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CORPORATE SOCIAL RESPONSIBILITY IN THE OIL AND GAS INDUSTRY: THE IMPORTANCE OF REPUTATIONAL RISK

DAVID B. SPENCE*

INTRODUCTION

The Deepwater Horizon oil spill in the Gulf of Mexico has underscored, once again, the magnitude of the risks assumed by those engaged in (and affected by) oil and gas development. Oil and gas companies face environmental risks, health and safety risks, liability risks, and ultimately, reputational risks the management of which is central to the companies' long-term success. As in the Deepwater Horizon example, the exploration and production of oil and gas is often technically challenging. Oil and gas producers tap into unseen, pressurized underground petroleum resources and try to extract those resources safely from the ground. Once extracted, the product is often transported long distances in pressurized pipelines or oceangoing tankers. It may be refined or transformed using any of a variety of complicated chemical processes at high temperatures and pressures. Each of these stages of the production process is managed by people and subject to human error. At the same time, despite all these risks, oil and gas production can be an extremely lucrative business for those who are good at it.[1]

If the public feels ambivalently toward the oil and gas industry, that ambivalence is understandable. On the one hand, the availability of inexpensive fossil fuels has driven economic growth for more than a century, enabling people to achieve higher standards of living, and feeding the public coffers of oil-rich nations. On the other hand, oil and gas production imposes significant costs on society, costs that include air pollution, oil spills, injuries, and deaths. It is also sometimes associated with second

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1. For an in-depth discussion of the processes used to produce and refine gasoline, see generally *When We Put State-of-the-Art Technology to Work, We Put America to Work*, AM. PETROLEUM INST., http://www.api.org/policy/americatowork/upload/offshore_access_technology_011210.pdf (last visited Sept. 18, 2010); *Pipeline*, AM. PETROLEUM INST., http://www.api.org/aboutoilgas/sectors/index.cfm (last visited Sept. 18, 2010).

order costs, including social dislocation and conflict. Indeed, these phenomena are sufficiently common that scholars speak of "the oil curse," the notion that the presence of oil wealth in a nation can do more harm than good.[2]

This ambivalence means that governments, nongovernmental organizations (NGOs), and people will constantly seek the means to control oil and gas development so as to minimize the risk of harm and provide redress in the event harm is done. In the OECD countries, this is typically accomplished through laws and regulations. For example, the United States government establishes a wide variety of licensing and permitting requirements for oil and gas projects,[3] requirements that impose limits on emissions of pollutants from projects, specify safety standards the project must meet, and so on. Yet we also know that in such a technically challenging industry, accidents will happen. Therefore, societies look to oil and gas companies to self-regulate: to do more to guard against risks to society than merely comply with the law. Perhaps more so than in any other industry, people demand corporate social responsibility (CSR) from oil and gas companies.

Part I of this article examines the origins of CSR, its rationale, and its growth in the business world. Part II explores some of the dimensions of reputational risk facing modern oil and gas companies, using several high-profile examples. Part III explains some of the ways in which oil and gas companies use CSR initiatives to manage that reputational risk.

I. CORPORATE SOCIAL RESPONSIBILITY

Modern CSR programs reflect the recognition that business, including the energy business, does not happen in a social vacuum. Today's oil and gas companies work within an ever-broader and more complex set of social institutions—norms and expectations that exist alongside market forces, but

2. The oil curse is sometimes also known as the "resource curse." *See e.g.*, Daniel Pipes, *The Curse of Oil Wealth*, ATLANTIC, July 1982, at 19–25. A paper by the economists Jeffrey Sachs and Andrew Warner is sometimes credited with demonstrating empirically the existence of this phenomenon. *See* Jeffrey D. Sachs and Andrew M. Warner, *Natural Resource Abundance and Economic Growth* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 5398, 1995). For a recent analysis of the curse in the context of the oil industry, see Paul Collier, *Essay: Laws and Codes for the Resource Curse*, 11 YALE HUM. RTS. & DEV. L.J. 9 (2008).

3. These are too numerous to mention. There is a general regime for permitting oil and gas development on federal lands administered by the Bureau of Land Management, another for offshore development administered by the Minerals Management Service, and state permitting programs. In addition to these, there are individual environmental statutes like the Clean Air Act, the Clean Water Act, the Endangered Species Act and others whose provisions apply to most oil and gas exploration and production activities. *See, e.g.* Clean Air Act, 42 U.S.C. § 7401 (2010); Clean Water Act of 1977, 33 U.S.C. § 1251 (2010); Endangered Species Act of 1973, 16 U.S.C. § 1531 (2010).

which are created and shaped in other ways. Some of these expectations take the form of legal requirements, but only some of them; others reflect ethical norms that may turn out to be every bit as important to companies in the long run as laws and regulations. Many of these expectations come from society—from governments, NGOs, and the community at large. Others may arise from business leaders' individual desires to "do the right thing." In an age of instantaneous communication and lowered regulatory and trade barriers, more and more business is done out in the open, where customers, suppliers, investors, employees, neighbors, governments, and NGOs can see it, and see it almost immediately. If an energy company employs child labor in Indonesia or dumps toxins into an African river, activists, investors, and customers in Europe and North America will learn about it not long after (or perhaps even before) locals do. Transparency and globalization have strengthened the ability of external stakeholders (neighbors, NGOs, governments, and activists) to detect and publicize wrongdoing, and to press their concerns on business people. When almost everyone has a telephone and almost every telephone is also a camera, there is an increasing probability that business wrongdoing will not only be reported by media outlets, but will be posted for all to see on YouTube or some other website.

A. Defining CSR

The term "corporate social responsibility" refers to the kinds of things companies do in their efforts to navigate these swirling currents of changing expectations, expectations that have never loomed larger in the daily lives of companies, including oil and gas companies. CSR is more popular than ever in the business world. One would be hard-pressed to find a Fortune 500 company that does not publish some form of annual CSR report touting its investments in environmental sustainability, social progress and the like.[4] Most of the time, this is more than mere window-dressing, though it is also true that companies do take credit for the social benefits incidental to self-interested behavior. Of course, a company's pursuit of its self-interest *does* provide social benefits. This is the essence of Adam Smith's "invisible hand."[5] Efficient firms provide benefits not only to shareholders

4. One byproduct of this popularity is the Corporate Social Responsibility Newswire, which acts as a repository for CSR reports and a news service covering CSR issues. *See* CSRWIRE, THE CORPORATE SOCIAL RESPONSIBILITY NEWSWIRE (Sept. 12, 2010), http://www.csrwire.com.

5. Adam Smith put it this way in THE WEALTH OF NATIONS:

> [E]very individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own gain, and he is in this, as in many oth-

(return on investment), but also to employees (wages), suppliers (revenue), customers (better products at lower prices), and local communities (jobs, growth, tax revenue), all of which increase those stakeholders' utility. Those stakeholders, in turn, spend or donate money, increasing others' utility, and so on.

However, CSR implies more than the operation of the invisible hand; it is linked to the idea that companies owe *duties* to their external stakeholders beyond those enshrined in the law. The word "responsibility" implies a duty to someone or something; the use of the word "social" as a modifier implies that companies owe duties to society at large. This notion, in turn, has implications for theories of the firm. Proponents of stakeholder theory argue that managers owe stakeholders a variety of legal and ethical duties. Corporations, they say, are organized not merely to achieve efficiencies that cannot be realized through arms-length exchanges; to the contrary, they are legal persons in their own right, and they act in the firm's (rather than simply the shareholders') best interests. Employees, customers, suppliers, neighbors, governments, and NGOs can be and are affected by what the company does. In that sense, they clearly have a "stake" in the company, and managers know this. Managers and employees are the people who give the company life and make the decisions that we attribute to the company. In practice, therefore, firms balance duties owed to a variety of stakeholders, including (but not limited to) their owners.[6]

CSR is not new. Firms have always given company money to charitable organizations. For more than two decades now, heavily regulated firms have explored ways in which they could move beyond compliance, particularly with respect to the environmental impacts of their actions.[7] Much of their initial focus was on environmental issues, under the banner of "sustainability," a term that has taken on many meanings in the world of CSR. The economist's idea of "sustainable development," or "sustainability,"

> er cases, led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 181 (Elibron Classics 2006) (1776).

