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Corporate Social Responsibility and Non-Judicial Access to Remedy Human Rights Violations: Is It Time for the Dog that Didn't Bark?

By
F. Peter Phillips¹

An entire day of the 2008 IBA Conference in Buenos Aires was devoted to the topic of the interrelationship among Corporate Governance, Corporate Social Responsibility and Human Rights. Organized by James E. Brumm, A. Jan Eijbouts and John F. Sherman, III, one focus of the discussion was the Report of John Ruggie, the Special Representative of the Secretary General of the United Nations, titled "Protect, Respect and Remedy: a Framework for Business and Human Rights" (the "Ruggie Report").²

The Ruggie Report offers "a conceptual and policy framework to anchor the business and human rights debate" and articulates "three core principles: The State duty to protect against human rights abuses...; the corporate responsibility to respect human rights; and the need for more effective access to remedies."³

I was privileged to participate in some of the workshops that Prof. Ruggie convened at the John F. Kennedy School at Harvard University, focusing on the third "principle" of access to remedies. In those workshops, concerns were voiced (as

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² The Ruggie Report and other documentation relating to the Special Representative's work are posted at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

³ Ruggie Report, Summary.

reflected in the Ruggie Report) that mechanisms should be established as “a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available.” (Ruggie Report ¶ 82)

Substantial attention was directed at mediation, or other less formal means of facilitated discussion and negotiation, as a remedy for human rights violations. There is no question that mediation and its less formal variants are a critical component of dispute management of claims arising from corporate activities involving third-party stakeholders. Especially because the “rights” at issue in such claims are not necessarily legally cognizable,⁴ the provision of a remedy that is both non-judicial and what the Ruggie Report terms “rights-compatible” is all-important.

Moreover, there have been many examples of the successful use of mediation in the case of public land use or invasion of indigenous tribal rights. Several years ago, a leading American mediator was tasked with a bundle of disputes regarding use of the northern Colorado River that implicated fishing rights, agricultural rights, tribal religious interests, and public policy planning for the provision of electrical power to the region.⁵ Mediation is a powerful tool for such multiparty disputes implicating non-economic as

⁴ The Universal Declaration of Human Rights, which articulates the “rights” at issue, may be found at <http://www.un.org/Overview/rights.html>. Not all of these rights are cognizable in American or European law. See, e.g., Article 16 (“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry”) and Article 23 (“Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment”). It is the absence of national law ensuring these rights that prompts the provision of remedies outside of courts.

⁵ “Strategic Mediation,” *Alternatives to the High Cost of Litigation* vol. 17, no. 7, at p. 127 (July/August 1999).

well as commercial interests.⁶ It is particularly suited to human rights claims from third-party stakeholders, who frequently seek to reassert their dignity, who seek acknowledgement of their worth and importance, or seek other noneconomic interests. These claims are frequently inchoate at first, and only if unattended or poorly managed evolve into embarrassing and harmful injury.

However, in practice mediation is too often used to assist the resolution of claims only after they have already arisen and are ripe. Rather than the model of interest-based negotiation and facilitated deal-making,⁷ mediation of disputes based on perceived violations of human rights caused by corporate activity too frequently fit the paradigm of the reckless youth who thoughtlessly rampages through a shop and is subsequently called upon to clean up his mess. Its focus on providing alternatives to litigation or public campaigns ignores the possibility of efforts to alter the corporate conduct that would give rise to such claims.

Ruggie's first two principles – the duty of the state to protect human rights and the duty of the corporation to respect them – are sound. The third prong might best be understood as a challenge, not merely to use mediation to resolve ripe disputes, but to create systems whereby human rights concerns are identified and managed sufficiently justly so that they seldom, or never, grow into ripened conflict. That is, the challenge is one of preventing ongoing violations of those rights – modifying corporate conduct that threatens those rights -- rather than just of remedying injuries after they have occurred.

