BUSINESS AND HUMAN RIGHTS

Introduction

The recognition that business and human rights were inextricably intertwined continued to grow throughout the year and moved beyond a simple debate over the need to adopt codes of conduct. Those companies that previously stated a commitment to human rights continued to develop programs to implement their policies. As in previous years, the apparel and footwear industry and the energy industry were the focus of scrutiny because of their long-standing problems.

However, the issue of business and human rights moved beyond the sole focus on corporations. Increasingly, governments—either individually or through multilateral institutions—became part of the effort to ensure that human rights were not sidelined by commercial considerations. Through court cases, scrutiny over the corrupting influence of oil revenues, or because of multilateral institutions’ efforts to address these issues, governments emerged as a crucial actor in the debate over business and human rights.

The Apparel and Footwear Industry

As the U.S. and European apparel and footwear industry continued to develop and implement monitoring and compliance programs—principally through the development of the White House-sponsored Fair Labor Association (FLA), the Council on Economic Priorities (CEP) Social Accountability 8000 program (SA-8000), and the new Workers’ Rights Consortium (WRC)—to ensure the rights of workers in the industry were respected throughout the world, controversies emerged about the effectiveness of the various initiatives. At the same time, litigation emerged as another method of ensuring corporate respect for workers’ rights.

Controversy on College Campuses

Throughout the year, university students in the United States stepped up efforts to ensure that their schools did not sanction abusive labor practices through their apparel licensing agreements. Unlike previous years, however, the students focused their efforts on two key demands: that universities withdraw from the FLA, a monitoring body made up of corporations and human rights organizations, and instead join the newly formed Workers Rights Consortium (WRC), a monitoring body made up of student organizations, university officials, and labor organizations. These demands led to a heated debate over the quality of various voluntary monitoring organizations and was best epitomized by the actions of Nike in 2000.

On April 24, Phil Knight, Nike’s chairman and chief executive officer, announced that he would not donate any more money to his alma mater, the University of Oregon, because the school had joined the WRC instead of the FLA, where Nike is a founding member. Previously, Knight donated approximately U.S. $50 million to the university and planned to donate millions more until the university joined the WRC. A few days later, on April 28, Nike terminated negotiations with the University of Michigan over the renewal of
a six year multimillion dollar licensing agreement because of the university’s support for the WRC.

On July 2, university professors stepped into the fray. Under the auspices of the Academic Consortium on International Trade (ACIT), more than 200 scholars wrote an open letter to universities stating concerns about the way decisions to join either the FLA or the WRC were made by universities and suggested that both initiatives may actually be detrimental to the cause of workers' rights. ACIT also urged universities to consider other initiatives such as SA-8000, to undertake more research and consultation before joining any particular monitoring group, and warned that raising wages of workers further may have detrimental effects because “the net result would be shifts in employment that will worsen the collective welfare of the very workers in poor countries who are supposed to be helped” by these initiatives. The FLA criticized ACIT, arguing that it had unfairly compared the FLA to the WRC. The WRC attributed ACIT’s criticism to an effort to undermine the credibility of these initiatives since ACIT was not part of the decision-making process. While it was too early to assess whether any of these initiatives was completely adequate since none of them had been fully implemented, the controversies surrounding factory monitoring strongly suggested that these internecine disputes would continue in the absence of enforceable legal standards requiring corporations to respect workers’ rights.

