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The Principle of Good Faith: Toward Substantive Stakeholder Engagement

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Abstract Although stakeholder theory is concerned with stakeholder engagement, substantive operational barometers of engagement are lacking in the literature. This theoretical paper attempts to strengthen the accountability aspect of normative stakeholder theory with a more robust notion of stakeholder engagement derived from the concept of *good faith*. Specifically, it draws from the labor relations field to argue that altered power dynamics are essential underpinnings of a viable stakeholder engagement mechanism. After describing the tenets of substantive engagement, the paper draws from the labor relations and commercial law literatures to describe the characteristics of good faith as dialogue, negotiation, transparency, and totality of conduct; explains how they can be adapted and applied to the stakeholder context; and suggests the use of mediation and non-binding arbitration. The paper concludes by addressing anticipated objections and shortcomings and discussing implications for theory and research.

Keywords Stakeholder engagement · Stakeholder input · Corporate accountability · Stakeholder theory · Stakeholder activism

Introduction

Normative stakeholder theory is a viable means of framing corporate behavior and one of its central tenets is that, because they are more than simply means to an end, stakeholders are entitled to have input into the matters that affect them. Nevertheless, the scenario wherein a stakeholder asks for redress of a concern and is politely rebuffed—*after careful consideration we have decided to deny your request that we change our practices regarding [insert issue here], thank you for your interest and concern*—is all too common. Corporations can thereafter tout their stakeholder engagement while emphasizing that seeking input does not imply agreement with its content or any obligation to act. Despite its sympathetic veneer, the form letter response raises the issue of firms appropriating the moral legitimacy of the stakeholder rubric while escaping accountability regarding the extent to which stakeholder input is ever binding; one of the central, albeit ill specified, aspects of stakeholder theory. The issue of stakeholder engagement has been a fly in the ointment of stakeholder theory that eludes simple solutions, but as demonstrated by recent mishaps (i.e., Foxxcon, Tazreen Fashions), the burgeoning complexity of stakeholder relationships make it worthy of our attention.

Citing the need to solve problems of infinite regress and deaf majorities, Phillips and Johnson-Cramer's (2006) principle of stakeholder discourse proposes that, particularly in times of conflict and transition, systems for the exercise of voice are necessary. Nevertheless, stakeholder engagement, corporate practices undertaken to involve stakeholders in a positive manner in its activities (Greenwood 2007), does not appear prominently in stakeholder theory. In their extensive review of the stakeholder literature Laplume et al. (2008) identify threads of research addressing stakeholder actions and responses, and corporate actions and responses, but largely missing is a thread detailing the engagement mechanism that connects the corporation with its stakeholders. Similarly, Phillips et al.

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(2003, p. 30) indicate that, although stakeholder theory is concerned with who has input, important issues of procedural fairness are underemphasized and the method of stakeholder engagement is "an open question." Thus, there is the paradox of an issue being both important and relatively unattended. From the stakeholder perspective, however, the credibility of the stakeholder paradigm rests on the substantial attention afforded to their interests.

Views on stakeholder engagement range from convincing managers to recognize that their interests are inseparable from those of their stakeholders and acting accordingly (Noland and Phillips 2010), to obtaining explicit stakeholder consent (Van Buren 2001), to separating moral and strategic interactions with stakeholders to prevent self-serving dialogue (Reed 1999), to providing stakeholders with control in managing the corporation (Moriarty 2012). Moreover, there is the reality of corporate power that affords broad decision making prerogative in matters of disagreement with stakeholders. In order to address the ambiguity surrounding stakeholder engagement it is necessary to develop a set of guidelines that address power asymmetries and typify substantive engagement. Hence, stakeholder engagement requires a fresh look, but rather than proposing an all-encompassing solution, I will challenge the notion that corporations can fully discharge their obligation to deliver value to stakeholders without more substantive means of engagement and propose the principle of *good faith* from the labor relations and commercial law literatures as a moderate fix.

Good faith bargaining entails an obligation to participate actively in deliberations so as to indicate a present intention to find a basis for agreement (National Labor Relations Board 2011), and is a staple in the contentious labor relations realm where it has been relatively effective.[1] Given the varied regulatory systems that support labor relations around the world, this paper draws from the U.S. system and is best understood in that context. Clearly the U.S. labor relations system has shortcomings, but a number of scholars and practitioners have deemed the grievance and arbitration process, based on good faith bargaining, a major asset because it provides an orderly process for resolving disputes without workplace disruption (Bemmels and Foley 1996; Feuille 1999; Lewin 1999). Indeed, labor relations and stakeholder theory make strange bedfellows. Corporations often present favorable relationships with stakeholders, such as workers and the local community, as reason to avoid or discard labor unions. For their part, labor unions tend to see themselves as partners and creators of wealth with the corporation, and do not wish to be *lumped together* with other stakeholder groups (Mather 2006; Preuss 2008). However, when considering reform, neither labor nor management desires to dismantle the arbitration system; to the contrary it has been adopted by a number of leading firms in the non-union sector (Peterson 1992). Also, I employ the legal literature, not as an appeal to the authority of the law, but for the value of its arguments, rationales, and interpretations regarding the principle of good faith.

This paper attempts to strengthen normative stakeholder theory through a more robust notion of stakeholder engagement derived from the concept of good faith. Capitalism thrives on the divergent goals and interests that create competitive markets, but that also makes conflict between corporations and their stakeholders inevitable. I describe good faith stakeholder engagement as a form of substantive stakeholder input that begins by acknowledging power asymmetries and providing mechanisms that offset or diminish those disparities and provide stakeholders greater impact on distributive outcomes. In "The Role of Substantive Engagement in Stakeholder Theory" section, I establish the normative basis for stakeholder engagement and argue that the pluralist view of power dynamics and conflict resolution provides the ideological underpinnings of a robust stakeholder engagement mechanism. "The Principle of Good Faith" section characterizes the principle of good faith. "Good Faith in Stakeholder Engagement" section addresses criteria for good faith in stakeholder engagement. "Assessing Good Faith in Practice" section describes how to assess good faith engagement, presents exemplary structures for its application, and addresses objections and shortcomings. I conclude by discussing the implications of the research in "Discussion" section.