6. *See, e.g.*, R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 25–26 (Pitman Publ'g Inc., 1984); William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, *in* ETHICAL THEORY AND BUSINESS 75–84 (Tom L. Beauchamp & Norman E. Bowie eds., 4th ed. 1993); Peter A. French, *Corporate Moral Agency*, *in* HONEST WORK: A BUSINESS ETHICS READER 250 (Oxford Univ. Press, 2007).

7. For a summary of these efforts, see David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 951–65 (2001).

grew out of the tragedy of the commons[8] and focuses on long-term productivity of a natural resource. For example, overfishing can reduce populations below their sustainable levels; therefore, sustainable yields require cooperative restraint in the short-term, or some sort of government regulation. Others employ a broader notion of sustainability that includes all sorts of voluntary actions aimed at benefiting the environment, such as reducing energy use, special environmental projects (e.g., company investments in conservation), reducing use of toxics, and more.[9] Still others employ the framework of ecology and the "precautionary principle," arguing that (i) ecosystems are complex, (ii) we do not understand all the ways in which human activity affects ecosystems, and (iii) therefore, oil and gas companies ought to bear the difficult burden of proving that their actions will not cause harm.[10] Still others believe that flora and fauna have rights which ought not to be infringed by the activities of oil and gas companies and others.[11]

Industry has faced these myriad environmental concerns for decades, and different industries have responded in different ways. In the 1980s, the Chemical Manufacturers Association (which includes several major oil companies) established their "Responsible Care" program, a system of voluntary rules and regulations for their members, governing the handling and disposal of chemicals and chemical wastes.[12] Companies who join the European Union's "Eco-Management and Auditing Scheme" (EMAS) agree to continuously improve their environmental performance over time, beyond anything required of them by law.[13] EMAS and its now-defunct

8. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

9. For example, Royal Dutch Shell calls its annual CSR report a "sustainability report," and it includes within its concept of sustainability not only environmental issues but also issues such as human rights and social investment. ROYAL DUTCH SHELL PLC, SHELL SUSTAINABILITY REPORT 2009 (2009), *available at* http://sustainabilityreport.shell.com/2009/servicepages/downloads/files/all_shell_sr09.pdf.

10. The 1992 United Nations Conference on Environment and Development (known as the "Rio Conference"), included a statement of the precautionary principle. United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26, Principal 15–16 (June 14, 1992). The idea has since been written into several European Union environmental directives. It also lies behind the Endangered Species Act of 1973. *See*, 16 U.S.C. § 1531 (2010).

11. *See e.g.*, Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV 450, 456–58 (1972).

12. The current version of the Responsible Care Program can be found at the Chemical Manufacturers Association's website. *See Responsible Care Status Report 2008*, RESPONSIBLE CARE, http://www.responsiblecare.org/filebank/Status%20Report%2001_05.pdf (last visited Sept. 14, 2010).

13. The current version of EMAS can be found at the European Union's EMAS website. Regulation 1221/2009, of the European Parliament and of the Council of 25 November 2009 on the Voluntary Participation by Organisations in a Community Eco-Management and Audit Scheme (EMAS), 2009 O.J. (L342/1) art. 1, *available at* http://ec.europa.eu/environment/emas/index_en.htm.

American counterpart, the EPA's Performance Track program,[14] achieved high levels of voluntary participation by member companies. Environmental management consulting is now a mature, niche industry, one that goes far beyond helping firms comply with environmental rules. More recently, the rise of climate change as a major environmental issue has stimulated countless efforts by companies to reduce their "climate footprint," by reducing their emissions of greenhouse gases and/or promoting sequestration of carbon dioxide (underground or undersea) or carbon sinks (planting trees and the like).

As noted above, as the notion of social responsibility moved beyond environmental sustainability to include non-environmental issues, more companies became concerned with the social impacts of their operations. This was in part a response to NGO and public pressure on companies to pay greater concern to issues of human rights, educational opportunity, and workplace/employment practices.[15] These pressures are not new; many of the world's most successful companies agonized over the question of whether to do business in South Africa during apartheid, with some choosing to pull out, and others remaining under the Sullivan Principles, a set of guidelines meant to ensure employment and fair treatment of South Africa's black majority.[16] However, public pressure on companies to improve social performance is stronger and more ubiquitous than ever before. Companies that do business in developing nations, where social, political and legal infrastructure is lacking, face particular pressure to fill the void by investing in social development. Consequently, it is now commonplace for large and small companies alike to respond to these pressures through their CSR policies, and to issue annual CSR reports, documenting their socially beneficial works.[17]

A recent survey by *The Economist* divides CSR activities into three general categories.[18] The first and oldest form of CSR is corporate philanthropy—giving money to worthy causes such as the local food bank.[19]

14. The history of the life of a Performance Track program can be traced at the EPA's Performance Track website. *National Environmental Performance Track*, U.S. ENVTL. PROT. AGENCY (Oct. 20, 2009), http://www.epa.gov/perftrac/.

15. *See infra* notes 000-000 and accompanying text.

16. The Sullivan principles were named after Reverend Leon Sullivan, who was instrumental in their formation. The Sullivan principles have survived apartheid. *See The Global Sullivan Principles of Social Responsibility*, http://www.globalsullivanprinciples.org/principles.htm (last visited Sept. 14, 2010).

17. *See, e.g.* CSRWIRE.COM, *supra* note 3, at "Distribution" (listing 4800 members that have submitted information to CSR).

18. *A Survey of Corporate Social Responsibility: Just Good Business*, ECONOMIST, Jan. 17, 2008, at 4 [hereinafter *Survey of CSR*].

19. *Id.*

The second form of CSR is the "CSR as risk management," or investment in reducing legal and reputational risk.[20] Because stakeholders can help or hinder the company, their opinions and expectations matter; and so businesses attend to those opinions and expectations.[21] The third form of CSR identified by *The Economist* includes the kinds of actions companies take that provide a social benefit and save money, such as being more energy efficient, reducing the use of toxic chemicals as manufacturing inputs etc.[22] *The Economist* calls these "win-win" CSR, and alleges that companies should have been doing these things anyway, irrespective of social concerns or pressures.[23]

B. The Rationale for CSR

The question remains: Are these the sorts of things companies *should* do? This is both a normative question and a strategic one. As a normative question, there is no clear answer. Scholars offer a variety of explanations for CSR spending, ascribing it to managers' desire to make up for past "bad behavior," feel good about the company, forestall new regulation, find a market niche, meet the demands of NGOs, and more.[24] Orthodox neoclassical economics is uncomfortable with CSR in so far as CSR seems to imply that the "invisible hand" is not doing its job. Adam Smith's description of the invisible hand includes this line, from *The Wealth of Nations*: "I have never known much good can be done by those who affect to trade for the public good."[25] Milton Friedman, economist and Nobel laureate, put it more succinctly, noting that the "one and only one social responsibility of business" is to "increase its profits so long as it stays within the rules of the game."[26] That is, managers ought to attend to shareholder needs first, and to stakeholder needs only when it advances shareholder return. Proponents of this view argue that the manager-shareholder relationship is unique. Only shareholders provide (and risk) the capital from which all other con-

20. *Id.*

21. This view of CSR is sometimes called "enlightened shareholder value," because it ties shareholder interests to stakeholder interests over the long run. For a discussion of enlightened shareholder value, see David Millon, Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law (June 16, 2010) (unpublished manuscript) (on file with the Washington & Lee Public Legal Studies Research Paper Series).

22. *Survey of CSR*, *supra* note 18, at 4.

23. *Id.*

24. For a summary of some of this literature, Dylan B. Minor, Corporate Social Responsibility as Reputation Insurance: Theory and Evidence 1–5 (July 2010) (unpublished manuscript) (on file with the Haas School of Business, UC Berkeley).

25. SMITH, *supra* note 5, at 181.

26. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sep. 13, 1970, at 125.

tracting stakeholders are paid, relinquishing control to managers. This represents an irreplaceable contribution to the formation of wealth-creating firms; that is why the law imposes on managers unique fiduciary duties designed to protect shareholders.

