that address the health and wellness needs of host country employees and their communities. Many such programs focus on the eradication of emerging and reemerging infectious diseases as they are a significant threat to the global economy.

Despite remarkable advances in medical research and treatment during the 20th century, infectious diseases remain among the leading causes of death worldwide for three reasons: (1) emergence of new infectious diseases; (2) reemergence of old infectious diseases; and (3) persistence of intractable infectious diseases. Emerging diseases include outbreaks of previously unknown diseases or known diseases whose incidence in humans has significantly increased in the past two decades. Reemerging diseases are known diseases that have reappeared after a significant decline in incidence. The World Health Organization (WHO) estimates that 1,500 people die each hour from an infectious disease. Half of those deaths occur in children under five years of age, and most of the remaining deaths are in working adults who frequently are breadwinners and parents. Because of the effects they have on current and future communities, the control and prevention of HIV/AIDS, tuberculosis, and vector-borne diseases like malaria are among the key global health priorities, particularly in urban areas and resource poor settings.

Each year, newly identified infectious diseases are added to the burden of known infectious conditions. In the spring of 2009, a "new" influenza virus, the H1N1 or

"swine flu" virus, emerged in Mexico and in the southwestern United States. Since then, the H1N1 virus has spread around the globe with an estimated one million infections in the United States and another quarter million infections around the globe. Although the effects of H1N1 seem relatively mild in adults, deaths are occurring, primarily among people with preexisting illnesses such as HIV/AIDS.

An estimated 15.5 million women and 15.3 million men aged 15 years and over were living with HIV worldwide in 2007, compared with 14.1 million and 13.8 million, respectively, in 2001. In sub-Saharan Africa, almost 60 percent of adults living with HIV in 2007 were women. While research advances have resulted in effective treatments and a striking decrease in the AIDS-related death rate in the United States, the toll in suffering and death in developing nations remains enormous and dwarfs the epidemic here at home. Every day, 6,800 people become infected. Indeed, in some African countries, between 25 and 35 percent of the adult population is infected with HIV while the life expectancy in several of those countries has decreased dramatically and has negated the gains made during the past few decades.

Tuberculosis (TB) is an airborne infectious disease that is preventable and curable. It has been on the rise since the 1980s, with its spread concentrated in Southeast Asia and Africa. The HIV/AIDS pandemic has fueled this resurgence in TB, particularly in sub-Saharan Africa, where HIV is the most important factor determining the increased incidence of TB. In fact, it is estimated that one-third of the 40 million people living with HIV/AIDS worldwide are co-infected with TB, the vast majority live in sub-Saharan Africa, where the rate of co-infection rises to 70 percent in some countries. While global access to TB treatment is improving, it remains low with the emergence of drug-resistant TB particularly where many TB patients are co-infected with HIV, posing a serious threat to its control. Although the WHO declared TB to be global health emergency in 1993, it continues to be a major cause of illness and death around the globe with about one-third of the world's population, or 2 billion people, carrying the TB

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bacteria. An estimated 1.5 million people died from TB in 2006 and another 200,000 people with HIV died from HIV-associated TB.

Malaria, a vector-borne disease, is a protozoal infection that is transmitted from human to human by mosquitoes. As of 2006, 3.3 billion people—nearly one-half of the world's population—were at risk for malaria, with an estimated 247 million malaria cases causing nearly a million deaths. Of the 109 countries endemic for malaria in 2008, 45 were within the WHO Africa region—most of the remaining countries endemic for malaria are in the Southeast Asia region. There were an estimated 881,000 malaria deaths in 2006, of which 91 percent were in Africa and 85 percent were of children under five years of age.

International organizations recognize the importance of infectious disease eradication to global economic growth and stability. Following a three-day Millennium Summit of world leaders at the headquarters of the United Nations, the General Assembly adopted the Millennium Declaration on September 8, 2000. Thereafter, on December 14, 2000, the General Assembly passed a resolution to guide its implementation. The Millennium Development Goals (MDGs) are eight international development goals that 192 UN member states and at least 23 international organizations have agreed to achieve by the year 2015. They include combating AIDS, malaria, and other diseases (MDG 6). As one of its primary objectives, MDG 6 has a target for 2015 of having halted and begun to reverse the spread of HIV/AIDS.

