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Trials and tribulations

Sometimes complex issues are more easily understood in the negative—what they are not. Non-profit or non-governmental, for example. When considering the phrase 'corporate social responsibility' (CSR), the inverse, or corporate social irresponsibility, helps illuminate its meaning. This is particularly true in relation to what the history books may call the 9/11 of CSR: Enron. In May 2006, a jury of eight women and four men in Houston, Texas, did what all of the regulators, investors, analysts, banks, boards, legal advisors and market checks and balances could not—concretely convict Enron's leaders of historic failures and human losses. Enron's emblematic emasculation embodied the turn-of-the-century corporation gone bad, and catapulted the field of CSR onto the popular culture radar of North America.

The stark trajectory of Enron stood out as the iconic embodiment and public face of all that CSR seeks to be the antidote to, despite competition from a veritable golden age of recent corporate scandals that have occurred primarily in the US:

- WorldCom (the *biggest* bankruptcy—$11 billion accounting fraud)[1]
- Global Crossing (the sixth largest bankruptcy in US history)[2]
- Adelphia ($2.3 billion in hidden debt)[3]
- Royal Ahold ($1.23 billion restatement and $1.1 billion settlement)[4]
- AIG ($2.3 billion restatement)[5]
- HealthSouth ($1.4 billion in false earnings)[6]
- Fannie Mae (Over $10 billion in accounting errors)[7]

Will the conviction of Ken Lay (who died in July 2006 around three months before his sentencing to a likely 30 years in jail)—former chairman and founder, on six counts including conspiracy, wire fraud and securities fraud and four counts in a separate bank-fraud trial—as well as Jeffrey Skilling—former CEO, on 18 counts of conspiracy and fraud and one (of 10) counts of insider trading[8]—make a difference? Will the convictions be a deterrent?

Ken Lay and Jeffrey Skilling were not the first corporate executives to be convicted, nor will they be the last. On the face of it, the collapse of Enron has not had much of an impact on executive compensation. However, perhaps a belated recognition by boards of their fiduciary responsibilities, and a surge in corporate governance shareholder resolution successes in the 2006 annual meeting proxy season,[9] will start to lessen a CEO's ability to run a company into the ground.

Five years after the introduction of the signature US reaction to loss of trust in the market—the Sarbanes–Oxley legislation to strengthen transparency, accountability and improved corporate governance—it remains unpopular with business in terms of its cost and the quality of auditing. Lingering implications of the reaction to Enron encompass potential mergers between stock exchanges in the US and abroad.

So, given the limits of regulatory and legal moves, does CSR have a role to play in avoiding future Enrons? We should remember that Enron had staff in charge of corporate responsibility. It issued a corporate responsibility report. It lied.

Investors in particular have an interest in spotting future Enrons, and as such could be key enforcers of better corporate governance. The new mainstream of CSR, typified by stakeholder dialogues and sustainability reporting, does not appear to be sufficient to empower these investors, given their reliance on self-declarations about corporate intentions and management systems, and audits from firms with a commercial interest in being regarded by their clients as both reasonable and affordable. Consequently, both responsible investors and the wider public face a credibility riddle of whom to believe when they make judgements on the social performance of companies. Three areas are important in solving this riddle: the type of information self-declared by companies, the type of auditors involved, and information gathered from other sources.

The first area where the information flow to investors could be improved is the production of more quantitative indicators of social and environmental performance rather than corporate intentions and management systems. Requirements could include guidelines for the production of basic quantitative indicators such as pollution records, average wages paid to different types of employee (including in the supply chain), non-compliance notices issued by law enforcement agencies, pending court cases, court rulings, out-of-court settlements, admonitions or investigations from intergovernmental bodies, recognised trade unions in the workplace, collective bargaining agreements, multi-enterprise codes endorsed, certifications received, political donations, memberships of trade associations, and payments to lobby groups. With such information, companies might be able to be indexed on the basis of their actual impacts on society rather than on the appearance of their management systems. The limited amount of information provided in this way raises questions not only of companies and their auditors, but of the ability of the stakeholders they engage with to move beyond issue identification for the materiality of non-financial reporting to the type of data required about those issues. Some of these performance indicators would be more difficult to compile and audit than others, with statistics on wage levels being much easier than mapping the often opaque and ad hoc nature of lobbying, or assessing its content. The usefulness of these performance indicators will still depend on the professionalism of the auditors. Initiatives such as the International Standard on Assurance Engagements (ISAE) 3000, developed by the International Auditing and Assurance Standards Board (IAASB), and the AA1000 Assurance Standard (AA1000AS), launched by AccountAbility, help ensure better practice, with the latter including attention to the auditors' capacity to deal with the stakeholder-determined issues in extra-financial reports.[10] However, self-disclosure verified by contracted auditors provides a context within which conflicts of interest can undermine effective disclosure. A comprehensive solution to credible information on company performance must include systems for gathering and processing information and opinion from society, unmediated by the companies involved

