Remarks of Ursula Wynhoven, General Counsel, Global Compact Office, to the New York Bar Association

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Around ten years ago, when I joined the United Nations Global Compact Office – the UN Office responsible for supporting and coordinating the UN's corporate sustainability initiative – our engineering-trained Executive Director was known to proudly boast that he did not have a single lawyer on staff. In his experience, and in the experience of many within businesses that worked on corporate responsibility, lawyers played a fairly negative role – they told you what not to do.

In house counsel and law firms alike told businesses things like:

- don't go beyond strictly legal responsibilities;
- don't join that voluntary initiative;
- don't make explicit policy statements about corporate responsibilities and commitments;
- don't do that risk or impact assessment;
- definitely don't publish the results;
- don't speak with those critics and stakeholders acknowledging their concerns and corporate responsibilities; and
- don't put any of this in your annual report.

Motivating their advice, was often fear of litigation, that disclosure and transparency may increase risk to the business and may create legally enforceable expectations among employees and communities. Due diligence and corporate responsibility generally was seen as too risky.

Before I go on to speak about what is different today, I will tell you more about the UN Global Compact. Since I am before a legally trained audience, a good place to start is with our mandate from the UN General Assembly. It is "to advance United Nations values and responsible business practices within the United Nations system and among the global business community." The UN values are encapsulated in ten universal principles derived from international conventions and declarations that enjoy the highest degree of consensus among Member States of the UN.

The principles fall within four issue areas that the UN considered were most relevant for businesses: human rights, labour, the environment and anti-corruption. The instruments are the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Declaration on Environment and Development, and the UN Convention against Corruption.

The innovation undertaken was to recast principles from these instruments into a set of ten principles oriented to business and their role as a complement, but importantly not a substitute for the role of governments. Initially, the Global Compact was an act and

initiative of the Secretary-General in his capacity as Chief Administrator of the UN Organization with authority to take action to implement what Governments had agreed to. Over a period of several years, the Global Compact became a UN initiative endorsed by the UN's General Assembly and the principles themselves were recognized.

At its most fundamental level, the Global Compact is an advocacy initiative promoting responsible business practices the world over among large and small businesses from all sectors. Over 7000 businesses from 140 countries have publicly pledged support for its principles and their intention to work towards implementation and to publicly report on an annual basis on their progress to their own stakeholders.

The latter element is called Communication on Progress or conveniently "COP" for short. A system of business-led multi-stakeholder country networks in 100 countries, the most recent launched a couple of weeks ago by the UN Secretary-General in Myanmar, has grown over the past several years to help with the advocacy efforts and support business participants in their efforts to improve their respect and support for the principles and disclosure on their progress in doing so.

The initiative itself, which is a public-private, global-local endeavour, is coordinated from an office based here in the UN Secretariat in New York. Working groups and platforms on diverse topics such as anti-corruption, water, climate change, sustainable agriculture and food, women's empowerment, business and children's rights, indigenous peoples' rights human trafficking, child labour, anti-corruption and others, promote learning, dialogue, transparency, partnerships and collective action in these areas.

The goal is not to be a total solution to corporate responsibility challenges or gaps in governance, but rather to be a complement, emphasizing the kinds of actions – the policies and processes and disclosures - that businesses should take and make to meet their responsibilities to avoid causing or contributing to harm, but also emphasizing the business opportunities to make positive contributions and create shared value through their core business activities, strategic social investment, public policy engagement and advocacy, and partnerships and other forms of collective action. The starting point is compliance with applicable law, but the initiative goes beyond the law to advocate that business strive to meet international standards, where national law sets a lower standard, and urges action in business' self-enlightened interest to contribute to more sustainable development.

The UN Secretary-General has called on our office to scale up the initiative from 7000 businesses to 20,000 by 2020. Key to the strategy to achieve this is our work with intermediary organizations like investors and business schools so that corporate responsibility and sustainability are rewarded and mainstreamed. Governments also have a key role to play in creating the right enabling environments, carrots and sticks.

It is important to note what the Global Compact is not. It is not a compliance-based initiative monitoring and sanctioning business conduct. Reporting is to the business' own stakeholders not to the United Nations. I think of our role as a guide dog rather than a

watch dog. Our role is to point the direction and guide, rather than to bite. There is a role for biting and naming and shaming, but that is best left to other organizations such as Governments and civil society.

What contribution can the UN Global Compact make to advance the issue areas that it covers?

To name a few:

- consensus building;
- awareness raising of the issues and how to address them;
- promoting multi-stakeholder approaches to practical solution finding;
- enhanced transparency through the annual communication on progress; and
- learning, dialogue and mobilizing corporate action in support of global issues and UN goals that go beyond the avoidance of harm.