The Role of Substantive Engagement in Stakeholder Theory

Stakeholder theory attempts to reframe managerial capitalism by replacing the belief that managers have a singular duty to shareholders with the notion that managers should create and sustain moral relationships, and fairly distribute the harms and benefits of corporate activities among those who can affect or are affected by the corporation (Freeman 1984). The substantive input of stakeholders is central to this objective. Based on Kant's (1797) principle of *respect for persons,* stakeholder theory states that individuals are entitled to be treated not merely as means to the

[1] Labor stoppages in the U.S. are greatly diminished over the last 30 years. From 2001 to 2010, there were approximately 17 major work stoppages (1,000+ workers and lasting at least one shift) per year, compared with 34 per year from 1991 to 2000, and 69 from 1981 to 1990. Most unfair labor practice complaints are settled by agreements between the parties. Bureau of Labor Statistics 2011. News Release: Major Work Stoppages in 2010. Washington D.C.: U.S. Department of Labor. National Labor Relations Board: Charges and Complaints. Retrieved December 19, 2011: http://www.nlrb.gov/charges-and-complaints.

achievement of the ends of others but as valuable ends in themselves, and must, therefore, participate in matters of the corporation that affect them (Evan and Freeman 1993). Kant also indicates that duty emerges from acts that produce vulnerability in another without that party's consent. In keeping with that duty, Freeman's (1994) doctrine of fair contracts requires a method of stakeholder engagement that enables all parties to advocate on behalf of their interests and the rules of the game to be established by unanimous consent. The corporation is an entity that exercises broad discretionary power, and its accountability to affected parties cannot be completely fulfilled outside of engagement that bears on distributive outcomes. Therefore, corporate leaders are morally obligated to address the interests of their stakeholders and direct resources and activities to their benefit.

The principle of stakeholder fairness provides that "obligations of fairness are created among the participants in the cooperative scheme in proportion to the benefits accepted" and these participants warrant additional moral obligations (Phillips 1997, p. 53). There are, however, a number of groups that are not part of the cooperative scheme and provide no value to the firm but are still affected by its practices such that the inverse corollary also applies; additional moral obligation accrues based on how corporate activities affect stakeholders. Whereas stakeholders that lack the power to press their claims are left to the advocacy of sympathetic and more powerful stakeholders or the magnanimity of managers, a just and substantive standard entails the obligation to err in favor of those parties least able to protect themselves. Thus, not only is consideration of stakeholder interests morally binding on the corporation, but that imperative must also be satisfied in a just manner.

In a review of the stakeholder engagement literature, Noland and Phillips (2010, p. 40) present the view of ethical strategists in stating that, when *viewed rightly*, the purpose of the corporation is to produce value for all stakeholders, and make the case that good strategy necessarily entails moral and ethical concerns. They also criticize adaptations of Habermas' theory of moral discourse that suggest strategic and moral decisions should be separate to prevent strategic interests from polluting moral judgment. The purpose of separating strategic and ethical content in decision making is laudable—to prevent disingenuous dialogue—but it is practically untenable. In the same way, ethical strategists' depending on managers to view their businesses rightly and manage in the interests of all the corporation's constituents is too optimistic; particularly when the consequences of the failure to manage rightly are visited upon stakeholders. Perhaps managers can achieve a right view of business in time but, in the interim, stakeholders cannot afford to be so sanguine. Accordingly, when stakeholder and corporate interests are in conflict, there should be suitable means for generating resolutions that both parties can accept.

Power, Conflict, and Substantive Stakeholder Engagement

Freeman (1994) suggests that stakes require action and conflicting stakes require methods of resolution. Obviously, methods of resolution differ and are not equally available and this means that, amid conflict, some entities are able to assert influence over others and resist influence in return; some entities are more powerful. For example, definitive stakeholders (i.e., institutional investors) possess power in that they are able to extract a concession from an unwilling corporation by threatening to exit the relationship, but dependent stakeholders (e.g., the natural environment) lack that capacity (Mitchell et al. 1997). This power asymmetry means that, although dependent stakeholders have legitimate interests in the corporation, they lack the pragmatic means to sanction or modify activities that affect them. Since corporations are generally more powerful than their stakeholders, substantive stakeholder input on economic, social, and environmental (natural) matters necessarily reduce the level of corporate prerogative. Rather than renegotiating terms of stakeholder involvement, the corporation has reason to exploit its leverage and refuse attempts to modify its behavior. However, an even-handed Rawlsian *veil of ignorance* notion of stakeholder engagement includes the presumption that either position might prevail on a given issue.

Having noted the prominent role of power in stakeholder engagement, I will turn to political theory because of its usefulness in addressing the central political problems of legitimate power, conflict, and distributive justice that are often present in ethical challenges (Moriarty 2005; Unerman and Bennett 2004). Political ideologies entail a set of values, beliefs, and doctrines that often form the basis of individuals' judgments of social, economic, and cultural institutions. For instance, if one subscribes to the view that the *invisible hand* aligns the interests of market participants in all but the most extreme cases, then interference with market dynamics is seldom contemplated. In the same way, possible methods of conflict resolution, and the importance accorded to stakeholder engagement are markedly influenced by political ideology. Stoney and Winstanley (2001) underscore the conflict between stakeholder politics and economic expediency, arguing that participatory democracy contradicts economic expediency by extending an inclusive view of stakeholders in corporate decision making.