Most public health experts now agree that reaching MDG 6 requires a multifaceted, collaborative, approach involving governments, non-governmental organizations (NGOs), and the private sector. HIV prevention is most effective when it is supported by strong and visible political leadership, and by policies that address the root causes of vulnerability to infection, including anti-stigma measures that prevent discrimination; gender equality initiatives, including programs to enhance women's education and economic independence, and laws to combat sexual violence and trafficking; and involvement of communities and HIV-infected individuals in educating people about HIV and in developing, implementing, and evaluating prevention programs. Knowledge of HIV serostatus has been an important element of HIV-prevention and treatment efforts. It now is generally accepted that reducing the incidence of both new infections and HIV-associated morbidity and mortality requires earlier testing and improved access to prevention and care services for persons infected with HIV.

Many experts see a three-tiered approach to HIV/AIDS at work as one effective weapon in the arsenal of weapons needed to reach MDG 6. Employer best practices currently include workplace programs (education, voluntary counseling, and testing), CSR programs, and supply chain programs. Increasingly, global companies recognize the value of adding HIV/AIDS to their corporate sustainability portfolios and a few global companies have emerged as leaders in developing HIV/AIDS-centered CSR programs.

Chevron, one of the largest integrated energy companies in the world, is an example of how a company can support HIV/AIDS-related activities outside its primary lines of business. Headquartered in San Ramon, California, and conducting business in approximately 120 countries with more than 55,000 employees globally, Chevron has adopted a top-to-bottom HIV/AIDS program that applies to all Chevron locations with the target audience being employees and their eligible dependents. Chevron also is targeting education and prevention efforts in the communities in which it operates. One example is Chevron's Nigerian operations. There, Chevron has conducted HIV/AIDS awareness, prevention, and treatment activities for nearly a decade. Chevron also has supported, in some locations, anti-malaria efforts through community medical clinics. Here at home Chevron has supported the activities and efforts of organizations such as AIDS Walk Houston (Texas).

Levi Strauss & Co. is another example of a global company working with an integrated approach to HIV/AIDS prevention, treatment, and care outside its traditional lines of business. With a workforce of more than 10,000, Levi Strauss & Co. has been a world-class leader in the fight against HIV/AIDS for more than a quarter century. Working together in 1982, Levi Strauss & Co. employees and executives started a grassroots educational effort that evolved into its first major corporate response to HIV/AIDS. From its Levi's "Red for Life" campaign, that used the Levi's brand to educate consumers in South Africa, to its current commitment to extending comprehensive HIV/AIDS treatment and care (including access to necessary medications) to all of its employees and their families around the globe, Levi Strauss & Co. continues to expand the depth and breadth of its response to HIV/AIDS. Since 1982, Levi Strauss & Co. has donated more than \$50 million to HIV/AIDS-related initiatives around the world, including its support of Get Screened Oakland (California), an HIV testing initiative of that city's mayor, Ronald V. Dellums.

One of the largest biopharmaceutical companies in the world, Gilead Sciences sets the standard for CSR programs that directly reflect a company's line of business. Gilead



has adopted a corporate philosophy that as a market leader in the development of medications used to combat HIV/AIDS, it has a responsibility to ensure that its innovative medicines are available to all who can benefit from them. Implementing this philosophy means that in 130 countries Gilead offers substantial price reductions through the Access Program it established in 2003. Gilead offers tiered pricing, based on a country's gross national income per capita and HIV prevalence, and collaborates with its network of distribution partners to establish a fair price for its drugs in a given country and advance the regulatory submission process. Most intriguingly, Gilead has established industry partnerships with 12 Indian drug producers—providing a full technology transfer—to enable them to produce and distribute generic versions of its HIV medications in 95 developing countries.

