



DIRECTORS
ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Peter Rees, QC

Global Legal Director of
Royal Dutch Shell

THE SPEAKERS



Peter Rees, QC
*Global Legal Director of
Royal Dutch Shell*



Lucille De Silva
*Senior Partner, Energy, Dentons
UKMEA LLP*



Lista Cannon
*Partner and Global Co-Head of Regulation &
Investigations, Norton Rose Fulbright LLP*



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*Partner, International Dispute Resolution
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(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, www.directorsroundtable.com.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished guest of honor's personal accomplishments in his career and his leadership in the profession, we are honoring Peter Rees, QC, Global Legal Director of Royal Dutch Shell, with the leading worldwide honor for General Counsel. Royal Dutch Shell is a global group of energy and petrochemicals companies. His address will focus on key issues facing the general counsel of an international energy corporation. The panelists' additional topics include creating multi-national contracts, energy deal making, international litigation, and regulation. The transcript of this event will be made available worldwide in electronic copy.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator



Peter J. Rees QC
*Legal Director of
Royal Dutch Shell*



Peter Rees QC was Legal Director and a Member of the Executive Committee of Royal Dutch Shell plc for three years, stepping down at the beginning of 2014.

Prior to joining Shell, Peter was, for just under five years, a partner in the London office of the New York based law firm of Debevoise & Plimpton LLP and prior to that, a Partner and Head of Global Dispute Resolution in the law firm of Norton Rose, which he joined in 1979.

In private practice Peter had extensive experience of major projects and disputes in the international construction, engineering and energy sectors, and represented government departments, local governmental authorities, inter-governmental agencies, contractors, sub-contractors, developers and professionals in many multi-million dollar projects and disputes. Peter advised CERN over a period of ten years on the construction and procurement aspects of the particle accelerator, the Large Hadron Collider, and drafted all the civil engineering consultancy and construction contracts for that project.

He is widely recognized as one of the leading construction disputes lawyers in the world and has been recommended as a leading expert in commercial arbitration and litigation by the Euromoney Guides to the World's Leading

Litigation Lawyers and Experts in Commercial Arbitration and in the Legal Business Report on Legal Experts as an Expert in Arbitration, Commercial Litigation and Construction and in the Chambers "Leaders in their Field" as an expert in construction.

He is a Chartered Arbitrator, accredited mediator and adjudicator and, in the area of international commercial arbitration, Peter has acted as counsel or arbitrator in numerous arbitrations both ad hoc and under the rules of the major institutions. He is a member of the Governing Body of the ICC Court of Arbitration, of the Court of the LCIA, of the Board of CPR and of the Board of Trustees of the CI Arb as well as sitting on the ICDR Rules Revision Committee and the IBA Arbitration Conflict of Interest Rules Revision Committee.

Peter also has extensive expertise and experience in anti-bribery and corruption law, and led one of the teams in the largest and most extensive corporate internal investigation into bribery and corruption, namely the investigation into Siemens, which resulted in that company paying over \$1 billion in fines to regulators.

In 2009, Peter was appointed Queen's Counsel, one of very few Solicitors to have been so appointed.

Royal Dutch Shell plc

Royal Dutch Shell plc is incorporated in England and Wales, has its headquarters in The Hague and is listed on the London, Amsterdam and New York stock exchanges. Shell companies have operations in more than 70 countries and territories with businesses including oil and gas exploration and production; production and marketing of liquefied natural gas and gas to liquids; manufacturing, marketing and shipping of oil products and chemicals and renewable energy projects. For further information, visit www.shell.com.

JACK FRIEDMAN: The Directors Roundtable has done programming here in London for many years, and a number of you have been to our programs, but I'd like to quickly give you a little orientation.

We're a civic group that has done 800 events globally at no cost to the audience. Our mission is to put on the finest programming possible for Boards of Directors and their advisors.

After this program is completed, we will make available to 150,000 leaders nationally and globally a full-color transcript of the proceedings.

Today, our distinguished Guest of Honor is Peter Rees, who is head of the legal function globally for Shell. He will make his introductory remarks and then we'll have the other speakers make brief comments about their special topics. Following that will be a Roundtable discussion and toward the end, the audience will be invited to ask questions.

I'm not going to do justice to Peter's entire career but I will highlight a few things. He went to the University of Nottingham and then went to Cambridge. I have had occasion to talk to the faculty there, and people do remember you fondly. He has also had an extensive career in the private sector, and we'll get into some of those experiences later. Without further ado, let me introduce Peter Rees, our Guest of Honor.

PETER REES: Good morning, and thank you. I've got to say, I'm honored to be recognized by the Directors Roundtable and to be invited to speak today with such a distinguished panel and such a good-looking audience. You're good-looking because I know many of you, and I know that underneath those exteriors, there really is something that's better looking than the outside!

Today I'm going to talk about the rule of law and why it's so vital to what we do at Shell, which is supplying energy that keeps the world moving. I want to look at what



the rule of law really means, where absence of law causes emotion to override evidence, and where compliance with the law requires you occasionally to break the law. In particular, I want to look at a specific situation where the failure of governments around the world to enforce the rule of law is crippling a country and allowing criminals free use of the proceeds of crime.

In doing this, I intend to call upon the help of Martin Luther King, Dick Tracy, Rumpole of the Bailey, and Deep Throat, the Watergate whistleblower. Before I deploy this cast of characters, let me start by setting the scene a little and giving you some context about Shell and its position and influence in the world's oil and gas industry.

Shell has 87,000 direct employees in more than 70 countries. When you add the contractors and staff at our retail stations and in our other related operations, it totals about a million people working for Shell every day. We have 44,000 retail sites, which is more than McDonald's has restaurants, and we produce oil and gas amounting to the equivalent of approximately 3 million barrels of oil a day. We also provide a whole range of goods and services for industry, including fuel for ships and planes, and petrochemicals, and a whole array of products such as plastics, detergents and textiles. Every year since 2007, we have

spent \$1 billion on research and development, and our net capital expenditure last year was around \$30 billion. So, you've got some idea of the size of Shell.

Now, I want you to participate in a little exercise for me. An exercise of two sorts: one, some physical exercise; and secondly, some mental exercise. I'm going to ask you all in a moment to stand up. Having told you about the size of Shell, you are aware of the other major oil companies in the world — Exxon, BP, Chevron, Conoco, and Total. What I would like you to do is to think about those companies, and think about how much of the world's oil and gas the supermajors produce. So would you all please stand up?

My Shell colleagues, I should say, are exempted from this, because they know the answer. I'm going to start at 80%, and when I get to the percentage that you think the supermajors — the six companies I've mentioned — supply of the world's oil and gas, please sit down. Eighty? Seventy? Sixty? Fifty? Forty? Thirty? Twenty? Ten. Those of you who are still standing at ten have got it right. When you add the combined oil and gas supplied by Shell, Exxon, Chevron, BP, Total, and Conoco, you are talking about 12 or 13% only of the world's oil and gas. So when you think about the world's attempts to control carbon emissions and to regulate



the activities of the international oil and gas companies, please bear in mind that the vast majority of the world's hydrocarbons are supplied by national oil companies owned fully or in part by governments, and they control more than 90% of the world's oil reserves.

Now, the rising demand for energy caused by a growing population and improving living standards in the developing world is going to be the greatest challenge for all of us in the decades ahead. Again, you probably know that the world's population grows by 200,000 people every day, and by 2050, the population of the world will be 9 billion, from the 7 billion that it is at the moment. Global energy demand is going to increase by as much as 80% during that time.

When the world's governments are thinking about attempts to reduce greenhouse gas emissions and improve the living standards of those living in developing nations, they need to think beyond the international oil companies. They need to think long and hard about who really does influence these issues, and they need to resist the temptation to reach for measures that are simply short-term political gestures.

As Martin Luther King said — and this is not going to be the only time I'm going to rely on his wisdom — “Rarely do we find men who willingly engage in hard, solid thinking. There is an almost universal quest for easy answers and halfbaked solutions. Nothing pains people more than having to think.”

So, with those words fresh in our ears, let me turn to the rule of law. The rule of law is vital to what we do at Shell, but it's equally vital to remember what it means. When I was a young lawyer, at one of the first trials I went to, the judge commenced by saying, “This is not a court of morals, nor is it a court of justice. It's a court of law.” That struck me at the time, and has throughout my career. Ideas of what is morally right or wrong, and what constitutes justice, are very subjective ideas. Law is what it is, and that is why the rule of law is so important to Shell. The rule of law sets out the parameters within which we can operate; it gives us certainty as to what we can do and what we can't do. Just as importantly, it tells us what others can and can't do to us.