**Litigation Against Apparel Companies**

On June 2, the U.S. Ninth Circuit Court of Appeals overturned a lower court decision and ruled that twenty-three garment workers in Saipan could anonymously sue garment manufacturers because disclosing their identities could subject them to retaliation by employers, the Chinese government, and third-party “recruiting companies” since they had paid agents recruiting fees to migrate from China in order to work in Saipan; and allowed the case to be heard in Hawaii rather than in Saipan. The workers had filed a class action suit against twenty-two companies for violations of the Fair Labor Standards Act and accused apparel companies of conspiracy under the Racketeering Influenced Corrupt Organizations Act (RICO). Earlier, on March 28, eight defendants in the lawsuit: Calvin Klein Inc., Jones Apparel Group, Liz Claiborne Inc., The May Department Stores Company, Oshkosh B’Gosh Inc., Sears Roebuck and Company, Tommy Hilfiger USA Inc., and Warnaco Inc. agreed to a U.S. $5.7 million settlement with the plaintiffs that would be used to fund a rigorous independent monitoring program to monitor working conditions in Saipan. Previously, in 1999, Bryland L.P., Chadwick’s of Boston, Cutter & Buck, The Dress Barn, Donna Karan Inc., Gymboree Corp., J. Crew Inc., Nordstrom Inc., Phillips Van-Heusen, and Polo Ralph Lauren also settled with the plaintiffs in exchange for funding an independent monitoring program. At this writing, Abercrombie & Fitch Inc., Associated Merchandising Corp., Brooks Brothers Inc., Gap Inc., J.C. Penney Co., Lane Bryant Inc., Levi-Strauss Inc., the Limited Inc., Talbots Inc., and Woolrich Inc. were among the companies that had yet to settle with the plaintiffs. Barring a comprehensive settlement, the trial was expected to begin in February 2001.

**The Energy Industry**

Oil prices rose sharply in 2000 to levels more than three times that of 1997-98 largely due to an imbalance between global supply and demand. As energy companies and energy exporting countries profited from the price rise, the energy industry increasingly recognized that these large revenue streams could negatively
impact prospects for good governance, fiscal and political accountability, and human rights. In particular, large revenue streams generated by oil development provided an incentive for corrupt governments to subvert democratic processes and limit freedom of expression in order to evade public accountability. Two examples of this phenomenon were developments in Kazakhstan and Angola.

Kazakhstan

A corruption scandal involving President Nursultan Nazarbayev and his associates, coupled with a deteriorating human rights situation, strongly suggested that Nazarbayev was seeking to consolidate political and economic control over this oil-rich country—a key player in the development of Caspian pipelines—at the expense of good governance and human rights.

For example, on June 12, 2000, the United States Department of Justice (DOJ) requested information from the Swiss authorities regarding the “alleged use of U.S. banks to funnel funds belonging to certain oil companies through Swiss bank accounts and shell companies in Switzerland and the British Virgin Islands for ultimate transfer to present and former high-ranking officials of Kazakhstan,” in order to determine whether these transactions violated the Foreign Corrupt Practices Act and the Racketeer Influenced and Corrupt Organizations Act (RICO) as well as U.S. money laundering and extortion statutes.

The DOJ cited transactions totaling U.S. $114,822,577 from March 1997 to September 1998, which were transferred from several international oil companies including Amoco Kazakhstan Petroleum Company, Amoco Kazakhstan (CPC) Inc. (both companies are now part of BP), Phillips Petroleum Kazakhstan, and Mobil Oil Corporation (now part of ExxonMobil), to James H. Giffen, a close associate of Nazarbayev and financial advisor to the Kazakh government. Giffen subsequently transferred U.S. $55,869,000 of these funds to accounts belonging to Akezhan Kazhegeldin, a former prime minister of Kazakhstan, Nurlan Balgimbaiev, another former prime minister and current president of the powerful state-owned KazakhOil company, and President Nursultan Nazarbayev, or their families. At this writing, Giffen, as a U.S. citizen and the conduit for these transfers, was the primary focus of the DOJ investigation. The DOJ had not determined whether any of the U.S. oil companies acted illegally.

During the period that these transactions took place (March 1997 to September 1998), the Nazarbayev government took action to undermine freedom of speech, assembly, and association in Kazakhstan to prevent independent media reporting of such activities, and to deny Kazakh citizens the right to express their opinions and change their government.

The government used six main methods to harass the independent media: it filed criminal charges of engaging in “criminal speech” against individuals and publications; confiscated publications for alleged violations of the Law on the Mass Media; bankrupted publications through the awarding of large libel damages to government officials; disrupted publications’ activities through harassment by the tax inspectorate or the customs authorities, and by denying access to state printing and distribution networks; and through informal and formal censorship of reporters.