As these case studies demonstrate, there are multiple roles for corporate counsel to play as more companies add HIV/AIDS and other infectious diseases to their CSR portfolios. Most such programs involve sensitive negotiations between host countries, local NGOs, and the company seeking to establish the program. Policies on non-discrimination, confidentiality, and privacy must be developed; technology transfer agreements must be drafted. Locating and arranging for in-country expertise to assist in the development and execution of the program require knowledge of local laws and customs. Lawyers thus are essential to any team with a mission to develop and implement an HIV/AIDS-focused CSR program. They may, in fact, be the best weapon in the arsenal. ♦

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## CSR and Its Progeny: Post-Recession

By Brian W. Burkett and Jodi Gallagher

As the world economy recovers from its pratfall in 2008, close attention is being paid to evaluating and redefining a number of international initiatives aimed at addressing the so-called “social deficit” associated with globalization. The recent economic turmoil has called into question the “old ways,” including ever-expanding globalization. We wonder whether initiatives to reduce or eliminate the social deficit embedded in globalization are being carried forward with greater or less vigor. These initiatives include, first and foremost, private sector corporate social responsibility (CSR) activity, but also encompass the UN Global Compact, the ISO 26000 initiative, the work of the Special Representative to the UN Secretary-General Professor John Ruggie of the United States, and the emergence of International Framework Agreements between multinational enterprises and global trade unions.

### The UN Global Compact

Launched in 2000, the UN Global Compact seeks to advance responsible corporate citizenship by challenging

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world business leaders to voluntarily “embrace and enact” ten core principles in the areas of human rights, labor, the environment, and anti-corruption.

The labor principles of the Global Compact, which are the core principles most relevant to addressing the social deficit within globalization, state that businesses should strive to uphold the freedom of association and the effective recognition of the right to collective bargaining, eliminate all forms of forced and compulsory labor, eliminate discrimination in respect of employment and occupation, and effectively abolish child labor.

Now endorsed by most national governments, a variety of unions and non-governmental organizations (NGOs), in addition to over 5,200 businesses in 130 countries, the Global Compact creates a platform for structured dialogue and sharing of best practices, rather than monitoring corporate practices or enforcing a binding set of regulations.

Signatories to the Global Compact commit to issuing a clear statement of support for the initiative, integrating the ten core principles into their business operations and annually communicate their progress in this regard. Participants also commit to engage in public advocacy for the Global Compact and to partner with UN organizations. UN Secretary-General Ban Ki-moon has commented that

the Global Compact is central to the UN's engagement with the private sector.

Participating companies' annual Communication on Progress (COP) are intended to promote transparency and accountability, share corporate practices, and protect the integrity of the initiative. Companies that fail to submit a COP as required may be placed on inactive status or delisted from the Global Compact's database. Through its COP Review Project launched in 2007, the Global Compact is working toward creating one of the largest fully catalogued repositories of reports in the corporate citizenship field.

The most recent UN Global Compact Leaders Summit took place in July 2007 in Geneva, Switzerland. It was the largest high-level event ever held on the topic of corporate responsibility, bringing together more than 1,100 leaders and representatives from business, government, civil society, labor, academia, and the United Nations. The Leaders Summit was particularly effective in that it allowed the stakeholders to candidly assess the initiative's progress, review commitment to principles, and project the Global Compact's future course. The next Leaders Summit will take place in June 2010 in New York.

#### Ruggie is Tackling Business and Human Rights Issues

In 2003, the UN Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights adopted the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (UN Draft Norms). Purportedly distilled from existing international instruments and principles, the UN Draft Norms addressed the human rights responsibilities of businesses "within their sphere of influence," including practicing non-discrimination, ensuring safe and healthy work environments, adequate remuneration, environmental protection, freedom of association and freedom from forced labor and child labor, and maintaining transparency. The UN Draft Norms called on companies to be subject to periodic monitoring and verification by the United Nations or independent agencies, implying a level of enforcement that goes significantly further than the voluntary compliance and reporting encouraged by the Global Compact. In contrast to purely voluntary initiatives that focus on multinational corporations' "commitment" to CSR, the UN Draft Norms were the first attempt to establish an international framework for mandatory CSR standards applicable to all businesses.

Building on the UN Draft Norms and a February 2005 report by the High Commissioner of Human Rights stating that NGOs and worker organizations supported the creation of a universal declaration of human rights standards

for business, the UN Commission adopted a resolution in April 2005 requesting that the UN Secretary-General appoint a Special Representative (SRSG) on business enterprises and human rights.