Martin Luther King again: “It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important.” It's very much the point. The rule of law cuts both ways, and that needs to be observed by those who try and use the rule of law as a stick to beat corporations in furtherance of what they see as just campaigns. Their campaigns need to be conducted within the law and utilizing the law. If the law does not produce the result they want, then they have to accept that fact and comply with the law. To do anything else is actually to disregard the rule of law. As I say, it cuts both ways.

Now, this is important not for us, but for society as a whole. I want to give a very quick example. To meet rising energy demand, we're going to have to make huge investments in the coming decades. The International Energy Agency has estimated that the world will need to invest \$37 trillion between now and 2035 to meet the

rising demand for energy. Although capital and technology are essential, the industry is only going to be able to make such investments with effective laws in place — laws that establish not only what can be done, but also regulate how it should be done.

Now, I'm sure you're all familiar with the concept of hydraulic fracturing to access shale gas and oil. In the United States, the so-called shale revolution has dramatically lowered costs for energy-intensive industries, and is attracting manufacturing back to the U.S. from overseas. It promises to provide the U.S. with a long-term competitive advantage, enhancing the nation's security and improving the balance of trade. They may even start exporting energy and exporting gas. Other countries are now looking at shale gas, including Australia, China and the Ukraine, and of course, here in the U.K., the government is keen to promote a similar shale gas revolution.

Shale gas will provide more energy to help power the world, and it will reduce carbon emissions by helping to displace coal. A modern gas-fired power plant produces half of the carbon emissions that a coal-fired plant produces. I saw in the paper this morning that the Environmental Protection Agency in the U.S. is considering banning any new coal-fired power stations there. This is a product of the shale gas revolution. There is a huge amount of emotion and controversy about hydraulic fracturing, and actually very little regulation about how it should be carried out. In consequence, compliance with the law is not a problem for Shell, but more worryingly, nor is it a problem for other less-experienced and possibly less-safe operators.

What is needed in this area is not a ban on hydraulic fracturing, but sensible regulation so that compliance with the law means that access to the resources can be achieved safely for everybody concerned. It's time for governments to do some of that hard, solid thinking. Let scientific fact inform the debate, and let detailed legislation regulate the process, so

that we can have clean, affordable energy and we can reduce carbon emissions significantly. Evidence-based decision making and thoughtful, comprehensive regulation should be the focus of European governments and governments around the world.

This is my final Martin Luther King quote: “Nothing in the world is more dangerous than sincere ignorance and conscientious stupidity.” Now, it should come as no surprise to this audience that a combination of sincere ignorance and conscientious stupidity, coupled with a lack of hard, solid thinking and a quest for half-baked solutions, can lead legislators to produce laws that do not achieve their aims and give rise to a multiplicity of unintended consequences.

Where those consequences require you to break the law in one country in order to comply with the law in another, then the rule of law really does run the risk of being brought into disrepute. Again, a quick but rather worrying example: The USA recently passed legislation which requires companies in the oil and gas business to publish how much they pay to foreign governments for the right to extract oil and gas. Now, in some countries — like China — that information is, according to their law, a state secret, and disclosing it is a criminal offense. However, the U.S. regulations permitted no exceptions and compelled compliance with U.S. law, even though it meant breaking Chinese law.

Now, fortunately, the rule of law is alive and well in the U.S., and a judicial review of regulations is permitted. So when the U.S. courts looked at this regulation, they concluded that not to have an exemption in circumstances like those made the rule arbitrary and capricious, and so the courts vacated the rule. Now, there were some who didn't like the decision, but as I say, the rule of law prevailed — it cuts both ways.

Unfortunately, we can't say the same of Europe. The European Union has issued a directive on reporting payments to foreign governments with exactly the same

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requirements as the U.S. legislation, and indeed, they specifically said they wanted to be the same as the U.S. But there's a big gap in the rule of law in Europe: no judicial review of a European Union directive is possible. You have this arbitrary and capricious rule now applying to European companies — but not to American companies — and European companies are going to be forced to break the law in China and in other places, simply to comply with the requirements of a European Union directive.

It seems that the EU institutions can issue directives unfettered by any independent judicial review, and force companies to break the law in other sovereign states. Where is the rule of law in Europe, and what happened to hard, solid thinking?

Finally, I want to turn to a specific instance where, unlike the previous two, there are adequate laws in place, but what is needed is the application of the rule of law. It seems governments around the world are not willing to take steps to do so. The consequence, as I said at the beginning, is that a country's development is being crippled, and the proceeds of crime are flowing freely to criminals. In our present world of well-organized crime and serious terrorist threat, you don't actually have to be a particularly hard thinker to anticipate where some of the proceeds of that money may flow. I'm talking about oil theft in Nigeria.

Let me be clear at the start: this is not a cottage industry; this is well-organized crime occurring on a huge scale, and with terrible

economic, environmental and social consequences. It's hurting not just companies and an industry, but a country and its people. Nigeria has substantial oil reserves; it's the largest producer of oil in Africa, and the twelfth largest producer in the world. It suffers from crime and ongoing social unrest. What can be done? As a society, we like to think that Dick Tracy — the fictional detective and scourge of criminals — was right when he said, “Crime doesn't pay.” I'm afraid at the moment, it's the observation of Rumpole of the Bailey that is more appropriate. His view of life was, “They say that crime doesn't pay; but it's a living, oh, yes, it's a living!” In the Niger Delta, well-organized criminal gangs are targeting oil pipelines on an industrial scale. Their work is sophisticated and it's carefully planned, and they're making more than just a living from it — they're making fortunes. Typically they'll sabotage a pipeline, which forces the pressures to be lowered and a leak to occur. Then they use the resulting repair period to set up tapping points on other parts of the pipeline, allowing oil to be siphoned off when the flow of oil is resumed.

I'm going to give you some astonishing statistics. On just two of our major pipelines in Nigeria, we discovered, at the beginning of this year, 84 illegal tapping points. Those are taps illegally bored into the pipelines, through which the thieves were draining the oil. During the course of this year, up to the end of August, we have discovered a further 111 tapping points in those two pipelines. Now, we're fighting a constant battle against the theft, and during



the course of this year, we've managed to remove 149 of the tapping points. Now there are only about half as many as there were at the start of the year. Can you imagine how much oil has been stolen in that time, and how much pollution has been caused by the leaks, and lives endangered by these illegal activities?

The Nigerian government estimates that more than 300,000 barrels of oil a day of output are lost due to theft and production deferral because of this disruption. We reckon that about 24,000 barrels of oil were spilled last year just in the vicinity of our pipelines, and so the total for oil spills caused by theft and sabotage in the country as a whole is undoubtedly many times greater.

In the past, most of the stolen oil was distilled in illegal makeshift refineries for local use. Today, most of the stolen oil is transported to ships offshore and then traded on the black market, or has its origin disguised for onward sail elsewhere in the world. A whole criminal network has developed to steal and transport the oil on such a large scale that the magnitude of the crime is nothing short of extraordinary.

This not only deprives Nigeria of the stolen oil and the corresponding revenues, but you also have major production delays

and further economic damage. With oil at about \$100 a barrel, you don't need to be an economist or a mathematician to realize that the government is losing out on billions of dollars of revenue that could be spent in improving the lives of the people in Nigeria. I must stress that it is the government and the people of Nigeria who are losing out, because although I talked about our pipelines, the operations we have onshore in Nigeria are actually a joint venture between us, Total and Eni, with a combined participation of 45%, but 55% is owned by the Nigerian National Petroleum Corporation, which is the state oil company. Again, by way of illustration, just last month the *Financial Times* reported that Nigeria's excess crude account, which is the government's fund to provide extra financial stability to the country, had fallen in value from \$9 billion to \$5.1 billion in the space of six months, reflecting the impact of oil theft.

We've taken steps to improve security, especially in the areas that are prone to oil theft, but frankly, razor wire and surveillance and security teams are only part of the solution. Oil companies cannot solve a crime of this scale on their own. As long as the international trade in stolen oil from Nigeria is thriving, there are going to be huge economic incentives for this to continue. Not

one of the leaders in the main oil theft gangs has so far been arrested or tried, and they clearly should be. It's time for the international community to recognize that they have a role to play, as well, and to take action to help the Nigerian government pursue those who carry out these illegal acts and bring them to justice.