One particularly illustrative case concerned the independent newspaper Dat. On September 10, 1998 an Almaty district court found Dat guilty of criminal libel and ordered to pay 35 million tenge (approximately U.S. $457,000) to the head of the state-funded Kazakhstan-1 television channel. Dat routinely published articles on government corruption and in this case, reprinted an account of a July 7, 1997 press conference
in which a former employee of Kazakhstan-1 claimed that the station misused government funds. After the decision, police seized Dat’s computer equipment and other property, and froze its bank accounts. Five days after the court’s decision, Phillips Petroleum Kazakhstan Ltd. transferred U.S. $30,000,000 into a Swiss account for its legitimate participation in the Caspian Offshore Oil Consortium. From these funds, U.S. $20,519,000 was then transferred to Giffen, who then transferred the funds to accounts in the British Virgin Islands belonging to companies registered to Nazarbayev and Balgimbaiev, according to the DOJ. The juxtaposition of these two events—the government’s closing of Dat and the transactions involving Nazarbayev and Balgimbaiev—underscored the linkages between human rights and corruption.

The electoral process was also undermined. In May 1998, the Kazakh parliament adopted amendments to the Law on Elections requiring that potential candidates for elected office submit documents to the Central Electoral Commission certifying their mental health and barred from election any candidates who had been found guilty by a court of any administrative violations or of corruption. On October 7, 1998, less than a month after the last financial transaction, Nazarbayev, then fifty-eight, signed constitutional amendments that eliminated the sixty-five year age limit on officeholders, increased the president’s term from five to seven years, and removed the 50 percent minimum public participation threshold for presidential elections that were part of the 1995 constitution. On October 8, 1998, Nazarbayev announced that presidential elections would be held on January 10, 1999—two years earlier than scheduled. Opposition candidates did not fare well. Three were barred from running, including former prime minister Kazhegeldin, because they had either violated administrative provisions regulating public meetings or participated in unregistered public organizations—laws that severely curtailed freedom of assembly and association. Kazhegeldin had left the government in 1997 after a dispute with Nazarbayev and emerged as the leading opposition political figure. Ultimately, Nazarbayev won the election with more than 79 percent of the vote and secured the presidency until at least 2006. However, the Organization for Security and Cooperation in Europe (OSCE) refused to send observers because the election so clearly fell far short of international standards for free and fair elections.

On July 17, 2000, Swiss authorities confirmed that they had frozen accounts connected with the DOJ and their own investigations. The Swiss investigation began in 1999 following a request by the Kazakh government to seize the accounts of former prime minister Kazhegeldin, whom it accused of tax evasion, money laundering, and abuse of office. When investigating the allegations, the Swiss found far greater sums of money held in accounts controlled by Nazarbayev. They froze those accounts and identified an account controlled by Kazhegeldin’s son-in-law that held approximately U.S. $6 million. Kazhegeldin said that he had originally tried to return the money to Nazarbayev, but could not, and left it undisturbed. Kazakh government officials denied that they held foreign bank accounts altogether and denounced reports that such accounts had been identified and frozen by U.S. and Swiss authorities.

These requests underscored the Kazakh government’s hostility to political opponents and its ongoing efforts to harass the most visible opposition politician, Kazhegeldin, in particular. Kazakh authorities also requested Kazhegeldin’s arrest and extradition to Kazakhstan to face money laundering and abuse of office charges while he was traveling through Moscow and Italy in September 1999 and July 2000, respectively. On both occasions, Kazhegeldin was briefly detained, but released after strong protests by the international community because the charges were believed to be politically motivated and improperly used the
international police system (INTERPOL). Nevertheless, questions remained about the U.S. $6 million account linked to Kazhegeldin.

In addition to pursuing political opponents abroad, Nazarbayev signed a law on July 21 to grant himself lifetime powers, including rights to remain on the powerful Kazakh Security Council, to head the parliamentary assembly of Kazakh peoples, to make national addresses on television and before parliament, to attend government meetings, to advise any future president on policy matters, and to immunity from prosecution. Opposition parliamentarians strongly criticized the law and suggested that Nazarbayev was moving towards making himself president-for-life, like his counterpart Sapurmurad Niyazov in gas-rich Turkmenistan.