Professor John Ruggie of the United States was appointed the SRSG in July 2008 and was tasked with identifying and clarifying standards for corporate responsibility relating to human rights, elaborating the regulatory role of states in that context, developing methodologies for undertaking human rights impact assessments, and compiling a compendium of best practices.

Ruggie's February 2006 interim report strongly criticized the UN Draft Norms for becoming "engulfed by its own doctrinal excesses," being poorly conceived and, therefore, highly problematic in their potential effects, and making exaggerated legal claims. Ruggie's second interim report, released in March 2007, included a "mapping" of existing human rights standards and initiatives along a continuum. It also included results of Fortune Global 500 firms and government surveys regarding human rights policies and management practices, as well as information on human rights impact assessments.

Ruggie presented his views and recommendations to the UN Human Rights Council in a June 2008 report that proposed a three-pillar conceptual and policy framework to anchor the business and human rights debate: (1) the state duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) the need for more effective access to remedies. This is known as Ruggie's "protect, respect and remedy" framework.

**The state duty to protect.** Ruggie suggests that although this duty is well recognized and understood by human rights experts within governments and beyond, it is vital that states be made aware of the diverse array of policy domains through which they may fulfill this duty. It is an urgent priority for governments to foster the inclusion of the duty.

**The corporate responsibility to respect human rights.** Ruggie emphasized the importance of companies considering all internationally recognized rights, and that any attempt by companies to limit those rights through narrow codification or other distortion is inherently problematic. Ruggie suggested that companies must engage in human rights due diligence to become aware of, prevent, and mitigate adverse human rights impacts.

**Mechanisms to investigate, punish, and redress abuses.** In Ruggie's view, the current patchwork of remedial mechanisms is incomplete and flawed, and efforts must be



undertaken to bolster judicial, non-judicial, company level, state-based non-judicial, and multi-stakeholder initiatives and processes to provide effective mechanisms through which breaches of human rights standards and grievances may be effectively addressed.

In June 2008, the UN Human Rights Council “welcomed” this framework and extended Ruggie’s mandate until 2011. He has been asked to operationalize the “protect, respect and remedy” framework, and provide practical recommendations and concrete guidance to states, businesses, and other social actors on its implementation.

### ISO 26000 Nearing Completion

The International Standards Organization (ISO), which is made up of a network of international standards institutes of some 146 countries, is developing a guidance standard in the field of social responsibility known as ISO 26000.

The ISO’s objective is to produce a guidance document for use by business and other organizations that can be understood and used by non-specialists to assist organizations in effectively addressing their social responsibilities in various cultures, societies, and environments. Unlike other ISO standards, ISO 26000 will not be suitable for certification.

In 2004, a Memorandum of Understanding was reached with the International Labour Organization (ILO) to ensure that the resulting ISO standard will be consistent with and complementary to ILO labor standards. In addition, a partnership was formed with the Global Reporting Initiative, a multi-stakeholder CSR reporting institute that is based in the Netherlands.

The ISO Working Group on Social Responsibility held its first meeting in Brazil in March 2005 to begin developing ISO 26000. A total of 225 experts from 43 ISO member countries and 24 liaison organizations participated in the meeting. Five meetings have taken place since then, with the last two meetings focusing on passing a resolution to elevate ISO 26000 to committee draft status and to deal with comments regarding the committee draft to move toward creating a Draft International Standard by October 2009.

The final ISO 26000 standard is expected to be finalized and published in September 2010.

### IFAs Gain Momentum

International Framework Agreements (IFAs) are a relatively new, and increasingly prominent, feature on the global industrial relations landscape.

Originating primarily in Europe, IFAs are agreements negotiated at a global level between global union

federations and corporations with transnational operations. IFAs principally address a corporation’s commitment to respect international core labor standards throughout its operations and, from the union’s perspective, constitute an attempt to grapple with some of the labor issues created by globalization. IFAs often create obligations regarding corporations’ subsidiaries and suppliers in addition to establishing the terms of relationships between transnational enterprises and trade unions at a global level.

The IOE’s 2008 working paper on common trends across IFAs revealed that IFAs commonly incorporate core ILO Conventions, reference the ILO’s *Fundamental Declaration*, reference the principles of the UN Global Compact, and affirm the UN Universal Declaration of Human Rights. IFAs also may include general provisions regarding union recognition and social and environmental responsibility.