To bring my final character into play, Deep Throat, the Watergate whistleblower, the advice he gave was, "follow the money." The ships sitting offshore Nigeria that receive the stolen oil need to be tracked. The countries receiving the stolen oil must act, and the countries and the financial institutions that are housing the bank accounts into which these vast proceeds of crime are deposited must ensure that the criminals can no longer get access to their illegally gotten gains. As I said, the sums are enormous; there are billions of dollars. Frankly, it's disingenuous of any government or bank to say that they're not capable of following the money and freezing the accounts into which it's been deposited. There are numerous precedents for this. Within a month of 9/11, the combination of U.S. legislation and U.N. resolution had frozen 66 bank accounts, and within six weeks of the Egyptian revolution in 2011, the EU had identified and frozen a similar number of suspect bank accounts. It can be done. If the criminal activity in the Niger Delta is to be stopped, then it's going to need action not just from the government of Nigeria, but also concerted action from governments around the world.

It's time to follow the money, to identify the money driving this illegal trade at both ends of its supply chain, and to apply the rule of law with a sense of urgency. This needs to be done to make sure that it's Dick Tracy, rather than Rumpole, who has the last word, to make sure that crime really doesn't pay. It's time for the international community to apply and enforce the rule of law now, and not just talk about it.

Thank you very much.

JACK FRIEDMAN: There are many important issues that Peter has raised, and we'll get to several of them further this morning. I want to ask Peter one or two quick questions. First of all, starting at the beginning of your talk you had mentioned the facts of fracking. Could you give us an idea of the misinformation and misunderstandings that people should know?

PETER REES: Sure, part of the problem with hydraulic fracturing is that there is not enough regulation to make sure that it's done properly and correctly. When you compare the cost of drilling an oil well offshore in the Gulf of Mexico to the cost of drilling an oil or gas shale well onshore in the U.S., it's about 20 or 30 times cheaper. You don't actually need to be a big operator to do it, but if you are doing it and there's no regulation around how you're doing it, it can lead to a real problem. It may not be done necessarily in a safe and proper way.

It is similar to the motor car. When the motor car came out, everybody was afraid of it. It was going at ten miles an hour and was going to cause havoc on the streets. What started was some regulation that required a man with a red flag to walk in front of the motor car, as a way of ensuring it was safe. We need the same sort of thing with shale gas. We don't need to say that hydraulic fracturing should be banned; we need to put the right regulation in place, to make sure it can be done safely. If it is done safely — and it's being done in the United States safely in a huge area — then it is going to supply the energy that we need. It's that lack of regulation at the moment. The problem is if you have one incident caused by one unsafe operator, then the whole industry is going to get tarred with that brush.

JACK FRIEDMAN: You talk about the piracy problem. Who can enforce the law? Is it left to the host government that's losing the oil?

PETER REES: There is a tendency for governments in the international community simply to say, "This is a Nigerian problem,

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so we're not going to bother with it." But quite frankly, it's not. As I say, this is crime on a massive scale. The ships that sit offshore are huge tankers that are being loaded with this oil, and it needs the international community to be willing to intervene to track where they're going and where they're trying to sell the oil. It also needs to ensure that the money is stopped. If criminals can't make money, they won't do it. That means that governments and financial institutions in the Western world, in the places where quite often these bank accounts are situated, have got to look hard at the sums of money that are going into those bank accounts, where they're coming from, and do something to stop that. It's not something that can be done solely by the Nigerian government, because although some of the money may be staying in Nigeria, a lot of it is actually leaving the country.

JACK FRIEDMAN: Regarding piracy in Africa, is there anyone other than a global Navy who is legally allowed to intervene?

PETER REES: Partly, it depends on the jurisdiction. So once the ships are on the high seas, there is no jurisdiction.

It is perfectly possible, given technology and the information that governments around the world — particularly the U.S. government — can access to track the vessels and see where they're going. When they enter sovereign waters of other governments, they should say, "This vessel is here with a load of stolen oil. Now you need to intervene and make sure that

this oil does not go into the black market." It's a question of governmental cooperation, tracking the vessels, and handling them when they get to their destinations.

Governments need to make sure that there's enough cooperation to stop them there. I'm not suggesting you blow them up on the high seas.

JACK FRIEDMAN: The world is not just a James Bond movie where everybody is all over the place, going after each other.

I would like to move ahead by introducing our three Distinguished Panelists, who will each introduce their topics. Lucille De Silva is with Dentons; Sophie Lamb is here from Debevoise & Plimpton; and Lista Cannon is from Norton Rose Fulbright. Let's start out with Lucille.

LUCILLE DE SILVA: Good morning, everyone. What I would like to talk about is change in the energy industry and how it impacts us all as lawyers. Contrary to popular wisdom, four things in life are certain — not two — in my view. In addition to death and taxes, I have it on good authority that next September, there will be a twelfth series of "Strictly Come Dancing"; and the fourth certainty is that no matter how settled and permanent a situation seems today, it will change.

If we start by looking back 40 years ago — to 1973 — there was a worldwide oil crisis which was precipitated by conflict in

the Middle East. In the U.K., there was a national coal strike that led to the government rationing electricity. The switch to natural gas was still underway in the U.K. and would not be finished for another decade and a half. Some of you may recall that the newspapers were, at that time, predicting a new ice age.

Since then, we have come a long way and a lot of things have changed. However, one statistic has hardly altered, and that is that fossil fuels still account for the vast majority of the world's energy needs; currently 80% of the total. Even this apparent stability is misleading, because the energy market has changed immeasurably, and the changes range from the fundamental to the more subtle and incremental. The rate and complexity of change appears to be increasing and so do the drivers for change. Energy markets have been opened up to greater competition. We have Kyoto and the low-carbon agenda, and these have brought climate change to the fore. We are finding new ways to exploit and commercialize energy sources, including LNG, wind, solar, and the most amazing technology changes such as smart metering. However, most important, in terms of its potential scale and opportunity is shale gas. The exploitation of shale gas enabled the U.S. to become a natural gas exporter. I am not sure there are many experts who would have predicted that fundamental shift even as recently as ten years ago. To give you an example of that, most of the colleagues I know in the LNG market were busily negotiating and closing deals for the import of LNG into the U.S., and the building of regasification terminals. Those terminals are now being converted to liquefaction terminals for the export of LNG.

Arguably, the greatest change is who is using the energy, and Peter touched on this earlier. A report by the U.S. Energy Department published in June this year said that in April, 2003, countries outside the OECD led the world in liquid fuel consumption for the first time ever. Just to re-emphasize, the OECD includes the

whole of North America and Europe, as well as Japan, South Korea, Mexico, Turkey and Israel. That trend is set to continue, so between now and 2030, 90% of growth in total energy consumption will occur in non-OECD countries. That is a huge change. In many of those markets, this change will only happen in an affordable way if investors like Shell and others have confidence in the legal, contractual and regulatory framework system in place.

What are the drivers for change? In my mind, simplistically, they can be categorized in three ways: government policy expressed in the form of a range of instruments, from regulation and international commitments (primarily legislation) to industry codes and licenses. Technical innovation enables economic exploitation of previously untapped energy sources. Lastly, short, sharp shocks make us re-examine existing technologies or policies, often with unexpected consequences. I will go on to have a look at those three.

Let us consider government policy first. Obviously, the overriding concern of any government, when looking at the energy agenda, is to keep the lights on, i.e., security of supply. However, there are other factors, too. Today, competition, human rights, climate change and environmental concerns not only loom larger in terms of public opinion, but they have to be embedded in government decision making as a matter of law. At least in our jurisdiction, they do.

In consequence, the government policy that emerges is a shifting and imperfect balance between long-term aims and acute short-term pressures, which are often pushing in opposite directions. The most obvious solution from a long-term perspective is often the least attractive in the short-term, and vice versa. For example, the need to manage immediate government budgets, or to manage public perception in the way that Peter talked us through regarding the shale issue, may give rise to sudden and unexpected drops of subsidies for renewables, or tax grabs for upstream profits.



This rings true beyond the energy industry; as Jean-Claude Juncker, the Prime Minister of Luxembourg, said when he was asked about the Euro crisis, “We heads of government all know what to do, we just don’t know how to get re-elected if we do it.”

As energy investments need long-term regulatory certainty, the long-term/short-term regulatory balance is that much harder to strike in energy policy. Oil fuel development, large-scale power projects; they take years, even decades, and their costs can be measured in billions. Rushing to make changes in policy or regulation can render an investment obsolete.

A perfect example of this on a much smaller scale in the U.K. has been the development of the U.K. solar market. The government’s intentions were to build up the solar market in the U.K. from literally a zero start by forming legislation to provide the certainty and stability that the industry needed. Immediately thereafter, within the timeframe of two years, there were at least 10 fundamental changes to that legislation, which was intended to provide stability. Despite a successful judicial review by a number of investors in that market who subsequently



went bust, very few companies have been successful in developing that market going forward. Obviously, this will change; there is more stability coming through. However a case study on that industry itself will give investors a feel for how stable, certain and predictable U.K. government regulation can be or may not be.