Indeed, according to Judge Richard Posner, all of this spending on CSR makes little sense, at least from an economic perspective:

> In competitive markets, a sustained commitment to any goal other than profitability will result in the firm's shrinking, quite possibly to nothing. The firm that channels profits into [CSR] will not be able to recoup its losses by charging higher prices to its customers. The customers do not benefit as customers from such expenditures; more precisely, they benefit just as much from those expenditures if they purchase the lower-priced product of a competing firm that does not incur them. Thus, the firm will have to defray the expenses of [CSR activities] entirely out of its profits. But in a competitive market there are no profits in an economic sense, other than as a short-run consequence of uncertainty (the shareholders being the residual claimants of any excess corporate revenues over costs).
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> . . . .
>
> The prospects for corporate social responsibility are only slightly brighter in monopolistic markets. If the firm has no rivals, it will be able to shift a part of the cost of [CSR programs] to its customers, but only a part. . . . To the outsider, the result is a reduction in monopoly profits. . . . To the shareholder, however, it is a loss. The price of a share of stock is equal to the present value of the anticipated future earnings of that share. If the firm has a monopoly with a prospect of continued monopoly profits of a certain level, the share price will be higher than it would be if a lower level of profits were anticipated. Suppose the firm decides to incur unanticipated [CSR] costs. Its anticipated future earnings are now lower, so the price of its shares will fall. This will be felt as a loss to the shareholder. In the usual case he will neither know nor care or whether the corporation has monopoly profits. All he cares about is that the value of his holdings has declined. Managers will be reluctant to visit such consequences upon their shareholders.[27]

For all of these reasons, economists often model the shareholder-management relationship as a principal-agent problem, and tend to view decisions that serve the needs of external stakeholders as a kind of shirking of managers' fiduciary duties.

If the leaders of oil and gas companies undertake CSR activities because their personal sense of right and wrong tells them to do so, then CSR may seem like the right thing to do. But is that fair to shareholders? Is corporate philanthropy nothing more than spending shareholders' money in

27. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 419–20 (Little, Brown & Co. Law Book Div., 4th ed. 1992).

ways that neither benefit shareholders nor reflect (necessarily) their preferences? Disagreement over whether CSR is the right thing to do can also be traced to different views of the relationship between business and society in the Anglo-American tradition compared to elsewhere. In many continental European nations, the law requires that external stakeholders be represented on company boards of directors, reflecting an expectation that companies will play a role in addressing the needs of those external stakeholders.[28] Sometimes this role is enshrined in law, sometimes not. European companies seem to be embracing environmental sustainability more widely and eagerly than their American counterparts. The so-called "European social model" makes governments and businesses alike responsible for ensuring social welfare to a much greater degree than we see in the United States. Indeed, some cultures elevate the needs of the group over the needs of the individual in ways that impose ethical duties on companies to meet social needs.[29]

One rejoinder to those who criticize CSR on ethical grounds is a strategic one: namely, that many kinds of CSR actually advance shareholder interests, and are strategically sound investments for the firm. R. Edward Freeman of the University of Virginia's Darden School of Business, has been perhaps the leading proponent of "managing for stakeholders" (rather than only for shareholders) within academia. He says:

> The basic idea is simple. Business can be understood as a set of relationships among groups that have a stake in the activities that make up the business. Business is about how customers, suppliers, employees, financiers (stockholders, bondholders, banks, and so on), communities, and managers interact and create value. To understand a business is to know how these relationships work. The executive's or entrepreneur's job is to manage and shape these relationships, hence the term "managing for stakeholders."
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> . . . If we understand capitalism as how business really works (rather than how theorists want us to believe it works) it will become obvious that this has always been true. Building and leading a great company has always been about managing for stakeholders. The idea that we need to pay attention to only one of these groups, the people that supply the capital parens stockholders or financiers), if we want to build and sustain a

28. For an argument that richer western nations should institutionalize social responsibility in their legal and political systems, see Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L.J. 37, 39–42 (2008).

29. For a summary of these differences, see HANS JANSSON, INTERNATIONAL BUSINESS STRATEGY IN EMERGING COUNTRY MARKETS: THE INSTITUTIONALIST NETWORK APPROACH 124 (2007) (discussing the work of Fons Trompenaars and Charles Hampden-Turner, whose research on business and culture has identified "communitarianism versus individualism" as a major dimension along which cultures differ).

> successful business is deeply flawed. The very nature of capitalism itself is putting together a deal, a contract, or a set of relationships among stakeholders so that all can mean continuously over a long period of time.
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> . . . .
>
> . . . [E]ven if the executives and directors of a firm belief that creating shareholder value is the only legitimate objective for business, they must concentrate on stakeholder relationships to accomplish the creation of shareholder value. The logic is simple. The business world today is very complex and there is a great deal of uncertainty. It consists of interconnected networks of customers, suppliers, communities, employees, and financiers that are vital to the achievement of business success. The company that manages for shareholders at the expense of other stakeholders cannot sustain its performance. A system of economic activity based on such exclusive attention to shareholders is rife for social activism and regulation in a free society on behalf of the other stakeholders.[30]

There is no doubt that many CSR activities are motivated by self-interest, at least in large part. Self-regulation of the kind practiced by the Chemical Manufacturers Association can be a strategically sound response to pressure for government regulation of an industry. By self-regulating in ways that relieve that pressure, industry can have more say in the design and implementation of the regulatory regime. Some CSR activities are designed to burnish the company's reputation, which may attract new, socially-conscious customers and investors, and may strengthen the loyalty of existing customers. Customers may be willing to pay a premium for "green" electricity or oil that comes from a relatively green oil company, and similarly, employees like to work for socially conscious companies, which may lead to improvements in employee productivity and better retention of good employees. If a company is perceived as a good corporate citizen, that may make customers and suppliers happier to work with the company, and employees happier to work for it. If the company treats its employees well, labor NGOs will be pleased with it.[31]

It is not difficult to see how the second and third CSR categories identified by *The Economist*—CSR as risk management, and" win-win" situations—may advance shareholder interests in the long-run and the short-run, respectively. Win-win investments save money now, while helping society. Investments which address broader stakeholder concerns can pay off in

30. R. EDWARD FREEMAN, JEFFREY S. HARRISON, & ANDREW C. WICKS, MANAGING FOR STAKEHOLDERS: SURVIVAL, REPUTATION, AND SUCCESS 3–4 (2007).

31. SRIstudies.org, a web portal managed by the Center for Responsible Business at UC Berkeley's Haas School of Business, maintains a list of studies addressing these questions, most of which support the notion that CSR investment builds value. *Key Studies*, SRISTUDIES.ORG, http://www.sristudies.org/Key+Studies (last visited Oct. 7, 2010).

important ways in today's transparent, connected world. Investments that reduce adverse environmental and social impacts, and build productive relationships with external stakeholders, aim to reduce liability and other risks in the long run; they may also help the firm realize opportunities that they might otherwise have missed.

This notion that "what goes around comes around" certainly drives some CSR investment. Indeed, there have always been costs associated with ignoring ethical norms over the very long run. The U.S. Supreme Court broke up John D. Rockefeller's Standard Oil trust 1911, concluding that it violated the antitrust laws, laws that were motivated in part by public outrage over the company's anti-competitive practices.[32] That outrage, in turn, was fed by a series of articles written in the early 1900s by the journalist Ida Tarbell exposing those anti-competitive practices.[33] The most notorious of those practices, a kickback system known as the "South Improvement Company," had injured the business interests of Ida Tarbell's father's father and brother in the late 19th century.[34] Increasingly, business leaders are deciding that the strategic answer to the question of whether companies should engage in CSR activities is a "yes."

However, for modern oil and gas companies, the task of behaving "responsibly" is further complicated by the multiplicity of environments – technical, legal, political, cultural, ethical – in which they operate. In John D. Rockefeller's time, Standard Oil and the largest investor owned oil companies (IOCs)[35] were known as "the majors," because they dominated

32. Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 79 (1911).

33. RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 437–38 (Vintage Books 2d ed. 2004) (1998).

34. *Id.* at 436.

