



# CSR JOURNAL

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### **Aviation's Role In Climate Change**

*By Roxane Peyser*

Recently, the Nobel Peace Prize was awarded jointly to the Intergovernmental Panel on Climate Change (IPCC) and Al Gore for their work in promoting education about man-made climate change. According to the IPCC, aviation has contributed to an estimated 2 percent to 4 percent of the current anthropogenic impact on climate, and will be responsible for up to 15 percent of human induced climate change by 2050.

On the other hand, while Boeing, Airbus and the International Air Transport Association forecast exceptional growth in air traffic, they argue that the airlines are setting targets for at least a 25 percent improvement in fuel efficiency and CO<sub>2</sub> (carbon dioxide) emissions above current levels with the aid of technological and operational enhancements.

There is no question that climate change has been an issue of mounting concern for the airline sector despite its exemption from legal and regulatory schemes. However, faced with the prospect of inclusion within the European Union Emission Trading Scheme (EU ETS) starting in 2011, and also within a growing number of legislative regimes on



national, regional and local levels, those airlines not already proactive in addressing emissions in their Corporate Social Responsibility plans (CSR) must now consider their response to forced compliance. The EU ETS represents the first legislative effort to hold airlines accountable for their greenhouse gas (GHG) emissions.

The EU ETS was implemented in 2005 as a cap and trade system for only CO<sub>2</sub>. It was established with two trading phases: the first trading period closing in 2007; the second trading period starting in 2008 and ending in 2012. This second phase also will include GHGs other than CO<sub>2</sub>.

See [Aviation - page 2](#)

### **Corporate Counsel Evaluate *Khulumani***

*By Jessica Ulm*

The Second Circuit Court recently ruled that a class action suit brought by South African plaintiffs against many of the world's largest corporations can go forward. *Khulumani v. Barclays National Bank, Ltd.*, may prove to be one of the most significant recent

Alien Tort Claims Act cases to proceed against corporations after the 2004 Supreme Court decision in *Sosa v. Alvarez-Machain* shed some light on what types of claims U.S. courts would hear from foreigners alleging tort violations of international law.

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Utilities and energy intensive industries have been the principal focus of mandatory participation for their CO2 emissions. Airlines have notably been omitted from the first trading period, but will begin their participation in 2011 when all flights between EU airports will be included. In 2012, all departing and arriving flights at EU airports will be subjected to the requirements no matter their country of origin.

One area under the environment-social-governance rubric that is seeing mounting efforts to making compliance with CSR standards mandatory is the environmental component. There is no question that it is the issue of climate change that is pushing these efforts toward obligatory compliance. There are those who argue that CO2 in particular and greenhouse gas in general should remain voluntary, while others argue that GHG will not be sufficiently reduced until those standards are converted to binding obligations.

For many in the corporate mainstream, CSR is about the triple bottom line represented by people, planet and profits. Driven in recent years by the virtual convergence of corporate management and accounting scandals leading to governance changes and social and health disasters implicating human and employee rights, as well as environmental challenges - most notably climate change - many corporations and other entities have found it productive to move beyond compliance. Although some mandatory obligations have materialized under regulatory schemes such as Sarbanes-Oxley, CSR for the most part has remained voluntary in terms of adopting and complying with specified standards.

And even where compliance is obligatory, the aviation sector has remained relatively untouched. However, this exemption is short-lived as the airline sector will begin to fall under the mandatory carbon caps of the EU ETS starting in 2011.

### **The GHG Spotlight**

The effort to make adherence to GHG caps - and specifically CO2 emission limits - compulsory is arguably one of the fastest growing and most enduring global movements.

A recap of the more salient international climate instruments would include:

- The United Nations Framework Convention on Climate Change (UNFCCC or FCCC), an international environmental treaty generated at the Earth Summit in Rio de Janeiro in 1992, with the goal of reducing GHG emissions to stabilize and reduce such emissions in order to prevent serious climate change.
- The Kyoto Protocol - an update to the UNFCCC agreed to on December 11, 1997, and signed on February 16, 2005, with 174 parties as of November 2007, many of whom have accepted binding emission targets.
- The U.N. Global Compact that was launched in 2006 as an initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies in the areas of labor, human rights, environment and anti-corruption.

More recent global efforts to focus attention on anthropogenic contributions to climate change include the recent Nobel Peace Prize; the election of new Australian Prime Minister Kevin Rudd (for whom an initial priority was to ratify the Kyoto Protocol - leaving the U.S. the only developed nation to not be a signor); and the U.N. Climate Change Conference in Bali, in December 2007, bringing together 190 nations in a climate meeting to take additional steps in the fight against global warming with a particular emphasis on curbing rising GHGs.

### **Globalization**

The EU has taken the lead in advancing measures designed to stabilize and reduce GHG emissions. Central to its GHG policy is the EU ETS, whose extended coverage to aviation emissions is being increasingly scrutinized, mirrored and criticized.

The EU ETS is designed in part to introduce some degree of stability and predictability regarding regulatory expectations and further ease business relationships by reducing transaction costs as well as uncertainty. The EU ETS is a manifestation of environmental globalization reaching across political boundaries because of its regulated, involuntary market for specific energy-intensive industries to buy

and sell allowances set at one ton of CO<sub>2</sub>. This is in sharp contrast to the Chicago Climate Exchange, for example, which is a voluntary program offering companies the opportunity to commit to legally binding GHG reductions as part of its CSR efforts.