Turning to technology, let us consider shale gas. Shale gas is not new; geologists have known about shale reserves for years. The means to extract it is not new, either. What has changed? The change is that there has been a cumulative, incremental development of the technology, and that has made shale gas extraction more efficient and potentially more competitive with the other sources of energy.

Switching from coal to gas-fired generation has enabled the U.S. power sector to reduce its carbon emissions. However, shale gas is still a fossil fuel and, as Peter has pointed out, its use is controversial. The EU has set a target of reducing carbon by 80% from 1990 levels by 2050. Although shale gas can slow that rate of increase in CO₂ levels, it does not eliminate CO₂ emissions. Is the

solution another technology? Carbon capture and storage is one possibility. Carbon capture and storage is the capture of CO₂ from power stations or industrial facilities, and its permanent storage in offshore depleted oil or gas fields or saline aquifers. In my view, it could be the energy industry's killer app. Were CCS to be commercially viable, it would support the continued use of fossil fuels in power generation with minimal impact on the environment. The U.K. is largely leading the way on CCS, with technology providers such as Shell involved in what could be the world's largest engineering project in Europe, and one of the most ambitious and farsighted commercial ventures ever attempted.

There are huge numbers of legal issues here in terms of long-term liability and risk. Capital-intensive projects like these need long-term certainty of government policy, an issue we have touched on before. That is what the industry will be awaiting from the government's Energy Market Reform Program and the Contract for Difference, which will be the key economic mechanism to support the development of CCS in the U.K.

The final driver for change that I would like to look at is the short, sharp shock; the unexpected major event that turns everything upside down. For example, Macondo – the BP oil spill in the Gulf of Mexico – which cast doubt on deep-water drilling, and Fukushima, which has led directly to at least Germany and Italy formally abandoning very successful and entrenched nuclear programs.

Even small events can have a major impact – witness two major earthquakes in Blackpool that were linked to fracking. The largest measured 2.3 on the Richter scale, which is below the limit most people can notice. However, you would not think that if you read some of the press around that time.

So what are the linkages between the three? Technology, government policy changes, and short, sharp shocks can all happen at the same time. Quite like buses, they often come in threes. They interact, and often. This is a positive process with beneficial outcomes, and surprisingly so.

Take Macondo. In the immediate aftermath of Macondo, there were calls to cease deep-water drilling. Instead, there has been a global re-appraisal of safety rules. In the U.K., the independent Maitland Report was published, the key finding of which was that the oil and gas industry had already addressed many of the problems. Since 2010, standards have been raised which require technological improvements and better practices. So, eventually, Macondo should facilitate more, not less, deep-water drilling.

The interplay between shale, carbon capture, and low-carbon technologies is more nuanced. If governments can reduce their carbon footprint without deploying renewables, might they be moving away from wind and solar? Just as those industries are reaching maturity, when the economies of scale and innovation would be just on the brink of making the public subsidies that the populations may not support unnecessary? Who knows?

Lastly, what is the role for lawyers in this complicated world? In my view, it is simple: The role of general counsel, in-house counsel and external law firms is to help our clients develop and implement their objectives in an ever-changing environment. To do this, we need to understand the changes and to anticipate them, and to bring clear thinking to difficult and new situations.

Having begun by saying there are four certainties in life, I am now going to contradict myself, because, in fact, I think there are five, not four. In addition to death and taxes and Bruce Forsyth and change, one other thing is guaranteed: When the change happens, whether it is destructive technology, a switch in domestic/international agenda, or a catastrophic event, at some stage a lawyer will need to look at the problem and find a workable solution. Law, whether in the form of regulation, negotiation or risk management, is, in my view, as crucial as the technical or commercial aspects of innovation.

There is one last point to remember, and that is one we can always be reasonably confident of: on the balance of probabilities, once we lawyers have squared the circle and got our ducks in a row, herded all the cats and dealt with every other cliché to achieve the best and even possibly the perfect solution for our clients, the value of our contribution will be underestimated and probably rapidly forgotten. While our commercial colleagues are in the pub on a Friday night whilst we are solving the problems of tomorrow, the non-lawyers will wonder why it took us so long to come up with the solutions, and also why it costs so much!

Thank you.

JACK FRIEDMAN: Before we move ahead, I would like to ask a question or two.

The question I have is, if such an event as the Gulf oil spill happened around the U.K. or other parts of Europe, how would it be handled differently here in terms of government, PR, and the courts compared to an oil industry crisis in America?

“As long as the international trade in stolen oil from Nigeria is thriving, there are going to be huge economic incentives for this to continue. Not one of the leaders in the main oil theft gangs has so far been arrested or tried, and they clearly should be. It’s time for the international community to recognize that they have a role to play, as well, and to take action to help the Nigerian government pursue those who carry out these illegal acts and bring them to justice.”

– Peter Rees

PETER REES: I suppose there is a different level of frenzy in the rather staid U.K. compared to the rather more excitable U.S. To that extent, I would imagine that there would not be the same level of attacks that have been leveled at BP. The U.K. had a situation several decades ago where there was a significant oil spill by the Torrey Canyon. That didn’t cause the same level of outcry, but probably was on a much smaller scale. One of the things that I have noticed that has been different is that BP tried to do the right thing. I was talking about rule of law earlier; there is actually a contractual cap on damages under American law that applies to such oil spills. Now it’s a relatively low cap, and the first thing BP said was, “We are not going to be governed by that cap; we are going to do the right thing, and here is \$40 billion, and we’re going to put that to one side in order to meet the claims that are going to arise out of this spill.”

The problem they now have, which is why they’re putting the ads in the *Wall Street Journal*, is that having thought that they had done the right thing, acted correctly, and evaluated the likely outcome of the claims that were being made, there do seem to be claims being made against them that perhaps stretch the level of credulity as to people’s real losses resulting from the Macondo spill. The big difference in the United States and here, and probably in the rest of Europe, is those claims would be thrown out, and they wouldn’t be countenanced in the way that they are being countenanced, and the way in which they are being handled in the

U.S. That would be the big difference for me. There are all sorts of other regulatory differences, but certainly, it would be handled in an entirely different and rather more restrained way. I don’t know if anybody else wants to comment.

LISTA CANNON: Also in the United States, we tend to assume that if something’s gone wrong, it’s the result of some corporate negligence. In the U.K. and in Europe, there is initially a greater understanding of human frailties and negligence. You take that combination of having to blame someone, a corporation with greater resources than the individuals, or the coastline that has been damaged, combined with political will, and you wind up with an environment where BP basically had to say they would do the right thing, because they were not going to be doing business in the United States if they didn’t.

JACK FRIEDMAN: Also, weren’t they faced with class actions? The claims can total colossal numbers including punitive damages.

LISTA CANNON: And there is also the concept of treble damages.

JACK FRIEDMAN: Looking at it from the corporate general counsel point of view, you might be looking at \$5 to \$20 billion in damages as a ballpark estimate, plus the unknown factor of a jury throwing in punitive damages for extra billions.

How does a general counsel get enough expert advice in that type of situation?

PETER REES: The short answer is that telling the board “you don’t know” is not actually an option that you have as general counsel. You have to make a judgment based on imperfect information. One of the big differences between being in private practice, that I discovered going in-house, is that I can no longer say, “If you give me more information, my advice to you will be better.” That’s not an option for the board. You have to use your judgment, and that’s what general counsel and all of my colleagues at Shell do all the time. We have to make judgment calls on what we think it’s going to be.

JACK FRIEDMAN: There’s a common saying that business people view lawyers as an obstacle to running a business. Is it the same at the board level in the U.K. or Europe? Is the General Counsel an unavoidable guest in the boardroom?

PETER REES: As Lucille said, lawyers will always need to look at everything. You only need to open a newspaper. If you look at the front page of any newspaper every day, 90% of what’s on the front page has to do with the law, in one way or another. So a lawyer is always involved. At Shell and at most other corporations these days, the legal team has gone from being the “business prevention unit” to being the “business facilitation unit.” Certainly at board level, we are expected to provide advice that is going to help the business do its job, in the right way, and to be sure that it remains compliant to fundamental regulations.

JACK FRIEDMAN: Thank you. Sophie Lamb will speak next.

SOPHIE LAMB: Thank you. Good morning. Like Peter, I’m also going to talk about the rule of law this morning. But I’m going to talk about the function of international arbitration and international investment treaties in addressing modern challenges to the rule of law.