In many cases, IFAs go further than local industry norms or legal requirements in establishing social equality principles. This may mean that an IFA extends the grounds of prohibited discrimination to include sexual orientation and handicap, even where such protection is not provided under local law.

The key sectors in which IFAs have been signed are the services, utilities, energy, mining, and manufacturing industries. The IOE estimates that over 60 IFAs have been put in place, affecting approximately 2 million employees.

Trade unions may increasingly demand that North America-based transnational corporations enter into IFAs that address CSR topics. Such a development would signal a significant advancement toward collective bargaining at an international level and an evolution in the private sector’s role in addressing the social deficit associated with globalization.

### Grappling with the Social Dimension of Globalization

While certainly not occupying the full field of activity in the area, the international initiatives constitute significant efforts on the part of governments, the private sector, NGOs, and supra-national organizations to grapple with the social dimension of globalization. It is encouraging that the initiatives described continue to advance efforts to bring balance to economic development and social progress, despite the impact of the global recession. The UN Global Compact, the work of SRSRG John Ruggie, ISO 26000, and IFAs are bringing much needed attention to the necessity of asking the complex questions and finding the complex answers on the social/labor front. ♦

## The Canadian Government CSR Strategy for the Extractive Sector: Just Another Standard or Pioneering Step?

By Paul M. Lalonde and Igor Abramov

On December 2, 2006, in a village nestled in the Andean mountains of Ecuador, a security brigade hired by Copper Mesa allegedly used excessive force against members of the local community to gain access to a mineral deposit. Legal claims by three Ecuadorian citizens ensued against the Toronto Stock Exchange and Copper Mesa for breaching a duty of care to avoid undue risk of harm to others. The condemnation of Copper Mesa that followed has been experienced by other mining companies in other contexts all over the world. The negative perception of mining companies as pillagers of the environment and perpetrators of human rights abuses has become so pervasive that mining projects have been stalled, financing has been frozen, and the lives of project coordinators threatened.

Mining companies play a large role in developing the cities, towns, and villages in which mineral extraction takes place. Mining companies bring expertise and technology to communities that may never have been able to raise enough capital to initiate extraction projects; and while mining companies need to make a return on their investment, local citizens learn skills to commercialize indigenous resources. With the development of compounds around mining sites comes a need for food, services, infrastructure, and maintenance, leading to the creation of local jobs.

As the Copper Mesa scandal illustrates, however, mining companies have also been criticized for a range of exploitive behavior, including failing to properly dispose of waste; disregarding the cultural and social interests of

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host communities; and resorting to bribery and threats to secure regulatory approvals, resource concessions, and access to properties. In addition to critical mainstream media coverage (often provided by journalists with no expertise whatsoever in mining or other extractive industries), organizations and groups such as Mining Watch, Mineral Policy Center, and Mines and Communities use the Internet to mobilize opposition to mining projects and influence the opinions of the public, consumers, and stakeholders in the mining business.

Extractive industries—mining, mineral resources, metals, oil and gas—face special corporate social responsibility (CSR) challenges different from manufacturing industries. They require massive capital investment up front, with long periods for recovery of those investments, and often face high levels of government regulation. There is also no flexibility in location; mines must operate where the minerals are located. If there is opposition to developing a particular location, extractive industry companies cannot close a plant and find another location. Thus, community and government support for extractive projects is crucial.

Most sophisticated companies involved in extractive industries understand that it is in their interest to conform to the highest standards of ethical conduct while respecting the environment and the cultures of the communities in which they work. Observers—particularly non-governmental organizations (NGOs)—complain that mining companies should be much more rigorous in implementing and observing codes of conduct. However, it is not productive for industry watch groups to criticize without offering proactive solutions. Mining is not going to cease; developing economies like India and China are hungry for iron ore to manufacture products and build infrastructure, while worldwide demand for gold and other rare minerals continues to rise. Ironically, generalized NGO opposition to mining projects may well help to increase ore prices, making marginal projects in jurisdictions with lax standards more attractive.