The third area for solving the credibility riddle involves generating reliable and relevant data from sources other than the companies themselves. The problem here is how to combine opinions from diverse stakeholders on different public issues into one framework, something that the Swiss investment analyst firm Covalence has been developing since 2001.[11] Its director Antoine Mach told *JCC* that 'the corporate reputation that matters, and is material to value, is not the one in the minds of management but within the web of stakeholders, with some stakeholders connected to more strands than others'. Covalence maps corporate, media and stakeholder views across 45 criteria of business contributions to human development, based on an international legal framework, to create a trackable 'ethical-quote' for each company. Another system of investment analysis that includes this broader view is Total Corporate Responsibility (TCR), developed by Frank Dixon and used by Innovest Strategic Value Advisors. It also focuses on some quantitative indicators of performance, as described above. The notable aspect of TCR is its systems approach, which considers how a company affects the societal systems it exists within, through a range of activities such as lobbying and advertising. This approach is

important in three ways. First, if we assume that external performance is an indicator of internal performance, then it helps investors avoid corrupt internal practices such as those that became the norm at Enron. Second, it helps investors determine how well prepared companies are for future social and environmental change. Third, it supports companies in promoting changes in market demand and regulatory frameworks that will sustain value creation over the long term, across the whole economy. The key issue for investors is how to shift investments away from firms with a high likelihood of internal unethical behaviour. TCR seeks to drive system change by rewarding firms that are more proactive than peers in seeking to promote, rather than block, change at a systemic level. Firms working for system changes that hold all companies more responsible receive higher TCR ratings, with a hoped-for rise in stock price as a result in an effort to create a race to the top of the market.[12]

Pragmatic rights?

The weaknesses of CSR governance that led to the collapse of Enron and the advent of Sarbanes–Oxley legislation in the US has implications for the challenges of CSR governance at the global level. The primary global dialogue and reference point for business and human rights concerns the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). The Interim Report issued in February 2006 by the SRSG, Harvard University Professor of International Affairs and **former UN Assistant Secretary-General John Ruggie**, provoked a flurry of reactions and stakeholder engagement.

The SRSG offered hope for blazing new ground in standards concerning business and human rights, and more specifically clarification of terms such as 'business spheres of activity and influence' by stating that its final report will go beyond restating what has taken place to date and contain 'normative judgments'.[13] In addition to strengthening the body of standards, a full overview of existing standards and tools and support for the most effective would move the field ahead in its application on the ground. An addition to this mix, a new Human Rights Guide for Business, was launched in June 2006 by the Business Leaders Initiative on Human Rights, the United Nations Global Compact Office and the Office of the United Nations High Commissioner for Human Rights.[14]

Amnesty International (AI) called on the SRSG to address the responsibilities of companies to protect human rights when they are in host states that are unwilling or unable to do so. Interestingly, both AI and the International Chamber of Commerce (ICC) called for clarification of the terms 'complicity' and 'sphere of influence' as used in the business and human rights context.[15]

The ICC's response to the SRSG's mandate commented that 'the state is the duty-bearer in protecting and promoting human rights' and, in its favoured monolithic monotone of the omnipotent voice of all enterprise, that 'Business does not believe there is a need for a new international framework.'[16]

The SRSG's Interim Report noted that 'it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended'.[17]

A letter issued by over 100 NGOs in May in response to the Interim Report called on the SRSG to take into account the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, or simply the UN Norms for short.[18] The SRSG, however, had criticised the UN Norms in the Interim Report in unusually stark language. Criticisms levelled include 'exaggerated legal

claims', by taking 'existing state-based human rights instruments and simply asserting that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law—hard, soft, or otherwise.' **Ruggie went on to say that 'All existing instruments specifically aimed at holding corporations to international human rights standards ... are of a voluntary nature.** Relevant instruments that do have international legal force ... impose obligations on states, not companies.' This critique does not even encompass the most volatile elements of the UN Norms—to monitor corporations and provide for payment of reparations to victims. Further, the SRSG cites 'the flaws of the Norms' as 'a distraction from rather than a basis for moving the SRSG's mandate forward'.[19]

John Ruggie
Special Advisor to the UN Secret... General for the Global Compa...