At its most essential, of course, the rule of law is the influence and authority that



the law has within society, especially as a constraint upon certain behaviors. The following are perhaps its four essential killers: First, that government and its officials and agents are accountable under the law. Second, that laws are clear, publicized, stable, fair, and protect fundamental rights, including the security of persons and property. Third, that the process by which the laws are enacted, administered and enforced is accessible, fair and efficient. Finally, that access to justice is provided by competent, independent and ethical adjudicators, attorneys and judicial officers.

Now, international arbitration and international arbitration tribunals have contributed to the growth of the rule of law for literally millennia by upholding contractual bargains, imposing the requirements of the law, and thereby creating the predictability, certainty and confidence necessary to facilitate commerce. With the growth of investment treaty arbitration, we have a mechanism for private parties to bring direct actions against foreign governments. Decisions by arbitrators transcend the private law sphere and engage directly on issues of public importance. Impartial investment treaty tribunals address a host state’s domestic public policies

on a wide range of issues impacting financial, social, and environmental concerns. In recent times, they have included sovereign debt restructuring, regulations on cigarette packaging, windfall taxes on commodities, the rights of indigenous persons, environmental pollution, environmental targets, and many others.

These policies would, of course, be subject to broader judicial deference in the host state’s domestic courts, but before a treaty tribunal, they are scrutinized according to international law standards.

With the proliferation of investment awards, arbitrators have developed a super-national rule of law, and that has helped to create uniform standards for both acceptable private and sovereign conduct. It has fleshed out those actions which involve transgressions of treaty standards, whether a failure to reimburse VAT, the arrest or deportation of key staff, forced modifications to corporate and commercial arrangements, arbitrary changes to licensing laws or regulations, and failing to provide physical security to investments, including in the way described by Peter.

Although there is no system of binding precedent, as such, in international investment law, there is a certain level of consensus which fosters a normative environment that is predictable. Awards have changed on normative expectations of how a government should behave towards foreign investors. Indeed, the system has, of itself, created a powerful incentive for the host state to live by the rules of an investment-friendly climate.

Now, in a moment I’ll describe just a few of the key substantive protections available under investment treaties, and how they meet many of the modern challenges to the rule of law. Let me preface those observations with some basics. The value of these treaties is now so well-known and understood that investment treaty structuring ought already to be forming part of a standard due diligence in any major overseas



project. There are almost 3,000 bilateral investment treaties, and the exercise can be as simple as inserting a holding company incorporated in a jurisdiction which benefits from a relevant BIT in the host state.

Now, although major energy projects and investments will likely be the subject of a detailed contract between an investor or suite of investors and the host state, contracts have any number of limitations, including the ability of the host state to remove it on a whim by legislative act or, indeed, by its coercive powers to insist on contract renegotiations. International law protections guaranteed by investment treaties address those arbitrary and discriminatory acts, and they do so under international law standards and not the narrower or parochial standards that can prevail or even control under national law.

There are certain common substantive protections among the treaties, even though their wording changes sometimes in material ways. In this short address, I will mention just four of them, and those are full protection and security, direct and indirect expropriation, denial of justice, and fair and equitable treatment. Some modern challenges to the rule of law engage several, if

not all, of those standards. The first of the four is constant protection and security. This obligation appears in many investment treaties, including the U.K. and Nigeria BIT, and also in the Energy Charter Treaty. It is a potent tool for investment protection. It requires reasonable measures of prevention and redress; vigilance to protect against looting, rioters, demonstrators, wanton destruction, theft, injury, harassment, intimidation, violence, regardless of whether the aggressor or perpetrator is a state or private actor. The standard of diligence expected of the host state is high, and not necessarily proportionate to the resources available. There is no need to prove negligence or bad faith. All tribunals have accepted that it protects physical integrity of an investment, but many have expanded beyond police powers and physical security to legal and commercial security of investments.

The second standard is expropriation. Expropriation is the taking of property, which includes, of course, contracts, shares and licenses, even where an investor remains in physical possession of his investment. Expropriation is not illegal, per se, under international law, but it is subject to conditions, including that it must be accompanied by prompt and fair compensation.

Creeping expropriation, or indirect expropriation, involves legislation, regulation and taxation, which over time makes it difficult for a business to operate or own that business in normal conditions. Both of these result in damages, and very often at fair market value prior to the expropriation, where the actions were not for a genuine public purpose.

The third standard is denial of justice. This standard requires that a host state provide fair and effective means in its judicial system to assert claims. The system should be free from excessive delay; it should be free from state interference. Bogus and corrupt court decisions can effectively be challenged or neutralized in the context of investment treaty claim.

Finally, there is fair and equitable treatment. This is the idea that a host state should provide a stable and predictable business and regulatory environment. It's a dynamic standard, and it depends on what the investor could reasonably have predicted or expected, given country risk, industry and context of his investment. Indeed, it's a standard that has involved controversy and debate, particularly insofar as it impacts upon regulatory autonomy in the sphere of social, labor and environmental policy.

The standard remains an important protection against arbitrary changes, but it does not guarantee that no changes can be enforced; absent, perhaps, a stabilization agreement. I want to say a few words on stabilization agreements. They are, of course, widely used risk management devices, particularly in the extracted industries. Lenders often view them as an essential element of the bankability of an investment. Interestingly, despite the enormous amount of controversy over BITs and their effects on regulatory autonomy, there are still relatively few cases involving stabilization clauses. We know they still matter, because treaty tribunals often justify refusing claims based on regulatory change by reference to the absence of a stabilization agreement.

Anecdotally, we know that many fiscal stability agreements are generally respected, or that they are only moderated over time with genuine consensus. The debate in more recent times is as to the use or, indeed, legitimacy of stabilization agreements outside fiscal arrangements. Do they limit unduly the application of new social and environmental regulations to investment activities over the life of an investment? Indeed, are they consistent and compatible with a state's duty to protect against human rights violations by businesses under the U.N. guiding principles?

In conclusion, then: investment protection standards are relevant, but they are dynamic. While still legitimate to seek appropriate financial security for long-term investments, the extent to which an investment can be insulated from regulatory change, especially when it falls within the social and labor space, is highly questionable. In any event, attempts to insulate in that way come with substantial reputational risk, and are unlikely to be compatible with any serious CSR policy with the essential core business values to which many of you are absolutely committed – or, indeed, with the U.K. government's expectations for businesses in light of the U.N. guiding principles.

The trend towards transparency will not, in any event, allow such arrangements to remain beyond scrutiny, including as we move towards human rights reporting requirements in the U.K. later this year.

Arbitration has and will continue to play a substantial role in protecting investments and upholding the rule of law. Investment treaties and tribunals are potent; they are necessary; and they are sometimes the only viable response to the many challenges to the rule of law experienced by investors around the world.

Thank you.

JACK FRIEDMAN: The American point of view is that possibly the greatest contribution that the U.K. has made in world



history is in the rule of law. This includes the remarkable degree to which countries that used to be colonies are in the forefront of not only business law, but also human rights. Hollywood continually makes movies about people who stand up for integrity under British law including Gandhi. I thank you, unofficially, on behalf of the American people, who inherited your rule of law.

We are going to move ahead with our final speaker, Lista Cannon.

LISTA CANNON: Thank you. I'm put at the end for a reason, because what I have to say is all about enforcement. I'm not going to lecture you about the things you're reading about every day in the paper. I am going to highlight some interesting points about the global approach to regulation, and the effect and the potential consequences that global approach is having on, among other things, the rule of law, fairness, and consequences for businesses that are doing international transactions and have entities and responsibilities in multiple jurisdictions.

The attempt to establish global regulatory standards is often referred to as regulatory imperialism. The United States is blamed initially for that imperialism, and perhaps not

unfairly. The reality of the situation is that most of the developing countries recognize the importance of enforcement of the rules regulating critical industry sectors. This is not just the energy industry; it's any industry that operates – the pharmaceutical industry, the financial services industry – and we're seeing, as lawyers, the need to respond to the risks inherent in cross-border work and management of risk when something goes wrong. The United States has led the way in the context of Sarbanes-Oxley, where you see accounting standards being imposed around the world; the Foreign Corrupt Practices Act; the U.K. Bribery Act; and other examples. In the energy sector, the continuing effort by countries to manage the environmental law and climate change is leading to increased regulatory enforcement.

The critical thing that we're seeing is the effect of cooperation between regulators in the leading economies. This cooperation is supported by formal agreements, memoranda of understanding; and increasingly, by informal work together with counterparts. Here are just a few examples: In February of this year, the Department of Justice, the SEC and the FBI hosted a meeting in Washington which had 130 people attending – there were judges, prosecutors, multinationals, international organizations – and there were about 30 countries represented. The purpose of this meeting was to discuss and exchange ideas about best practice and how the enforcement of regulation could be advanced on a cross-border basis, where appropriate.