In establishing a framework for a CSR strategy, the Canadian Department of Foreign Affairs and International Trade (DFAIT) recognized that community perceptions



would have to improve if North American mining companies were going to thrive internationally. Indeed, while corporate conduct standards generally aim to promote the recognition of human rights and respect for the environment, the DFAIT strategy also pursues a greater function: to improve relations between mining companies and the communities in which they operate so the interests and well-being of all stakeholders are protected, while shareholders see a return on their investment.

### **The Development of the CSR Strategy**

In 2006, the Government of Canada organized the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries. Over the course of the roundtables, members of industry and labor organizations, research institutes, and public representatives prepared oral presentations and written reports on the issue of CSR. The National Roundtables Advisory Group released a report summarizing the presentations in March 2007. Using the report as an informative tool, the advisory group advocated for the Government of Canada to adopt a formal set of CSR standards that Canadian extractive-sector companies operating around the world would be expected to meet.

In March 2009, the CSR strategy for the extractive sector was published: *Building the Canadian Advantage: A CSR Strategy for the Canadian International Extractive Sector*. The strategy recognizes that the competitive edge of Canadian mining companies will be enhanced if all companies commit to reducing the negative impact of their activities on the environment and society. Indeed, DFAIT recognizes that not only does irresponsible conduct harm local communities, but it undermines the earning potential of other Canadian companies that may be stigmatized because of their affiliation with the extractive industry. To facilitate positive relations between local communities and mining companies, and thus improve the position of Canada's extractive industry as a whole, the government aims to use the CSR strategy to achieve four broad goals.

The first goal is to support initiatives that enhance the capacity of developing countries to manage the extraction of minerals, oil, and gas. As a result of this development, revenue will be made available to reduce poverty, create jobs, and enhance sustainable economic growth. Part of the host-country capacity-building efforts include legal and judicial reform to ensure that human rights are being protected and public institutions are accountable to citizens. Because many developing countries do not have the capacity to implement legislation and regulations that

ensure that business activity is socially responsible, companies must take it upon themselves to improve resource governance, transparency, and accountability to help build an environment in which Canadian companies can successfully operate.

The second goal is to endorse widely recognized international CSR performance guidelines. The Government of Canada has made it a priority to increase the number of Canadian companies that are making CSR reports and to improve the quality of these reports. In 2003, the government supported the development of an online Sustainability Reporting Toolkit to assist companies in learning more about sustainability reporting and the reporting process. The government also sponsored in-person training workshops on CSR reporting for Canadian companies. In addition to domestic efforts, the Government of Canada has committed to promoting widely recognized international CSR performance guidelines for Canadian extractive companies operating abroad. These guidelines include the International Finance Corporation Performance Standards on Social and Environmental Sustainability, the Voluntary Principles on Security and Human Rights, which provide guidelines to help corporate entities deploy public and private security without using excessive force or abusing human rights, and the Global Reporting Initiative (GRI), all of which promote CSR reporting by the extractive sector to enhance transparency.

The third goal is to develop a CSR Centre of Excellence in collaboration with an existing institution outside government (this outside institution is not yet identified). The Centre will serve as a forum through which stakeholders can provide access to CSR tools, resources, and activities for clients in industry and government. The Centre will also develop CSR information packages for distribution to targeted groups, will develop an in-house inventory of Canadian company contacts, and will create a web-based platform for companies and stakeholders to share experiences and best practices. The Centre is intended to focus on extraction companies that do not have the human or financial resources to rigorously implement codes of conduct.

Finally, the fourth goal is to create an Office of the Extractive Sector CSR Counsellor who will report directly to the Minister of International Trade. Groups, individuals, or communities that reasonably believe they are being adversely affected by the actions of a Canadian extractive company by its operations outside Canada may make a request to have the company reviewed. Upon receiving consent from all involved parties, the Counsellor will then review the CSR practices of the target company and advise

stakeholders on the implementation of recognized CSR guidelines. The Counsellor's position emerged out of the recognition that unresolved disputes negatively affect business through investor uncertainty, conflict management costs and damaged reputations. As such, the Counsellor's role is to provide objective, timely, and proactive guidance in a conflict situation; the Counsellor will not make policy or legislative recommendations that are binding.