Approved on 13 August 2003, by the UN Sub-Commission on the Promotion and Protection of Human Rights, the UN Norms compiled a laundry list of the key human rights documents related to business under one roof, which served to focus the discussion greatly.[20] Subsequently, the UN Commission on Human Rights decided not to move ahead with the document. By virtue of this decision and the sheer lack of governmental support, the SRSG stated that the UN Norms did not possess legal standing.[21] A former high-ranking official with knowledge of the process commented that the SRSG's statement 'was the embalming oil of something that was already dead in the coffin'.

A lead in drafting the UN Norms, Professor David Weissbrodt, argues that the SRSG's critique of the Norms was 'inspired if not copied word-for-word from the advocacy of the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE)' and 'relies on the tendentious and highly biased views of lawyers employed by' those organisations and 'ignores the considerable positive commentary that the Norms have generated'. He criticises the SRSG for exaggerating the potential power of the Norms, reminding us that they 'do not constitute a treaty and therefore cannot bind either states or corporations in the same way that treaties are binding if they are ratified'. Weissbrodt explains that 'the Norms principally reflect, restate, and refer to existing international standards, but apply them not only to governments but directly to businesses. The Norms are consistent with the progressive development of international law in applying standards not only to states, but also to individuals, armed opposition groups, and other non-state actors.'[22] In this sense, the Norms seek to move forward the basic concept and application of international law in line with recent developments on non-state actors, as highlighted by the establishment of the International Criminal Court. Ruggie's approach rejects that development.

Despite this, the UN Norms are still breathing, in two respects: the issues lie at the heart of the SRSG's mandate, and NGOs continue to use the UN Norms as a campaigning and learning tool, while consultants are using it in work with companies.

Human rights impact assessment standards are another area that the SRSG cited as having considerable impact on the ability of companies to meet their human rights obligations at both national and project levels, but which are in need of development. Unfortunately, the broad scope of the SRSG's mandate—an entirely unfunded mandate—means that this task will be left to others to carry out.[23]

The SRSG declares in the final paragraph of the Interim Report 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best'.[24] As a school of philosophy, pragmatism suggests that beliefs qualify as valid or not, even 'true' or 'false', depending on how helpful they are in accomplishing the believer's goals. Thus it is only through their usefulness that theories and beliefs acquire meaning and validity. Even when the term is used in a more colloquial way, it often reflects this type of world-view.[25] Many human rights are widely seen, and legally recognised, as inalienable principles which are therefore absolute, not awarded by human power, not transferable to another power, and incapable of repudiation.[26]

The idea, which is held by Amnesty International, that rights should never be relative to circumstance sits uneasily with

the concept of pragmatism. *'We are concerned that the approach of "principled pragmatism" to which you refer in your report may lead to underestimating the need for binding legal principles and guidelines as well as the state of applicable international law', said* **Amnesty's director Irene Khan in a letter to Professor Ruggie in April.**[27] They pointed out the limited evidence of success from voluntary initiatives and the problem of providing mechanisms of redress based on voluntary benevolence from powerful actors. It is also worth remembering that, when the Norms were originally launched, Professor Weissbrodt also claimed pragmatism in defence of criticisms from NGOs that they did not go far enough. Perhaps if there is ever to be 'principled pragmatism', it will require incorporating a set of absolute values which counterpose the relativist and opportunistic dimensions to pragmatist philosophy. Otherwise, claims to pragmatism may mask how our views have been shaped by acquiescence to those power relations that sustain our privilege. If it did, then the successful acceptance of our ideas would merely make us the intellectual totalitarians of our time.

A potential area of common thought lies in the desire by business groups such as the ICC, IOE and Business for Social Responsibility,[28] as well as human rights groups, for more stable operating environments with better governance and rule of law. The fact remains that the lack of effective global governance mechanisms, coupled with national governments that have proven woeful in preventing or holding accountable corporate involvement in human rights abuses, has resulted in a void that needs to be filled.

One step in that direction occurred when the new UN Human Rights Council convened its first meeting on 19 June 2006. The new and improved body will take up the SRSG report and serve as a key global institution for dealing with business and human rights. It will now meet throughout the year and has a mechanism to take up urgent crises. All 192 UN member states will now have their human rights record examined, resources permitting. The real test of the new UN Human Rights Council, much like the challenge more broadly for business and human rights standards, will be in its ability to hold accountable 'any Council member who commits gross and systematic violations of human rights' and 'have their rights of membership suspended by a two-thirds majority of the General Assembly'.[29]