In the United States, we see the Department of Justice asking energy companies, from time to time, where they're operating in jurisdictions where there is high risk of corruption, and how they are ensuring that when operating in those countries, they're not exposing themselves to risk and are not working in a manner which would be in breach of international law. That's a huge burden which, certainly, the energy industry is meeting, but the financial services sector is also facing, as well.



One of the consequences for us, increasingly, is looking at how we manage that risk; how do clients manage it; how do we, as lawyers, help them manage the risk that comes from this cross-border cooperation? We're seeing, for example, an increase in deferred prosecution mechanisms. In the U.K. we'll be seeing in 2014 the introduction of DPAs and, as part of that, the imposition of monitors on corporates under the legislation that is currently proposed. These are all illustrations of potential impositions into day-to-day management; but nonetheless, they're part of enforcement mechanisms which are becoming embedded in businesses by various jurisdictions.

We're also seeing the increasing exposure of individuals to enforcement actions when things go wrong, and one of the reasons for that starting in the United States is the increasing intolerance for allowing corporates to pay large fines without any individual accountability. We see that, interestingly, in the SEC under the leadership of Mary Jo White, the SEC is moving from non-admission, non-denial settlements, and requiring some form of admission of guilt by a corporate in order to move forward and settle. In the U.K., we've really had that as a rule – with some exceptions, but basically under the Financial Services

and Markets Act, a corporate has always had to accept responsibility for something that's gone wrong in systems and controls or other areas, before the regulator would allow a settlement. This potentially allows governments to impose on individuals – whether they be directors or those not even at board level – individual responsibility when something goes wrong. Those are just a few examples of concerns that we have.

The basic message that I wanted to deliver, and really support Peter and the other speakers on, is the risk and the consequences of this integration, globally, and this cooperation in parallel proceedings. You'll have a regulatory action in multiple jurisdictions, and they have to be managed, settled, and resolved in a way which is fair, and also make sure that you're not exposing yourself as a corporate, or as an individual within that corporate, to greater risk.

There is inconsistent application. Peter mentioned some examples. The one that we're familiar with particularly, of course, is the facilitation payment problem, the FCPA having some tolerance for facilitation payments and the U.K. Bribery Act having none. Notwithstanding the attempts to amend the law here, people, from day one, recognized that that was an inconsistent standard.

The other concern about consequences is, as Peter has pointed out, that we have developed enforcement in the United States, in the U.K. and Germany and other important developed countries. We have the facilities to require banks to report every transaction that they have a reasonable basis to suspect may involve money laundering, for example. But many of these jurisdictions are not using those powers to find this money – the situation in Nigeria is one example. We recently advised a financial institution in connection with economic sanctions issues in connection with £10 (US\$16) interest in a bank account which had been closed long ago. The law required that the £10 be the subject of a report to the UK Serious Organized Crime Agency. We, in developed nations, are

attending to these issues in such great detail, but in fact, the money laundering that's going on around the world with illicit transactions is not really the focus of our enforcement agencies. The focus is the corporates and what they're doing wrong, and the individuals within it. Whilst that's always going to be important, there are tremendous tools and power that enforcement agencies have that could be used better to help corporates as they operate internationally in jurisdictions where there is risk of corruption, sanctions, and violations. Their power could be used to help those corporates to operate successfully in those countries, but also to bring to justice those who break the law.

Finally, I will just say that the confidence that corporates have to have, and individuals have to have, in the enforcement system, is something which is tested a great deal, particularly in the United States. Reference made to jury trials and to the fact that there is risk in the complexity of some of these enforcement proceedings that will test even the greatest goodwill of individual jurors. Until we can find a balancing mechanism to be sure that it's not just people who have deep pockets who are being held responsible for what goes wrong, until we can get that confidence on a better level field, people will feel that there's a tension and a potential unfairness in the aggressive multinational cooperation that we're seeing.

Thank you.

JACK FRIEDMAN: Peter, your counterpart at another of the great world oil companies said that their operations had a capital budget of many billions of dollars a year, but that the Board as a whole spent only a few minutes a year to consider it. Boards are so overloaded with different issues that even such a large capital budget is left to a committee of the Board. My question is, with all that your board has to face, how does it really work?

PETER REES: We are fortunate in that we've got a really excellent board at Shell. It is made up of some incredibly bright and

hard-working individuals. We take a lot of care in preparing materials for the board so that they never do have a stack that high, but they get all of the information that they need to have. I'm pretty comfortable, having looked at the way in which the risks are managed and evaluated, with the decisions that are put for board consideration, and that our board has a good handle on the operations we are handling. As I said in my talk, Shell's capital expenditure last year was in the region of \$30 billion. That is not necessarily exceptional in the oil and gas industry, and the boards of the oil majors are very used to looking at those issues and taking those decisions. I don't see it as a problem that our board is overloaded. They take the time, and we take a lot of time with them, in order to go through issues. It's a very well-oiled – if you'll excuse the pun – system that delivers the information to the board that they need to perform their job, and they do that extremely well.

JACK FRIEDMAN: In the United States, there's a problem called the "circle of trust." In other words, how far beyond yourself can you trust your colleagues? The question regards board members who know that they may end up being witnesses against each other. They have the knowledge that someday, something they discussed may require them to testify against their colleagues. Are there noticeable differences between the U.S. and U.K. corporate board environments?

PETER REES: We're not as litigious as the United States, and we have a pretty cosmopolitan board, so that we have a good spread of people from Europe and from the U.S. and a number of different countries. All have involvements in other major corporations, so that they are well used to dealing with all of the big issues that are involved in Shell. They are also familiar with all of the big issues that were involved in those other corporations, whether they be American corporations, like Dupont, or European institutions like Deutsche Bank. So from that point of view, there isn't that fear, because everybody is smart and gets the same information, evaluates things, looks at

“We don't need to say that hydraulic fracturing should be banned; we need to put the right regulation in place, to make sure it can be done safely. If it is done safely – and it's being done in the United States safely in a huge area – then it is going to supply the energy that we need. It's that lack of regulation at the moment. The problem is if you have one incident caused by one unsafe operator, then the whole industry is going to get tarred with that brush.” – Peter Rees

things in a measured way, and frankly has the ability to perform the job. It may be that it's an ability to perform the job that is what is needed in boards, and certainly, I'm very comfortable that we've got that.

JACK FRIEDMAN: Another point is that in America, a majority of large companies have the CEO and the chairman as the same person, whereas here they are not the same person.

Another big issue in the States is the increasing burden of preventive compliance for a company. I'm not talking about investigations after a crisis occurs; just compliance and internal audits. Do you have a sense of the difference between the United States and other places in the world?

PETER REES: Do you want to say something about that, Lista?

LISTA CANNON: Thank you. One of the difficulties in distinguishing between the United States and the rest of the world is that you've got to meet the highest standard. In many cases these are United States' regulations. In terms of the cost, you cannot separate those. You have to beware of international regulations. It has been reported that J.P. Morgan set aside US\$4 billion to deal with issues arising from particular regulatory issues they are having – apart from the general compliance. This also gives rise to the question of whether some organizations have become too big to manage.

The cost and the burden are there and most businesses are very transparent about it. However, it should be considered that some businesses may be too big to manage. Finally, it's challenging, as a lawyer, to try to articulate in a succinct way the complexity of a problem that you're escalating to the board, to the general counsel, for decision. Because increasingly, the nuances within the advice you are giving require more than one sheet of paper. It is increasingly difficult to do that, and that's another challenge in terms of the depth of consideration which a board can fairly give to the advice and particularly their options as to what course is best.

PETER REES: Compliance is not something that you have an option about; it's something that you have to do. One of the problems you have with it going forward, and this goes a bit to the “too big to manage” issue, is the extent to which actions of individuals who may be employed by or contracted to your company, can give rise to a liability to the whole of the company. That is fundamentally where you are with the FCPA, with the Bribery Act, with an awful lot of antitrust regulations.

The first thing I was ever taught about criminal law was that there were two requirements: you had to have the *actus reus* and the *mens rea*. You have to have committed the act and had the intention behind doing what you did.

Now, we seem to live in a world where somebody at a very low level in the company can



commit an act — pay a bribe, give a bottle of whiskey to a pilot to get the ship in a little earlier, or whatever it happens to be — which becomes the act of the company, the board, the executive committee, the whole of the corporation, and all of the shareholders of that corporation, even though there was clearly no corporate intent behind the act.

JACK FRIEDMAN: Without authorization?