35. The term IOC denotes a company that is non-state owned and operates in multiple countries. *The Changing Role of National Oil Companies in International Energy Markets*, 35 BAKER INST. POL'Y REP. 1 (2007) [hereinafter *The Changing Role*]. The term NOC denotes a company that is majority state-owned and (historically) operates domestically. *Id.* These distinctions have substantially blurred in the always-changing and globalizing industry landscape of heterogeneous ownership structures, mergers and name changes, privatizations and expropriations. Saudi Aramco, entirely-state owned, is a classical NOC, but Gazprom (today 50.0023% state-owned) and Petrobras (today 32.2% state-owned) and many other companies undergoing various degrees of privatization complicate any categorical distinctions. *PIW's Top 50: How the Firms Stack Up*, PETROLEUM INTELLIGENCE WKLY., Nov. 30, 2009, at Special Supplement 2. Petrochina is the world's first trillion dollar company, and still today the world's largest listed company by market capitalization—but the parent corporation, CNPC, is 100% owned by the Chinese government. *Id.* At the other end of the spectrum, even when the IOCs are more narrowly categorized as so-called supermajors—Exxon Mobil, BP, Royal Dutch Shell, Conoco Phillips, Chevron and Total—our ability to make comparisons across time are confounded by a maze of mergers, acquisitions, and the occasional losses of reserve holdings to nationalization. Those six companies contain remnants of fifteen different companies that existed as recently as 1997. *See* ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, PRIVATIZATION AND THE GLOBALIZATION OF ENERGY MARKETS (1996). Moreover, even the supermajors are not entirely free of ownership heterogeneity: at

worldwide oil and gas markets. Standard Oil's descendants and other IOCs — companies like ExxonMobil, ChevronTexaco, BP, and Royal Dutch Shell – now control significantly fewer of the world's oil and gas resources than national oil companies (NOCs).[36] As oil-rich regions have asserted authority over their petroleum resources (through nationalizations, the reservation of production rights to the national oil company or those partner with the NOC, or the imposition of unfavorable concession terms), IOCs must travel farther and work harder to find and produce energy. Much of that work takes place in places where laws are few, governments are relatively corrupt or inefficient, and violent conflict is endemic. In these difficult environments, modern IOCs concerned about protecting their reputations must discern just exactly what governments, international NGOs, and local neighbors expect of them, and just how many of those expectations the company can meet.

II. CSR IN THE ABSENCE OF LAW

In industrialized democracies, we expect that law will structure relationships between IOCs and external stakeholders, and that the conflict with stakeholders will be managed in part by governmental institutions. For example, the harm caused by the Deepwater Horizon disaster will be redressed by a relatively well-developed legal and governmental system. It the United States there are legal rules for apportioning liability for the environmental and other harm caused by the explosion and oil spill, and relatively efficient court systems to see that those rules are applied fairly. To be sure, governmental failure was a contributing factor to this accident: the Minerals Management Service was less than vigilant in its application of laws and regulations designed to minimize environmental, health and safety risk.[37] Nevertheless, the process of addressing regulatory failures is al-

times in its history, BP has been subject controlling stake ownership by the British government, and the French government still keeps a small "golden share" stake in Total. *Id.* at 9.

36. As the Energy Information Administration writes, "Although investor-owned oil companies are often thought of as those most responsible for world oil production, government-controlled companies actually control the majority of both current production (more than 52% in 2007) and proven reserves (88% in 2007), one indicator of future production potential." Energy Info. Admin., U.S. Dep't of Energy, *Who are the Major Players Supplying the World Oil Market?*, ENERGY IN BRIEF (Jan. 28, 2009), http://www.eia.doe.gov/energy_in_brief/world_oil_market.cfm; *See also The Changing Role, supra* note 35, at 1 (stating that, "State-owned enterprises represent the top 10 reserve holders internationally"); Carola Hoyos, *The New Seven Sisters: Oil and Gas Giants Dwarf Western Rivals*, FIN. TIMES (London), Mar. 11, 2007; ROBERT PIROG, CONG. RESEARCH SERV., RL 34137, ROLE OF NATIONAL OIL COMPANIES IN THE INTERNATIONAL OIL MARKET 1-5 (2007) (examining the market position of national oil companies); *PIW's Top 50, supra* note 35, at Special Supplement 1 (documenting the continuing decline in the majors' market shares over the last decade).

37. The MMS was particularly lax in its implementation of the National Environmental Policy Act (NEPA), the statute that requires preparation of an environmental impact statement (EIS) before ap-

ready underway; before the end of the summer of 2010 there were multiple congressional and executive branch investigations into the accident, most or all of which consider the question of regulatory failure to be within their jurisdiction.[38] By contrast, in developing country environments, legal standards may be weak or nonexistent, and governments may be corrupt, inefficient, or both. Governments may lack legitimacy in the eyes of their people, and social conflict must be resolved not through politics, but in other ways.

This poses a dilemma for oil companies, one they have come to understand through a sometimes painful learning process. For example, Royal Dutch Shell first began exploring for oil in Nigeria in the 1950s.[39] Its early production predated Nigerian independence, and coincided with the first years of Nigeria as an independent country, one that ultimately became the poster child for the concept of "the oil curse."[40] Blessed with enormous reserves of oil, particularly in the Niger Delta, the benefits of those blessings never reached the people of the Niger Delta.[41] Shell paid royalties to the Nigerian state, but much of that money found its way into the pockets of corrupt governmental officials.[42] At the same time, environmental, health and safety regulations in Nigeria were weak or poorly enforced, and oil production in the Niger Delta became associated with extensive environmental contamination there.[43] By the early 1980s, many Nigerians came

proving any project that may significantly affect the quality of the human environment. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006). The MMS had discarded an earlier requirement that each EIS include a "worst-case analysis," and its treatment of environmental issues associated with the Deepwater Horizon platform was particularly negligent, copying verbatim, huge portions of prior EISs prepared for other platforms, many of the provisions of which were inapplicable to the Deepwater Horizon platform. *See* Juliet Eilperin, *U.S. Exempted BP's Gulf of Mexico Drilling From Environmental Impact Study*, WASH. POST, May 5, 2010, at A4.

38. A joint investigation by the United States Coast Guard and the U.S. Department of Interior is ongoing. *See* US COAST GUARD AND US DEPARTMENT OF INTERIOR, DEEPWATER HORIZON JOINT INVESTIGATION, http://www.deepwaterinvestigation.com/go/site/3043/ (last visited Jan. 6, 2011). Another investigation by a specially-appointed Presidential Oil Spill Commission issued a report on the disaster on January 5, 2011. *See* NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, http://www.oilspillcommission.gov/page/about-commission (last visited Jan. 6, 2011). The United States House of Representatives Energy and Commerce Committee held several hearings on the accident over the course of 2010. *See* U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, http://energycommerce.house.gov/hearings/default.aspx (last visited Jan. 6, 2011). The Senate Energy and Natural Resources Committee held hearings following the accident. *See* H. Josef Hebert, *Rig explosion: Blame game begins at Senate hearings*, HOUSTON CHRONICLE, May 11, 2010, http://www.chron.com/disp/story.mpl/business/deepwaterhorizon/6999804.html.

39. Joshua P. Eaton, Note, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 265 (1997).

40. *Id.* at 265 n.13.

41. *See* Jad Mouawad, *Growing Unrest Posing a Threat to Nigerian Oil*, N.Y. TIMES, Apr. 21, 2007, at A1.

42. *Id.*

43. Eaton, *supra* note 39, at 269, 283.

to associate large oil companies, such as Shell, with the Nigerian government, and with plunder and exploitation.[44]

Shell eventually began to recognize and address its reputational problem by undertaking social investment and making concerted efforts to cultivate positive relationships with all of its important stakeholders in Nigeria. However, by that time, much of the reputational damage had been done. Despite pouring resources into social projects and stakeholder relations in Nigeria in the 1990s and early 2000s, protests against Shell became stronger and more organized. Groups like the Movement for the Survival of the Ogoni People (MOSOP) challenged Shell's right to operate within Nigeria, sometimes in extralegal or violent ways.[45] Ken Saro-Wiwa, author and journalist, was founder of MOSOP in the early 1990s.[46] In 1994, the Nigerian government arrested Saro-Wiwa and other Ogoni defendants on the charge of incitement to murder.[47] The government convened a special tribunal, which convicted the defendants, and sentenced them to death, a sentence which was carried out in 1995.[48] The trial and sentencing were widely criticized by environmental and human rights organizations, some of which charged Shell with aiding and abetting the prosecution of the defendants.[49] Shortly after Saro-Wiwa's execution, several human rights organizations supported litigation by families of the victims against Shell in American courts under the Alien Tort Claims Act (ATCA), seeking to hold the company liable for the persecution of Saro-Wiwa and others.[50] The suit alleged that Shell supplied weapons to Nigerian security forces, and participated in security sweeps in the Niger Delta that resulted in shootings of Ogoni people.[51] Shell denied these allegations. In 2009, before trial, Shell settled with the families of the defendants for $15.5 million, denying lia-

44. *See* Mouawad, *supra* note 41; Eaton, *supra* note 39, at 264-71; *see also Nigeria: Hints of a New Chapter*, ECONOMIST, Nov. 14, 2009, at 30-32 (describing the background of militant struggles in Nigeria); *Nigeria's Troubled Delta: Can a Local Man Make Good?*, ECONOMIST, June 26, 2010, at 47.