### The DFAIT Strategy

Over the past two decades, governments and a number of prominent business associations, NGOs, and international organizations have developed a body of global standards for CSR. These emerging standards are of four types: (1) Stakeholder engagement standards (i.e., AA 1000S); (2) Substantive standards (i.e., SA8000, Caux Roundtable); (3) Management process standards (i.e., SA8000, the CERES Principles); and (4) Reporting standards (i.e., Global Reporting Initiative)

At the international level, the Organisation for Economic Co-Operation and Development (OECD), the International Labour Organization (ILO), and the United Nations (UN) have all attempted to create frameworks to promote and/or regulate CSR. The Guidelines for Multinational Enterprises (Guidelines) developed by OECD aim to help multinational enterprises (MNEs) operate in accord with government policies and societal expectations. The Guidelines provide voluntary principles for responsible business conduct in areas such as workers rights, environment, competition, business conduct, combating bribery, and consumer protection. Under the Disclosure of Information section, MNEs should provide information on the structure, activities, and policies of the enterprises and provide annual reporting on financial statements.

The ILO, using a tripartite structure with workers and employers participating as equal partners with governments, adopted in 2000 a voluntary Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration). The aim of MNE Declaration is to encourage MNEs to positively contribute to economic and social progress and to minimize and resolve work-related issues arising from business operations.

Recognizing that CSR has emerged as a global phenomenon involving businesses, governments, civil society, and international organizations, the International Organization for Standardization (ISO) established a working group in 2004 to develop an ISO standard in the field of social responsibility. The objective is to publish by 2010 as ISO 26000, a "guidance document."

Like the ISO and other international initiatives, the DFAIT strategy emerged as the public was becoming increasingly concerned with the conduct of corporations carrying on business in the global marketplace. With the emerging focus on international sustainable development and good corporate governance comes a growing need for tools and resources that would help multinational entities understand and implement the concepts of CSR.

One major concern for international CSR initiatives as well as the DFAIT strategy is that of implementation and enforcement of the standards. While most CSR programs remain voluntary, their credibility is enhanced by mechanisms that verify compliance with a CSR regime. Otherwise, a commitment to social responsibility may be criticized as empty symbolism. The Office of the Extractive Sector CSR Counselor was created by DFAIT to provide hands-on guidance to companies who choose to comply with the strategy. The public ignominy that would come with rejecting counselor intervention in a particular matter may well help to ensure CSR standards are being implemented by companies who commit to them. In addition to building strong implementation strategies, it is important that CSR initiatives go beyond monitoring compliance and move to instilling a culture of social responsibility on a deeper level.

### Industry Reaction

The representatives of mining companies and the financiers of mining projects both agree that addressing negative attitudes and bad press surrounding the industry are important priorities for mining companies. Failing to deal with these priorities can slow down the development of projects, cause friction between operators and the local community, or even lead to violent conflict and expropriatory measures by host countries. That said, the DFAIT strategy does not receive unqualified support from the mining industry.

Some industry representatives believe that before the CSR strategy was introduced, there were sufficient methods and initiatives, both voluntary and mandatory, promoting standards of responsible corporate conduct and good governance. For instance, the Conference Board of Canada offers resources to educate stakeholders on CSR. The Corporate Responsibility Assessment Tool (CRAT) addresses elements of CSR common to both domestic and international activities of Canadian corporations.

Likewise, the Office of the Superintendent of Financial Institutions (OSFI) published its Corporate Governance Guideline in 2004, which sets out guidelines and standards that apply to publicly traded and federally regulated



bodies. Securities exchanges also have licensing and compliance standards that are imposed on companies that wish to trade stock.

In addition to these more formal sources, some members of the mining industry believe that there were adequate internal mechanisms within the industry itself that forced companies to self-regulate. Indeed, many observers maintain that existing laws (particularly in the United States), the highly competitive nature of the extractive resource sector, and intense investor and media scrutiny are sufficient to deter companies from engaging in dubious behavior in developing countries.

However, most industry representatives will agree that CSR sophistication varies greatly from company to company. This is not just a question of size and financial resources; many small- or medium-sized companies have exemplary records, governance, and policies on the CSR front. A CSR strategy that focuses on providing resources and training where they are most needed is most likely to achieve benefits. Conceptually, this is generally appealing to the industry, so long as it also promotes a level playing field for all companies.

