Choosing Values: Public–Private Relationships in a Global Economy

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I. INTRODUCTION

This article presents a case study that engages students on the legal and, more substantially, ethical issues of doing business abroad. More, specifically, it explores the scenario of direct foreign investment by an American company in a less developed country. This development imbalance necessarily implicates issues of ethical relativism and home–host country standards. Students are given a fact scenario and are asked to play the role of a manager who must decide whether to maintain the company’s presence in the foreign country (Malaysia). The students are given five options to consider and present to the board of directors. The five options raise issues relating to corruption and the Foreign Corrupt Practices Act, theory of relative development, business and ethical calculations, environmental ethics, sustainability, and the choice between short-termism and long-term strategic decision making.

The educational objectives of the case study include (1) examining the fusion of good business with good business ethics; (2) using the law strategically, to advance the application of ethical decision making that broadens the

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1In 2010, a version of this case study won the International Case Competition Award sponsored by the University of Indiana’s Center for Business Education and Research (CIBER) and the Academy of Legal Studies in Business (ALSB).

2This theory poses that less developed countries and emerging economies should not be subject to the same (high) standards (health, safety, environmental standards) as developed countries. But, these standards should be upgraded as a country reaches higher levels of development.

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benefit–cost analysis at the time of the decision and that takes a longer-term perspective of the consequences of a decision; and (3) simulating real-world decision making in order to enhance skill sets relating to stakeholder analysis and ethical decision making.

The students are introduced to the concepts of ethical decision making, including the use of stakeholder analysis (Appendix A), the use of law to create a competitive advantage and to create value and the advantage of long-term strategy over short-termism (quest for the immediate enhancement of shareholder value). Many other concepts and issues can be drawn from the case study through student research. These additional concepts include regulatory uncertainty, strategic alliances, strategic use of nongovernmental agencies, expanding core competencies, doing business in developing countries, and the problem of corruption (Appendix B).

Generally, the analysis of benefits and costs from a long-term perspective allows the student to select an option that is both ethical and in the long-term interest of the company and its shareholders. The case study also aims at developing a student’s analytical skills, ethical issue spotting abilities, and invites additional research to develop innovative solutions to the matrix of factors, facts, and interests presented by the case.

Part II presents the case and the fact scenario upon which the student exercises will be focused. Part III provides the questions and materials, and exercises for student work and class discussions. These materials are to be used in responding to the strategic and ethical decision-making problem presented in Part III. Part IV explains how students can use the ethical toolkit provided in Appendix A to spot the issues presented by the case and to arrive at an appropriate decision from the perspectives of practical and ethical decision making. The appendices provide a number of student and instructor materials that assist in responding to the dilemmas posed by the case study as well as material to be used in class discussions.

II. CASE PRESENTATION: TRANS-AMERICAN PAPER COMPANY

Trans-American Paper Company (TAPC) was founded in 1952 in Appleton, Wisconsin, as a merger of several small pulp processing and paper companies in the American Midwest. Over time it has further integrated other firms to become the third largest paper and paper products manufacturer and distributor in the world, operating in forty-two countries.
with worldwide net revenues of $23 billion. Beginning in 2010, the firm has experienced reduced or steady demand, sales, and profits as a result of the following factors:

- Significant increase in transportation costs in all modes except transocean shipping.
- Growing reliance on digital electronic communication by businesses and consumers.
- Competition with energy producers for woodchip and other biomass for energy generation.
- Growing scarcity of fresh water sources.
- Increasing environmental regulation and taxing of air, water, and landfill pollution.
- Shrinking availability of land for managed forests as competing uses drive up land prices.
- Chronic global overcapacity in the paper-making industry.

A. Making Paper and the Environment

The paper manufacturing process begins with the harvest of logs and wood chips for processing into a fibrous web of pulp, either through a mechanical process that produces ground-wood pulp or through a chemical process that produces chemical pulp; these types of pulp have different applications. This stage of processing requires significant amounts of water, to dilute the pulp mixture, and of energy, to force water out by pressing air and heat through the mixture to remove the water. Next the pulp is dyed or bleached, and various biological agents and chemicals are added to produce special finishes and product qualities. Finally, the treated pulp is applied to a mesh screen, the excess fluid flowing through and leaving a web-like sheet of fiber, which, when dried, becomes paper. The drying is accomplished through pressing or steam-heated dryers.

Despite serious conventional efforts at conservation and sustainability, the paper industry remains a major consumer of natural resources. The obvious need for forest wood can be managed sustainably. Pulp processing, however, requires high fresh water and energy consumption. The industry is a serious source of toxic chemical waste, including solvents and chlorine to bleach and smooth pulp; biocides to prevent bacterial growth on this organic product; and carbon dioxide, nitrous oxides, sulphur dioxides, and airborne particulates, all of which pose environmental hazards to air and water. Finally,
while paper pulp can be recycled several times, and while about 25 percent of Trans-America’s new domestic production is based on recycled fibers, it is inevitable that expended recycled paper sludge ends up in landfills or in waterways.

B. Globalization

Throughout the 1970s and 1980s and increasing at a more rapid pace in the early 1990s, TACP increased its operations outside of the United States, seeking sites that combined availability of wood and other biomass, abundant and clean water, and proximity to growing markets. In addition, TACP’s U.S. forest properties diminished significantly as competing uses increased the price of timberland. Moreover, increasing standards of education, economic activity, and disposable income in the less developed world fueled demand for paper products, including flat paper for newsprint, conventional paper products, and packaging materials for global manufacturers, many of which have relocated from the more developed world. Today more than half of TACP’s net revenues derive from non-U.S. facilities.

C. The New Mission Statement

In 2008, TAPC executives watched with interest while the global political environment focused on governmental corruption by multinational corporations. As an American multinational, TAPC had long been subject to the U.S. Foreign Corrupt Practices Act; however, the law had not been widely enforced. With governments of competing European paper manufacturers signing onto multinational anticorruption conventions, the TAPC board of directors directed management to reiterate its commitment to responsible actions wherever it operated. Specifically, it sent a strongly worded memo to all employees, threatening discipline or job loss for violations of its anti-bribery policy, and referencing the relevant provisions in its operation and procedures manual. It also ran checks on the reliability of its internal controls designed to detect corruption.

At the same time, beginning in 2006, the nongovernmental organizations (NGOs) dedicated to forests and wildlife were gaining increased political strength and credibility. Much of the public attention in the press at that time focused on the deforestation of the Amazon River basin in Brazil and Peru. TAPC has never operated in that region of the world, but it does operate in forests throughout the world, and many of its processes require abundant supplies of clean water. It was only a matter of time until public
pressure would reach the paper industry. The board decided to embrace voluntary standards and third-party certification, such as ISO 14001 and the programs of the Forest Stewardship Council. It has obtained third-party certification for almost all of its U.S. operations and many of its newer foreign operations.

More recently, the TAPC board of directors instituted a company-wide process to develop a new mission plan, to identify key values, and to identify challenges and opportunities for the firm in the changing global economic, political, and social environment. While the mandate to undertake the process came from top management and the board of directors, the well-structured process itself commenced at the lower parts of the company. It started with a survey involving more than one thousand employees, from all job classifications and levels, as well as the use of focus groups and planning sessions over many months. One of the outcomes of the process that surprised the board was the prominence of environmental concerns among employees in the lower and middle levels of management, from crew chief supervisors to college-educated foresters to industrial engineers on site in paper plants. The message came through, in short, that they wanted to be proud of where they worked. They wanted the company to operate in a way that was good for society and its employees, shareholders, and the environment. The general sentiment of these employees was that they were proud to work at TAPC and hoped that would always be the case.