⁶ See, e.g., Lawrence E. Susskind and Jeffrey L. Cruikshank, *BREAKING ROBERT'S RULES* (Oxford University Press 2006); see also *Rebuilding the World Trade Center Site*, a 2007 DVD available from the Program on Negotiation at Harvard Law School (http://www.pon.org/catalog/product_info.php?products_id=417), depicting a multiparty negotiation of a very public problem implicating several governments, a private insurer and grieving families).

⁷ Roger Fisher and William Ury, *GETTING TO YES* (Penguin Books 1983).

Two models for this concept spring to mind. One is the Hungarian physician Ignáz Semmelweis, who observed that mortality rates in maternity hospitals were drastically lower where delivering physicians washed their hands before examining women. He did not know why this should be so, and his inability to provide a scientific basis for this phenomenon caused his warnings to be ignored. But history has of course proven him right, and we now know Semmelweis as a doctor who spent his time preventing disease rather than dealing with it once it arose.⁸

A second model is our local firefighters, who discover many fewer burned corpses than they did a few generations ago. Modern building codes impose strict requirements for sprinkler systems, alarms, and construction standards to ensure the structural integrity of buildings during fires, identifying and extinguishing fires when they are small and isolated, and permitting inhabitants of those buildings to become aware of the presence of fire and to evacuate them very early in the progress of the fire.⁹

Both of these models reflect attributes that, in the corporate world, are called Corporate Social Responsibility (CSR), social accountability, sustainability, and social expectations. And the dispute management systems that seek to address the intersection between corporate activity and its impact on third-party stakeholders ought to feature some of these same attributes. We needlessly limit our imaginations by concentrating on ways to resolve ripened disputes outside of court. Instead, we should be thinking of systems that allow very early identification of CSR-related disputes, rapid identification

⁸ See generally http://en.wikipedia.org/wiki/Ignaz_Semmelweis and the citations contained therein. See also http://encyclopedia.jrank.org/SCY_SHA/SEMMELWEISS_IGNATZ_PHILIPP_1818.html.

⁹ The National Fire Protection Association promulgates national building codes and other resources “to reduce the burden of fire” and to “minimize the possibility and effects of fire.” <http://www.nfpa.org/categoryList.asp?categoryID=143&URL=About%20Us>.

of (and communication with) affected stakeholders, and immediate correction of the problem before it conflagrates. We should be discussing not just mediation, or even consensus-building, but rather early conflict identification and management aimed at dispute prevention, and effective multi-stakeholder communication leading to adjustment and modification of behaviors. We need a standing office of communication and conflict management attached to every corporate community project, the way the office of project manager is.

Such systems need not be designed from whole cloth. Indeed, models for this kind of approach already exist in the corporate world and ought to be the starting point for this work.

- Toro Company makes lawnmowers, hedge clippers, small garden tractors, and other very useful products that inevitably result in injury to a very small fraction of users. In expectation of these user injuries, Toro designed a protocol to manage them to the benefit of all concerned. The company does not wait to hear about the injury – it engages news services and other means so that it learns of them as early as possible. It does not contest the fact of the injury – it sends a representative to the injured party to seek information on the nature, extent and cause of the injury, the incurred costs of medical care, and other information such as the conduct of the injured party and the condition of the machine (including any modifications). It invites the claimant to seek counsel in order to assure that the claimant is informed before agreeing to any compensation. And its representative explains the derivation of the proffered compensation, adjusting the value of damages against any misuse by the owner or unauthorized modifications to the machine. If the offer is not accepted, the claim is mediated. The program has resulted in lower legal costs for the company, prompter settlements for the claimant and claimants' counsel, and value to the company's shareholders. It has also provided Toro with information on any product improvements that might avoid future injuries.¹⁰
- The University of Michigan Health System has initiated a protocol for medical malpractice claims. Once an instance of physician error has been identified, the

¹⁰ See, e.g., Miguel A. Olivella Jr., "Toro's Early Intervention Program, After Six Years, Has Saved \$50M," *Alternatives to the High Cost of Litigation* Vol. 17, no. 4 (April 1999) at p. 65; "Toro's Approach to Conflict Management: A Case Study in Mediation Advocacy," *Alternatives to the High Cost of Litigation* Vol. 20, no. 6 (September 2002), at p. 149.