Fox (1974) describes unitarist and pluralist political perspectives to address the question of how a free society

reconciles the varying economic interests of its people with the common good. In the unitarist conception, conflicting interests are addressed through corporate action in the free market (e.g., Fiorito 2001; Folger and Cropanzano 1998; Hammer 2000), such that stakeholders' interests will be protected or they will exit the relationship by shunning non-responsive firms. Ethical strategists (e.g., Noland and Phillips 2010) argue from a unitarist perspective when they propose that right thinking managers can align the interests of corporations and stakeholders to produce favorable outcomes for all concerned. The unitarist perspective is the de facto route in a free market system that affords property rights to corporations, but it is not well suited to robust stakeholder engagement. Consider that the decision to engage stakeholders, and the process and tenure of that engagement rest with managers. Moreover, self-interest and the sometimes mutually exclusive interests of corporations and stakeholders (e.g., whaling industry and environmentalists) make it unlikely that managers and market forces will adequately protect stakeholders' interests.

Conversely, the pluralist perspective (Dahl 1961) posits that open competition among interest groups *of relative equality* best advances the goals of the polity. Pluralism has clear implications for stakeholder theory because of the competing interests of stakeholders and the corporation's charge to build relationships with them. Stakeholder engagement at its best evinces a polyarchical vesting of power in a number of different venues, combined with competing group interests. The need for stakeholder engagement is based on the pluralist assumption that the corporation cannot adequately reconcile the interests of stakeholders with their own, and a real and viable counterweight to corporate prerogative is preferable to unitarist entreaties to embrace cooperation (Bogg 2011). Since large, oligopolistic industries have great influence in markets, politics, and the legal system relative to other stakeholders, stakeholder engagement must provide stakeholders with mechanisms that impact outcomes rather than simply making normative appeals for managers to protect their interests.

There have been pluralist political undertones in stakeholder theory from the outset and they remain, but are largely unarticulated. Freeman (1994, p. 416) refers to the desirability of a *reasonable pluralism* in corporate strategy. Van Buren (2001) argues that stakeholders possess property rights (whether quasi- or literal) and activities that affect them in producing the normative expectation of their expressed consent. His central premise is that the absence of consent, particularly when combined with power asymmetries, gives rise to unfairness in stakeholder relations, but managers are more likely to act fairly if obtaining the expressed consent of stakeholders (i.e., power offsets) is an ethical minimum. Similarly, discourse ethics (Habermas 1990; Reed 1999) proposes that, because no singular entity can determine objective reality, valid and morally legitimate standards meet, or could meet, with the approval of all those affected. Each participant in the discourse is free to accept or reject arguments, but concern for the common good is reflected in the requirement of consensus. Others (e.g., Matten and Crane 2005; Moriarty 2012) have argued in varying degrees that in order for stakeholders' to be fully represented they should have binding control over the corporation.

Since numerous issues emanate from corporate activities, including property rights and the difficulty defining stakeholder consent, it is better to employ consent as an ideal or aspiration. In keeping with the pluralist perspective it is preferable for the involved parties to engage directly and represent their interests within a framework of rules that restrict opportunism, but do not define or require a particular outcome. The outcomes of conflicts should not be controlled, as property rights and contracts enable markets to function, but the processes of stakeholder engagement should be arranged to diminish the impact of power asymmetries. That is, the just distributive outcomes sought through stakeholder engagement are more likely to occur if we place a Rawlsian *thumb on the scale* such that the benefit of the doubt goes to those least able to protect their interests in a transaction.

In sum, given that corporations maintain favorable power asymmetries over stakeholders under conditions that give rise to conflict, substantive stakeholder engagement must entail: (a) reduced power asymmetries such that either side can prevail in a dispute, (b) an inclusive and participative forum of interaction, such that neither party is dependent solely on the benevolence of the other, and (c) have the capacity to impact distributive outcomes. Without these attributes stakeholder engagement can be reduced to *the law of the jungle*, albeit camouflaged in benign verbiage. I now turn to the principle of good faith as a mechanism that meets the requisites of substantive stakeholder engagement.

The Principle of Good Faith

The principle of good faith is derived from the Latin term *bona fides* connoting an honest and sincere effort, and is prominent in U.S. labor relations and commercial law wherein actors with disparate interests fashion remedies for issues such as discipline and discharge, and execution of contracts. There are ample ethical premises for good faith that include virtue, duty, moral discourse, and utility. For example, Mather (2002) states that good faith presents a moral question that can be answered only by clarifying our conception of honesty and, in many cases, by deciding

which standards of conduct are reasonable. Quinn and Jones (1995) propose basic moral principles that constitute minimums in business settings, three of which intersect the principle of good faith. First, honoring agreements is necessary in order to make binding contracts. Second, honesty is a prerequisite for the efficient functioning of markets, and third, respecting autonomy recognizes that individuals have a right to liberty, without which contracts would not be morally binding. Habermas' theory of communicative action requires that ethical claims endure the full expression of views by interested parties, and careful consideration of contrary perspectives; and that autonomous strategic action yield to reasoned argument, consensus, and cooperation.

Good faith encourages engagement while preserving individual autonomy to pursue self-interest, which is integral to free markets. Regulation tends to be retrospective, and there are many times when neither corporations nor stakeholders are pleased with the outcome. However, when the focal parties are so disposed, such as under conditions of good faith, they are able to engage one another and fashion positive sum outcomes. Studies of unionized firms reveal that most grievances (i.e., substantive input) are settled in the first or second meeting with approximately three percent going unresolved into arbitration (Feuille 1999; Lewin 2004). Since the principle of conferring in good faith is employed extensively in the labor relations system, and labor unions are stakeholders, they provide a reasonable source of insights into the process of insuring the capacity of actors to engage one another on relatively equal footing.

