

Shareholder activism: the new smoking gun?

Is shareholder activism the new face of environmental lobbying? London-based law firm Mayer Brown reports on the development of this growing phenomenon

A CAMPAIGN spearheaded by the charity ActionAid to stop London-listed Vedanta Resources plc opening a bauxite mine and alumina refinery in India gained quite a bit of mainstream media coverage earlier this year. While this is not the first time the industry has been embroiled in controversy concerning developments in sensitive areas, the case provides an interesting example of a growing phenomenon among non-government organisations and campaign groups: shareholder activism.

WHAT IS SHAREHOLDER ACTIVISM?

Investor activism has been common in the US for some time but environmental and social campaign groups in the UK and Europe are now increasingly aware of their ability to use shareholder status and the rights derived from company legislation to call for a change in corporate behaviour. From ousting directors to blocking key resolutions, the shareholder wields considerable power. Coupled with sophisticated advertising and



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public-relations stunts, shareholder campaigns often provide a highly effective means of promoting a cause and applying pressure on companies.

Shareholder activism can cover a broad spectrum of behaviour. One approach UK campaigners are increasingly using is to purchase shares in a company in order to gain the direct right to participate in company meetings and resolutions. This need not be the preserve of well-funded groups: ActionAid reportedly purchased a single company share to give it access to the company's annual general meeting.

The ActionAid campaign focuses on the potential effect of the mining project on the Niyamgiri mountain, from which a number of local tribes derive their religious and cultural practices, and the plight of indigenous peoples who claim to have been involuntarily displaced from their homes to make way for the development. A slick media campaign, including spoof images of the demolition of British landmarks such as Stonehenge and St Paul's Cathedral in London, aims to drive home the message. The campaign has also enjoyed the benefit of high-profile endorsement from UK celebrities Bianca Jagger and Joanna Lumley.

While the Indian Supreme Court approved the development in April, the case has been appealed and a decision is pending.

In a wider sense, activism can also involve the lobbying of existing shareholders to exert their voting power to bring about change in company management or strategy. Many large institutional investors and asset managers now actively engage with companies to support investment decisions based on environmental, social and governance performance. Lobbyists are aware that the withdrawal of a significant investor can have considerable economic as well as symbolic power.

Interventions by major institutional shareholders are frequently supported by data and voting guidance from influential corporate monitoring services, such as the Carbon Disclosure Project, CERES (a coalition of US investors, environmental and public interest organisations working to address sustainability issues), EIRIS and PIRC (UK-based research services specialising in socially responsible investing and corporate governance). The UN-backed Principles for Responsible Investment is another high-profile initiative which aims to help major investors integrate environmental, social and governance considerations into their investment decisions.

SOME RECENT CAMPAIGNS

Not surprisingly, tackling the threat of climate change has been a key priority of many environmentally focussed campaign groups in the last few years. Notable interventions have included the attempt by a number of major shareholders to compel global oil and gas giant ExxonMobil to take steps to address climate



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Bianca Jagger (inset) joins ActionAid campaigners outside the Vedanta Resources AGM at The Lincoln Centre in London on July 20
Photos: Aubrey Wade/ActionAid

change, such as setting greenhouse gas emission targets and investing in renewable energy. Meanwhile, US car empire Ford Motor Co was forced to reveal its plans to cut its vehicles' greenhouse-gas emissions following motions by two activist shareholder groups.

The ability of investors to pull their combined weight in an attempt to overcome entrenched corporate attitudes was clearly demonstrated this autumn. The largest-ever grouping of institutional investors issued a statement calling on international policy-makers to reach agreement on a post-2012 climate change treaty in the Copenhagen summit in December. Co-ordinated by the US Investor Network on Climate Risk and the European Institutional Investors Group on Climate Change, the policy statement has the backing of over 180 signatories across a number of countries that collectively manage over US\$13,000 billion in assets.

In the US, shareholder lawsuits in the form of class actions and, less commonly, derivative actions, are the main legal tools for shareholders seeking to change corporate behaviour. However, there is also a long history of shareholder activists filing environmental and social resolutions with public companies. Even though the vast majority of such resolutions will not be passed, they may still promote a useful dialogue between lobbyists and management. According to CERES, 68 climate-related resolutions have been filed by pension funds, foundations, and religious, labour and other institutional investors so far in 2009. Among those is a major banking group which has agreed to conduct special due diligence on companies that extract coal by mountaintop removal. And, in what has been heralded as a breakthrough for campaigners, shareholders with 51.2%

of the voting rights in independent US power producer IDACORP voted in favour of a resolution calling for adoption of greenhouse-gas reduction goals.