So, back to what is different today in terms of the role of lawyers in corporate responsibility and sustainability?

Some of the changes that we have observed include:

- Recognition, including in US Sentencing Guidelines for Organizational Defendants, that actions to implement corporate responsibility, among other things, help to manage risk and instill a culture of compliance and thus are to be encouraged and not punished. These require companies to exercise due diligence to prevent corporate crime and ensure the existence of ethical and legally compliant cultures in order to be eligible for more lenient sentences following criminal conviction.
- Civil society and local communities are increasingly looking to the law to gain public attention for their cause as well as to attempt to hold businesses accountable for adverse impacts that they have caused or contributed to on human rights and environmental issues. While the US Supreme Court is currently considering the fate and scope of the Alien Tort Claims Act, even if that avenue of recourse is closed off, groups will continue to look for other creative ways to bring actions and hold companies to account.
- Major law firms are not only advising businesses to join voluntary initiatives and to go beyond compliance with the law, but are actually joining the Global Compact themselves, adopting their own policies and processes on corporate responsibility and having dedicated staff not just to serve clients, but to be responsible for the firms' own implementation of corporate responsibility! Some law firms that you have probably heard of that joined the Global Compact in recent years include: Clifford Chance and Freshfields. Another law firm name you may recognize is Latham & Watkins, which published a paper on the importance of voluntarism, making the case for businesses to join voluntary initiatives, including the UN Global Compact. Some boutique firms have also been established focusing almost exclusively on corporate responsibility issues e.g. Foley Hoag in D.C.

- In terms of in house counsel, a study by an organization called Corporate Executive Board in November 2007, found that a company's level of resource investment in corporate social responsibility determines how involved the legal department will be; that when acting as a risk advisor, the legal department has functioned mostly in a reactive capacity; but that as investment in CSR initiatives grows, organizations rely more on Legal to establish and monitor compliance with sustainability-focused policies; and that companies with dedicated CSR programs tend to involve Legal as a proactive thought partner. They made the case for Legal to be and be seen as a Proactive Partner. The trends they identified have increased since then.
- Consistent with this call to action, there does seem to be a growing trend of general counsel stepping out of the confines of pure lawyering and taking on greater responsibilities as champions of business ethics and integrity, corporate brand, corporate governance and corporate responsibility more generally.
- Other developments include that the International Bar Association has had a CSR Committee for several years. It now has 360 members.
- And, here in the US, in February of this year, the American Bar Association endorsed a set of guiding principles on business and human rights that acknowledge the corporate responsibility to respect human rights. (ABA House of Delegates Resolution 109.
- The legal regime is also fueling such trends. Governments have started mandating greater disclosure on corporate responsibility. For example in this country, section 1502 of the Dodd-Frank Act requires companies to conduct due diligence on their supply chain for products containing certain minerals from the Democratic Republic of the Congo, where mining has fueled armed conflict resulting in the death of millions. Another example is the California Transparency in Supply Chains Act of 2010, which requires large retail and manufacturing companies doing business in California to disclose the efforts they have taken to eliminate slavery and human trafficking from their supply chains. In a number of other countries, reporting on corporate responsibility is being incentivized or required. For example, the French counterpart to the US SEC requires publicly listed companies to include in their annual reports descriptions of their internal control and risk management systems.
- In the wake of corporate scandals, there also seems to be growing recognition that values based management may be more successful in building a culture of compliance than a legal compliance only driven approach, which can lead to a focus on the letter and not the spirit of the law, fuel the search for loopholes and bring companies too close to ethical lines, as well as fail to anticipate changes in the law.
- Recently, it seems that dialogue has also increased in the legal community around the responsibility of lawyers for their clients' failures of corporate responsibility, and discussion around the role of lawyers as well as corporate boards in helping to safeguard corporate conscience. It seems that there are growing calls for lawyers to become not just the "guardians of corporate legal responsibility, but of corporate ethical responsibility as well." (C. Marks and Nancy B. Rapoport "The Corporate Lawyer's Role in a Contemporary Democracy" 77 Fordham Law

Review 1269 (2008-2009), pp. 1293. An example of this was a conference held in November last year on the responsibility of law firms, as businesses, to manage their business with respect for human rights.

- More generally, recent corporate scandals and perceptions of the possible role of lawyers in failing to avert them has renewed interest in lawyers' "dual roles as guardians of and advocates for the interests their clients, and as gatekeepers for the interests of courts and society."
- Of course, we are honoured that our initiative the UN Global Compact has been invited here tonight to speak with you about the UN's corporate sustainability initiative. Our previous encounters with bar associations have primarily been with international law sections.