Not banking on corruption

In what may be a hoped-for multilateral race to the top, the World Bank declared a new, comprehensive, 'long-term' anti-corruption strategy in April 2006 to leverage loans and technical assistance to developing countries and through partnerships with stakeholders.[30] The Bank has identified corruption as among the greatest obstacles to economic and social development by limiting opportunities, creating inefficiencies and impeding the delivery of services, for example; and **World Bank president Paul Wolfowitz** reportedly sees corruption as his signature issue.[31] Previously, individual loans

were suspended in response to allegations of corruption in countries such as India, Bangladesh and Uzbekistan; however, Wolfowitz has acknowledged such a case-by-case approach 'by itself doesn't deliver effective results for the poor'.[32] To do so, 'the Bank will continue to work closely with Civil Society to provide checks and balances and promote accountability in their governments'.[33]

The extractive industry presents the greatest challenge to the World Bank in carrying out the new long-term anti-corruption strategy. In an effort to determine existing patterns in order to inform the design of governance instruments, the UN SRSG's Interim Report surveyed 65 instances of alleged corporate human rights abuses recently reported by NGOs, which were seen as 'unlikely to be a representative sample of all situations, but of the worst'. Unsurprisingly, the extractive sector—oil, gas, and mining—constituted two-thirds of the sample of reported abuses, and 'account for most allegations of the worst abuses, including complicity in crimes against humanity; large-scale corruption; violations of labor rights; and a broad array of abuses in relation to local communities, especially indigenous people'.[34]

Moving from what had been 'an ad hoc, low visibility approach towards instances of fraud and corruption in member countries, Bank-financed projects, and among staff', the Bank now seeks to assume 'a clear leadership role among multilateral institutions'.[35] In addition to a slew of other organisations, the Bank and its private-sector financing arm, the International Finance Corporation, have supported industry-wide efforts to address the serious challenge of corruption in extractive industry practices, such as the Extractive Industries Transparency Initiative (EITI), which works toward 'improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas and mining'.[36]

The Bank's most direct impact in this area will be in its own loan portfolio. 'The proportion of new projects with accountability/anti-corruption components jumped from 0.4% in the 1995–96 fiscal years to an average of 5% in the 2004–05 fiscal years', and all Bank Country Assistance Strategies are now required to address governance issues, according to the World Bank Institute.[37] The Chad–Cameroon Oil Pipeline Project demonstrates the challenges the World Bank and its Department of Institutional Integrity face in fighting corruption in its existing projects. In what was touted as the largest private investment in Africa, the $3.7 billion dollar Chad–Cameroon oil project, which is managed by a consortium of Exxon, Chevron and Petronas, stands as a litmus test for World Bank anti-corruption success to start at home.[38]

A 'deciding factor' in the World Bank's support for the Chad–Cameroon Oil Pipeline Project was Chad's 1999 Petroleum Revenue Management Law which required the bulk of direct revenue to be used for poverty reduction in agreed-to 'priority sectors', such as health, education and rural development, as well as a Future Generations Fund, to ensure financial savings once oil reserves are exhausted. In December 2005, the National Assembly of Chad amended the Petroleum Revenue Management Law and broadened the definition of priority sectors to include, among other areas, territorial administration and security, increased from 13.5% to 30% the share of revenue that can be allocated to non-priority sectors that are not subject to oversight and control, eliminated the Future Generations Fund and transferred its $36 million into the general budget. The World Bank, in turn, viewed the changes as a breach of contract, and on 6 January 2006 suspended new loans and grants to Chad.[39]

The Chadian government was reported to have used the first $4.5 million of the signing bonus that it received from the oil companies to purchase arms.[40] NGOs warned the World Bank against financing the project beforehand and said that its assessment of the situation in Chad, 'notorious for its corruption and human rights abuses', was based on unrealistic assumptions.[41] The World Bank's stakeholder engagement with civil society needs to take into greater account such concerns in future projects.

Subsequently, the World Bank and the Government of Chad 'signed a memorandum of understanding under which Chad committed 70 percent of its budget spending to poverty reduction programs, provided for a stabilization fund' for after the oil runs out, and made a new pledge of support for the independent oil revenue oversight authority.[42] The Bank won the round and will resume loan disbursements in education, health, community development, HIV/AIDS, agriculture, electricity, water and infrastructure.[43] Bank president Wolfowitz touted the MOU as a victory, saying 'The Chadian authorities have committed to ensuring that all oil revenues, not just the royalties, are spent on health and education

and other basic needs of the poor'.[44] The corporate consortium has stayed largely out of view during the ongoing saga; however, it is unlikely that Exxon, Chevron and Petronas will successfully be able to maintain an ostrich stance through the life of the high-priced project.