**Angola**

On April 3, 2000, as part of a larger agreement on economic reform, the International Monetary Fund (IMF) and the Angolan government reached an agreement to monitor oil revenues, known as the “Oil Diagnostic,” that would be supervised by the World Bank and implemented by KPMG, an international accounting firm that also had the Angolan central bank as a client. It was an effort by the international financial institutions to assess the percentage of government oil revenues that were deposited in the Central Bank. The Angolan budget had previously been opaque, raising concerns among multilateral financial institutions, NGOs, companies, and governments that oil revenues were being used secretly to finance arms purchases and that future oil production was mortgaged for immediate oil-backed loans. Some oil revenues bypassed the Ministry of Finance and the Central Bank and went directly to the state-owned Sociedade Nacional de Combustiveis de Angola (Sonangol) company, or to the Presidency to procure weapons. These payments being secret, they also sparked allegations of official corruption. More such allegations emerged in June 2000 when André Tarallo, former Africa director of France’s Elf Aquitaine (now TotalFina-Elf), testified to French authorities investigating corruption charges against the company that the Elf Corporation had paid large sums (up to U.S. $0.40/barrel) to African leaders, including Angolan President José Eduardo dos Santos, primarily through a slush fund the company held in Liechtenstein. Dos Santos and TotalFina-Elf vigorously denied the allegations.

In this context, Angolan government attacks on the rights to freedom of expression and association undermined these and other rights and targeted journalists’ efforts to ensure governmental accountability. Gustavo Costa, of the Portuguese-language newspaper Expresso, for example, was charged with defamation and slander for writing about cabinet corruption in April 1999, and on December 24, 1999 received a suspended prison sentence, was fined U.S. $508 and ordered to pay U.S. $2,000 compensation for “defaming the Chief of the Civil Office of the President, Jose Leitao.” Costa’s trial was closed to the public and the media, and he complained that he was pressured to reveal his sources. His lawyer lodged an appeal to the Supreme Court, but it had yet to be heard.

In September 2000, the Angolan government introduced a new press law that severely restricted freedom of expression. It prescribed sentences of two to eight years of imprisonment for any journalist who impugns the president’s honor or reputation; allows the authorities the right to determine who can work as a journalist; empowers them to seize or ban publications, including foreign publications, at their discretion; and allows the arrest and detention of journalists for thirty days before charges are filed. The law also removed truth as
a defense against libel involving the president or office of the president, enabling the authorities to imprison journalists who write accurate reports if these are deemed to impugn the president’s honor or reputation. The law was reportedly intended to curtail increased domestic press questioning of the government following the publication of a report by a U.K.-based NGO, Global Witness, exposing the links between oil and high levels of government corruption involving President Dos Santos and his associates.

Despite such censorship, however, public dissatisfaction over government mismanagement grew in Angola; and the Economist Intelligence Unit (EIU), reported in August 2000 that “public criticism of the government has grown noticeably, particularly focusing on official corruption.... The resurgent peace movement has also been active in articulating growing exasperation with the country’s political leadership over the impression that the country’s enormous, and growing, oil wealth has failed to produce any tangible benefits to the general population.”

The IMF/World Bank Oil Diagnostic, scheduled to run from September 2000 until late 2002, was a partial response to questions about the government’s use—or misuse—of oil revenues. The success of the oil diagnostic would hinge on the quality of information provided to KPMG by the government and informed third-parties, such as the international oil companies. Yet, several weaknesses limited the agreement’s effectiveness. Rather than agree to a full-scale audit of its oil revenues, Angola’s government agreed to a basic agreement that would only compare projected oil revenues with the actual amount of money deposited in the central bank. The oil diagnostic would not have the capacity to trace the flow of funds out of the central bank, nor to investigate the use of any funds that were generated by oil revenues that were not deposited in the central bank, such as those previously funnelled through the Presidency or Sonangol for covert arms purchases. Further, the terms of reference and the reports of the oil diagnostic—a baseline report conducted in September, followed by quarterly updates, and a final report in late 2002—were not to be made publicly available, despite the agreement’s purported aim to increase transparency and government accountability.

The Role of the International Community

Two key developments within multilateral institutions highlighted a growing awareness that these institutions must address business and human rights: the launch of the U.N. Global Compact and a decision by the European Bank for Reconstruction and Development (EBRD) to suspend public sector lending to Turkmenistan because of its refusal to move to a multiparty democracy. These efforts sent a strong message that the multilateral institutions supported corporate responsibility and good governance, but they did not show that these institutions would consistently apply strong standards to ensure adherence. At the same time, U.S. courts began to address the parameters of corporate liability for human rights violations.

