

In conversation with Gare Smith



Gare Smith is the founder and chair of the corporate social responsibility (CSR) practice at the law firm Foley Hoag LLP and a member of Barrick's CSR Advisory Board. At Foley Hoag, he provides counsel on a wide range of CSR-related issues including community relations, indigenous peoples' rights and environmental stewardship. He previously served as Senior Foreign Policy Advisor and Counsel to U.S. Senator Edward M. Kennedy and was later appointed by the White House to serve as Principal Deputy Assistant Secretary in the State Department's Bureau of Democracy, Human Rights and Labor. He developed the first voluntary code of conduct for U.S. multinationals, helped launch President Bill Clinton's Model Business Principles and served as U.S. representative to the U.N. Human Rights Commission, the International Labor Organization and the U.N. Working Group on Indigenous Peoples. Smith spoke with *Beyond Borders* about the evolution of CSR, indigenous peoples' rights and the shift towards legislated transparency requirements.



BOTTOM LEFT: GARE SMITH (IN SUNGLASSES) EXITS A HELICOPTER TO WORK WITH THE ACHUAR INDIGENOUS PEOPLE IN THE PERUVIAN RAINFOREST.

BELOW: GARE SMITH WITH FORMER U.S. PRESIDENT BILL CLINTON.

BOTTOM RIGHT: GARE SMITH RESTS WITH HIS CAMEL DURING A CROSSING OF THE WESTERN SAHARA DESERT.



BB: You have worked on the front lines of the CSR sector for a long time in various capacities. How have things changed since you began working in the field?

GS: I began working in the CSR field about 25 years ago, which is before the term “CSR” existed. One of the more important developments during this period has been the recognition that CSR does not simply refer to philanthropy. Rather, a socially responsible company seeks to manage its impacts on society and the environment. CSR is essentially a concept developed by businesses to address social and environmental challenges through sustainable practices and respect for international normative standards. That substantive concept of CSR is widely embraced today.

CSR has also increasingly been recognized as a mainstream business practice that helps both to mitigate legal, reputational, and operational risks and to promote company brands.

BB: It has been more than a decade since the establishment of the Voluntary Principles on Security and Human Rights. Do you think this initiative has had the desired impact and changed the way businesses think about human rights? Has it made businesses more accountable?

GS: I’m rather biased about the Voluntary Principles. Foley Hoag’s CSR Practice Group, which I chair, serves as the Secretariat for the Voluntary Principles, and I helped edit them when they were being written 13 years ago. My soft spot aside,

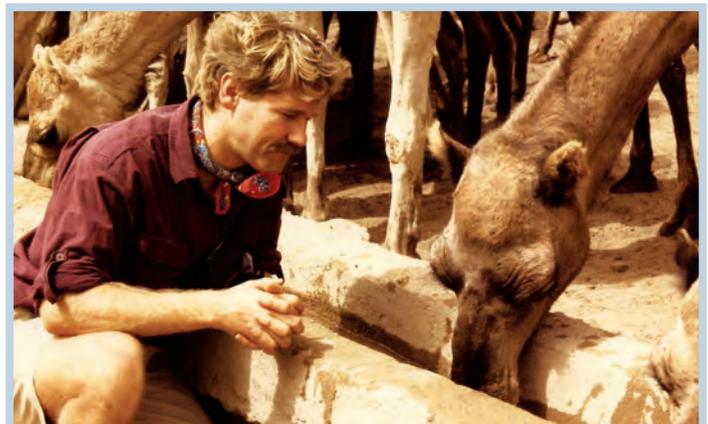
participants in the Voluntary Principles process clearly benefit from this multistakeholder initiative.