As a result of this process, the board of directors built a new mission statement and statement of values for the firm. The mission statement now includes the following:

- The overriding objective of Trans-America Paper Company is to create value, increase value, and sustain value for shareholders. This objective is to be realized in superior long-term profits and improving equity value over the long term.\(^5\) Corporate directors and managers are responsible for developing and implementing strategy to meet this objective.

- To ensure sustainable long-term returns, the corporation shall provide accurate and timely disclosure of environmental risks and opportunities through adoption of policies or objectives such as those associated with climate change.\(^6\)

- The corporation shall adopt maximum progressive practices toward the elimination of human rights violations in all countries or environments in which the company operates.

- The corporation shall strive to measure, disclose, and be accountable to internal and external stakeholders for organizational performance toward the goal of sustainable development.

- In emerging markets, a level of performance above minimum adherence to the law shall be expected with emphasis on practices that promote sustainable economic, environmental, social, and governance development.\(^7\)

In addition, the company started an office of global strategic management and an office of ethics and compliance and charged both to closely collaborate so that the company’s global strategic direction is developed and

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7. See, e.g., *id.* at 32 (“Adopt maximum progressive practices toward the elimination of human rights violations.”).
reviewed within a legal and ethical framework. The two offices, headed by C-level officers, report directly to an executive vice president (EVP) in charge of compliance and ethics.

III. CURRENT STRATEGIC DECISION: THE PROBLEM

Trans-America operates a plant in Sabah, Malaysia, that produces a wide range of paper products, employing both ground-wood and chemical methods of pulp production and numerous processes for creating many different product finishes. The plant was located in Sabah in 1989 due to the lower cost of labor, minimal regulatory controls, and management’s anticipation of the growing demand for paper products in that area of the world. For several years, the facility has been a source of concern. Plant management is aware of the growing pressure on the Malaysian government to better regulate air, ground, and water pollution; the Sabah plant is clearly deficient, especially in its inability to prevent water contamination. At present, however, such water pollution does not violate Malaysian law.

In addition, equipment failures have required plant shutdowns at a rate that exceeds industry standards. In 1998, civil unrest and sabotage caused a complete shutdown, for almost five months, of the private power plant on which TAPC depended for power to run the machinery that grinds wood into pulp and its hot steam rolling process to make paper. To solve that problem, TAPC began its current practice of purchasing coal-fire produced electricity from the City of Sabah under an arrangement that is periodically renegotiated often on short notice. The current crisis was precipitated in early 2010 by the City of Sabah’s demands for increased prices for renewal of the electricity supply contract. TACP’s machinery uses such substantial amounts of electricity that its products would become substantially less competitive in the Asian market with the proposed cost increase.

TACP tasks upper manager Aaron Askew to research the problem and make recommendations for its resolution. Askew first meets with the EVP for Compliance and Ethics and later, with the EVP and the chief operating officer (COO) of TAPC. The COO provided Askew with a detailed engineering and financial report of plant operations prepared by managers and engineers in Malaysia working with personnel from corporate in Appleton, Wisconsin. The COO and EVP confirm that Askew’s assignment is to generate options for the president to take to the board of directors. Specifically, he is to explain feasible options for reducing costs in order to increase competitiveness and
to make a concrete recommendation for the president to consider. It is likely that his report will go to the board of directors in one form or another. Askew is likely to be called into the board meeting to answer questions about the president’s recommendation. Askew then meets with his global strategy team, which has generated the following possible options:

A. **Option I: Replace Equipment but Do Not Change Process**

TAPC could retain its plant as is. The local plant manager, a Malaysian, recently met with a government official in Sabah who indicated that for a generous gift or facilitation fee, he would be able to persuade the city to reduce its demand for price increases. The manager is understandably wary of the government official and even has the impression that perhaps TAPC’s previous management had been providing these payments in the past and that the current demand is merely a continuation of an established practice. The government official went so far as to imply that the manager might receive a personal referral fee if the government official was successful in retaining the current pricing on the government-supplied electricity. The manager also reports a veiled threat of violence against Trans-America property and personnel if it takes steps to close the plant. Finally, the manager reports that when the official understood TAPC’s policy against bribery and the pressures it was under in the United States to avoid corruption charges, he was willing to clear the way for a 10 percent discount on current electricity prices if TAPC made a substantial gift to a local charity. Factoring the charitable contribution and electricity prices, the manager estimates that TAPC’s profit margins from the plant would fall below industry averages in the Asian Pacific region within eighteen to twenty-four months.

B. **Option II: Build a Cogeneration Plant to Produce Electricity**

TAPC’s local managers propose that TAPC make its own electricity by building a cogeneration power plant on site. The company would burn coal to produce electricity and use the waste steam to run the paper dryers. This would provide TAPC with a steady power supply at reliable costs and permit it to stop purchasing electricity from the city. The new generator would have sufficient excess capacity to sell electricity. In fact, officials from the local community, just downstream from Sabah, are willing to subsidize a portion of the cost of constructing the cogeneration plant. In exchange, the community would receive a reliable supply of electricity for ten years at below market rates. The community also would pledge not to object to the plant’s
continuing emission of waste products, including the runoff from pulp production, chemicals, and biological agents, and spent recycled sludge, into the river.

C. Option III: Build a New Plant in Malaysia Using All New Equipment

A third option is to build a new plant using state-of-the-art equipment. A Chinese venture capitalist, Han Wei, has contacted Askew with a proposal to retrofit the existing plant with state-of-the-art paper manufacturing equipment and to expand it to accommodate additional processes and output. Askew inquired about Wei in banking circles in Shanghai and Guangzhou, and learned that Wei has a good record in financing international joint ventures. His investment group (WIG) includes funds from the Chinese government’s sovereign asset management agency. WIG would create a joint venture with TAPC in which WIG would have a 51 percent interest and TAPC a 49 percent interest,\(^8\) with profits divided proportionately with ownership interest. The joint venture would enter into a fifty-year operating lease with TAPC on the existing property, and WIG would manage the plant.

The joint venture would invest $1 billion in new state-of-the-art equipment, all capital provided by WIG. WIG plans to use new fuel-efficient machinery to reduce labor and electricity costs, and to increase output. WIG possesses a patent on a technology to mix recycled sludge with concrete for non-weight bearing decorative cement applications and will contribute all rights in the technology to the joint venture for the duration of the patent or the joint venture, whichever is shorter. In addition, it would employ technology to recover significant amounts of the chemical and biological agents used in processing paper. Sludge and chemical byproducts are now dumped into the river just downstream from the plant site. Wei foresees no difficulties in obtaining electricity from the city at highly favorable rates due to connections between the local construction company WIG would use in the construction of the new plant and the Malaysian government.

\(^8\)The potentially devastating effect of losing control of a company’s operations was demonstrated in the Union Carbide Bhopal Disaster. In that case, Indian Foreign Investment Law at the time limited foreign ownership to 49 percent. See M.J. Peterson, Case Study: Bhopal Disaster, ScholarWorks@UMass Amherst, (Mar. 20, 2009), available at http://scholarworks.umass.edu/edethicsinscience/4.
D. **Option IV: Close the Plant**

None of the members of Askew’s team proposed the option of closing the plant, but Askew believes it is an option that should be given consideration. TAPC probably could sell the plant to WIG directly or find another buyer. Changes in government energy policy and the availability of new tax and investment incentives in the United States may make it feasible to increase production in the United States. The current environment in the United States includes government subsidies of green technologies, the reduced costs of labor, and local government incentives to create jobs. The expansion of an existing U.S. plant or the construction of a state-of-the-art facility might increase the attractiveness of the relocation option. In the short term, the costs of production would be higher than that of its Malaysian plant.