patient is informed of it and encouraged to engage counsel to protect her legal rights. The hospital then works with the patient to frame a satisfactory response to the event that entails (i) an acknowledgement of and apology for the error; (ii) compensation for the patient's injury and for its consequences; and (iii) steps to prevent a recurrence of the error in future patient care. One instance involved the patient's willing participation in a training video to discuss the impact of a missed diagnosis of breast cancer on her and her family. That video is now used in training new oncologists.¹¹

- Most large employers in the United States now engage in some form of system for workplace dispute identification and management. These systems are often designed with input from the work force as well as from professional personnel managers and dispute system designers. They are typically "tiered," beginning with informal conferences through peer review panels, formal mediation, and arbitration (sometimes binding, sometimes advisory, and sometimes binding on the company but on the claimant only by election). Overwhelmingly, companies whose workers avail themselves of such systems report that practically every measure of success is achieved. These measures might be reduction of cases filed with agencies and courts; user satisfaction; reduction of turnover rates; increased productivity; enhanced managerial skills, etc.¹²
- The construction industry prevents crippling disputes by the use of Dispute Review Boards. These neutral experts monitor the progress of a construction project and are alert to potential problems such as disputes over change orders, failure to complete stages of construction on time, failure to supply raw materials, payment disputes involving subcontractors, and so on. The Board is available to mediate such disputes and resolve them consensually. Boards might be empowered to issue either a recommendation or a binding decision, subject to review when the project is finished. In this way Boards manage the daunting task of keeping a complicated, multi-stakeholder project on time and on budget despite inevitable conflicts and changes in conditions.¹³

¹¹http://www.nytimes.com/2008/05/18/us/18apology.html?_r=1&scp=1&sq=michigan%20hospital%20malpractice&st=cse; see also <http://www.npr.org/templates/story/story.php?storyId=15073418>

¹² See F. Peter Phillips, ed., *HOW COMPANIES MANAGE EMPLOYMENT DISPUTES: A COMPENDIUM OF LEADING CORPORATE EMPLOYMENT PROGRAMS* (CPR Institute 2002). See also Rebecca Jane Weinstein, *MEDIATION IN THE WORKPLACE* (Quorum Books 2001); Alan F. Westin and Alfred G. Felio, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION* (BNA 1988).

¹³ The International Chamber of Commerce's Dispute Board Rules, http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/db_rules_2004.pdf, explain the various roles, powers and procedures of different types of Dispute Boards. Further information may be obtained through the Dispute Review Board Foundation, <http://www.drb.org/index.htm>; see also Matyas, R. M., A. A. Mathews, R. J. Smith and P. E. Sperry, *CONSTRUCTION DISPUTE REVIEW BOARD MANUAL* (McGraw-Hill 1996). An excellent report on the use of DRBs and other dispute avoidance mechanisms in Hong Kong may be found in Colin J. Wall's paper, "The Genesis, Development and Future Use of the Dispute Resolution Adviser System," dated 17 November 2004, published privately.

Thus, models for early conflict identification and management already exist. What does not exist is the perception that such “pre-dispute” models may have application to human rights injuries arising from corporate behavior, or the acceptance that, in the exercise of Corporate Social Responsibility, companies are responsible for creating and maintaining such a capability as an attribute of a particular project. It is common, for example, that corporate projects may set aside a percent or a fraction of a percent of its budget for public artwork or for contributions to community infrastructure. Yet I have never heard of a project that has been budgeted with a set-aside for a standing conflict identification and management facility, despite the inclusion in the budget for the substantial costs of legal wrangling incurred in the management of such conflicts once they mature into legally cognizable disputes (or embarrassing and injurious public campaigns).

I envision not ad hoc resort to mediation, but a standing dispute facility that is created with the cooperation of, and trusted by, all stakeholders in the project, including community members. It would be a place where complainant individuals and communities can go for neutral, trusted and reliable facilitation and problem-solving. Though the funding for such a facility will undoubtedly come from project capital, it should be fully funded at the outset and independent of any party’s control once begun. In this way, small grievances, misunderstandings, errors or omissions can be brought up and handled with cultural and economic delicacy, rather than being ignored and so compounded that they lead to a major incident or a campaign. The concept of dispute resolution should thus be made obsolete, in favor of constant problem-solving: that is, dispute management or even dispute prevention. Mediation may have a place in this

process, but (I suspect) a very marginal one, because in the kind of facility I envision very few issues would ever develop to the point that they would need formal mediation.