Effective implementation of CSR policies will come most naturally to those extraction companies that see it as consistent with commercial interests and their own code of business conduct. This leads some observers to suggest that the primary emphasis should be not on standard-setting, regulation, and enforcement but, instead, on educating future managers on the competitive advantages and long-term merits of best practices and modern norms of corporate governance and responsibility.

Nonetheless, there is little disagreement that CSR engagement among stakeholders as well as the industry's adoption of triple bottom line (people, planet, and profit) approaches are gaining momentum. At the same time, some key challenges remain unresolved, including how to move from standard-setting to effective audit, inspection, and monitoring of operations. The extent to which the DFAIT strategy achieves results on this front will be the real test of whether it is an important pioneering initiative in the CSR field or whether it is just another standard, among many others. ♦

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## CITIES ABROAD

# A Lawyer's Survival Guide to Moscow

By Maxim Likholetov and Carl Östring

Moscow is the capital of Russia and is its political, business, scientific, and cultural center. The mother tongue is Russian. Many Muscovites studied English at school, but, in spite of that, it may be problematic for a foreigner to find English-speaking people or policemen ("militia" in Russian) when looking for directions. If you go to a bar, a restaurant, or a shopping center, you can usually count on being understood in English. A general knowledge of the Cyrillic alphabet, or at least a guidebook to help you decipher it, is most helpful, especially in Moscow's magnificent subway.

### Transportation and Orientation

Many international flights arrive and depart from Terminal 2 of Sheremetyevo airport. The taxi to or from the airport can cost about 1,300 rubles (about US\$45), and it will take anywhere from 40 minutes to 1.5 hours to get to the center of the city. It's useful to arrange for a taxi to meet you at the airport because it could be quite expensive to get to the hotel by a taxi taken at the airport. If you travel light and don't want to waste time, you can use the train (Aeroexpress) from the airport for only 250 rubles (about US\$12) and in 35 minutes you'll be at the Belorussky railway station in the center of Moscow.

### Business Hours

Typical business hours are from 9 a.m. to 6 p.m., but the working day of a

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lawyer is often longer and can sometimes go for two or three more hours.

### Legal Profession

The legal profession has become very popular during the past 10 to 15 years. To work as a lawyer, you need a university diploma. However, to get the status of attorney-at-law (called an advocat in Russian and similar to the status of a barrister in the United Kingdom) and become a member of a bar association the requirements are higher. Such persons must have higher law education and must have graduated from a state-accredited institution or must have a scientific degree in law received after post-university education. In addition, to become an attorney-at-law, one also must have completed at least a two-year legal apprenticeship with a private or governmental organization or have undergone a special study course with an attorney's office. Those meeting these requirements can then sit for the Russian bar. Foreign lawyers can practice in Russia as attorneys-at-law only if they fulfill the above mentioned requirements.

### Professional Etiquette

Professional lawyers' etiquette requires that men wear suits and women wear jackets or blouses and skirts. However, this may be less formal in some offices.

Greetings at business meetings consist of a handshake, but in most instances it is between men only. It is uncommon to shake hands with women and a verbal greeting is sufficient, unless you are offered a handshake. Unlike in the European countries, men in Russia shake hands each day they meet, not only at the first meeting. It is good manners and a showing



Department Store in Moscow

of respect to wait for an offer of a handshake from the one who is older than you.

It is rare to have business meetings before 10 a.m., in particular due to heavy traffic in the morning. Also no one arranges business meetings on Saturdays and Sundays; weekends are for family and friends in Russia.

### Dining

Restaurants in Moscow are not cheap and their service sometimes leaves something to be desired, but nearly all world cuisines are represented in the city. Do not miss the opportunity to try some of the national kitchens of former Soviet republics such as Uzbekistan, Georgia, Ukraine, or Azerbaijan. ♦

## SURVIVAL GUIDES ON THE WEB

For more tips from the author, please visit the Section website at [www.abanet.org/intlaw/hubs/publications/citysurvival.html](http://www.abanet.org/intlaw/hubs/publications/citysurvival.html). There you'll also find other Lawyer's Survival Guides, including Ankara, Beijing, Brussels, Buenos Aires, Cairo, The Hague, Madrid, Reykjavik, and Warsaw.

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