Section 8(d) of the National Labor Relations Act (NLRA) requires employers and union representatives to "… confer in *good faith* [emphasis added] with respect to wages, hours, and other terms and conditions of employment… but such obligation does not compel either party to agree to a proposal or require the making of a concession."[2] The requirement to bargain in good faith was incorporated to compel the parties to fully discuss their respective claims and demands and, when opposed, to justify them with reason. The fundamental elements of good faith are that the parties are in fact willing to agree[3] and that they do not make false claims (Gaal 1987). If the parties reach an impasse and no movement is likely then either party can resort to strategic leverage. In his classic treatment of good faith Cox (1958) notes that, although the law cannot force the parties to have an open mind, it can at least compel them to conduct themselves as if they are trying to persuade and willing to be persuaded. Good faith stakeholder engagement could be expected to have similar aspects of dialogue and negotiation.

Good faith is also employed in commercial law where the Uniform Commercial Code §1-203 provides that each party to a contract is obligated to exercise good faith in its execution.[4] Based on the Uniform Commercial Code, the scope of good faith varies according to the nature of the agreement and the obligation to act in good faith assumes a particularly significant role in contracts where discretion is reserved to one party in the agreement (Dubroff 2006; Summers 1969). The *fiduciary doctrine* emphasizes that the exercise of discretion by one actor in executing the terms of the contract that affects another actor's interests generates a obligation to exercise good faith (Farnsworth 1990; Fox-Decent 2005; Harpum 1997). Some conduct, such as duplicity and evasion, clearly violate that duty, but the obligation goes even further and may consist simply of inaction. Better said, good faith may oblige a party not only to refrain from a given practice, but also to take some affirmative steps to achieve a specific objective (Elkouri and Elkouri 2003). Extrapolating the fiduciary doctrine to the stakeholder context, because management retains the prerogative to take unilateral actions that impact stakeholder well being, the exercise of good faith in establishing boundaries for managerial discretion is a necessary safeguard. It also has bearing on assuring that the benefit of the doubt accrues to the party—generally stakeholders—with the least discretion in the interchange.

The standard of good faith yields principles that can make stakeholder engagement more substantive and credible. The first requisite of good faith is to compel the parties to confer about their positions and demands and obviously this objective cannot be met without *dialogue*, the exchange of concerns between two parties. On this basis, the first characteristic of good faith stakeholder engagement is that corporations confer with stakeholders about their concerns. The second aspect of conferring in good faith is to justify claims and demands with reason so as to indicate a desire to reach an agreement. Corporate leaders indicate a desire to participate actively in deliberations with stakeholders and a sincere desire to adjust differences and to reach common ground through the exchange of remedies, all of which typify the practice of *negotiation*. The expectation that claims be justified also has moral relevance as demonstrated in Habermas' theory of communicative action, but without the aspect of *transparency*, it is difficult to establish the veracity of claims made. Finally, good faith is directed toward determining the intentions or mindset of the involved parties (Cox

[2] National Labor Relations Act (1935), Section 8(a)(5).

[3] NLRB v. Reed & Prince Mfg. Co., ii8 F.2d 874, 88 s (ist Cir.), *cert, denied,* 313 U.S. 595 (1941).

[4] Uniform Commercial Code. Posted by Legal Information Institute. Retrieved December 6, 2011: http://www.law.cornell.edu/ucc/1/article1.htm.

1958), and as with most human interaction, making a determination entail both art and science. The three factors must be considered jointly as *totality of conduct*, rather than solely in isolation.

Good Faith in Stakeholder Engagement

The sincere desire to reach an agreement is the central indicator of good faith and although it can be stated as a position, its presence must generally be established by the behavior of the actors (Brownsword 1996; Summers 1969). Dialogue preserves autonomy and exposes claims to reasoned examination rather than the morally fraught position of permitting strategic advantage to determine or influence the merit of claims. Negotiation addresses the fiduciary obligation that accompanies unilateral discretion and the importance of safeguarding vulnerable parties through the exchange of remedies and transparency. After detailing these requisites of good faith, I will present exemplary mechanisms of good faith stakeholder engagement and argue that the consensus of interested observers is the preferable means of assessing the extent to which it exists.

Dialogue

Dialogue is communication between two parties that connotes the respectful exchange of ideas. O'Riordon and Fairbass (2008) describe stakeholder dialogue as a key vehicle for exchange in which the firm offers something of value (typically a social benefit or public service) to an important constituency and, in turn, anticipates receiving the approval and support of key socio-political groups. Dialogue also emphasizes hearing claims and testing them with reasoned arguments to determine if they are rationally true or correct. Practices include tasking company units with respondence to stakeholder concerns (i.e., product safety and environmental impact), permitting stakeholder involvement in compliance oversight, and access to information relevant to stakeholder interests (O'Connell et al. 2005). More involved dialogue can include direct stakeholder participation in the managerial decision process to garner consensus (Burton and Dunn 1996), and mediation to resolve disputes (Lampe 2001). The most extensive forms of dialogue include board interlocks with key stakeholders for particularly complex problems, and alliances such as greening initiatives with environmental NGOs (Calton 2006). In this case, I am employing dialogue as a predicate to negotiation that is focused on grasping the legitimate interests of both parties and perhaps establishing a process for interaction going forward.

As noted previously, good faith is warranted, in part, because of the impact of corporate activities on stakeholders. Legitimate stakeholders are defined in terms of their interests, including a right (legal or moral), ownership, or legal title (Carroll 1989; Frederick et al. 1992), impact of the firm's activities (Savage et al. 1991), or risk regarding the focal firm's operations (Clarkson 1995). If the legitimacy of the stakeholder can be reasonably established the process moves to the focal issue in which case centrality—the extent of benefit or detriment—is a critical consideration. Obviously the corporation cannot fully appreciate the stakeholder's interests relative to its operations, if it does not grant them a hearing. Stakeholders must also be legitimate in their behavior. Baur and Palazzo (2011) argue that for NGOs to have moral legitimacy they must commit to civility and discursive orientation, and work toward consensual behavior. It is reasonable to extend these criteria to other stakeholder groups as well. If the legitimacy of the stakeholder and the focal issue can be reasonably established good faith engagement moves to negotiation.