All of this would appear to have little to do with the law. It is a challenge for managers and systems analysts, but only for the most foresighted of lawyers. The limitations of conventional legal approaches may be viewed in an excellent legal memorandum on the Ruggie Report that was created by the law firm Weil Gotshal & Manges LLP.¹⁴ While noting that “there is a substantial business case in favor of safeguarding human rights wherever the company does business,”¹⁵ the paper supports endorsement of the Ruggie Report on the ground that it does *not* create new liabilities or advocate change of current corporate conduct. The authors note that “risk-conscious U.S. companies are already looking at human rights issues carefully in terms of the company’s impact on stakeholders”¹⁶ and that well-established legal principles of fiduciary duties and statutes such as the Alien Tort Claims Act, the Foreign Corrupt Practices Act and the federal securities laws “result[] in many of the very practices advocated by the [Ruggie Report] already being undertaken by U.S. corporations.”

The authors of the memo support the Ruggie Report by pointing out that it does not propose a new set of legal obligations or standards of behavior. Were this the entire case, however, then the Ruggie Report would be a solution in search of a problem. But this is not the case. The Ruggie Report does not advocate mere compliance with existing law – it proposes that companies change their behavior in the first instance, and provide

¹⁴ See <http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf>

¹⁵ Id. at p. 2.

¹⁶ Id. at p. 5.

extra-legal opportunities for redress of unintended injury caused by their operations. As stated in a recently published report by Business Leaders Initiative on Human Rights: “In order to be held to account for its impact on human rights, a company must internalize human rights principles into the shared values – embraced at all of its levels – that drive its businesses on a day to day basis.”¹⁷ This is not mere legal compliance; it is a different way to run a business enterprise.

Urging compliance with existing laws and standards is not the sole, and perhaps not the most important, role of the corporate legal counselor. Social expectations exist for enterprises as well as for individuals, and a wise company will be attuned to shifting trends. A well-counseled company knows that it should comply with the ever-evolving expectations of behavior that society has of it, not merely that it must comply with the statutes and legal standards that society demands of it. Benjamin W. Heineman, Jr., former General Counsel of General Electric, calls it “performance with integrity” and argues that it is the role of senior legal counsel to encourage ethics along with growth.¹⁸ Thus the role for lawyers in the field of avoidance, management and resolution of human rights claims is more nuanced than to encourage compliance with the law and mediation of claims. It is, as the Ruggie Report puts it, to design and support a corporate capability to “identify and address grievances early, before they escalate,” and that is perceived by

¹⁷ John F. Sherman, III and Chip Pitts, “Human Rights Corporate Accountability Guide: From Law to Norms to Values” (December 2008), available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/other_sherman_BLIHR_accountability_guide.pdf.

¹⁸ Benjamin W. Heineman, Jr., *High Performance with High Integrity* (Harvard Business School Press 2008).

all stakeholders as legitimate, accessible, predictable, equitable, rights-compatible and transparent.¹⁹

The attitude that I advocate is similar to the one Sherlock Holmes adopted in solving the mystery of *Silver Blaze*, when Dr. Watson asked Holmes:

"Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

*"That was the curious incident," remarked Sherlock Holmes.*²⁰

It is critical to our success that we stop thinking like Watson, like firefighters, and like doctors, and like compliance lawyers. We must start thinking like Holmes, like code authors, like managers and like conflict professionals. We need more incidents like that “of the dog in the night-time” – so that people don’t need to come to the point of barking in order for their needs to be addressed.

¹⁹ Ruggie Report at ¶¶ 92-93.

²⁰ Arthur Conan Doyle, *THE COMPLETE SHERLOCK HOLMES* (Doubleday), vol. 1 p. 347.