The Voluntary Principles were developed by representatives of companies, governments and civil society, each of which was brought to the table by different drivers. What we’ve found over time, though, is that their objectives often overlap. Companies wanted to know the boundaries of their legal responsibilities with respect to human rights. They worried, for example, whether they would be sued for human rights violations perpetrated by government security forces that they didn’t control, and wanted to know how to avoid human rights abuses in the first place. Indeed, all three groups had an interest in addressing such sphere-of-influence questions. The theory behind the development of the Voluntary Principles was that it’s better to focus on the common interest of protecting human rights and developing best practices together, instead of confining engagement to competing press releases and courtroom arguments after human rights violations have occurred.

The proof of the initiative’s success is self-evident. Companies are working together with non-governmental organizations (NGOs) to achieve common ends using the Voluntary Principles as their compass, and are being supported in their efforts by home and host governments. Notably, Barrick provides a leadership role in the Voluntary Principles process and serves as one of four companies on the initiative’s Steering Committee.

BB: What steps can companies take to ensure their suppliers, contractors or even host governments maintain human rights standards that are consistent with the values espoused in the Guiding Principles on Business and Human Rights?

GS: The Guiding Principles provide a practical way for companies to address their human rights impacts by building on existing management systems through what is termed “human rights due diligence.” An expectation established by the Guiding Principles is that companies should conduct human





GARE SMITH GREETES FORMER U.S. PRESIDENT JIMMY CARTER.

rights due diligence to identify, prevent, mitigate and account for the adverse human rights impacts of their operations. This expectation has been widely endorsed by the international community due to the tremendous efforts of Professor John Ruggie, the former U.N. Special Representative on Business and Human Rights and author of the Guiding Principles.

Companies are expected to assess the human rights impacts of all of their business activities and engagements, though the Guiding Principles acknowledge that the risks to human rights may be greater in certain areas and that those areas may be the focus of heightened attention. Additionally, companies need to manage the impacts of their suppliers and service providers. Are the products and services that the company purchases environmentally sustainable and produced under conditions that reflect international normative standards?

Security and human rights demand a strong focus. Extractive companies need to evaluate the support they receive from public and private security forces. When companies are fortunate, those security forces are well trained and understand such key concepts as the proportionate use of force. When companies are less fortunate, the security forces may not read or write, have the capacity to use a gun properly, or know how to engage with community members impacted by the project. Public security forces in developing countries can be young, underpaid and even underfed. Consequently, when untrained, they are sometimes more inclined to use their weapons to intimidate local citizens and extort money than protect company assets or demonstrate respect for human rights.

As a best practice, some companies have included the Voluntary Principles in project agreements, thereby contractually requiring both parties to abide by them. Host governments and companies then become partners in implementing the Voluntary Principles. When security forces operate in a manner that is consistent with the Voluntary Principles, it can help host governments attract additional investment and gain stature on the international stage. That's a winning scenario for the governments, the local communities and the companies.

BB: Most extractive industry companies are in favor of publicly disclosing the payments and revenue they provide to host governments. However, there is debate over whether this should be a legal requirement or a voluntary initiative. How do you see this debate unfolding?

GS: Whether they support voluntary or mandatory compliance, most people agree today that transparency is the 21st century Rosetta Stone for credibility. If you aren't regarded as a transparent company, you aren't going to be regarded as a credible company.

In the extractive industry, many companies adhere to a voluntary reporting initiative called the Extractive Industries Transparency Initiative (EITI). This initiative is designed to ensure that revenue streams from companies to governments are made public so that citizens of those countries can hold their governments accountable with respect to the use of those funds. The EITI is an important global initiative, but some stakeholders believe that its voluntary nature has kept it from being as effective as it could be. They note that certain governments signed up to the EITI but failed to follow through with their commitments, and many corrupt governments have avoided joining the EITI. These stakeholders have pressed for legislation making transparency mandatory, and some governments have followed suit.

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* was enacted in the U.S. and includes a transparency provision for publicly listed extractive companies. Similar legislation was passed by the European Union and legislation to promote transparency is also pending in Switzerland, so it is clear that mandatory initiatives are gaining momentum.