45. Eaton, *supra* note 39, at 269-70.

46. *Id.*

47. *Id.* at 270.

48. *Id.*

49. Greenpeace, for example, was one of the more vocal critics of Shell in connection with this incident. *See, e.g.*, Greenpeace Press Release: Ken Saro-Wiwa and 8 Ogoni People Executed: Blood on Shell's Hands (Nov. 10, 1995), http://archive.greenpeace.org/comms/ken/murder.html.

50. Complaint at 15, Wiwa v. Royal Dutch Petroleum Co., 626 F.Supp.2d 377 (S.D.N.Y. 1996) (No. 96-cv-8386). For discussions of the role of the ATCA within the oil industry generally, see Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635 (2004); Seher Khawaja, Note, *Corporate Free Market Responsibility: Addressing Rights Violations with a Fiduciary Duty Approach to Natural Resource Extractions in Weak Governance Zones*, 3 BROOK. J. CORP. FIN. & COM. L. 185 (2008); Kerrie M. Taylor, Note, *Thicker Than Blood: Holding Exxon Mobil Liable for Human Rights Violations Committed Abroad*, 31 SYRACUSE J. INT'L L. & COM. 273 (2004).

51. Complaint, *supra* note 49, at 8.

bility, but explaining the settlement as part of its reconciliation process within Nigeria.[52]

While the litigation against Shell was proceeding through the courts, ExxonMobil found itself in the middle of a different kind of armed conflict in Indonesia. ExxonMobil's Arun natural gas field sits in the special Indonesian territory of Aceh, on the northern tip of the island of Sumatra. The company's predecessor, Mobil Oil, began operating the field in the late 1960s. Throughout the 1990s, the region experienced considerable unrest and violent conflict associated with separatist movements, particularly the Free Aceh Movement. In 2001, eleven villagers brought suit against ExxonMobil in an American court under the ATCA, alleging that the company aided and abetted human rights abuses (including torture and murder), by hiring members of the Indonesian military (as company security), members who subsequently committed the human rights abuses against the plaintiffs.[53] The suit was supported by an international NGO, the International Labor Rights Fund.[54] In 2009, after a long series of procedural disputes, a federal judge granted ExxonMobil's motion to dismiss the suit on the grounds that the plaintiffs lacked standing to bring it.[55] As with the case of Shell in Nigeria, NGOs and others charged ExxonMobil with supporting the government's repression of the rebels, a charge Exxon Mobil denies.[56] In each case, however, the company found its reputation damaged by its association with the repressive government.

IOCs have experienced similar problems in Latin America. A consortium of oil companies including Hunt Oil and others is grappling with the consequences of a less violent, but equally persistent, conflict between the government of Peru and the indigenous people of the Peruvian Amazon.[57]

52. Jad Mouad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, at B1.

53. Doe v. Exxon Mobil Corp., 573 F.Supp.2d 16, 19–21 (D.D.C. 2008). See also Seth Mydans, In Indonesia, Once Tolerant Islam Grows Rigid, N.Y. Times, Dec. 29, 2001, at 3; Wayne Arnold, Indonesia Takes a Tortuous Path to Oil, N.Y. Times, Feb. 19, 2004, at 1, 7.

54. Attorneys for the International Labor Rights Fund represented the plaintiffs in this litigation. *See, e.g.*, John Doe v. Exxon Mobil Corp., 2006 U.S. Dist. LEXIS 25860 (D.C. Cir. 2006) (listing John Baxter of the ILRF as counsel for the Aceh plaintiffs).

55. Doe v. Exxon Mobil Corp., 658 F.Supp.2d 131, 135 (D.D.C. 2009); *see* Brett Kendall, *Update: Judge Dismisses Indonesians Suit against Exxon*, DOW JONES NEWSWIRE, Sept. 30, 2009, *available at* http://www.nasdaq.com/aspx/stock-market-news-story.aspx?storyid=200909301400dowjonesdjonline000633&title=update-judge-dismisses-indonesians-lawsuit-against-exxon.

56. For a good description of the human rights aspects of this dispute, see THE BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, CASE PROFILE: EXXON MOBIL LAWSUIT (RE ACEH), http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/ LawsuitsSelectedcases/ExxonMobillawsuitreAceh (last visited Jan. 6, 2011).

57. Royal Dutch Shell was the initial project sponsor. Eventually, Mobil Oil became involved. Shell and Mobile eventually gave way to the current project consortium, which includes the Peruvian

The Camisea Project is the first major gas development initiative in the Peruvian Amazon.[58] The project involves the construction of drilling platforms and other production facilities in the Lower Urubamba Valley of the Peruvian Amazon, and pipelines for transportation of natural gas and liquid natural gas to the Peruvian coast.[59] Much of the gas will go to a natural gas liquefaction and export facility owned by Peru LNG, another consortium whose membership overlaps with that of the Camisea production company.[60] Project pipelines cross extremely sensitive ecological areas within the Peruvian Amazon, including a large area designated as a reserve for isolated indigenous Amazon peoples. At the time of the project's inception, Peru's laws were relatively undeveloped.[61] International NGOs and other representatives of indigenous communities have charged the project developers with violations of international and Peruvian law, and have used direct protest methods to try and stop the project, which is proceeding nevertheless.[62] Behind the conflict with indigenous peoples lies a long history of social stratification in Peru, one that has left indigenous people at the bottom of the socioeconomic ladder. A succession of Peruvian presidents have tried unsuccessfully to mediate the conflict. Meanwhile, the project has moved forward amid continuing controversy. The coastal LNG facility began exporting in the summer of 2010, despite strikes aimed at shutting the project down.[63]

national oil company, Hunt Oil, and several other companies. HUNT OIL COMPANY, HUNT IN PERU, http://www.huntoil.com (last visited Jan. 6, 2011) ("In February 2000, the Government of Peru awarded Hunt Oil Company and its partners Pluspetrol, Tecpetrol and SK Corporation the exclusive rights for 40 years to develop and produce the giant Camisea gas fields.").

58. Lila Barrera-Hernández, *Hydroelectric Energy in the Peruvian Amazon: The Inambari Puzzle*, AM. Q., http://www.americasquarterly.org/inambari-puzzle-barrera (last visited Sept. 10, 2010).

59. Michael Valqui, Juan Carlos Riveros, & Ivan Brehaut, *Hydrocarbon Development in the Lower Urubamba Region, Peru: Learning from Camisea*, (World Wildlife Fund Macroecon. Program Office, D.C.), Nov. 2005, at 1–3.

60. Repsol YPF, *Repsol YPF to Participate in Camisea Project and Peru LNG*, RIGZONE (June 2, 2005), http://www.rigzone.com/news/article.asp?a_id=22903.

61. *See generally* Juan Forero, *Energy Project vs. Environmentalists in Peru*, N.Y. TIMES, Sept. 9, 2003, at 7; David B. Ottaway, *Gas from the Rain Forest*, WASH. POST, Apr. 21, 2006, at D1, D5; Simon Romero, *Fatal Clashes Erupt in Peru at Roadblock*, N.Y. TIMES, June 6, 2009, *available at* http://www.nytimes.com/2009/06/06/world/americas/06peru.html; *Gas for Peru v. Green Imperialism*, ECONOMIST, Aug. 9, 2003, at 28; *Tread Softly*, ECONOMIST, Aug. 30, 2008, at 37. For a description of the lack of environmental standards in place at the time, see Judith Kimmerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 COLUM. J. ENVTL. L. 523, at 531-32 (2002).