Another important example of high-level collaboration to combat corruption involving corporations is the formation of a new coalition involving the World Economic Forum, the United Nations Global Compact, the International Chamber of Commerce and Transparency International,[45] the latter of which established the Business Principles for Countering Bribery.[46]

A tightening web?

If access to the internet superhighway was the first generation of the digital divide between the global North and South, and access to content via high-speed connection is the second, then impediments to the dissemination of content, whether through government censorship or corporate pay-for-play demands that result in different levels of access, is the third generation (3G) of the divide.

Structure has won a round against function, with the owners and controllers of the internet highway pipeline, whether the Chinese government on a national basis or internet network operators on a business basis, holding sway over the lords of content such as Yahoo, Google or Microsoft.

Critical Congressional hearings in Washington, DC in the first half of 2006 focused a spotlight on corporate complicity in censorship in China. Google fared worse in some parts of the media than its competitors Yahoo and Microsoft because of an apparent violation of brand identity embodied in their slogan 'Don't Be Evil'. Google co-founder Sergey Brin publicly acknowledged in June that the dominant internet company compromised its principles by accommodating Chinese censorship demands.[47] 'We felt that perhaps we could compromise our principles but provide ultimately more information for the Chinese and be a more effective service and perhaps make more of a difference', Mr Brin told reporters. 'Perhaps, now, the principled approach makes more sense.'[48] Microsoft responded to the pressure and took small steps in connection with its testimony before Congress, announcing a new policy concerning responses to governmental requests for removal of content and user access. Critics pointed out that new policy does not stop the company from assisting governments in censoring and removing access to blogs, or in providing information on specific users.[49] Microsoft and Yahoo had previously said in a joint statement 'they lacked the leverage on their own to influence world governments'.[50]

The implications of such behaviour by large, powerful companies casts a shadow beyond what may typically be considered corporate citizenship. For example, the *Wall Street Journal* called hypocritical claims by companies that more forceful resistance to human rights violations by China is not possible because the country's market is too big to ignore while at the same time 'protesting China's failure to protect intellectual property'. '[The Chinese government] might censor information that is vital to conducting business there.' What if the government doesn't want to let people know the banking system is weak?' said Arvind Ganesan of Human Rights Watch. 'Today it's political censorship. Tomorrow, it's central-bank reserves.'[51]

Another aspect of the 3G digital divide, pay-for-play demands for tiers of access, speaks to a less clear-cut, but more far-reaching, potential impact. The short-term issue may be telecommunication companies charging higher prices to companies such as Google and eBay—which generate the most dissemination of data-intensive applications such as movies and video games and internet traffic—to recoup the billions of dollars needed to upgrade their networks to handle the increase in such traffic. The longer-term issue may be whether economic activity and democratic debate are available at the same level for those with access.[52]

In fact, steps in this direction were taken by AOL to charge large mass emailers for a new 'Goodmail' certified email service which bypasses spam filters and offers guaranteed delivery directly into AOL customers' inboxes.[53] A coalition with over 500 members, DearAOL.com, called the new service 'a threat to the free and open internet', and described 'pay-to-send' email as tollbooths on the currently open internet which demand 'protection money at the gates of their customers' computers' and constitute a tax on email and 'tiered services and dozens of middleman fees for every simple act of communication'. Coalition members include the AFL–CIO, Consumers Federation of America, Computer Professionals for Social Responsibility, Craig Newmark (Craig's List), Defenders of Wildlife, Democratic National Committee, Friends of the Earth, MoveOn, Oxfam America and Working Assets.[54]

The role of technology in enabling participation in democratic discourse, or 'accessible democracy', was also raised at Google's 2006 annual meeting by Amnesty International, which has issued reports citing a dramatic rise in the number of people detained or sentenced—and in cases tortured—for internet-related offences in China.[55] Adding to the glare of the spotlight, the NGO Reporters Without Borders released a report which labelled Yahoo as the 'Worst Search Censor in China'.[56] China has signed the International Covenant on Civil and Political Rights (ICCPR), which states in Article 19 that everyone shall have the right to hold opinions without interference; that everyone shall have the right to freedom of expression; and that this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his [or her] choice.[57]

Technology corporations have defended their practices in a strikingly similar manner, as embodied by Microsoft: 'Inthe case of China, we believe that despite the circumstances, the Internet has already transformed the economic, cultural and political landscape of China.'[58] This reflects the 'e-vangelical' approach of the internet generation, which believes the internet is an inherently positive force in the world. However, it does not reflect the emphasis on unbridled free markets and freely associating individuals which typified the early dot.commers. While dot.com investors remain supportive of business co-operation with, and facilitation of, government curbs on human rights, the positive promise of the internet may be broken.

Appendices

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