PETER REES: Or with corporate authorization of any sort. That is the interesting thing that you have. Then you have to ensure compliance; you have to have your compliance programs. You make sure that everybody is properly trained; you make sure that everybody understands the consequences of their actions. The good thing that you then get within the U.K. Bribery Act is that you have taken reasonable measures and endeavors to ensure that. That is something that does give you a defense to that sort of claim, and increasingly, we've seen in the U.S., with recent examples, it's now being taken into account there.

Contrast that with European competition law, where the European Competition Commissioner has publicly said that "having an antitrust compliance program will make absolutely no difference to the amount I am going to fine you for a breach by one of your employees of competition law." It's a strange world we live in.

JACK FRIEDMAN: Isn't that incredible?

PETER REES: Yes!

JACK FRIEDMAN: If the agency said, "If you cooperate and tried to comply we'll give you at least some break, even if it is only 1%." They have to give you something to take back to the board to say, "Let's do something right, right at the beginning, to show that we're good people."

I'd like to go back to our other speakers. First, let's talk about the oil project area. One of the things that's hard for people who are in other businesses to understand is how a company can put billions of dollars into a project for decades, negotiated with a national oil company which has the government-of-the-day behind it. The question is, "Will we be able to enforce any rights 20 years from now on this project?" It is mind-boggling: the timeframe, the amount of money involved, and the political sensitivity. I'd like to ask the panelists about this. The government may say, "My cousin used to be president of the country, and I'm the president now. We never got along and my cousin and I don't read the contracts the same way. You can forget about what you negotiated with him."

LUCILLE DE SILVA: It's challenging to comment on it outside a specific project, but I'd say that there are a few things. One is a philosophy of the way that the government entity and the oil company venture together. How close is the relationship, that you tried to build a partnership where there are common aims, and effectively result in

a project that both parties are trying to support? Is it antagonistic — there have been examples of, for example, in the Metronet there was a structure of contracting where you had two contracts — one contract which was very strict; one contract which was very much "let's all be friends and hold hands and play nicely together." The strict contract was silenced while the friendly, happy contract was performed. The project failed, and there's a lot of debate about why that happened. One of the points that was made is that what's called the "Alliancing Contract" was actually a little bit too friendly. There wasn't sufficient audit, reporting, scrutiny, accountability. One of the mechanisms is actually the balance that you take between, on the one hand, a partnership, and on the other hand, strict control.

From an economic perspective, to handle possible sanctions — whether you've got the most perfect stabilization clauses or the correct choice of law — you go to those as a last resort and they don't always work, as we've discussed this morning.

In my mind, you try and create the right economic incentives. If you want someone to do something, you make sure that your contract fights economically where they fail to do so. Either they don't get paid or their payments are deferred or there are retentions. In a way, it's an economic commercial tool, but it's often the most effective. To be honest, you don't want to end up in the courts, arguing about particular points.

JACK FRIEDMAN: It may be the local national courts, for example, which are enforcing a law of the government that supervises the court.

LUCILLE DE SILVA: Exactly, that could well be the case. You may not feel that the company is in the best jurisdiction to have its interests protected. Economic incentives are very important.

SOPHIE LAMB: Let me suggest five basic litigation arbitration inputs that we would add into contracts of this nature. The first, of course, is defining adequately obligations and expectations – that’s a contract basic in any scenario.

The second is ensuring that there is adequate and appropriate legislative authority so that the government is bound by the promises that it has made. That is particularly relevant in the case of tax, for example, where very often it’s only Parliament that has the right to extend tax incentives. Even where a contract is concluded and signed between the president of a country and an investor, that is not an authorized derogation from tax laws under many systems in many constitutions.

The third is governing law. To have a contract governed by the law of the host state is obviously fraught with risk, certainly in the absence of a stabilization agreement.

JACK FRIEDMAN: Could you amplify that a bit more?

SOPHIE LAMB: The host state has the ability to change its own law.

JACK FRIEDMAN: Interpret it the way it wants?

SOPHIE LAMB: Exactly, and could legislate outside of any particular problem. That risk could be minimized by choosing any particular system of law – English law, for example.

The fourth is providing a neutral forum for the resolution of disputes, not the



host state’s domestic court. I mentioned in my address that you should expect substantial judicial deference on issues that inveigh with fundamental public policy. International arbitration provides neutral venues by neutral decision makers for court disputes arising out of a contract.

Finally there are super-national protections. Investments should be structured in jurisdictions that benefit from bilateral investment treaties. Even in the worst case scenario, where a contract is taken away by a legislative act, there is still redress under a treaty which can be prosecuted directly by an investor against a government for those sorts of arbitrary and discriminatory acts.

Those are five very basic litigation and arbitration inputs into contracts.

JACK FRIEDMAN: Relating to your comments, we had a program in New York on creditor rights if the Euro collapses and debtors are not paying any more. A litigator from one of the British firms was speaking. He basically said that every creditor is going to try to get their national court involved. They hope that their national courts will interpret the situation in their favor. In other words, the Americans will run to Manhattan, and the French will run to Paris, regardless of the way an agreement

is written. On the other hand, the court of the sovereign will say, “All of these contracts are well-written, but this is such an important matter that it can’t be left up to private documents. We’re taking it over.” He said, “It’s going to be a free-for-all, no matter how you write the contract.”

Continuing on this theme, a president of a country may say, “Our policy has changed. You can take it or leave it. If you don’t take it, we’ve got your competitor who is willing to come in and do a new contract with us.”

How does the industry deal with arbitrary decisions that governments are supporting on a “take it or leave it” basis?

PETER REES: Commerce, generally, and the oil and gas business in particular, is a risk-based business. We will spend billions of dollars drilling a hole in the ground where we have evaluated the possibility of success at 20%. Being willing to take risks, is the first thing.

The second thing is, read all the things that Sophie’s talked about in terms of structuring, where we can, and put Shell in a good position. Shell is an English PLC; it’s domiciled in the Netherlands. The Dutch Bilateral Investment Treaty is generally viewed as the best model that there is in



the world, and there are loads of them. We will quite often be able to build the sort of protection in that Sophie talks about.

But even when you've got that, if you have a country saying "we would like a bigger piece of what we originally granted to you," you have to take a view as to whether that is something that you are willing to accommodate in order to remain operational in the country and build future profits. Or if it's not something you're willing to accommodate, are you willing to risk having the country go further and expropriate the whole shooting match? That simply becomes a risk decision; you can provide legal advice on it but some companies have moved one way; some companies have moved the other way, refused to pay the extra tax, commenced a bilateral investment treaty about it, and had all of their assets in the country expropriated.

JACK FRIEDMAN: Do you put them at legal risk outside their own borders?

PETER REES: No.

JACK FRIEDMAN: Can you try going to your own courts?

PETER REES: You can certainly try to do that, and that is what you do with a bilateral investment treaty. Then you have to find assets against which you can enforce it, and one of the general rules is that where those

are sovereign assets, you have some difficulties in enforcing it. There are many issues to take into account. You may not be able to have protection. We have projects in countries that have not entered into bilateral investment treaty arrangements, who are not signatories to the New York Convention, where we have been required to enter into dispute resolution provisions that provide for local law arbitration in the local country. Then it goes back to what Lucille was saying – you have to try and make sure that there are the right economic and social incentives. If the current president leaves and his cousin takes over, no matter how he views the rule of the previous president, he still sees the value in having your project there. That's what we do all the time. It is a risky business, so you can't protect it.

JACK FRIEDMAN: Could you tell us about the legal department at Shell? How do you select and compensate your outside counsel?

PETER REES: We've got about 750 lawyers in Shell, with another 200+ support staff. We're just under a thousand members of the Shell in-house legal team in over 40 different countries. We're a pretty large, international law firm. In 2007, in terms of our total legal spend, 45% was spent on the lawyers in-house at Shell, and 55% was spent on external counsel. Last year, 67% was spent internally on the lawyers in Shell, and 33% was spent on external counsel. Additionally, within that period we also

reduced our total spending by a third; if you want to do the math, we halved our external counsel spending.

How have we done that? We've done that simply by recognizing that in the business that we do, we are the world's most experienced law firm. The average PQE [post qualified experience] of a lawyer in Shell is 19 years. We, as a team, have been doing this work for longer, and more of it, than anybody else in the external legal environment.

What we seek to do on the transactional work is to work as a team with our external lawyers, bring them in where we need the areas of specialization that we have not got. We're very clear that it is our transaction that they are assisting us on, rather than something that we are handing over to the external law firm. We've focused, and it's always been a focus of mine, that if you can work as a team, you will get the best out of all the components and produce something that is better than the individuals.

JACK FRIEDMAN: What types of issues are done more out-of-house?