62. The NGO Amazon Watch calls the Camisea Project "arguably the most damaging project in the Amazon Basin." *Camisea Natural Gas Project*, AMAZON WATCH, http://www.amazonwatch.org/amazon/PE/camisea/ (last visited Sept. 13, 2010).

63. Isabel Guerra, *Strike in Southern Peru Against Camisea Gas Exports Starts with Mobilizations*, LIVING IN PERU.COM (June 17, 2010 12:42 PM), http://www.livinginperu.com/news-12473-law-and-order-strike-south-peru-regions-against-camisea-gas-exports-starts-with-mobilizations.

ChevronTexaco faces a similar problem in neighboring Ecuador. Prior to its merger with Chevron, Texaco was the minority partner in an exploration and production venture in Ecuador with the Ecuadorian national oil company, PetroEcuador.[64] The project sponsors contend that the project complied with applicable Ecuadorian laws at the time, but the project nevertheless left behind significant (and toxic) environmental pollution, triggering remediation obligations under Ecuadorian law.[65] ChevronTexaco claims that the partnership of which Texaco's subsidiary was a part had met its remediation obligations before departing Ecuador, but that PetroEcuador had not, and that claims against ChevronTexaco ought properly to be directed at PetroEcuador.[66] Human rights activists challenge that claim, and charge ChevronTexaco with a variety of environmental and social crimes.[67] The litigation, in turn, has sparked additional direct protest on the part of residents of the Ecuadorian Amazon. The litigation against ChevronTexaco under the ATCA was dismissed in American courts, but continues in the Ecuadorian courts.[68]

Because IOCs' license to operate comes from governments and oil and gas are sometimes found in places rife with unresolved social conflict, IOCs find themselves caught up in that conflict. These stories illustrate the complexity of the stakeholder environment oil and gas companies sometimes face.[69] In each of these cases, the national government lacked the capacity to resolve contentious issues and establish enforceable regulatory standards, and the government and the IOC were seen by disaffected groups and NGOs as partners and as opponents local interests. In some

64. *A History of Texaco and Chevron in Ecuador*, TEXACO, http://www.texaco.com/sitelets/ecuador/en/history (last visited Sept. 10, 2010).

65. *See* CHEVRONTEXACO'S HISTORY OF CHEVRON IN ECUADOR, http://www.texaco.com/sitelets/ecuador/en/history/ (last visited Jan 6, 2011) (claiming that the activities undertaken by ChevronTexaco's predecessors in interest were in compliance with Ecuadorian law at the time).

66. Juan Forero, *Texaco Goes on Trial in Ecuador Pollution Case*, N.Y. TIMES, Oct. 23, 2003, *available at* http://www.nytimes.com/2003/10/23/business/texaco-goes-on-trial-in-ecuador-pollution-case.html.

67. *See, e.g.*, Kerry Kennedy, *Chevron and Cultural Genocide in Ecuador*, HUFFINGTON POST (Nov. 4, 2009, 6:39PM), http://www.huffingtonpost.com/kerry-kennedy/chevron-and-cultural-geno_b_346257.html.

68. Aguinda v. Texaco, Inc., 303 F.3d 470, 472–73 (2d Cir. 2002).

69. Of course, there are other, similar episodes as well. For a summary and analysis of some of these additional conflicts, see Matthew F. Smith & Naing Htoo, *Energy Security: Security for Whom?*, 11 YALE HUM. RTS. & DEV. L.J. 217 (2008); Bede Nwete, *Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?*, 4 GERMAN L. J. 311 (2007); Jedrez George Frynas, *Corporate Social Responsibility in the Oil and Gas Sector*, 2 J. OF WORLD ENERGY L. & BUS. 178–95 (2009); JEDRZEJ GEORGE FRYNAS, BEYOND CORPORATE SOCIAL RESPONSIBILITY: OIL MULTINATIONALS AND SOCIAL CHANGE 49–63 (2009).

cases, irresponsible development in the early project phases hardened and mobilized the opposition of external stakeholders.

III. LESSONS LEARNED: CSR AND REPUTATIONAL RISK

Some NGOs and other observers contend that these stories are fairly typical of the oil and gas industry, an industry whose efforts to behave responsibly are mostly window-dressing or "greenwashing."[70] This is consistent with the notion that IOCs, as rational maximizers of shareholder returns, will take advantage of absent or inadequate laws and regulatory standards, and will pollute and exploit local populations as long as they can avoid liability in the process. However, this view turns a blind eye to the forces that have put CSR closer to the center of business decision-making over the last couple of decades. Some IOCs within the oil and gas industry may be embracing CSR because they believe that it is wrong to leave a legacy of toxic contamination, poverty and social dislocation.[71] More likely, they may recognize that reputational harm can be just as damaging to the bottom line as legal liability, and that investments in socially responsible behavior may earn positive returns—at least, over the long run.[72]

A. Stakeholder Engagement

In order to protect the company's reputation effectively, IOCs must understand the perceptions and forces that determine that reputation. For that reason, developing more productive working relationships with external stakeholders, including governments, is now the *sine qua non* of company CSR programs.[73] All of the major IOCs now devote significant time and energy to stakeholder engagement as a key component of risk management. For example, Royal Dutch Shell, ExxonMobil, and ChevronTexaco now employ much more transparent, cooperative and systematic approaches to stakeholder engagement than they once did. ExxonMobil's corporate citizenship report recounts its commitment to use of "stakeholder

70. *See* JOSHUA KARLINER, The CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION 170–75 (1997).

71. For a summary of the literature supporting the notion that companies may be motivated to act by reasons other than the threat of punishment, see Spence, *supra* note 6, at 969–77.

72. For a description of the rise of CSR within the oil industry, see Michael J. Watts, *Righteous Oil? Human Rights, the Oil Complex, and Corporate Social Responsibility*, 30 ANN. REV. ENVTL. RESOURCES 373, 393–98 (2005).

73. For another analysis of why stakeholder engagement is central to reputation management in the oil industry, see Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 71, 116 (2008).

dialogue" in order to "improve corporate governance," along with a number of examples of how it puts that pledge into practice.[74] For several years now, stakeholder concerns have enjoyed a prominent place in the Royal Dutch Shell's Annual Sustainability Report.[75] Similarly, the consortium that built the Peru LNG project convened to or participated in more than 20,000 meetings with external stakeholders,[76] and the latter stages of the Camisea Project employed a similarly open approach to engagement.[77] These examples reflect one way in which IOCs have learned from past experiences, experiences which have brought them to a more open approach to engagement, and a greater attention to social and environmental issues.

That does not mean, however, that all conflicts are resolvable. A willingness to engage and to develop sustainably is necessary, but not sufficient, to avoid or minimize reputational and liability risks. Sometimes a company's own legacy (as with Shell in Nigeria) or its association with an unpopular government means that engagement between the company and its stakeholders will be fraught with distrust, despite the company's best efforts. Nevertheless, oil and gas projects demand the IOC's presence in communities over decades, and IOCs have no choice but to try to develop productive relationships with local opposition groups and others who distrust the company.[78] That is something that can be accomplished only over the long run, if at all.

In any event, stakeholder engagement can also help companies develop better and more strategically-sophisticated CSR programs. Consistent with the notion that CSR expenditures are driven by risk management,

74. EXXONMOBIL, 2008 CORPORATE CITIZENSHIP REPORT 8–9 (2008), *available at* http://www.socialfunds.com/shared/reports/1243310437_ExxonMobil_2008_Corp_Citizenship_Report.pdf (recounting the benefits of stakeholder engagement and projects in a united Arab Emirates in Thailand). *See also* CHEVRON, THE VALUE OF PARTNERSHIP: 2009 CORPORATE RESPONSIBILITY REPORT 16–17 (2009), *available at* http://www.chevron.com/globalissues/corporateresponsibility/2009/documents/Chevron_CR_Report_2009.pdf (describing engagement with stakeholders on environmental issues).

75. The first paragraph of the opening statement by the company's CEO states:

> Our reporting focuses on the environmental and social challenges that most affect business performance and matter most to our key stakeholders. These include local communities, non-governmental organisations, shareholders, investors, customers, governments, employees, media, academics, contractors and suppliers.

ROYAL DUTCH SHELL, *supra* note 9, at i.