E. **Option V: Thinking Outside of the Box**

Is there another option, or combination of options that Askew’s group has not considered that would provide a greater net benefit for Trans-American and the other stakeholders?

### IV. Student Problem Solving

The Principles of Responsible Management Education (Principles) call for the changing of colleges and universities curricula, research, and teaching methodologies to better recognize that in a global economy the tension between corporate responsibility and sustainability must be recognized and resolved. This case study provides a scenario that tests the students’ comprehension of this tension and asks them to make a decision to resolve the tension. Materials will provide the tools, both ethical and legal, to develop a technique for practical–ethical decision making. The case study will create educational frameworks, materials, processes, and environments that enable effective learning experiences for responsible leadership.

The case study objectives include the development of a knowledge base (techniques for practical business and ethical decision making), as well as research, issue spotting, negotiation, and presentation skills. After the students read the case problem, they are asked to place themselves in the

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position of Mr. Askew. Using the legal and ethical tools provided elsewhere in the materials, they are asked to analyze the options provided including the fifth option of fabricating a better option than the four posed in the case problem. The first section below provides a generic framework for students alerting them to the types of issues faced by companies when transacting business abroad under the scenario presented in the case study. These are the types of issues emanating societal concerns and the proper role of companies in responding to such issues, as balancing economic and environmental factors, corruption, employee well-being, and relative levels of development between home and host countries. The second section provides a prelude to the ethical dilemmas presented in the problem and the student exercise. The third section provides references and explanations of the supplemental materials that students should refer to in discussing solutions relating to the case problem.

A. Issues

- Is there a proper balance between economic progress and environmental protection? How is that to be determined? Is it a zero-sum calculation? What timeframe should be used in making such a calculation?
- How does a company transact business in countries where there is a persistence of corruption and in which any profitable enterprise necessarily requires a high degree of public-private interaction?
- Should the company consider distributive concerns premised on basic human rights and the profitability of the private company? For example, should the company consider the payment of higher than market labor rates that reduces its overall profitability? Does paying a “living wage” necessarily result in lower corporate profits?
- Does the company owe a higher degree of care to existing employees when considering relocation? Should the company consider the relative level of development when considering relocations between more fully developed and less developed countries?

B. Student Problems: Which Option Would You Recommend?

Students are presented with the problem and are asked to select from one of the five options provided. The instructor should provide an introduction by teaching a segment of business ethics and by describing the ethical dilemmas presented by the case scenario. The instructor can frame the dilemmas by discussing the following themes: (1) the relationship between the key goal of
directors and officers of companies to increase profitability and goals related to other stakeholders of the company (employees, suppliers, creditors, local communities, environment); (2) the importance of the difference between short-termism (calculating the short-term impact of decisions relating to profitability and stock price) and long-term strategic growth (sustainability of profitability); (3) the relationship between alternative growth or profitability options and socially responsible courses of action; and (4) the potential trade-off between different means of production and their environmental impact.

The case presents a real-world scenario involving numerous concerns and stakeholders. As such, the ability to find an absolutely optimal solution to the problems posed is unlikely; the students, at best, should be able to spot and analyze the legal and ethical issues presented in each option and determine which ones or parts of each scenario are the most problematic. The dilemma involves balancing economic, legal, environmental, and human rights–related moral and ethical concerns. The stakeholders involve a for-profit company, multiple layers of a foreign government, and different local communities, as well as societal concerns involving workers’ rights and environmental protection. As noted above, it is unlikely that a perfect solution that meets the concerns of all interests and stakeholders will be achieved.\(^\text{10}\)

The problem aims at forcing the student to value and balance the competing interests into a correct decision. In the end, the students must evaluate the given options as well as thinking outside the box to formulate an alternative option.

**C. Supplemental Materials**

The case study is supported by two sets of materials. Appendix A provides materials entitled *An Integrative Approach to Ethical Decision Making*. It is relatively brief in length and avoids the many nuances of moral philosophy by providing a tool kit of ethical approaches focused on practical application. It will integrate concepts, such as utilitarianism, dominant considerations, distributive justice, human and worker rights, the importance of virtue to corporate culture, and the ethics of care, to demonstrate the practical application of ethical tools and to advance the idea that if used properly, the

major ethical schools of thought will arrive at similar decisions. Appendix B provides Teaching Notes, including a teaching schedule or discussion plan as well as providing material for instructors to examine in more depth such areas as ethical decision making, corruption and bribery, business and legal strategy, and how business ethics can improve profitability.

D. Case Methodologies and Usages

The instructor may assign and use the case study in a number of ways: independent and group projects, independent research, classroom discussion, and exam writing.

1. Independent and Group Projects

Students are asked to engage in independent research and produce a five-page synopsis of their findings and analysis. This synopsis can be used to inform their discussions when they meet as the board of directors of TAPC. The board is made up of six to ten students (with the instructor as chair). The synopsis will be submitted to the instructor but not shared with other students prior to, or during, the meeting of the board. This method is used to encourage a discussion of the issues in the words of each student. The board will then write a corporate resolution rendering and explaining their decision on the matter. Finally, the different resolutions will be presented to the class by each group and discussed.

2. Independent Research

The fact scenario is a composite of real-world decision making in a global environment. Thus, students may conduct independent research of actual cases and the secondary literature to better inform themselves of the difficulties involved in rendering such decisions. The LEXIS-NEXIS database can be used to uncover newspaper and scholarly articles, as well as government reports, legal cases, and international initiatives relevant to the many issues presented by the case study. This research could be the basis for the synopsis noted above or be the basis of a lengthier research paper.

3. Uses in Classroom Setting and Exam Writing

The case study is useable in a variety of courses, including law, business, political science, public policy (protection of the environment), globalization,
human rights, and business ethics. The case study is suitable for use at both the undergraduate and graduate levels.

V. Conclusion: Choosing Values

The case study discussed in this article articulates a number of parameters for choosing values to be incorporated into corporate decision making. These values include a global corporate social responsibility approach to environmental challenges. It sensitizes students to the role, dynamics, and impact of corporations in the creation of sustainable social, environmental, and economic value. It exposes students to the challenges that managers of corporations face in meeting their duties of increasing shareholder value and, at the same time, meeting social and environmental responsibilities. This case study instructs students in business, legal, and ethical decision making by exposing them to ethics and legal materials that apply to the dilemmas presented in the case problem.

Appendix A: Integrative Approach to Ethical Decision Making

(Ethical Analysis Toolkit Application to Case Problem)

I. Introduction

This appendix surveys and summarizes some of the legal and ethical issues that face a company when transacting business across national borders. The focus will be on the ethical obligations of an American-based multinational corporation. It introduces students to the concepts of ethics and, more importantly, to the various schools of ethical thought. The general premise of these materials is that when properly applied, the different ethical schools of thought will arrive at the same conclusion. Alternatively, the different approaches may be blended together in solving ethical dilemmas.