Negotiation and Transparency

Negotiation is a voluntary problem-solving process designed to reach a mutually acceptable decision on common concerns, and characterized by identifying issues and differences, providing needs and interests, and generating and bargaining possible settlement options (Lewicki et al. 2005). Corporations should appoint a representative of standing who is able to make binding choices because failure to do so undermines confidence in the discussions. This requisite is particularly important in global supply chains where it is preferable to address the multinational corporation along with its suppliers. For instance, in the Tazreen Fashions tragedy, Disney and Wal-Mart each distanced themselves on account of intermediaries (Mosk and Schwartz 2012). In cases like this stakeholders addressed by suppliers and other minor players are left to question whether their efforts are taken seriously. Therefore, failure to appoint a person of standing fails a standard of good faith in labor and commercial disputes (Darrow-Kleinhaus 2001). Another aspect of negotiation is bargaining—exchanging proposals and counter-proposals, and providing justification upon reason—because it offers a rudimentary indication that the actors are seriously considering alternatives and attempting to arrive at agreement.

Corporations may be reluctant to negotiate with stakeholders for a number of reasons: it can confer legitimacy upon stakeholders, the concern has been addressed, it can intensify the problem, it can have negative impacts on image, and it can be very time consuming. Not all stakeholder issues will or should result in negotiation. However, because the fiduciary aspect of good faith and normative stakeholder theory suggests a broadly construed

predisposition toward stakeholder input, if the corporation and the stakeholder disagree about grounds for engagement regarding a legitimate issue, that disagreement should also be subject to negotiation. As the party that exercises discretionary power over the actions in dispute, the corporation should make the case for why negotiation is unwarranted. Justifying an action that stakeholders view as unacceptable is a reasonable consequence of transacting business in public space, and with reasonable disclosure and transparency it need not be burdensome, but it does not preclude frank and relatively unwavering statements of position.

Providing justification upon reason raises the issue of transparency and how much information corporate leaders should disclose. Labor and commercial law renderings of good faith widely recognize corporate property rights (e.g., Brownsword 1996; Margalioth 2011; Summers 1969), which clearly include control of information. Managers must be free from the constraints of any negotiation process to the extent necessary to run a profitable business unless the benefits of negotiation justify the restriction on property rights. By asserting confidentiality or trade secrets as reason to withhold information, corporations have sometimes avoided disclosure, even when there is a legitimate stakeholder interest in the information.[5] Nonetheless, unsubstantiated claims undermine good faith by restricting stakeholders' capacity to fully verify corporate claims. Premised on the notion that if an argument is important enough to present during negotiation it is important enough to substantiate, the U.S. Supreme Court ruled that good faith requires verifiable claims,[6] and lower courts have long held that corporations act in bad faith when they conceal relevant information during labor negotiations (Gaal 1987; Lloyd 1994).

When a corporation makes statements to stakeholders it induces reliance—the presumption that those statements can be credibly acted upon—and consequently, the relevance of information can outweigh concerns about confidentiality.[7] Synthesizing these arguments and extending them to the stakeholder context, I propose a *warranted disclosure* criterion of good faith stakeholder engagement. Information is in the province of management but, to the extent that the information induces reliance and can be verified by trusted third parties (e.g., government officials), it should be provided to stakeholders. More broadly, transparency also refers to making behavior and motives readily knowable to interested parties (Hale 2008). If information about the tenor of discussions, participants, and basic policy positions is readily available then the actors are subject to greater scrutiny and oversight.

Totality of Conduct

As noted previously, determining good faith is both art and science, and thus regulators and the courts rely on case-by-case examinations of behavior in all aspects. The totality of conduct doctrine[8] stipulates that even though individual acts, when viewed separately, are not indicative of bad faith those acts may constitute bad faith when viewed as a pattern of behavior (Day 1968). For example, in 2006 business for social responsibility, along with the World Bank and other groups, initiated a project to improve working conditions in factories producing electronic devices in China and elsewhere. The Apple supplier Foxconn agreed to participate and negotiated changes in labor practices, but as the date for implementation approached Foxconn steadily retreated from previous positions, until it was clear that the project would not proceed. Although Foxconn participated in negotiations it did not act as if it sincerely intended to reach an agreement, and the NGOs and other stakeholders soon realized the lack of good faith. The incident generated such criticism from news organizations that Apple, which could have sent representatives to the negotiations, took the unprecedented step of releasing the names of 156 of its suppliers (Duhigg and Barboza 2012). The negotiation was a failure, but the lack of good faith by Foxconn was apparent and prompted Apple's strong response.

History is also a means of assessing the totality of conduct. Issues may not be thoroughly addressed when they first emerge and corporate–stakeholder engagement can extend over years. Monitoring follow through after the fact in previous agreements can shed light on whether good faith is present. Negotiations between the NGO's and managers at Foxconn had enough history for outside observers to note that the company was stonewalling (Duhigg and Barboza 2012), and it is reasonable that their actions will color future exchanges with its stakeholders. Although they can be very difficult to substantiate, stonewalling, presenting unsubstantiated claims, and obfuscation are inconsistent with good faith. Finally, unilateral activities concerning the disputed issue while negotiations are ongoing—absent urgent circumstances—connote duplicity and have long been considered evidence of bad faith (Cox 1958). Otherwise, actors can be coopted into delaying their own actions or providing cover for the predetermined actions of others.