76. Personal communication between author and Martin Grisolle, the Chief Financial Officer of Peru LNG.

77. Eric J. Lyman, *Peru's Camisea Project an Extreme Marriage of Drilling, Ecological Care*, HOUS. CHRON., Mar. 18, 1999, *available at* http://www.ericjlyman.com/camisea.html.

78. For an argument that that the intractability of social conflicts ought not to deter companies from continuing to do business in the developing world, see Vivek Krisnamurthy, Response, 11 YALE HUM. RTS. & DEV. L.J. 259 (2008).

many oil and gas IOCs invest their CSR funds in programs that will not only enhance their reputation, but do so in ways that could benefit the company's operations in the long run. Thus, they invest in biodiversity and other environmental protection in places where they do business[79] by doing such things as preserving sensitive habitats, reducing flaring up natural gas, and more. These efforts may be aimed at repairing reputational harm associated with past environmental damage, or forward-looking attempts to build good will in the host country. Similarly, IOCs invest in the development of a skilled and healthy local workforce[80] by promoting educational programs for locals, building local infrastructure, and more. Given the ever more stringent "local content"[81] requirements imposed on projects by host governments, it makes sense for IOCs to train locals. Moreover, the best workers are likely to seek healthy and safe work sites. Finally, IOCs invest in promoting governmental transparency[82] and in human rights and security.[83] This makes obvious sense. To the extent that governments have the capacity to protect human rights and govern in the public interest, the people of oil-rich regions will be less likely to look to IOCs to provide these services, and to ascribe to IOCs guilt by association with corrupt or ineffective governments. Effective stakeholder engagement programs enhance all of these kinds of efforts.

B. Embracing Extra-legal "Standards"

Stakeholder engagement is, in the minds of many, no substitute for the application of clear standards of behavior. In the absence of effective or sufficiently stringent governmental regulatory standards, IOCs have turned to substitutes. For example, many IOCs pledge to hold themselves to certain global minimum environmental standards, such as the ISO 14000 environmental management system,[84] or to particular environmental goals,

79. *See* EXXONMOBIL, *supra* note 70, at 29; CHEVRON, *supra* note 70, at 16–21; ROYAL DUTCH SHELL, *supra* note 9, at 15.

80. *See* EXXONMOBIL, *supra* note 70, at 35–39; CHEVRON, *supra* note 70, at 24–37; ROYAL DUTCH SHELL, *supra* note 9, at 18–21.

81. Local content requirements specify that a particular percentage of work (by contractors, subcontractors or suppliers) be allocated to local companies. *See* Richard J. Hunter, Jr., *Property Risks in International Business*, 15 CURRENTS: INT'L TRADE L. J. 23, 32 (2006).

82. *See* EXXONMOBIL, *supra* note 70, at 41; CHEVRON, *supra* note 70, at 42; ROYAL DUTCH SHELL, *supra* note 9, at 21.

83. *See* EXXONMOBIL, *supra* note 70, at 42–43; CHEVRON, *supra* note 70, at 39–40; ROYAL DUTCH SHELL, *supra* note 9, at 21–22.

84. ISO 14000 is one of several standards established by the International Organization for Standardization, a private standards setting organization for business operations. ISO 14000 establishes minimum standards for environmental management systems. For a description of ISO 14000, see *ISO*

such as the minimization or elimination of flaring of natural gas.[85] A World Bank survey of environmental performance within the oil and gas industry examined individual companies' CSR reports and codes in an attempt to understand oil and gas companies' approaches to environmental performance.[86] The Bank found widespread adoption of environmental management systems (EMSs), and adherence to voluntary environmental management standards, to supplement legal compliance:

> One clear trend apparent in all the codes is that companies increasingly use and implement EMSs. As the World Bank/IFC states in its Handbook, EMSs such as ISO 14001 are seen as mechanisms for achieving improvements in environmental performance and for supporting the trade prospects of "clean" companies. Additionally, manufacturers almost uniformly mandate compliance with any applicable and relevant environmental regulations and laws, and almost uniformly mandate the provision of a safe and healthy working environment.
>
> There is also an emerging trend among the codes of conduct analyzed that, for those companies with an EMS, the system should allow the company to incorporate environmental matters into its business decisions. ISO 14001 is the recognized international standard for EMSs.
>
> Eni uses ISO 14001 standards for EMS requirements, and Norsk Hydro uses ISO 14001 "as a guideline" to "integrate environmental objectives and targets in business planning."
>
> Some companies institutionalize EMS programs, such as Chevron-Texaco's "rigorous operational Excellent Management System for managing safety, health and environmental affairs." This system "assesses and manages risk to employees, contractors, the public and the environment from its operations and products" and employees are "held accountable for results against aggressive environmental performance targets."
>
> Similarly, Exxon Mobil's program, Operations Integrity Management System (OIMS), "ensure[s] that environmental considerations are addressed in all operations." OIMS meets "the intent and requirement of ISO 14001." Shell states that "HSE management systems are in place and our programme to certify major installations to the ISO 14001 standard is virtually complete. . .The challenge now is to implement such systems in all the acquisitions."[87]

With respect to social issues such as workplace safety and human rights within the workplace, most IOCs adhere to the International Labour

14000 Essentials, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/iso_14000_essentials (last visited Oct. 14, 2010).

85. Flaring refers to the burning of excess natural gas found that in oil production location, or an oil refinery. Flaring has fallen out of favor within the oil industry because it is wasteful and produces harmful air emissions. *See* PAUL STEVENS, OIL AND GAS DICTIONARY 85 (1988).

86. The World Bank Group Corporate Social Responsibility Practice, *Company Codes of Conduct and International Standards: An Analytical Comparison*, at 14–21 (Mar. 2004) (pt. II of II: Oil & Gas Mining).

87. *Id.* at 14–15.

Organization's (ILO) standards. The ILO began as an NGO, but came under the auspices of the United Nations after World War II.[88] It exists to promote the rights and interests of workers. Its standards cover workplace safety, hours and overtime issues, child labor, indentured or bonded labor, and more.[89] Because oil and gas resources are sometimes found in countries where exploitative practices like child labor and bonded labor occur, IOCs may face situations and choices that implicate ILO standards. Contractors and subcontractors may wish to violate ILO standards, or the failure of government to protect workers may lead workers or their representatives to look to oil and gas companies for help. Consequently, many IOCs explicitly endorse ILO standards prohibiting such practices.[90] In addition to the ILO's standards, the United Nations provides additional guidance for companies on questions relating to human rights. The U.N. Special Representative on Human Rights, John Ruggie, issues regular reports addressing the challenges businesses face in this field. Ruggie charges governments with the responsibility to *protect* human rights, and companies with the responsibility to *respect* those rights.[91]

However, governments sometimes fail to perform their duties; as we have seen, they may even violate human rights "on behalf of" companies, leaving the local populace feeling powerless and exploited. Hence the importance of developing good relationships with stakeholders and making good on promises to adhere to existing international or NGO standards, particularly in the absence of effective local government regulation.

C. *Partnership Initiatives*

A third CSR approach to managing reputational risks is for IOCs to partner with stakeholders, including governments, to develop *new* standards for addressing social and environmental issues in the absence of legal standards. Large mining and oil companies have participated in several recent collaborative attempts to address problems associated with governmental capacity, transparency and accountability. One such effort is the "Extractive Industries Transparency Initiative" (EITI), which grew out of

88. 2 EDMUND JAN OSMANCZYK, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 1109–10 (Anthony Mango ed., Routledge 3d ed. 2003).

89. International Labour Organization, Constitution, Prbl. (May 10, 1944), *available at* http://www.ilo.org/ilolex/english/constq.htm.

90. *See* Press Release, ExxonMobil, ExxonMobil Commits to Uphold Core Labor and Human Rights In Response to Shareholder Proposal (Apr. 21, 2004), *available at* http://www.iccr.org/news/press_releases/2004/pr_exxon042704.htm.