II. Definitions

Business ethics is not aimed at persuading people to act in moral ways—it provides knowledge of the nature of ethical concepts and their application. It helps overcome the problem that managers often do not know the ethical course of action or are unable to spot ethical issues.

Ethical dilemmas arise in a situation in which one is faced with two equally unacceptable alternatives or in which the situation has no satisfactory solution. In
the former case, one attempts to escape the dilemma. Some theorists deny that there is any such thing as an ethical dilemma, maintaining instead that in every situation there is a correct way of acting.\textsuperscript{11}

\textit{Ethical relativism} is the theory that because different countries have different ethical belief systems, there is no rational way of determining whether an action is right or wrong other than by asking whether the people of a particular society believe it is morally right or wrong. Also, within a society, it is whatever the majority believes is morally correct.

\textit{Moral standards} are norms we have about the kinds of actions we believe are morally right as well as values we place on the kinds of objects we believe are morally good.

\textit{Organizational ethics} recognize that even though its activities are carried forth by human actors an organization has moral duties and is morally responsible in a secondary sense.

\textit{Subordinate responsibility} is sometimes framed as the nonchoice of just following orders versus freely and knowingly choosing to follow orders. An employee has no duty to obey an immoral order; pressure by superiors may mitigate employee responsibility, but it does not eliminate it. The issue of fixing moral blame on individuals in an organization is made problematic due to the devolution or fragmentation of responsibility. Employees in large organizations follow rules and may be unaware of possible outcomes. Thus, the excusing factors of ignorance or inability to prevent an outcome may absolve them of moral responsibility.\textsuperscript{12}

\section*{III. Ethical Approaches to Business Decision Making}

This segment will briefly review the major schools of ethics. As noted in the introduction, it will be done from the perspective that when properly applied each school will, in almost all instances, produce the same result. In order to integrate the schools in a more meaningful way, in reviewing each school of thought, suggestions are made on how the schools of thought can be combined or used in conjunction with one another. These suggestions will be flagged by the label integrative approach.

\subsection*{A. Approach 1: Utilitarianism or Teleology (Consequentialism)}

\textit{Bentham’s Utilitarian Principle}: An action is right if the sum total of utilities produced is greater than that of an alternative act. Is the best decision for \textit{Trans-American} (TAPC) whichever option that most reduces costs per unit?

\textsuperscript{11}Richard DeGeorge, \textit{Competing with Integrity in International Business} 209 n.1 (1993).

\textsuperscript{12}For a dramatic and excellent discussion of the problem of subordinate responsibility, see Hannah Arendt, \textit{Eichmann in Jerusalem: the Banality of Evil} (1963).
**Point of Emphasis:** Utilitarianism is not merely a minimal utility calculation of the benefit-costs of *Trans-American*. A true utilitarian analysis takes the positive and negative production of utility for each stakeholder directly and indirectly affected by the decision.

**Point of Emphasis:** The utilitarian calculation changes given the term (time) when the utility is calculated. A short-term time frame may produce a lesser net welfare gain than a long-term time frame. A related issue of time frame is whether the action is viewed as experimental in nature: (1) Is the decision, for example, a first step to becoming more energy efficient in response to expected increases in future energy costs? (2) Is the decision a first step in being more environmentally friendly due to the realization that environmental laws globally will become more stringent? (3) Is the decision to joint venture with WIG part of an overall model or strategy to lower risks and/or to improve market entry elsewhere in Asia, such as China?

**Point of Emphasis:** A true utilitarian analysis seeks out alternatives that have a greater net welfare effect. Option V in the *Trans-American* case study encourages the decision maker to seek alternatives that further maximize benefits and lower costs.

**Integrative Approach:** An integrative approach to ethical decision making recognizes the limitations of utilitarianism in failing to take into account how the utility benefits are distributed within society. How can one utilize utilitarianism given this flaw?

Response: View the utility calculation as the first step in a multiple-step process. The next step could look at the distribution of benefits and burdens (distributive justice) or individual entitlements to freedom and well-being (rights).

**B. Approach 2: Rights–Duties Approach**

A right is an individual entitlement to something that should not be interfered with by others including government authorities. Rights and duties are reciprocal in nature—for every right there is a correlative duty. As compared to utilitarianism, a rights approach views morality from the perspective of the individual; often utilitarianism views ethical problems from the perspective of society as a whole.

**Integrative Approach:** Rights generally trump the dictates of a strict utilitarian calculation. Therefore, more is needed than “mere net benefit to society” such as the protection of minority or human rights.

**Contract Rights:** What kind of ethical rules should govern contracts? In the joint venture proposal by WIG, do all parties, including *Trans-American* and the Malaysian governmental units, possess full knowledge of the nature of the agreement? Is there a duty to disclose by WIG of all relevant facts given its expertise in joint venturing? Is there a duty to disclose by *Trans-American* given its experience in paper manufacturing, the issues relating to the existing plant such as the corruption tainted offers made by Malaysian government officials? Do WIG and *Trans-American* owe a duty to fully disclose the environmental, economic, and social impacts of their decisions to the Malaysian government even if not required under Malaysian law?

Is there a duty on WIG, *Trans-American*, or other stakeholders not to misrepresent facts or projections even if such misrepresentations may lead to a more equitable agreement or a more optimal result? For example, is it ethical for an environmental
group to intentionally overstate environmental impacts in the hope of getting a more environmental friendly factory built?

Kantian ethics (rights and duties) and its categorical imperative assert that the “rightness” of an act depends on its conformity to moral law. Kant’s test of conformity was that of rational form. Moral laws must be consistent (they cannot be self-contradictory); universal (same for all persons; there is no such thing as relativism); and a priori (based on reason not experience). Therefore, when contemplating an action, ask would you want it to become the basis for a universal law? Moral laws are premised upon respect for all rational beings. Humans may never be used as a means to an end.

C. Approach 3: Justice and Fairness

There are numerous facets of justice including distributive, procedural, and corrective justice. Generally, justice concerns may result in a decision that a general net benefit to society (utilitarianism) cannot justify an injustice such as discrimination upon a minority group. Alternatively, large social gains may justify a certain level of injustice (e.g., to combat extreme poverty).

Distributive justice focuses on how the burdens and benefits of an action are allocated among the different stakeholders. Is justice obtained by an equal distribution or as determined by market forces or somewhere in between? Does the fact that a decision has global or cross-border effects change this determination? Is the fact that a company is from the developed world and the host country is in the impoverished world affect the decision-making process based on distributive justice concerns?

Procedural justice looks to the process of decision making and the distributive impact of the decision. In John Rawls’s A Theory of Justice, it is argued that fairness in the process satisfies justice concerns. In the Trans-American case, procedural justice as fairness can be constructed under the following parameters: full disclosure to all stakeholders of the benefits or harms in upgrading, replacing, or relocating the plant; rejection of all corrupting influences ensuring a decision on the merits; and the opportunity for all stakeholders to voice their opinions. Rawls alludes to the quality of consent issue in his difference principle. The difference principle leverages the decision making to recognize the social and economic inequalities and to make a decision that gives the greatest benefit to the least advantaged persons. Rawls also ensures the quality of consent by placing the decision makers behind a veil of ignorance. He asserts that rational persons make the ethically correct decision if they are not aware of which of the stakeholders they represent.