[5] Detroit Edison Co. v NLRB, 440 US 301, 314-17 (1979). NLRB v First National Maintenance Corp., 627 F2d 596, 601-02 (1980).

[6] NLRB v Truitt Manufacturing Corp., 351 U.S. 149 (1956).

[7] Curtiss-Wright Corp. v NLRB, 347 F2d 61, 71 (3d Cir 1965).

[8] Labor Board v. Virginia Elec. & Power, 314 U. S. 469 (1941).

Assessing Good Faith in Practice

It is important to consider that corporations and stakeholders will regularly have difficulty arriving at mutually acceptable outcomes and will also disagree about the extent of good faith exhibited by the other. Consequently, there is a need for concrete external measures that represent solid instances of good faith stakeholder engagement and the potential to resolve important differences. Using third-party neutrals is clear evidence of good faith because it signals the intention of the involved parties to consider proposals and arrive at agreement.

Calling Balls and Strikes

Two key points of good faith stakeholder engagement are escalating from dialogue to negotiation, and coming to resolution through negotiation. At each point, if the corporation and the stakeholder agree, the matter is resolved. If, however, the corporation and stakeholder remain at odds a determination can be made with respect to whether they have engaged in good faith. Rough consensus regarding what constitutes good faith in stakeholder engagement (i.e., good faith stakeholder input) can be established through normative convergence, the community standards norm, and institutional pressure.

Donaldson and Dunfee (1999) suggest that norms are validated through a convergence of religious, political, and philosophical thought. It is generally a long process precipitated by *norm entrepreneurs* that persuade leaders to adopt new standards and practices, and use that platform to influence a broader audience (Barnett and Finnemor, 2004; Finnemore and Sikkink 1998). This process can result in *soft law*, non-binding statements, principles, and codes of practice often found in framework treaties and United Nations declarations (Boyle 1999), but can also precipitate changes at the domestic level. Brownsword (1996) argues that based on the *community standards* approach good faith norms are justified and binding because they are widely accepted as such by participants in a contracting context. Hence, we are able to draw upon the conventional practices of fair dealing accepted by members of particular communities to determine the requisites of good faith in those contexts. Although not determinative in themselves, the longstanding use and acceptance of good faith in labor relations and commercial law provide a substantial body of precedent and a basis for institutional judgments in the stakeholder context.

According to institutional theory, cultural pressures grounded in normative evaluations of moral propriety by governments, professional groups, and interest groups determine corporate standing in society (Suchman 1995). Corporations regularly subject themselves to the assessments of respected independent organizations. For example, in 1993 the insurance industry agreed to alternative dispute resolution covering all commercial insurance disputes related to insurance policies that were not in the best interests of consumers (Atlas et al. 2000). A broad standard advocated by human rights advocates, religious leaders, and consumer and community organizations is likely to be more effective than individual company codes, which suffer the fundamental lack of credibility posed by self-regulation. Since corporations generally respond to external measures of moral legitimacy, if the good faith standard of stakeholder input becomes a normative expectation, it will become more prominent in corporate policy and practice.

The process of developing specific guidelines for good faith is likely to occur in an iterative manner, which is how consensus around useful prescriptions is often forged. In the same way that legal precedents build and specify a body of case law, practices that are in keeping with good faith can be isolated and codified. For example, the Americans with Disabilities Act, designed to prevent discrimination against persons with disabilities, provides that an employer is required to make a *reasonable accommodation* for duly qualified persons with disabilities, but need not incur an *undue hardship* in doing so. Whereas the practical meaning of reasonable accommodation and undue hardship will vary with each instance, there is a growing body of case law that continually clarifies the terms. The precedents are not formal and legal, although they can be written into company or industry codes, but normative and become normatively binding. For example, NGOs such as Greenpeace attempt to influence consumer perceptions and corporate behavior by contrasting sound environmental practices with poor environmental practices and encouraging consumers to patronize environmentally sound producers (Financial Times 2001). Similarly, the Carbon Disclosure Project identifies environmental leaders and laggards, and attempts to build precedents by highlighting exemplary behavior and providing pressure for others to follow. The same normative convergence can occur with respect to whether corporations engage in dialogue and negotiation with their stakeholders in a transparent manner to resolve differences—the key aspects of good faith.

Third-Party Neutrals

When the actors are not successful in their engagement through negotiation, they should accept the account and/or recommendations of a third-party neutral, which is a very strong evidence of good faith. A third-party neutral serves as an impartial mediator or arbitrator to assist parties in resolving a dispute, and is often selected from professional rosters (e.g., American Arbitration Association), but can be

any individual the actors deem appropriate. For example, the International Labor Rights Fund, the Lawyers Committee for Human Rights, and the Consumer Federation of America engaged with Nike, Reebok, Levi Strauss, and other firms with the then-Labor Secretary Robert Reich as mediator, which resulted in the apparel industry partnership to address sweatshop labor. Third-party neutrals can also serve as arbitrators that make non-binding recommendations. In this instance, the corporation and the stakeholder present their positions to a mutually accepted person or tribunal that studies the issue and renders a public report of conclusions and recommendations for settling the differences, such that the public is informed and can bring pressure for a resolution. Since non-binding arbitration carries no legal weight, the parties retain their right to take other actions as they see fit.

Some stakeholders certify accreditation bodies, such as labor inspectors, as third-party neutrals to verify corporate activity (O'Rourke 2006). The National Association of Securities Dealers employs arbitration to help resolve disputes between and among investors, brokerage firms, and individual brokers (FINRA 2013).[9] While employing a mediator or arbitrator is not a punitive measure, it is especially appropriate when the actors dispute issues of fact or adequate trust and goodwill does not exist. During the Gulf States oil spill BP made assertions about the magnitude of the slick and their capacity to contain it that were so inaccurate as to indicate dishonesty and/or gross ineptitude. In either case, there was little reason for stakeholders to accept BP's assertions going forward, and BP accepted independent assessments of environmental impact and oversight of recovery efforts (GCORP 2011).

