

Publicly Traded Companies that Benefited from Forced or Slave Labor, 1929-1945

MSCI ESG Research Report to CalPERS

December 2012

Introduction

I. Introduction to this Report

This report was prepared in order to fulfill a contract with the California Public Employees' Retirement System (CalPERS), undertaken in response to state legislative mandate Calif. Stats. 1999, Ch. 216, a statute requiring CalPERS "to monitor investments in businesses that owe compensation to victims of slave labor." This report lists publicly traded companies that have been identified as having employed forced or slave labor in Nazi-controlled or allied territories (including Japan) from 1929 to 1945. It is an updated version of a report first submitted in September 2001. Where a company with evidence of use of forced or slave labor is now private but has been acquired by a publicly traded parent company, MSCI ESG Research has not attributed the actions of the subsidiary to the parent company.

II. Historical Background

Particularly near the end of World War II, a large portion of the able-bodied male workers in Germany and Japan were serving in the armed forces, and the German and Japanese governments offered private corporations the opportunity to substitute as laborers foreign nationals, prisoners of war or concentration camp inmates. In addition, Japanese corporations established outposts in countries occupied by Japan. In some cases Japanese corporations paid these laborers a small salary (frequently in company scrip); in Germany the government often received payment for each laborer a given company used. Companies provided laborers with food and shelter, which was frequently inadequate.

Many historians make a distinction between slave labor, usually performed by POWs or concentration camp victims and including severe abuse, and forced labor, frequently performed by foreign civilians working against their will, but under somewhat more humane conditions. (The characterization of forced labor as more humane than slave labor is a relative one: for example, while female forced laborers at Volkswagen were treated better than concentration camp inmates, forced laborers' infants were taken from them and kept in an unheated, bug-infested nursery, where nearly all of them died from neglect.) Because Calif. Stats. 1999, Ch. 216, covers companies using both slave and forced labor, MSCI ESG Research uses the term "forced labor" as an inclusive term, describing labor that may have been forced or slave. The term "slave labor" appears in this report only in cases where companies described their laborers as "slave laborers" to MSCI ESG Research; however, in some cases this may be the result of the language barrier rather than an indication that slave, as opposed to forced, labor was used.

III. Methodology

MSCI ESG Research's main sources of information for the names of companies involved in forced or slave labor were the International Tracing Service's *Catalogue of Camps and Prisons in Germany and German-Occupied Territories, Sept. 1, 1939-May 8, 1945*, compiled in 1949; the English-language (and in some cases, German-language) press, accessed through the NEXIS press archive; nongovernmental organizations; and documents from the offices of the Supreme Commander of the Allied Powers in Japan, now housed in the U.S. National Archives. We are also grateful for the help of historian Linda Goetz Holmes, an expert on U.S. POWs in Japan and author of the book *Unjust Enrichment*, who kindly shared with us historical documents from her own collections. In some cases MSCI ESG Research encountered English- and Korean-language non-corporate and non-governmental websites providing information on companies' involvement in forced or slave labor; we used such information as a jumping-off point for further research and have not included any company based solely on information from an independent website. MSCI ESG Research used a variety of sources to find corporate addresses and investing information.

MSCI ESG Research also reviewed the list of companies that have contributed to the German Economy Foundation Initiative's "Remembrance, Responsibility and the Future" fund, founded by German corporations with the support of the German government to provide compensation to former forced laborers and other victims of the Nazi regime. Companies on this list that are also contributors to the fund are identified in the report.

IV. Legal Status of Companies on this List

In October 2003, the U.S. Supreme Court upheld an earlier Ninth Circuit Court of Appeals decision that found California Code of Civil Procedure 354.6—which extended the statute of limitations for former forced laborers to sue companies that profited from their labor—to be unconstitutional. The Ninth Circuit Court of Appeals based its decision on the Constitution's granting of foreign affairs powers to the federal government, rather than states. Extending the statute of limitations on forced labor claims is not merely a procedural matter, the court found, but amounted to interference by California in the foreign policy of the United States. Most of the companies on this list, therefore, face significantly diminished liability from their use of forced laborers. Companies are therefore classified according to the type of forced labor they used and any settlement agreements or court decisions that lessen corporate responsibility for this type of forced labor.

Legal status of claims by various victim groups:

Chinese and Korean civilians: It is extremely unlikely that any lawsuits by these groups will be successful in U.S. courts. Companies that used non-U.S. forced laborers may still be open to legal liability in Japan, however. In 2005, 2007, and 2011 Japanese courts dismissed suits against companies accused of using civilians as forced laborers. The few judgments against companies have resulted in extremely small damage payments; the largest such court-ordered payment was \$190,000.