D. Approach 4: Ethics of Care

A narrow application of utilitarianism in the Trans-American case study would make the correct decision the one that produces the most net benefits to the company. However, the selection of a decision is affected by the problem of the time frame over which the calculation is to be performed. The impact on existing or future employees would not be factored into such a narrow utility calculation. The ethics of care approach championed in Carol Gilligan’s book, In a Different Voice, rejects such
a narrow utility calculation for a broader stakeholder analysis. More importantly, she challenges how utility is determined, as well as rejecting the utilitarian and Kantian views that all humans are to be treated the same (objectivity and impartiality). The ethics of care approach recognizes that certain concrete human relationships can and should be more highly weighted than other relationships in the utility calculation. In the Trans-American case, a special obligation should be recognized between the company and the care of its workers and their communities. Under this approach, morality dictates that ethical decision making should recognize a web of relationships in which a company preserves and nurtures individual and communal relationships. In summary, the different schools of ethical thought all offer insights and tools to deal with ethical dilemmas. The instructor should use the Trans-American case to apply an integrative approach to decision making—one in which all the above schools of thought are utilized.

E. Discussion Points

(1) Does a company have a duty to monitor the conduct of its partners, suppliers and contractors (duty to monitor third parties)?

A good corporate ethics code recognizes the company's responsibility for not only itself, but also for other companies in its supply chain as well as its partners. Some companies have developed codes of conduct for their suppliers to follow. A good starting point is to require all suppliers and partners to conform to the core tenets of the international conventions produced by the International Labor Organization, as well as the United Nations Universal Declaration of Human Rights.

(2) Is there a practical business reason for monitoring the conduct of other companies (good ethics is good business)?

Yes, violations of human rights by associated companies are likely to harm a company's reputation. It is important to avoid doing business with others who intentionally and continually violate core values.

(3) Should a company commit itself not to harm the environment and to move toward sustainability (long-term sustainability versus short-termism)?

Visionary companies operate in ways that foster sustainable and clean use of natural resources. They understand that such an approach is both ethical and cost effective in the long term. A starting point is to establish an environmental management system in accordance with International Standards Organization's environmental standards (ISO 14001).
APPENDIX B: TEACHING NOTES

The Teaching Notes provide suggestions for leading class discussions on issues embedded in the case study as well as additional materials to expand the scope of the discussions. Part I provides a “Discussion Plan,” along with some preliminary information that can be provided before the class discussion; Part II provides a synthesis of major ethical schools of thought that can be used for lecture planning and can be given to students for use in answering the case problem, and furthermore, the case problem is integrated into this discussion of ethics; Part III provides material on “Bribery and Corruption” and again integrates the case problem into the discussion of corruption; Part IV discusses the interrelationship between business and legal strategy and shows how law can be used to obtain competitive advantages and in value creation, as well as the importance and dangers in entering joint ventures and global alliances; and Part V concludes with a discussion of why “good ethics is good business,” and again, like the previous parts, provides questions relating to the case problem.

I. Discussion Plan

The case study provides flexibility to the instructor as to coverage and time allotment. It allows for individual student research and writing, group projects, and classroom presentation and discussion. Whether individual or group projects are selected, the case assumes that there will be classroom discussion of the core issues presented by the case. The Teaching Notes are presented in segments that the instructor may utilize or skip depending on interests and time constraints. The lesson plan presented here is based upon the discussion of all the issues presented in the case and the materials provided in the Teaching Notes. Thus, the lesson plan dictates more than one class for full coverage. Again, the instructor can pick and choose the coverage and limit the time costs to a single class.

I. Preliminaries (15 minutes)
II. Corruption and Bribery—Classroom Discussion of Core Concepts (20-25 minutes)
   Alternative: Corruption and the Foreign Corrupt Practices Act (FCPA)—A review of the main elements of the FCPA (45 minutes)
III. Ethical Decision Making: An Integrative Approach to the Ethical Dilemmas facing Trans-American (45 minutes)
IV. Practical Business Decision Making (45 minutes)
V. Additional Materials and Exercises

A. Preliminaries

The Need for a Board Decision. In arguing for the need for decisions based upon long-term interests and well-being, and not short-term enhancement of shareholder value, the instructor should assert that “I believe that we must rely on individual board
members and the board as a group to be the guarantors of values, balance, judgment, and accountability.”

The Paper Making Industry. The instructor should note that Trans-American is part of an industry with systemic problems and that these problems will grow going forward. Its three major inputs are energy, water, and wood.

Need for Energy. The paper industry will be subject to the same energy constraints confronting all manufacturing-based industries. Currently, large parts of the world are suffering from “energy poverty.” The accelerating demands for energy by countries like China and India will threaten energy security for companies throughout the world since such energy demands are not sustainable.

Need for a Water Supply (and the Dumping of Waste into the Water Supply). Organization for Economic Cooperation and Development (OECD) water-use projections show that “by the year 2050 the water supply to some 47 percent of the world’s population, mostly in developing countries, will be under severe stress.”

Need for Wood Supply. Between the scourge of deforestation and the demands for wood from other users, the price of wood and uncertainty of supply present major problems for the industry going forward.

B. Short-term versus Long-term Timeframes

John Reed notes the problem of short termism, which is the management strategy of increasing shareholder value (as well as executive compensation) in the short term by increasing share prices. It is a problem because many of the decisions made under this perspective are counterproductive to the long-term sustainability and profitability of the company. The instructor may want to highlight this dichotomy at the outset given the 2008 financial crisis. The Trans-American scenario can be used to examine

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this dichotomy in microcosm. The case can be used to argue for a new metric in which management decisions are based not upon short-term shareholder value, but on the development of a long-term strategy or what Reed calls the *evolutionary process* form of corporate decision-making.\(^\text{17}\)

II. Integrative Approach to Ethical Decision Making

A. Framework

Ultimately, this case study’s purpose is to introduce ethical concepts relevant to solving the ethical and business dilemmas presented in the facts of the case, to develop reasoning and analytical skills needed to apply ethical concepts, and to encourage students to review case studies of actual moral dilemmas. The case provides a real-world–style corporate decision of whether to close, relocate, or improve a plant in a country in the developing world. The scenario implicates issues of law (corruption, bribery, environmental) and ethics (duty to employees, duty to local community, environmental ethics, and sustainability).

The nature of the paper-making industry provided in the facts of the case show an industry that consumes large amounts of energy and water, and one that produces high amounts of emissions and toxic wastes. The case can be used to explore the power of a company in such an industry to transform itself. The problems of the paper-making industry call for a visionary corporate strategy to move from the ad hoc cost benefits of a particular plant decision to a long-term strategy to create a competitive advantage and secure the long-term sustainability of corporate profits.

B. Introduction

The instructor begins with a discussion on the following topics:

- Explain and discuss the ethical and legal problems facing companies doing business in a global environment.
- Examine the ethical obligations of an American company doing business in a developing country.

C. Applying Utilitarianism

Each student should prepare the following information for class discussion:

1. List all those affected by the *Trans-American* decision given the options provided.
2. List good and bad consequences.
3. Are there any “dominant considerations” or consequences that make a certain option unethical despite it resulting in a positive net benefit? (loss of life, violation of human rights, environmental destruction, breaking the law).

\(^{17}\)Reed, *supra* note 13, at 39.
4. Develop alternatives: Is there a more beneficial alternative? Which alternative best promotes the common good? Which alternatives best respect the moral rights of individuals?