Although third-party neutrals diminish corporate autonomy they are perceived to be procedurally just, and are widely embraced by corporations that use them to avoid legal costs, jury trials, and publicity (Hoagland 2005; Wall 2000). Between 15 and 25 % of U.S. companies, employing an estimated 30 million workers, require *binding* arbitration to resolve disputes with workers and consumers (Ventrell-Monsees 2007). It is ethically consistent for employers that require stakeholders to abandon access to the legal safeguards afforded by the courts to do so themselves when disputes occur. In significant corporate issues it is reasonable that managers will not submit the firm to binding arbitration because it entails a complete loss of autonomy and perhaps abdication of their responsibility to shareholders. If, however, corporations and stakeholders can agree on third-party neutrals they can be accountable to stakeholders and still preserve corporate autonomy.

[9] Arbitration & Mediation. http://www.finra.org/ArbitrationAndMediation/.

In sum, good faith stakeholder engagement is a substantive form of input that reduces power asymmetries such that either side can prevail in a dispute, provides an inclusive forum for participation, and prevents either party from being dependent solely on the benevolence of the other. The parties can prevail upon one another through dialogue and then negotiate over their areas of difference. Most significantly, the specter of arbitration and observation by concerned and interested moral authorities encourages remedies that impact distributive outcomes.

Objections and Shortcomings

It is certainly reasonable to question why corporations would subject themselves to the good faith standard of stakeholder engagement, but there are benefits. Failed interactions with stakeholders entail risk because they lead to other forms of adversarial behavior (Dahan et al. 2010; Utting 2002). For example, stakeholders will withhold resources when they are not dependent on the corporation and make use of resources conditional when they are (Frooman 1999), and the outcomes of these strategies can be suboptimal for both parties. It is important to remember that good faith engagement emanates from the pluralist ideology and is not an attempt to remove conflict or free market dynamics from stakeholder interaction. Wicks et al. (1994) note that fostering participation and collective action builds the type of competitive environment corporations require to be successful. Still, corporations and stakeholders need the means to fairly contest differences, and to maintain the tension in their relationships that assure independence and the critical capacity to protect their respective interests.

Second, labor unions are internal, direct, and contract-based stakeholders and their interactions differ from those of non-contract-based, external, and indirect stakeholders. Good faith is a key element of arbitration in business transactions, and requires a disposition that is favorably adapted to stakeholder engagement. Clearly there are differences between labor unions and other stakeholders, although not as many as one might assume. Just as the individual worker has less power, so does the individual consumer or the powerless stakeholder. Labor unions act collectively to bargain on equal power terms with corporations, and although in the absence of contractual bargaining, stakeholder activists often employ litigation and corporate campaigns to focus unfavorable attention on a corporation such that consumers will act collectively to bring about change (Holzer 2008). The growing prevalence of corporations that require arbitration for disputes belies the notion that labor relations remedies cannot be adapted more broadly.

Third, it is reasonable to question whether I am attempting to replace the ambiguity of one term with the

ambiguity of another. Good faith requires parties to make a sincere attempt to reach common ground but does not require them to make a concession in doing so, and this formulation can seem too incongruous to be useful. On the other hand, the ambiguity serves a fitting role in addressing what Garret Hardin (1968) termed a *tragedy*—a problem for which there is no technical solution but only the continual stress of working it out. Conflict poses ambiguity; good faith stakeholder engagement may be cumbersome initially, but it provides the long-term promise of reducing ongoing conflict and reducing the likelihood that dependent stakeholders will be left with *efficient* decisions that damage their interests.

Advocates of stakeholder democracy (i.e., codetermination) might argue that good faith does not go far enough. However, in the absence of fundamental regulatory reform, stakeholder democracy presents more issues than it resolves. For example, how many stakeholder seats on the board, do they vote shares, does the board member really represent the stakeholders in question, on what matters do they vote? Also, stakeholder groups can be difficult to engage because of varied interests that reduce their capacity to set priorities and maintain unity (Winn 2001; Wolfe and Putler 2002), and in some cases there is no basis for enforcing the agreements that are made. While good faith stakeholder engagement does not assure distributive justice, it gives rise to just outcomes by strengthening stakeholder prerogative. In sum, the notion of good faith stakeholder engagement is not a flawless remedy, but it increases accountability to stakeholders by adding more substantive character to the stakeholder input process while maintaining flexibility and corporate autonomy.

Discussion

I have made a normative case for why substantive stakeholder engagement should be characterized by: reduced power asymmetries that enable stakeholders to represent their interests on relatively equal footing with corporations, a participative forum that does not make either party solely dependent on the benevolence of the other, and the capacity to impact distributive outcomes. Additionally, I argue that full consideration of the power dynamics in stakeholder theory begins with addressing the, often implicit, ideologies of unitarism and pluralism that predispose remedies for reconciling conflicting interests. To meet these requisites, I present a method of stakeholder engagement based in pluralist notions of conflict resolution and modeled on the principle of good faith. Good faith stakeholder engagement requires dialogue, negotiation, and transparency, both severally and jointly, and when agreement cannot be reached I have proposed mediation and arbitration as appropriate dispute resolution techniques. Non-binding arbitration enjoys widespread use, and corporate codes of conduct are regularly negotiated between NGOs and corporations or industry groups (Egels-Zaden and Hyllman 2007). Corporations are more likely to act fairly if good faith stakeholder engagement, including tools of mediation and arbitration, are ethical minimums.