As China's influence relative to that of Japan has grown, Chinese nationals and the Chinese government have become more aggressive about pursuing claims against the government of Japan and Japanese companies for abuses that took place during World War II. In November 2006, the *New York Times* reported that attorneys for victims of forced labor have contacted Japanese companies with a significant presence in China. If the Chinese government chooses not to interfere, these attorneys could exert

significant pressure on such companies, pressure that could result in significant payouts to former forced laborers and even such laborers' heirs.

The following companies in CalPERS's portfolio are currently facing lawsuits (including lawsuits under appeal) in Japan or China over their use of Chinese civilians as forced laborers:

Mitsubishi Corporation
Mitsubishi Materials Corporation

There were no companies in CalPERS's portfolio facing lawsuits (including lawsuits under appeal) in Japan over their use of Korean civilians as forced laborers.

U.S. POWs: The Ninth Circuit decision regarding California's forced labor law and the subsequent Supreme Court upholding of that law significantly reduce the risk that companies that profited from the labor of former prisoners of war would be liable in U.S. courts. The U.S. Congress has occasionally seen bills that would allow U.S. POWs to sue companies that profited from their labor, but these bills have died in committee—and even if passed they would probably have been found unconstitutional. Past federal courts have determined that in the treaty ending the war with Japan the United States forfeited the right of its citizens to receive reparations from any Japanese entity.

In a September 2000 case, U.S. District Judge Vaughn R. Walker of the Northern District of California dismissed a case brought by former U.S. POWs who had been forced to labor at various Japanese companies. Walker ruled that the 1951 Treaty of San Francisco, which established peace between Japan and the Allied nations (including the United States, Australia, Great Britain, Holland, the Philippines and others), precluded members of the armed forces of Allied nations from suing as a result of their wartime experiences. Article 14 of the treaty reads, in part:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

While the language of the treaty appears clear, a number of legal scholars disagree with Walker's finding, and former POWs have called for a reversal of his ruling or new legislation that would permit claims against Japanese companies.

Australian, British and other Allied POWs: The Treaty of San Francisco, as interpreted by the Northern District of California, precludes claims by all Allied Powers POWs, and the Justice for United States Prisoners of War Act does not include non-U.S. Allied Powers POWs among groups that it would allow to sue in U.S. courts. MSCI ESG Research is unaware of any successful suits by Allied Powers POWs in non-U.S. courts.

Filipino civilians and POWs: Filipino civilians and POWs are no longer able to sue in the United States, and MSCI ESG Research is unaware of any Japanese court cases in which Filipino former forced laborers received compensation from companies that benefited from their labor. The risk of lawsuits against companies that benefited from the labor of Filipinos is therefore extremely low.

Indonesian civilians: Indonesian civilians were forced to labor in their own country while it was occupied by Japan. They were used both as agricultural laborers and laborers in factories owned by

Japanese corporations. MSCI ESG Research has identified several companies that used Indonesian civilians as forced laborers; however, MSCI ESG Research is unaware of any lawsuits filed against these or other corporations in the U.S., Japan or elsewhere, and believes that the risk of lawsuits against such companies is extremely small.

Groups persecuted by the Nazi regime: Nearly all of the companies identified by MSCI ESG Research as having used Nazi victims as forced or slave laborers have made some sort of voluntary reparations to former forced laborers. "Nazi victims" includes conquered peoples (most notably Eastern Europeans, but also French nationals and some Allied POWs) brought to Germany or its occupied territories as laborers and those incarcerated in concentration camps, including Jews, members of the Roma and Sinti tribes ("Gypsies"), Jehovah's Witnesses and others.

Germany, Austria and Switzerland have each reached settlement agreements with representatives of these former forced and slave laborers, absolving German, Austrian and Swiss companies—as well as parent companies with wartime German, Austrian and Swiss subsidiaries—of legal responsibility. A summary of each agreement appears below.

German settlement--In August 2000, the German government passed the German Foundation Act, setting up the "Remembrance, Responsibility and the Future" fund, underwritten jointly by the government and private businesses to provide payments to former forced laborers and other victims of the Nazi regime. The German and U.S. governments assured German businesses that the compensation program would provide companies operating in Germany during the Nazi era (and foreign companies with subsidiaries operating in Germany during the Nazi era) with immunity from all lawsuits related to Holocaust-era claims, including claims from former forced laborers.