United Nations Global Compact

On July 26, U.N. Secretary-General Kofi Annan convened a meeting with the heads of U.N. agencies, corporations, labor unions, and NGOs to launch the U.N. Global Compact, a voluntary initiative to promote corporate responsibility and cooperation between companies and the U.N. Comprising a set of nine principles that supporting corporations were required to endorse, coupled with minimal reporting requirements, and supporting guidelines that were intended to ensure that corporations “complicit” in human
rights violations would not be allowed to partner with the U.N. The Global Compact was hailed by the U.N. as a major step forward in pushing corporations to respect human rights, including labor rights, and environmental protection, and to promote “partnerships” between the U.N., corporations, labor unions, and NGOs. However, it was criticized by NGOs, including those that participated in the July 26 meeting, because it did not contain any independent monitoring mechanisms to assess the conduct of corporations; the guidelines were too vague and did not adequately ensure that companies complicit in human rights violations would be barred from partnership with the U.N.; and that the weaknesses in the compact could enable companies to garner favorable publicity, or “bluwash” their image by securing the use of the U.N. logo, without having to adequately improve their human rights, labor rights, or environmental performance. In addition to highlighting these shortcomings, Human Rights Watch called on the U.N. to begin the process of developing binding standards on corporations, rather than solely relying on the voluntary Global Compact.

European Bank for Reconstruction and Development and Turkmenistan

In a stunning rebuke of the dictatorship under Turkmenistan’s president-for-life, Sapurmurad Niyazov, the European Bank for Reconstruction and Development (EBRD) indefinitely suspended lending to the government on April 19 while continuing private sector lending. The EBRD justified its decision because of the government’s failure to implement economic reforms and because “[t]here has been no progress towards a pluralist or democratic political system, as President Niyazov retains a firm grip on power, not properly balanced by the country’s legislature or judiciary. Most disturbingly, President Niyazov was made President for life in December 1999.”

Events leading up to the EBRD decision were almost comical. Earlier in April, an EBRD delegation tried to meet with Niyazov to discuss economic and political reforms and future lending by the bank. Niyazov rebuffed their requests and then told the media that, “[t]he issue put by the European Bank is as follows: You have to increase the price of petrol and do things as they are done in Europe, and the second issue is to establish a multiparty system in your country and that is one of our conditions. I said that they were bank clerks. I have not received them. I said that I did not want to discuss such things with them.” Following this snub, Charles Frank, then acting president of the EBRD, announced that “[t]he President’s refusal even to discuss the question of political reform suggests that the Government of Turkmenistan is not committed to one of the basic principles upon which the EBRD was founded,” and promptly cut off public sector lending. While the decision sent a clear message that the EBRD could act strongly on the issue of multiparty democracy, it remained to be seen whether the bank would take the same approach with other client governments that were hostile to democracy, such as Azerbaijan and Kazakhstan.

Doe v. Unocal

On August 31, U.S. District Judge Ronald Lew ruled on a summary judgement motion in the closely watched Doe v. Unocal case that was originally filed in 1997. The plaintiffs argued that Unocal, a California-based oil company, was liable under the Alien Tort Claims Act (ATCA) for human rights violations, including forced relocations, forced labor, rape, and torture “perpetrated by the Burmese military in furtherance and for the benefit of the pipeline.” This arose from the company’s participation in the joint-venture that constructed and operated the Yadana gas pipeline that runs from Burma to Thailand. Security
for the project was provided by the Burmese military, who committed human rights abuses while fulfilling their security role. Although Judge Lew found that the “evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice,” he dismissed the suit because of insufficient evidence that Unocal had actively participated in or conspired with the Burmese military to commit human rights violations, and because Unocal’s joint-venture with the Burmese government did not make it legally liable for human rights violations committed by the Burmese military. At this writing, the plaintiffs planned to appeal the decision to the Ninth Circuit Court of Appeals. The other joint-venture partners: Total of France (now TotalFina-Elf), the Myanma Oil and Gas Enterprise, and the Petroleum Authority of Thailand, were not defendants in this case because the court ruled that it did not have jurisdiction over foreign companies.