PETER REES: Mostly, these days, disputes. The vast majority of our external spend, probably 70% of it, is on litigation, for a number of reasons – one being that in many areas of the world, as an in-house lawyer, you're not allowed to appear in front of the local courts; secondly, you usually find with large-scale litigation, you have to bring a reasonably large team in to provide that support. Thirdly, we're still building up expertise in-house in some of those areas, so one of the things I am hopeful of, going forward, is that we would do more in-house litigation, but that will take time.

JACK FRIEDMAN: I may get this statistic somewhat wrong, but the majority of the money spent on outside firms by U.S. legal departments is on intellectual property, and these are not just tech companies. For example, when we did a program with the general counsel of Chevron, he said, "I'm going to

include a discussion about our IP. People think that we're just oil and gasoline; we've got an intellectual property portfolio that matches many companies in Silicon Valley."

Let's discuss some of the differences between what's privileged for in-house counsel in the U.S. vs. in the U.K. or EU. In the U.S., corporate counsel communications with management is privileged, if it's about legal issues, not business issues. In Europe, I have been told that it's not privileged. Also, what are some of the different rules about what the in-house counsel can and can't do in court?

PETER REES: Firstly, you can't generalize, but there are differences across Europe, for instance, as to what you can and can't do as in-house counsel. To take an example, if you go in-house in the U.K. or the Netherlands, you can retain your bar admission. If you go in-house in Italy, you are debarred; basically, you are no longer a member of the bar in Italy. You lose all of the benefits that you would have as a lawyer.

Privilege is a uniquely common law concept, so you don't have it once you get into continental Europe; you have a different concept of confidentiality and secrecy. The instance you are thinking about, however, is the European Union. There is case law that says an in-house counsel, whether in England or in the Netherlands or in Italy or anywhere else in Europe, does not have any privilege over any communications, advice or anything, legal or otherwise. So you have that European situation where you have an EU investigation. If it's an Office of Fair Trading investigation in England, for instance, I would still retain my privilege. The Belgian courts and the Dutch courts have recently held, as well, that their lawyers, in those situations, are not subject to the EU.

You actually have a hugely complicated arrangement in various parts of Europe of which you have to be aware.

JACK FRIEDMAN: What are the legal requirements for a lawyer to keep about confidences, whether he or she is an in-house counsel or from an outside law firm? Are client communications privileged even from a government agency?

PETER REES: If I was still in private practice, I'd send you a bill, Jack! But again, it varies enormously. There's no absolute rule, because it depends on the powers of the agency, whether they have the ability to get the information. Quite frankly, in a lot of situations, you get asked to waive privilege, and it's been made clear that it's probably a good idea for you to do that. That happens a lot with the U.S., as well.

LISTA CANNON: In the U.S., as many of you will know, the Department of Justice, in particular, can exert significant pressure on that point, and until fairly recently viewed the failure to waive privilege in the context of an investigation they were doing as a lack of cooperation. They were finally, by the Southern District of New York, forced back from that position in that this was not a proper pressure to exert, because it was obviously penal in nature to penalize someone for hanging onto a legal right. It is an issue in the United States. The U.K. is still one of the best jurisdictions to be in, as a lawyer.

JACK FRIEDMAN: I'm asking about this because a large part of the audience which is going to get the transcript is not in the U.K. I'm trying to help lawyers globally to understand more about the legal differences, such as American jury trials which face corporations in both civil and criminal cases.

As an example, the Enron case was conducted in front of a jury in Texas. It actually happened that one of the jurors — who had been sitting there for weeks hearing about the SEC — said during jury deliberations, "The SEC — isn't that the government agency that sends people to the moon?" The other jurists said, "No, that's NASA!" So he sat through the whole case and he had a right to vote. The government had to win its case by a unanimous, 12-0 vote. That's quite different from the U.K. or EU.

There is one final question I want to ask you: in the five minutes a month that you have free, what do you like to do?

PETER REES: Those of you who know me well, know I like to play football. So even though I'm way too old still to be doing it, that's what I do!

JACK FRIEDMAN: You're the Pele of the bar?

PETER REES: Exactly, yes — I wish! I like any form of sport, basically. It's the best way of taking your mind off whatever else you are thinking about, because once you step onto the field, it's difficult. You have to concentrate on making sure somebody doesn't kick you, and that you can actually kick the ball. That's what I do.

JACK FRIEDMAN: We are recognizing our Guest of Honor today and we feel that we're being honored by his gift of time and wisdom and a better understanding of Shell and its legal department. We would also like to thank our Distinguished Panelists. Thank you very much.



Lucille De Silva
Senior Partner, Energy,
Dentons UKMEA LLP

DENTONS

Lucille specializes in energy projects and regulation, both domestic and international, including in downstream, midstream and upstream oil and gas, renewable and conventional electricity (in particular, solar), and petrochemicals. She has developed the firm's U.K. solar practice and has led and closed over 40 large-scale solar projects during the year. This involved the design, construction and operation of the projects, the acquisition from third parties of project rights, detailed advice and structuring of arrangements in the light of changes to the feed-in tariff subsidy regime, negotiation of power purchase agreements and FIT arrangements with power offtakers and utilities. Further, she led the power and ethanol aspects of the Addax biomass co-generation project in Sierra Leone (African project finance deal of the year), negotiating complex power arrangements with the government of Sierra Leone and cross border ethanol trading and long-term storage arrangements, in the

context of the Renewable Energy Directive and Reach. She is currently the deputy team leader on the Department of Energy and Climate Change's project to procure projects two to four of the U.K.'s carbon capture and storage demonstration program and is presently leading the team drafting the Project Contract, the main contract governing the relationship between Government and the CCS Developer.

Lucille is the author of the Solar Power legal issues chapter of *Renewables: A Practical Handbook* and regularly speaks and chairs solar conferences.

Lucille De Silva has "an understanding of commercial pressures and how contracts need to cover all circumstances." *Legal 500 2012*

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Lista Cannon

*Partner and Global Co-Head
of Regulation & Investigations,
Norton Rose Fulbright LLP*



Areas of Concentration

- Litigation
- Arbitration and ADR
- Transnational Financial Regulation and Enforcement
- White Collar Crime
- Government Investigations and Enforcement
- Mergers & Acquisitions

Experience

Lista Cannon joined the London office of Fulbright & Jaworski International L.L.P. as a partner in 2005. Lista advises on transnational regulatory investigation and enforcement proceedings, commercial litigation, sovereign immunity issues, risk assessment and transnational commercial disputes. Lista is co-chair of Fulbright's International Investigations Group and heads the firm's EU and U.K. Sanctions practice in London. Lista is dually qualified, admitted to practice in England and New York. Lista

also practices in the professional indemnity field, representing major law firms and professional accountants in connection with civil and regulatory proceedings. She has a strong banking, finance and arbitration practice through her extensive experience representing multi-national corporations, governments and financial institutions. In 2012, Lista was appointed Deputy Head of Fulbright's Global Litigation practice.

Lista also has experience in energy disputes and contracts. Significant work includes London Court of International Arbitration and ICC arbitrations, energy related contract disputes, including transnational litigation arising out of oil and gas joint venture disputes. Lista was seconded to the Securities Investment Board (Financial Services Authority) as acting Head of Enforcement in the transition to the new U.K. regime. Lista is a trained CEDR mediator.

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**Sophie Lamb**

Partner, International Dispute Resolution Group, Debevoise & Plimpton LLP

DEBEVOISE &
PLIMPTON LLP

Sophie Lamb is a partner in the International Dispute Resolution Group of Debevoise & Plimpton LLP.

Ms. Lamb is an experienced advocate and acknowledged leader in the field of international arbitration. Her practice focuses on commercial and investment treaty arbitration, complex litigation, public international law and business and human rights. Ms. Lamb has full rights of audience in the English courts and has appeared as counsel at every level, including the U.K. Supreme Court. She has represented clients across a range of industry sectors, and is co-chair of the firm's energy disputes group. She is resident in the London office and chair of its Diversity Committee.

Ms. Lamb has acted as adviser and/or advocate in more than one hundred international arbitrations. She has also appeared as counsel in arbitration-related court proceedings, and conducted cases under all the principal

arbitration rules. In addition, she sits as arbitrator including in cases involving states and state entities. She is on the International Board of the Arbitration Institute of the Finland Chamber of Commerce.

Ms. Lamb graduated from the University of Manchester and the Université de Bourgogne with first class honours in English law and French law. She holds a Master's in Banking and International Finance Law from the London School of Economics, and has received various prizes and awards for academic excellence, including a Prince of Wales Scholarship (the most prestigious academic scholarship awarded by Gray's Inn). Ms. Lamb was called to the Bar of England and Wales in 1998 while practising as a barrister at one of London's leading commercial barristers' chambers. She is also admitted to the New York Bar.

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