What lies behind the changes in mindset that I outlined?

Some indications can be found in a public statement published a few years ago by a number of lawyers from Wiel Gotshal & Manges on a report by the then UN Special Representative on Business and Human Rights, which articulated a Protect-Respect-Remedy approach to business and human rights. This report was the precursor to the Guiding Principles that I mentioned a few minutes ago. The report said that businesses had a responsibility to respect human rights, which while not a wholly legal obligation, was not a law free zone either. In addition to affirming governments' primary duty for human rights, this report called for businesses to adopt policy statements on human rights, assess their risks of adversely impacting human rights through their operations, products, services or business relationships, and address those risks and remediate any and all adverse impacts on human rights that the business had caused or contributed to. There was a particular emphasis on having effective company level grievance mechanisms to handle concerns and disputes at an early stage before they become full blown legal claims. In expressing their support for and opinion on the report, Weil Gotshal gave some of the following reasons:

- Adoption of the report, will help level the playing field for US corporations, placing on foreign boards and management responsibilities to adhere to many of the same fiduciary and legal responsibilities presently applicable to US companies.
- There are no new legal obligations for US corporations in this.
- The fiduciary and reporting responsibilities of U.S. boards and managers today require that they be aware of, manage and properly disclose risks material to the company.
- Violations of human rights may constitute material risks for many U.S. corporations, not only in the United States, but also in foreign jurisdictions where they conduct business.
- Additionally, and beyond the obligation to manage risks, and comply with law, there is a substantial business case in favor of safeguarding human rights wherever the company does business.

The considerations I just outlined are focused on business' human rights responsibilities, but the same equally apply to other areas of corporate responsibility, including labour issues, the environment and anti-corruption.

No doubt there is also more work for lawyers in these areas too. In late 2009, an article in the Financial Times (by Reen SenGupta, 22 October 2009) noted that while it may not be politically correct to talk in terms of beneficiaries of the credit crisis, but there is one group of professionals for whom the crisis and downturn is more of an opportunity than a disaster: in house legal functions. Noting that for many years they were seen as the struggling partner's career haven, the article claims that they are coming of age in business. Reinforcing this idea is a 2010 issue of International Law News, a publication of the American Bar Association, which posed the question of why lawyers should be bothered by Corporate Social Responsibility. The answer given was "Because it will help you retain clients, attract new ones, lead to your competitive advantage by differentiating you from your competition, and add to your bottom-line benefits." International Law News, Winter 2010, R. Peyser and A. Filutowski "What Is Corporate Social Responsibility and How Can I Incorporate It into My Practice?"

Lawyers' drafting, risk management, negotiation and dispute resolution skills, among others, are in increasing demand in this connection. Drafting corporate policies and disclosures, conducting risk and impact assessments, managing stakeholder engagement encounters, conducting due diligence of potential business partners, advising clients on which initiatives to join, and defending clients in law suits alleging failure of corporate responsibility using a wide variety of causes of action from tort to competition law to criminal law are just some of the functions lawyers are being increasingly called on to perform.

Recognizing the key intermediary functions played by lawyers, and in an attempt to help further drive this change in the role of lawyers in corporate sustainability, the UN Global Compact, the International Bar Association and Lexis Nexis have been collaborating over the past couple of years on a project called Lawyers as Leaders. Using short film clips of progressive and proactive corporate counsel that have embraced corporate sustainability and responsibility, this efforts seeks to have lawyers convince their own peers of the value of action on corporate sustainability to manage risk and create value for businesses and societies.

The project consists of four short film modules on the issue areas covered by the UN Global Compact – human rights, labour, the environment and anti-corruption. Today, lawyers are increasingly the accelerators and not brakes on their company's corporate sustainability efforts. I want to mention by name one lawyer who has been a tireless advocate of lawyers having a more proactive role in corporate responsibility. John F. Sherman III, who was a member of the team that worked with the Special Representative on business and human rights, has written articles, given speeches and done much more, responding to key questions like "Human Rights Due Diligence, Is it Too Risky?" And "The UN Guiding Principles for the Corporate Legal Advisor: Corporate Governance, Risk Management, and Professional Responsibility." He has a webinar upcoming on 6

June 2012 with Northeastern University School of Law and Columbia Law School on "UN Guiding Principles for Business and Human Rights: What Lawyers Should Know."

However, there is still a long way to go and we'd like to ask for your help in getting there.

I am pleased to share that these days, our Executive Director is known for regularly saying how much he values lawyers, their practical solution finding orientation and their key roles as champions of corporate responsibility and sustainability.

Thank you.