D. Applying Kantian Ethics (Rights and Duties)

Under such an approach, the president and board of directors of Trans-American should ask whether they would want to live near an area contaminated by waste and chemical discharges from its plant. However, is there a way of phrasing this question that would not make the answer so obvious? Under a theory of relative development, in the host country’s level of development (such as an impoverished, less developed country), there are other factors that need to be considered. Would you accept a level of environmental pollution in exchange for employment and raising your family’s and country’s standard of living? At what level of environmental harm should the trade-off between pollution and economic benefits be terminated? In the era of global warming—where all specific instances of emissions no matter where the facility is located, whether in a developed or less developed country—should the global impact of those specific emissions be factored into the decision-making process?

Can the ethical dilemma presented by the trade-off between environmental and economic concerns of doing business in less developed countries be lessened by full disclosure to the country, communities, employees that are subject to that harm? The answer may be that disclosure is mandatory, but it does not solve the ethical dilemma since it does not take into account the effects on future generations and the cumulative harm to the planet. Future generations are not able to give informed consent. Harm to the planet is only addressable through global consensus.

E. Justice and Fairness Concerns

Question: Ask your students how they would prioritize net benefits, rights, and justice concerns? One defendable prioritization would be Justice >>>>> Rights >>> Net Benefits (utilitarianism).

How could such a prioritizing be rationalized? Correcting extreme injustices may justify restricting some individual rights. The protection of core rights (human rights) may justify the limiting of a decision to one that is second or third best from the perspective of net benefits.

Question: Can you see any problems with “consent” being sufficient for purposes of procedural justice in the Trans-American plant scenario? Full disclosure and consent does not overcome the problem that those giving consent do not have a real choice to withhold consent (impoverished country)?

F. Ethics of Care

Question: How can the ethics of care be used in business decision making? It can be used within the utilitarian or Kantian approaches as a counterbalance to those approaches singular emphasis on impartiality and universality. It allows for an element
of partiality and particularity in calculating the impact of a decision on certain concrete relationships.

G. Integrative Approach

An integrative approach to ethical decision making uses all four of the above-discussed schools of thought.

- *Trans-American* in analyzing its ethical dilemma (choosing an option) should weigh the benefits and harms to itself, as well as to others, that are directly and indirectly affected.
- In order to maximize social utility, it will need to compare the options and think outside the box for a possible superior fifth alternative.
- *Trans-American* should take into account whether any of the options infringe on basic rights, including, workers’ rights and environmental harm.
- *Trans-American*’s primary purpose is to create shareholder value, but it should also judge the distributive effects of its decision on other stakeholders.
- In weighing the benefits and costs of the different options, the interests of special relationships, such as current employees and communities, should be given added weight.

H. Stakeholders Analysis

The instructor may want to provide basic information on such concepts as stakeholders and stakeholder analysis. One way of illustrating such an analysis is through the use of an existing company’s code of conduct or ethics. The stakeholder analysis is firmly entrenched in most companies’ codes of ethics, codes of conduct, and mission statements. Simply stated, the stakeholder approach to corporate decision making rejects Milton Friedman’s hypothesis that good corporate ethics is solely the creation of value for shareholders.18 The stakeholder analysis rejects the shareholder as the only stakeholder mantra in favor of a broader view of interested stakeholders, which the corporation needs to factor into corporate decision making. A typical corporate *Code of Business Ethics* or *Code of Conduct* (Code) begins with a statement of its commitment to a list of stakeholders. The list begins with employees and then moves to shareholders, customers, families, communities, and vendors and suppliers. In reference to its employees, it recognizes the diversity of its employees throughout the world and commits to protecting basic human rights in the treatment of its employees.

Question: Why is diversity considered an asset? How does diversity relate to corporate decision making? The Code should recognize that diversity brings different attributes and skill sets that form the basis for creativity and problem solving. Does

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Trans-American’s placement of plants and offices throughout the world add to diversity in corporate decision making? The answer can only be hypothetical since it depends on the input the diverse groups have in the decision-making process. The Code also should recognize that its employees must strive to balance their work life with their family life.

Question: What motivational force can be used to help frame this balance? The Code should answer this question by stating that it is partially done by having employees’ families be proud of the work done by the family member and in the company that the member is employed. Given the facts of the case, students could be asked how they thought Trans-American employees in general, and those working in the Malaysian plant in particular, would answer the pride question. The Code should recognize the importance of the company’s relationships to the communities in which the company operates.

Question: What types of obligations does a corporation have toward the communities in which it works? The answer by the Code should consider the factors of the quality of life, including environmental protection, and the minimizing of waste as well as providing help in civic, charitable, and community activities. Does Trans-American-related environmental contamination meet the community standard test? Would a relocation of an otherwise profitable plant meet the community standard test, especially given that this is a plant in a less developed country?

In the selection of vendors and suppliers, the Code should state that the integrity of the supplier relating to price, quality, delivery, and service is to be factored into the selection process.

Question: How would you (student) define integrity? How does one determine the integrity of a prospective vendor or supplier? What should Trans-American’s due diligence include in deciding on whether to joint venture with WIG?

III. Discussion of Corruption and Bribery

A. Bribery and Gift Giving

Most corporations do not have explicit rules on the matter of distinguishing between appropriate gift giving and bribery. Common criteria include (1) consistency with customary business practices, (2) not excessive/not construable as a bribe, (3) no violation of law or ethics, and (4) public disclosure would not embarrass the company.

Question: Do these four criteria provide a sound basis for legal and ethical decision making? Do you see any issues relating to the application of these criteria? How do these criteria apply to the Trans-American case? It is important to note that the word “excessive” is not defined. TAPC’s Code should also encourage departments to establish policies and procedures for approving gifts of unusual monetary value.

Question: Can you foresee any problems with the devolution of authority to departments on this issue? Can the approval of gifts for “unusual monetary value” be made consistent with the general criteria that gifts shall not be excessive? Does such local, ad hoc determination of appropriate gifts, as in the Trans-American case, increase the chances of illegal and unethical bribery?
Follow-up Question: If the determination of acceptable gifts is best made at the local or department level what added precautions should be incorporated to diminish the risk of bribery? In gray areas, the corporation’s legal department or ethics officer should approve the proposed gift. The instructor should note the distinction between gifts given to employees of private companies and those given to government employees. However, it is also important to note that gifts to both types of recipients may be illegal or unethical.

Question: What precautions should be undertaken before a gift is given to a government official? The legal department should certify that the gift giving complies with the Foreign Corrupt Practices Act (FCPA). Submission to the company’s ethics officer should also be made to ensure that the gift complies with the company’s ethics and conduct codes. Would the fact that such precautions were undertaken as mandated by the policy of Trans-American impact the decision-making process of a student? What facts or information would you want to know before making your decision? Benchmarks include industry practice and relevant governmental regulatory and tax laws.