In the mining and energy sectors, the issue of the exploitation of natural resources in areas afflicted by armed conflict, human-rights abuses, corruption, or poor governance standards has been the focus of lobbyists for many years. Of course, the extractive industries are not alone in being vulnerable to shareholder intervention. Other high-profile campaigns have targeted the shareholders of major retailers over the use of forced or child labour in the supply chain, animal welfare standards and genetically-modified organisms, to name but a few.

LEGAL STRATEGIES

The tactics available to shareholder activists inevitably vary by jurisdiction. In the UK, the recent major overhaul of companies legislation, culminating in the passing of the Companies Act 2006, has significantly added to the activist's armoury.

The Act introduced a new concept to the English legal system: 'enlightened shareholder value'. Previously, a company director's primary role was simply (subject to a number of subsidiary duties) to act in the best interests of the company and its shareholders. This gave considerable leeway to directors and the English courts have traditionally been reluctant to challenge their commercial judgement; Lord Denning's assessment that company directors are "are a self-perpetuating oligarchy; and virtually unaccountable" not being without some truth.



The ActionAid media campaign included spoof images of the demolition of British landmarks such as Stonehenge
Photo: ActionAid

Now, the concept of enlightened shareholder value recognises that other 'stakeholders' may have an interest in a company's affairs and this is translated into the Act by a requirement on directors to have regard to certain other interests. Importantly, these include the impact of the company's operations on the community and the environment.

The Act also contains a new procedure for derivative claims, flowing from the Law Commission's recommendation that there should be more modern, flexible and accessible criteria for determining whether a shareholder can pursue an action against a company. Previously, owing to complex and often arcane

common law, only a few derivative actions ever succeeded. The new procedure expands the range of circumstances in which shareholders can bring claims against companies and would, for example, be available for breach of duty by a director, even if the director has not benefited personally from the breach. Although it is likely to remain extremely complex and difficult for shareholders to mount successful challenges in the English courts, fears have been expressed that these changes will in time lead to a flood of tactical litigation against directors by activist shareholders. Even the mere

possibility of such claims is already seeping into the awareness of directors.

The ability to requisition company meetings or call for resolutions to be passed will often depend on a threshold shareholding which only major investors are likely to meet. These options may also be subject to regulatory impediments, including under the market abuse regime.

Greater transparency and access to information is another key factor in terms of the activist's ability to hold a company to account. Under the Act, certain quoted companies must now include information about environmental and social matters in their

business reviews. By 2012, it is anticipated that greenhouse-gas emissions reporting may become a legal requirement in the UK under provisions set out in the landmark Climate Change Act 2008.

Activists have not been slow in assessing the opportunities for challenge presented by the recent changes to the law. The Corporate Responsibility Coalition (a group supported by organisations such as WWF, Amnesty International, Friends of the Earth and the Trade Justice Movement) has published a campaigners' guide to using the Act to influence corporate behaviour. This includes advice on how to buy shares, the rights to influence corporate behaviour this will entail, as well as guidance on mobilising other shareholders to take action.

MANAGING THE CORPORATE RESPONSE

Managing interventions by activist shareholders is an increasingly important part of corporate investor relations, especially for companies whose operations potentially have a significant environmental or social impact. Developing a strategy to respond to such campaigns will involve a combined response dealing with legal, presentational, commercial and operational issues. For major companies, it may involve co-ordinating time-critical action across a number of jurisdictions.

Recent experience has shown that, with company or product reputation and their bottom line at stake, many companies are seeking to avoid public skirmishes with protestors by taking the proactive step of engaging with environmental and social activists. This can form part of a wider corporate responsibility programme or address a particular issue of concern.

The US Climate Action Partnership (US-CAP) provides a good example of such an approach. An alliance of major businesses and leading climate and environmental groups, it has called on the US federal government to enact legislation requiring significant reductions in greenhouse-gas emissions. US-CAP counts a number of major mining, chemicals and energy conglomerates among its members, and has also pledged support for the landmark American Clean Energy and Security Act (the 'Waxman-Markey' Bill), which passed the US House last June.

Although this article focuses on shareholder activists, companies should not lose sight of the myriad of other means of challenging corporate decision-making. In the UK, the growth in use of judicial review proceedings over development projects such as the proposed new runway at Heathrow Airport and the potential availability of class actions, are issues to watch out for. Companies boasting unsubstantiated green credentials have also successfully been taken to task in 'greenwashing' challenges under legislation overseen by trade and advertising watchdogs.

With the pressures of increasing regulation and the global concern over issues such as climate change, companies and their directors will undoubtedly need to remain alert to the possibility of challenge. Strong compliance programmes, training and proactive corporate strategy aimed at engaging with activists will continue to be needed to help address these issues.

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A woman pours out water for an elderly man in the village of Majlipali, Sambalpur district, Orissa, India. This area is part of Vedanta's target mine development
Photo: Bloomberg News