The principle of good faith bridges the various views of stakeholder engagement present in the extant literature. Ethical strategists will observe that corporations are still able to meld their strategic and ethical interests to fashion win–win outcomes for their stakeholders. Arbitration and mediation reduce the likelihood that strategic leverage will influence outcomes on behalf of the most powerful actors in the exchange, which aligns with Habermas' theory of moral discourse and moves toward greater parity between stakeholders and corporations. Finally, the substantive nature of good faith engagement addresses criticisms of stakeholder theory due to the under-determinism of the input mechanism. Theorists have reasonably objected to the ambiguity of balance as a means for evaluating activity related to stakeholder interests (Sternberg 2000), and the general lack of pragmatic means for bringing about moral relationships (Marcoux 2000). The means and method of stakeholder engagement is clearly central to the charge of corporations maintaining moral relationships with their stakeholders and delivering value to all of them. This paper speaks to that criticism by encouraging development and use of external and verifiable standards through which to determine whether substantive input and balance are present.

In order to make engagement more substantive and meaningful, we must confront the political notion that substantive engagement can be attained without meaningfully addressing power asymmetries and standards of conduct. Stakeholder engagement is an inescapably political undertaking, particularly in a global economy where developing countries lack adequate regulatory structures. Political ideology can be muddled but is frequently the ideological software that supports assumptions about how conflicts are to be addressed. Making political assumptions explicit subjects them to more thorough analyses and contributes to a more precise understanding of the positions taken. Good faith stakeholder engagement presumes pluralist assumptions and values; primarily that society benefits most from organizations that are relatively equal in power rather than the benevolent self-interest of the most powerful organizations. Since power and conflict are so closely intertwined, ethical analyses of stakeholders' well being cannot be separated from political impacts and ideology. It may be that explicitly adopting, elaborating, and defending a pluralist orientation can lead to different perspectives and prescriptions regarding stakeholder engagement.

Since issues of power and conflict are central to corporate–stakeholder relationships, genuine stakeholder participation is predicated on reduced corporate prerogative. It is, however, important that good faith engagement facilitates genuine and substantive stakeholder input without unduly compromising the freedom of the actors to forge the terms of an agreement. While I agree with the ethical strategists regarding the potential of business to do well by its stakeholders, I am a good deal more pessimistic. The notion that the corporation can operate as the benevolent or morally strategic reconciler of multiple interests belies the corporate controversies that occur with unfortunate regularity. In Rawlsian terms, an agreement based on overlapping consensus, centered on moral grounds and able to endure regardless of the relative strength of the parties, is morally and practically more tenable, but we must get there from a circumstance that is frequently *modus vivendi*, wherein corporations hold the cards. On that basis stakeholders warrant a process that affords them the benefit of the doubt.

Finally, good faith stakeholder engagement has pragmatic utility because one function of ethical analysis is to provide direction to managers as to what ethical behavior means in practice. Rather than simply making reference to good faith—a widely used and underspecified term—stakeholders can reasonably expect ethical corporations to exhibit good faith by engaging early and directly with stakeholder in lieu of intermediaries, exchanging proposals, and employing third-party neutrals when possible. Moreover, NGOs can highlight the components of good faith as best practices, and emphasize the activity of firms that operate in good faith as examples to their peers. Good faith should also be regarded as a central and non-compensatory aspect of corporate citizenship because it provides fundamental information about corporate attitudes toward accountability to their stakeholders.

Conclusion

Empirical research can be directed toward determining which types of stakeholder dispute mechanisms are the most broadly effective, those the corporation fashions unilaterally after listening to stakeholder input, those fashioned in good faith collaboration with stakeholders, or developed as a result of mediator or arbitrator involvement. There are a number of different approaches to making corporations more accountable to their stakeholders such as corporate responsibility reporting, codes of conduct, and support for labor rights, and there is a need to determine what has the greatest impact for all concerned. Clearly, all types of stakeholder engagement are not equal, and there should be greater pragmatic focus on what constitutes acceptable engagement with stakeholders and what does not. To eliminate sham engagement, standards of substantive engagement and external means of establishing legitimate outcomes are necessary. Conceptually good faith must be more clearly reconciled with corporate property rights and integrated into normative frameworks of stakeholder management.

Granted, stakeholder theory should not be used to weave a basket big enough to hold the world's misery (Clarkson 1994; c.f., Phillips et al. 2003), but it must extend as far as the corporate capacity to cause, complicate, or exacerbate that misery. Supply chains broaden the impact of corporate actions and this must be accompanied by broader accountability. There will, and should, be tension between the requisite for earnest engagement and recourse to the property rights and economic weapons that typify free market capitalism. At a minimum, good faith stakeholder engagement provides a benefit by giving the actors a better indication of the strength of the other's convictions, and the opportunity to dispel inaccurate caricatures of one another. The tensions can also serve a positive role in stakeholder relationships by insulating all parties against real or perceived cooptation (Baur and Schmitz 2012; Burchell and Cook 2011). By identifying requisites of substantive engagement and showing how the good faith standard meets those requisites, stakeholder theory can move from merely asserting the value of stakeholder engagement, to specifying what it entails and assessing its legitimacy in practical terms. In addition, preventing disproportionate attention to the interests of shareholders to the detriment of others blunts criticism of stakeholder theory on the grounds that it masks managerial opportunism.

The management of stakeholder interests, and strategic management generally, is an organic undertaking that resists regimentation and precision. That said, in the absence of substantive mechanisms of stakeholder engagement, statements of its importance fall flat. Corporate adherents to the stakeholder model can more readily provide value to all of their stakeholders if they hew to the requisites of good faith engagement. While much work needs to be done to develop suitable mechanisms of engagement, corporations cannot credibly bemoan the litigiousness of consumers and the burgeoning activism of other stakeholders when other means of conflict resolution remain so woefully underdeveloped. If, however, good faith engagement becomes more a prevalent aspect of stakeholder relations, corporations that adhere to its principles might achieve both ethical and competitive advantage with their stakeholders.

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