While the German Foundation Act is often referred to as a "settlement," it is technically only an agreement between the U.S. and German governments and German businesses. A legal settlement is reached under the guidance of a court and precludes any future lawsuits regarding the same matter. The German Foundation Act provides no such protection. Lawsuits can still be filed in the United States against German companies that benefited from forced labor; however, when such suits are filed, the United States files a Statement of Interest recommending that the case be dismissed. The reparations agreement between the U.S. and German governments and the 2003 Supreme Court decision against California Code of Civil Procedure 354.6 together make it highly unlikely that any German companies can successfully be sued for their use of forced labor. A recent court case in New Jersey illustrates this point: in a lawsuit against Schering and Bayer, Judge William G. Bassler found that "The history of foreign policy commitments devoted to the resolution of Holocaust-era claims, coupled with the relatively recent creation of the Foundation, renders such claims nonjusticiable."

Swiss settlement--As part of a settlement agreement with Swiss banks accused of appropriating the assets of depositors who died in the Holocaust, Judge Edward Korman of the Eastern District of New York issued a call for information from Swiss firms whose subsidiaries in Nazi-occupied countries had benefited from forced labor. Korman promised immunity from forced labor litigation to companies that identified themselves to a court-appointed Special Master and provided lists of forced laborers "or ... represented that such names are unavailable despite diligent investigation." Of the companies that came forward with information, the majority were not granted immunity because their subsidiaries that used forced labor were not Swiss-owned during the Second World War. In an April 4, 2001 decision, Korman lists 27 companies that were granted immunity. As with the settlement with German companies, these Swiss companies could theoretically be sued by former forced laborers, but it is highly unlikely that they will be.

Austrian settlement--An agreement similar to the German and Swiss agreements was reached with Austrian companies in 2001, leaving the likelihood of lawsuits against Austrian companies small.

Summary of legal issues: While there exists scenarios under which the companies on this list could be sued in U.S. courts by former laborers, such scenarios are highly unlikely. Still, MSCI ESG Research recommends that CalPERS continue to monitor new legal developments. Japanese companies on this list are at risk of lawsuits filed in Japanese courts, although any awards resulting from those cases are likely to be small.

V. Identification of Successor Companies

The majority of the German companies that used forced or slave labor no longer exist as publicly held companies under the same name they used during World War II. In identifying German successor companies, MSCI ESG Research relied in part on research conducted by the American Jewish Committee, which we confirmed by checking addresses and by reviewing corporate histories on company websites, and in correspondence with the present-day companies themselves.

Japanese companies posed a different problem: While many retain the names of World War II-era companies, several of those companies were dissolved at the end of the war and later reorganized, and the present-day companies have told MSCI ESG Research that they are not liable for predecessor companies' actions. Despite corporate reorganizations, however, Japanese courts have found reorganized companies to be responsible for the actions of their predecessors. In cases where companies disputed their identification with prewar precursor companies, MSCI ESG Research consulted the *International Directory of Company Histories* to confirm its identifications, but has noted cases in which companies claim not to be legal successors.

Selected Biography

Note: Part I includes references to some of these documents; abbreviations used in references appear in italics

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abbreviated in Part I as "Allied Powers Records"

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Abbreviated in Part I as "War and the Rights of Individuals"

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MSCI ESG Research is the successor of sustainability pioneers KLD, InnoVest and IRRC, which were acquired through MSCI's acquisition of RiskMetrics. ESG ratings, data and analysis from MSCI ESG Research are also used in the construction of the MSCI ESG Indices.

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¹As of June 30, 2011, based on eVestment, Lipper and Bloomberg data.



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Date [upon approval of transmission by IC]

Gregory Schmidt
Office of the Secretary of the Senate
State Capitol, Room 3044
Sacramento, CA 95814

Dear Mr. Schmidt:

In accordance with Chapter 216, Statutes of 1999 (SB 1245, Hayden), the California Public Employees' Retirement System (CalPERS) is submitting to the Legislature the attached report on portfolio companies that may owe compensation to victims of slave or forced labor during World War II. To compile this report, CalPERS contracted with MSCI Inc. who provided research from multiple sources and supplied a list of companies with potential Holocaust Era restitution liability.

At the direction of the CalPERS Investment Committee, CalPERS staff will contact companies included in the Report that are currently facing litigation regarding their use of forced or slave labor during the Holocaust Era. Our letter both notifies the company that we are posting the Holocaust Era report on our website and encourages the company to resolve these issues.

Attached you will find a complete copy of the 2012 Holocaust Era report. Please contact Anne Simpson at (916) 795-9672 should you have any questions regarding the report.

Sincerely,

ANNE SIMPSON
Senior Portfolio Manager
Investments
Director of Global Governance

Attachment:

cc: Anne Stausboll, Chief Executive Officer
Joseph A. Dear, Chief Investment Officer
Danny Brown, Division Chief