B. FCPA and the Trans-American Case Study


- Is the gift or facilitation fee suggested in Option One (see Part III A) a bribe under the FCPA or a gift, minor payment, or routine government action exempted under the FCPA (FCPA § 78dd-1(c))?  
- Should past practices (bribery) be investigated? How do the FCPA accounting provisions apply to this issue? (FCPA § 78m)  
- Is the referral fee suggested in Option One (see Part III A) an appropriate gift to the manager? Would your answer change if the deal advances the interests of Trans-American?  
- In rejecting the request for a gift or facilitation fee, is using the fact that it would be illegal under the FCPA a good technique or strategy to avoid giving a bribe?  
- Is there a problem with the alternative suggestion of making a donation to a local charity? What further information would you like to know about the charity? (Third-Party Bribery at FCPA § 78dd-1(a)(3))  
- Do you see any issues in Option Two (see Part III B) where a local government in need of electricity offers not to complain about water pollution and other environmental harms caused by the Trans-American manufacturing plant in exchange for being able to buy the excess electricity produced by the cogeneration plant?  
- Is there an issue with the community needing the electricity obtaining a government grant to reduce the cost (subsidize) of constructing the new plant?  
- Option Three (Part III C), joint venturing with WIG scenario, raises a number of issues. Would you consider obtaining information from banking circles in China about the reputation of WIG sufficient due diligence? What would you like to see in the joint venture agreement to safeguard against improper activities being conducted by WIG? Should you be concerned that WIG will own 51 percent of the joint venture?
• What do you think about WIG’s assertion that it is confident of getting favorable electricity rates from the local government due to WIG’s relationship with a local construction company? What does the relationship with a local construction company have to do with receiving favorable rates from the government? What information or due diligence would you require?

C. Bribery Hypothetical Cases

1. As manager of a foreign subsidiary, you recently discovered your branch director has authorized a very convoluted accounting system, most likely to hide certain expenses (payments). In addition, the director has close ties to officials in the government who can make or break your company in this country. What do you do? [Hint: FCPA accounting provision; internal whistleblowing]

2. You are a manager of a foreign company in a country where bribery is common. You have been told an important shipment has arrived, but it will take up to six months to clear the paperwork. However, you are informed casually that a “tip” of $200 would cut the time to three days. What do you do? [FCPA’s routine government action exception]

3. You have been trying for several months to privatize what was formerly a state-owned business. Unfortunately, obtaining approval from the government agencies is a slow, costly, and tedious process. An official who can help suggests that if you pay expenses for him and his family to visit the parent company in the United States (plus a two-week vacation at Miami Beach and New York City), the necessary approvals could be obtained more expeditiously. What do you do? [clear case of bribery]

4. Your company has been trying to get foreign contacts in a developing country for months. Yesterday, the sister-in-law of the trade minister offered to work as a consultant to help you secure contracts. Her charges are twice as much as the customary rate for such consultants. What do you do? [potential case of third-party bribery under FCPA; requires “extreme” due diligence]

IV. Business and Legal Strategy

Business strategy has incorrectly been viewed as separate from legal strategy. In fact, law provides means to develop business strategies since it can be used to create competitive advantages and value creation

A. Use of Law as Competitive Advantage

If Trans-American is successful in pursuing a long-term strategy of research and development of energy-efficient and environmentally friendly production processes, such

19 See Larry A. DiMatteo, Strategic Contracting: Contract Law as a Source of Competitive Advantage, 47 Am. Bus. L.J. 727 (2010) (discussing how contract law can be used to create and maintain competitive advantages, as well as to create value).
an outcome can be used to create a competitive advantage over its competitors that have elected not to pursue such a course of action. It can take a proactive stand in favor of higher environmental standards against competitors that do not meet those standards. In the future, Trans-American is likely to obtain a competitive advantage if, as expected, a “cap and trade” environmental policy is adopted in which polluters (producers of greenhouse gases) will have to incur the costs of buying carbon credits.

B. Use of Law for Value Creation

The ability to patent newly developed production processes and energy saving, environmentally friendly technologies would allow Trans-American to expand its core competencies into the licensing of its patents. Intellectual property rights are a substantial generator of new revenue streams.

C. Becoming a Visionary Company

In reality, Trans-American has only two options in the case study, at least from an ethical and environmental perspective: continue to take advantage of government corruption and lax environmental laws and enforcement or recognize that they are operating in an increasingly changing world where environmental concerns, as well as energy needs and sustainability, have become bottom-line cost factors, and will become increasingly more important determinants of future competitiveness. The plight of the American steel companies is a case in point: their failure to invest in more efficient and environmentally friendly technologies and processes lead to the loss of their competitive advantage and ultimately, in their demise. An option (possibly one that is created through Option 5; see Part III E of Case Problem) that encompasses the mantra that research and development into more environmentally friendly and energy-efficient manufacturing processes will result in significant long-term benefits would be a visionary strategy.

D. Accelerating the Transformation of the Company

The issue here, as in the previous issue, may not be so much and issue of how as when. The word “transformative” does not mean instantaneous or immediate, but requires a long-term strategic plan that a company is committed to follow. Use the Malaysian plant as a test project. This entails expanding the cost–benefit analysis into the future. Going green may make the Malaysian plant less profitable or unprofitable, but those costs should be spread over time to the building of future plants. The hope is that in experimenting with new technologies and processes, as well as procurement, outsourcing, and distribution, Trans-American will learn new things and develop new ideas through experiences generated by such projects. Other methods to accelerate transformation include acquisition and integration of companies and engaging nonprofits and NGOs.

E. Strategic Alliances: Leveraging the WIG Relationship (Chinese Market)

The potential venture between WIG and Trans-American is an example of a strategic alliance. Strategic alliances are used to unite companies with different core
competences to produce synergistic benefits or to join competitors to share risks and penetrate a new market or to develop a new product line. The problem with such alliances is when the partners are natural competitors or they perceive themselves as potential competitors; then the temptation to usurp venture gains or opportunities from the other partner needs to be controlled. The main thesis in Francis Fukayama’s book *Trust* is that cooperation between businesses is based upon the development of trust, which inherently requires ethical behavior.\(^{20}\)

Question: What should Trans-American do to align its interests with those of WIG going forward? If Trans-American hopes to leverage its relationship with WIG, then it should openly discuss those intentions with WIG and hopefully work out a long-term strategic alliance involving more than just the Malaysian plant. The interfirm collaboration anticipated by the partners in a joint venture can be threatened when one of the partners attempts to gain additional benefits, often not in the interest of the other partner or the joint venture. For example, a joint venture partner may provide confidential information to assure joint venture success. The fear is that the contributed information and the information or ideas produced in the joint venture operation will be taken by the other partner to gain a competitive advantage against other competitors, including its joint venture partner.\(^{21}\) If the purpose of the joint venture is the promotion of mutual interests through the joint venture enterprise, then it is vital that the joint venture agreement provides means to deter such strategic advantage taking.\(^{22}\)

**F. Controlling Opportunism in a Joint Venture**

In the area of deterrence of opportunistic behavior by one of the partners, the creation of “reciprocal penalties” is suggested to punish and hopefully deter a party from pursuing a self-interested, venture or partner-harming activity. In order to be successful in deterring such conduct, the penalties in some cases will need to be


\(^{22}\)It is important to note that there are costs of using the equity joint venture as a means of coordination through internal governance structures:

> [T]he equity joint ventures permit firms to adapt to unforeseen contingencies that arise over the course of the alliance, [but] the mechanisms that facilitate greater coordination and control in an alliance also introduce bureaucratic costs. . . . Given these costs, firms should use equity joint ventures only where alliance activities require more substantial coordination and control.

severe. In such cases, they will likely serve a punitive purpose.\textsuperscript{23} Other devices to increase collaboration and deter opportunist behavior include “significant mutual investment,”\textsuperscript{24} establishment of an “interlocking directorate,”\textsuperscript{25} and establishing ‘shared ongoing risk.”\textsuperscript{26}

The above review indicates the importance of managers and their lawyers working together in drafting a strategic joint venture contract through the use of a variety of contract clauses ranging from highly specific terms to broader, more open ones.\textsuperscript{27} In the end, the flexibility of contract law and the nuanced nature of joint venturing allow for, if not require, the strategic design of a governance structure in the joint venture agreement to enhance the chances of success.\textsuperscript{28}

V. Good Business Ethics Is Good Business

Ethics is consistent with the pursuit of profit: In the long-run unethical behavior becomes unprofitable. One commentator notes that ethics is becoming the defining business issue of our time: “As big business gets bigger, as more of the world’s economy becomes truly global, the risk of ethical damage grows as well . . . . But the real reason for developing this [ethical] orientation is not just what we gain from being ethical, but in realizing what we lose—in economic, social, natural and personal terms—by succumbing to irresponsibility.”\textsuperscript{29} The collapse of the accounting giant Arthur Andersen is an example of how a scandal and destruction of a company’s reputation lead to the ultimate penalty—the demise of the business.