One of the challenges of mandatory reporting is that revenue transparency laws differ by country. This can result in some companies being required to disclose more information than others.



THE CSR ADVISORY BOARD VISITED BARRICK'S NEVADA MINES IN APRIL: (FROM L TO R) JAMIE SOKALSKY, BARRICK PRESIDENT AND CEO; MELANIE LAWSON, COMMUNITY RELATIONS SPECIALIST; PETER SINCLAIR, VP OF CSR; AND CSR ADVISORY BOARD MEMBERS GARE SMITH AND ELIZABETH DOWDESWELL.



BB: In recent years, there have been a number of initiatives aimed at empowering and/or recognizing the rights of indigenous peoples, which are affirmed in key documents such as the U.N. Declaration on the Rights of Indigenous Peoples and ILO (International Labor Organization) 169. What are some of the impacts that these initiatives have had on the extractive industry, and have they resulted in meaningful change? Do you see room for further change?

GS: The concept of free, prior and informed consent (FPIC), which refers to the requirement that governments consult with indigenous peoples and obtain their consent for projects that impact their traditional lands, is still relatively nascent. During the Clinton Administration, I headed the U.S. delegation that negotiated the U.N. Declaration on the Rights of Indigenous Peoples. That Declaration includes a provision on FPIC, and although the Declaration passed with support from many countries, it has been translated into local law by only a handful of governments.

The dearth of guidance in this area has, as a practical matter, often transferred the responsibility of governments to consult and secure FPIC to companies' shoulders. When a government offers an extractive-sector company a concession without having consulted with the indigenous peoples living in that area, the company must weigh the risks of moving forward without engaging those peoples against the prospective benefits attendant to such engagement. Failure to engage and secure some form of consent could lead to significant problems for a company, ranging from simple roadblocks to widespread protests at the local level, as well as NGO campaigns, adverse shareholder resolutions, and associated reputational damage at the international level.

Accordingly, companies are wise to secure a social license to operate from indigenous (and non-indigenous) people impacted by their operations, and establish transparent consultation processes with those peoples that include appropriate grievance mechanisms. Inasmuch as there is still no universally accepted definition of consent, FPIC is certain to be a significant challenge for both governments and companies for many years to come.

BB: What new trends or issues do you see emerging in CSR in the next five years?

GS: In the extractive sector, transparency is likely to remain a paramount issue. There are certain to be additional efforts to pass legislation designed to promote revenue stream transparency and even the transparency of contracts. As previously noted, FPIC – how it is defined, and how that definition translates into realities on the ground – is another

important issue facing the industry. In coming years, new, more collaborative best practices with respect to community engagement, consultation and FPIC are certain to emerge. There are also broader issues with respect to indigenous peoples related to land, cultural heritage and intellectual property rights. The Voluntary Principles will continue to grow, and more developing countries will participate in the initiative. In addition, the Guiding Principles will be embraced by additional industries



SMITH AT THE TE-MOAK EDUCATION CENTER IN NEVADA.

and more companies will conduct human rights impact assessments and basic human rights due diligence, not only prior to commencement of a project, but throughout the project's life.

BB: Why did you agree to serve on Barrick's CSR Advisory Board?

GS: I considered it an honor to be invited, and was delighted that Barrick was taking CSR sufficiently seriously to enlist leaders in the field to participate on the Advisory Board.

BB: How has the experience been for you so far?

GS: It's been terrific. The Board Members have been very pleased with the seriousness with which Barrick has taken this initiative. We have consistently had CEO and senior-level executive participation from the company, which says a lot about Barrick's commitment to CSR.

Equally important is the earnestness of the executives' efforts. We have looked at both best practices and serious challenges that Barrick has encountered. By openly addressing these challenges and seeking constructive criticism, Barrick has set a high standard for its engagement with the Advisory Board. The company faces an array of issues, but it is equipping itself to address them in conformity with international best practices. ■