91. U.N. Special Representative of the Secretary General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 6, U.N. DOC. A/HRC/4/035 (Feb. 9, 2007).

an effort on the part of the World Bank, ExxonMobil and others to ensure that money devoted to social programs and community investment in connection with and ExxonMobil project in Chad found its way to its intended recipients, rather than into the pockets of corrupt officials.[92] More generally, the objective of EITI is to promote good governance in countries where extractive industries do business. Here are the EITI Principles, agreed by the program's participants in June 2003:

> We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.
>
> We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.
>
> We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent.
>
> We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.
>
> We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.
>
> We recognise that achievement of greater transparency must be set in the context of respect for contracts and laws.
>
> We recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring.
>
> We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.
>
> We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business,
>
> We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.
>
> We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country.
>
> In seeking solutions, we believe that all stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral or-

92. Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT'L ECON. L. 1, 40–46 (2005). For more on the EITI, see *id.* at 48–51; Genasci, *supra* note 28, at 51–55.

ganisations, financial organisations, investors, and non-governmental organisations.[93]

As you can see from this list, programs like EITI aim to help governments develop both the will and the capacity to protect human rights, provide security and public services, and be accountable to their people.[94]

Another recent partnership initiative addresses more directly the kinds of security issues presented by ExxonMobil's troubles in Indonesia is the Voluntary Principles on Security and Human Rights (VPSHR).[95] These are a set of non-binding principles developed in 2000 by a handful of governments and a larger number of companies and NGOs[96] to address the question of how to balance safety needs while respecting human rights and fundamental freedoms. The VPSHR include the following principles:

> **Acknowledging** that security is a fundamental need, shared by individuals, communities, businesses, and governments alike, and acknowledging the difficult security issues faced by Companies operating globally, we recognize that security and respect for human rights can and should be consistent;
>
> **Understanding** that governments have the primary responsibility to promote and protect human rights and that all parties to a conflict are obliged to observe applicable international humanitarian law, we recognize that we share the common goal of promoting respect for human rights, particularly those set forth in the Universal Declaration of Human Rights, and international humanitarian law;
>
> **Emphasizing** the importance of safeguarding the integrity of company personnel and property, Companies recognize a commitment to act in a manner consistent with the laws of the countries within which they are present, to be mindful of the highest applicable international standards, and to promote the observance of applicable international law enforcement principles (e.g., the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), particularly with regard to the use of force;
>
> **Taking** note of the effect that Companies' activities may have on local communities, we recognize the value of engaging with civil society and host and home governments to contribute to the welfare of the local

93. *Extractive Industries Transparency Initiative Sourcebook*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, 8 (Mar. 2005), http://eiti.org/files/document/socurcebookmarch05.pdf.

94. For the list of supporters of EITI, see *EITI Fact Sheet*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, 3 (July 19, 2010), http://eiti.org/files/2010-07-19%20EITI%20Fact%20Sheet.pdf.

95. For more on the VPSHR, see Bennett Freeman, Maria B. Pica, & Christopher N. Camponovo, *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423, 425–27 (2001).

96. The oil and gas companies include BP, Chevron, ConocoPhillips, ExxonMobil, Marathon Oil, Occidental Petroleum Corporation, Shell, StatoilHydro, and Talisman Energy. The NGOs include Amnesty International, Oxfam, and Human Rights Watch. *Fact Sheet*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS (June 2010), http://www.voluntaryprinciples.org/files/VPs_FactSheet_June2010_US.pdf.

> community while mitigating any potential for conflict where possible . . .[97]

Initiatives like VPSHR and EITI bring businesses together with their stakeholders to help build good governance structures, enhance or repair company reputations, improve workforce conditions in the host country, and build more productive (read: more transparent, less corrupt) relationships between the firms and host governments. Backers of the EITI hope that the required record-keeping that accompanies the certification will help hold countries accountable to their residents, and allow those residents who live in poverty to see some of the benefits from their country's mineral wealth. Countries must sign up voluntarily, and once a country has signed up as a candidate country, it has two years to establish itself as "fully compliant."[98] Nigeria and Peru are "candidate countries" under the EITI; Indonesia is not.[99]

Nor are EITI and VPSHR the only partnerships of this kind. There are countless others that go beyond the oil and gas industry. On the subject of environmental sustainability, for example, there are groups like the Global Environmental Management Initiative (GEMI),[100] the Initiative for Global Environmental Leadership (IGEL),[101] and Ceres,[102] all of whose missions are to advance sustainable business practices. Whether initiatives like EITI, VPSHR and their environmental counterparts will achieve their desired long-term goals remains to be seen. Nevertheless, they reflect the efforts oil and gas companies are putting into CSR, and the assumption that the company's reputation is an important asset.

IV. CONCLUSION

The work of oil and gas companies is as socially and politically complex as it is technically complex. Oil and gas companies serve a strong and constant worldwide demand for their products. At the same time, IOCs

97. *The Principles: Introduction*, VOLUNTARY PRINCIPLES ON SEC. AND HUMAN RIGHTS, http://www.voluntaryprinciples.org/principles/introduction (last visited Sept. 15, 2010).

98. Mara V.J. Senn & Rachel Frankel, *Firms can Avoid EITI, FCPA Pitfalls*, OIL & GAS J., July 21, 2008; Robert DiNardo, *Transparency Initiative Gathers Steam in Oslo*, PLATTS OILGRAM NEWS, Oct. 23, 2006, at 1. *See also* Murray Armstrong, *Window on the World: Transparency Rules for Developing Countries Rich in Natural Resources Need Global Application*, GUARDIAN, June 8, 2005, at 13.

99. *Candidate Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://eiti.org/candidatecountries (last visited Sept. 10, 2010).

100. For more about GEMI, see *About GEMI*, GLOBAL ENVTL. MGMT. INITIATIVE, http://www.gemi.org/AboutGEMI.aspx (last visited Sept. 10, 2010).

101. For more about IGEL, see *Mission and Goals*, INITIATIVE FOR GLOBAL ENVTL. LEADERSHIP, http://environment.wharton.upenn.edu/mission_goals.html (last visited Sept. 10, 2010).

102. For more about Ceres, see *About Ceres*, CERES, http://www.ceres.org/Page.aspx?pid=415 (last visited Sept. 10, 2010).

must depend, at times, upon inefficient, unreliable or corrupt governments for their legal licenses to do business. IOCs often work in the shadow of intractable social conflicts and/or their own legacy of insufficient attention to the needs and concerns of society. The development of better and more sophisticated CSR programs, fed and nurtured by a more transparent, receptive approach to stakeholder engagement, represents their response to the changing expectations of governments, NGOs and neighbors over the last several decades. This is, it seems, a logical response to the absence of effective government regulation and legal dispute resolution mechanisms.

Some, however, remain dubious about the ability of CSR to fill the regulatory and legal void. Former Clinton administration official Robert Reich argues that CSR is actually harmful because it removes or minimizes pressure on governments to enact laws and undertake actions that maximize social welfare.[103] In many places, it is certainly true that the worse things get for people, the more pressure exists for government to act. If things get bad enough and government remains ineffective, that pressure might provoke a change in government, whether peaceful or violent. Some would argue, however, that the assumption that the system will eventually respond to this kind of pressure is a naïve and/or uniquely Western one. There are parts of the world where governments have never been very good at responding to popular wishes, or where society does not expect government to be the only provider of social welfare. In such contexts, both governments and society may demand that companies step into the breach.

In the oil and gas sector, CSR activities represent an attempt to fill that void. It is no secret that many oil-rich nations have been poorly governed, and that IOCs have extracted valuable resources from such countries in the past, while paying inadequate attention to the attendant environmental and social costs. It is also true that IOCs have paid reputational costs for that lack of attention. It appears that most investor-owned oil and gas companies have reached the conclusion that their long-term best interests will be served by paying greater attention to the needs and wants of external stakeholders, and to their environmental and social legacy in the places they do business. The last two decades have seen these companies make great strides toward doing business in a more sustainable and socially responsible way. That said, the business of exploring for and producing oil and gas will always entail environmental costs and social challenges. The Deepwater Horizon disaster is a cruel reminder of that fact. Therefore, govern-

103. Robert B. Reich, *The Case Against Corporate Social Responsibility*, 3–5, 38–54 (Goldman Sch. Of Pub. Policy, Working Paper No. GSPP08-003, 2008) *available at* http://ssrn.com/abstract=1213129.

ments, NGOs and people will continue to pressure oil an d gas companies to respond to the evolving social (as well as legal) expectations. Companies ought to respond to that pressure; if they do not, they put their reputations, and therefore their future license to operate, at risk.