A. United Nations’ Global Compact: Good Ethics in a Global Marketplace

The “what goes around comes around” placed in more sophisticated terminology, underscores the proposition that cooperative and ethical behavior is the means

\textsuperscript{23}The strategic rationale for the use of enforceable terms is to “terrorize” through supracompensatory damages to deter from the targeted misconduct. This poly can be seen in the employment area where many employers continue to use overly restrictive covenant not to compete. For a brief review of the complexities in designing an enforceable covenant not to compete, see Larry A. DiMatteo, \textit{Contracts and Precedents}, 2009 Transactions: The Tenn. J. Bus. L. 262.


\textsuperscript{25}Id. at 88.

\textsuperscript{26}Id. at 90.


\textsuperscript{28}For a general review of contract drafting techniques, see \textit{Symposium: Teaching Drafting and Transactional Skills: The Basics and Beyond}, 2009 Transactions: The Tenn. J. Bus. L. 3.

to overcome prisoner’s dilemmas. Rational self-interest results in uncooperative behavior. But, this is premised upon a false assumption that the interaction is isolated. In the increasing global marketplace, companies deal with each other repeatedly and their reputations become common currency in the trade. Game theory has shown that the prisoner’s dilemma can be resolved because people can be motivated by other than pure self-interest that encourages ethical conduct in business relationships and transactions.

The United Nations’ Global Compact (Compact) will be reviewed here as a source of guidance for the Board of Trans-America. The ten principles that make up the Compact address the areas of human rights, labor, the environment and anticorruption. The main focus of the Compact is that multinational corporations should act as vanguards to prevent human rights abuses in the running of their businesses.

Question: Does Trans-American owe a duty beyond that of not abusing its own employees? The Compact indicates it does in cases of companies that build close relations with a government or other companies that abuse human rights. The closer those relationships determine the extent to which a company is expected by its stakeholders to respond to such abuse. Question: Does Trans-American owe a duty beyond not supporting the abusive practices of suppliers, contractors, or government entities? Under the spirit of the Compact, the answer is an affirmative: Companies should take advantage of “an opportunity to promote and raise standards in countries where support and enforcement of human rights issues is insufficient.”

Question: Is there any other reason that Trans-American should discourage human rights abuses and pay a fair wage? Yes, lawsuits against multinationals for poor practices outside their country of origin are a growing trend. In addition, the negative reputational affect, if such practices become public, may prove more costly than the costs saved through unethical activities. This principle is especially true today with the proliferation of watchdog groups, the existence of a global information network, and consumers influenced by unethical business practices in making their purchasing decisions.

B. More on Human Rights

If time permits, the options available to Trans-American can be analyzed from a human rights perspective. This segment will review some of the Principles of the Compact.

1. What is complicity in a country that is governed by corrupt officials? Given the global economy and interlocking of societies throughout the world, the meaning of complicity has and is changing.

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31Principle 1 states that “Businesses should support and respect the protection of internationally proclaimed human rights.” Id.
Question: What types of factors should the board of Trans-American use in determining if they are complicit in human rights violations? Clearly, if the company causes the abuse or the abuse is undertaken to the benefit of the company, then the company is directly implicated in committing or supporting such abuses. So, participation or encouragement is a factor in determining the ethical–legal propriety of the company’s activities. Receiving benefits from the abuses of others is another factor.

Question: Does Trans-American have a duty to promote and respect human rights? In the case of discrimination of particular groups within a country, a company would seem to have a proactive duty not to discriminate. This was the case during apartheid in South Africa—foreign companies generally disregarded South African laws that band the hiring of blacks.

Question: In order to avoid making unethical decisions in the area of human rights, what should be the facets of Trans-American’s “Human Rights Policy”? First, it should assess the human rights records of countries that they do business with or are considering doing business with. Second, the company should ensure humane treatment of its own employees and the employees of suppliers, partners, and contractors that it does business with. Third, the company may want to consider engaging a NGO with expertise in this area.

C. Precautionary Approach to Environmental Challenges

Students should be lectured on the “precautionary principle” as a foundational concept in environmental protection. Principle 15 of the 1992 Rio Declaration on Environment and Development states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” 32 Given the type of operations that the Trans-American plant engages and its implications for producing toxic waste damage, water contamination, greenhouse emissions, and deforestation, the precautionary principle presents a seemingly insurmountable obstacle to rationalize the plant operations on ethical grounds.

Question: Why is the precautionary principle not very relevant to the Trans-American case? The precautionary principle is used to proscribe actions that have not scientifically been proven to be harmful to the environment. In short, the precautionary principle is akin to the adage that when in doubt, err on the side of caution. Past examples are numerous. Here are two examples: (1) In 1962, Rachel Carson in Silent Spring warned of the environmental harm and human dangers caused by the indiscriminate use of pesticides. She alerted the world that such pesticides enter the water supply with dangerous but still unknown consequences. Despite the lack of scientific knowledge, the warning was taken seriously and resulted in major changes in our environmental laws. (2) Even though some dispute the effect of greenhouse

emissions on global warming, the scientific community overwhelmingly supports such a connection. Even before this consensus, there was much support to limit such emissions as a precaution. In the Trans-American case, the company is directly harming the environment through disposal of chemical wastes in a river and greenhouse emissions.

Question: Is there a difference in accountability between the disposal of chemical wastes and greenhouse emissions from Trans-American’s plant?

Question: How can the precautionary principle be used in the Trans-American case to support an option that is more environmentally friendly? The use of “precaution” in deciding whether to keep the plant as is, relocate the plant, or build a more environmentally friendly plant recognizes that environmental remediation damages are generally much greater than the costs of preventing environmental harm in the first place. The 2010 BP deep water drilling platform explosion, resulting in the death of eleven people and a catastrophic environmental tragedy in the Gulf of Mexico, is an example where prevention (better design, better maintenance) were far outweighed by the cost of remediation and the loss of human life. In addition, if a risk assessment shows that the plant being contemplated is likely to violate future environmental laws and international global agreements, then it may be cost effective to upgrade the plant not only to save energy costs, but also to reduce the risk of paying damages for future environmental harm and to comply with expected increases in the stringency of future environmental laws.

Question: What policies should Trans-American implement that would aid in the decision-making process? How should a preexisting corporate code and set of practices mandate the limitation of harm to the environment and to the local community? How can Trans-American accomplish such an enlightened policy and remain competitive? They could promote an industry-wide effort to develop production processes that are more environmentally friendly. Or, they could fund research to create a more environmentally friendly operation that would pay for itself through lower energy costs. The development of new technologies and processes could give them a competitive advantage.