Recent EU efforts have elevated the issue of emissions caps for the aviation industry. In November 2007, the

EU backed cuts in GHG quotas for the sector. As a result, aviation-generated CO<sub>2</sub> is set to be reduced to 90 percent of the average emissions for the 2004-2006 time period. These caps would initially pertain to EU domestic flights starting in 2011; however, quotas imposed by the European Parliament would extend to all flights arriving into or departing from the EU beginning in 2012.

It is this unilateral action that has caused some outside the EU - particularly in the U.S. - to accuse the EU of "regulatory imperialism." Statements by some members of the European Parliament reinforce this perception. For instance, one German right-center MEP told *Businessweek* magazine, "We want a worldwide system as soon as possible. If other countries have better proposals, we are ready to change our system. But there must be an end to the status quo that nothing is done in the aviation sector." In addition, the Commissioner of the Environment for the EU commented that air transportation "must contribute in the fight against climate change in order for it to not be unfairly advantaged relative to other sectors of the economy which are already making significant efforts to reduce their emissions." He further added that CO<sub>2</sub> emissions from aviation would be 150 percent higher in 2012 than they were in 1990.

Contributing to the controversy are competing claims from scientists and researchers who argue that aviation's share of emissions is still small. For example, some studies have concluded that the average airplane passenger is responsible for about the same GHG emissions as one who is traveling alone by automobile, not taking into account varying details. Another researcher at a recent conference on global aviation emissions concluded that 14 percent of all GHG emissions in 2004 were caused by all transportation, with aircraft emissions accounting for no more than 6 percent of global emissions. He did, however, acknowledge that the aviation sector is rapidly expanding at about 4.4 percent a year, challenging the gains made in fuel efficiency.

Whether climate change is part of a natural cycle or human induced, or both, is really no longer the question. The bottom line is that the climate is changing. What to do about its effects? For the EU, institutionalizing compulsory emissions requirements is one response, and it is causing consternation to many outside the EU who object to the reach of the EU ETS not just in direct ways such as through its extension to all international flights in 2012, but in its indirect impact, as well.

EU ETS-inspired efforts - both compulsory and voluntary - are working their way into national, regional and local resolutions beyond the political borders of the EU and specifically in the United States where activity at the federal level has thus far resisted efforts to address these issues.

### **National, Regional And Local Efforts**

The U.S. has witnessed a number of recent attempts to establish legislative schemes at various levels of government that address the growing concern over climate change. These efforts to respond to climate change, as part of a focused and collaborative approach to fill in the vacuum left at the federal level, are increasing almost daily. They include the U.S. Regional Greenhouse Gas Initiative, the California ETS and Western Greenhouse Gas Initiative, the Midwest Regional Greenhouse Gas Reduction Accord, the Climate Registry and others.

It also includes state action such as the Florida executive action using a CSR template published by the World Business Council on Sustainable Development to establish GHG emissions reduction targets for state agencies and departments at 10 percent below current emissions levels by 2012; 25 percent below current levels by 2017; and 40 percent lower by 2025.

Earlier efforts are exemplified by Maine when, in 2001 its governor signed an agreement with eastern Canadian provinces to reduce GHG emissions to 1990 levels by 2010; to 10 percent below 1990 levels by 2020; and in the long-term make 75 percent to 85 percent reductions below 2001 emissions levels.

Other significant developments include the April 2007 U.S. Supreme Court ruling that the U.S. Environmental Protection Agency has the authority to regulate heat-trapping gases such as CO<sub>2</sub>; and the

November 2007 bill requiring reductions in emissions coming out of the U.S. Senate, co-sponsored by Virginia Republican John Warner and Connecticut Independent Joe Lieberman, and approved in committee by an 11-8 vote.

### Trading Debate

In the meantime, the proposal to create a \$300 billion carbon-trading market will be the subject of continued debate, while states and regions continue with their own initiatives leading to the speculation by some seasoned lawmakers that the longer it takes to pass similar legislation at the federal level, the more likely it is that more stringent and varying state measures will not be preempted by any federal legislation addressing the same subject matter.

Principals in the aviation sector, including airlines, pilots and trade associations, have expressed concerns about a U.S. cap-and-trade GHG ETS arguing that, if enacted, it would function as an additional fuel tax resulting in increased airline costs, which would impact their abilities to invest in fleet improvements and new, more fuel-efficient aircraft.

If the airlines are poised to make billions from CO2 trade, as some have alleged, the airlines do not seem to be very eager to take advantage of the opportunity.

### Investors, GHGs And Globalized CSR

In a different approach, a group of leading institutional investors and other organizations released a document they named "Global Framework for Climate Risk Disclosure." The instrument, released in October 2006, essentially has four components of disclosure that investors need to evaluate corporate climate risk and opportunity. The elements these key investors seek compulsory disclosure about are: GHG emissions data, emissions management/corporate governance of climate risk, physical risk analysis and regulatory risk analysis.

On September 18, 2007, a broad coalition of U.S. state officials with regulatory, law enforcement and fiscal management responsibilities (including attorneys general and state treasurers), institutional investors, and NGOs filed a petition with the SEC seeking an interpretation that existing law requires corporate disclosure of material climate risk information. "Climate risk disclosure" is a term that has been used

broadly to describe what companies should do to inform the public - namely investors - about how climate change is affecting the company for purposes of shareholder value and portfolio analysis.

Prior to the filing of the recent SEC petition, another coalition of institutional investors controlling an estimated \$41 trillion of the world's assets arrived at a specific mechanism - or method - for disclosing a company's climate risk, and specifically its GHG emissions data.

The Carbon Disclosure Project is not a recent initiative, as it has been around for a little more than seven years. Five reports have been published since 2003 in response to five information requests - the response to which is voluntary. Driven by institutional investors (e.g., Morgan Stanley, Merrill Lynch, RBS, BP Investments), and endorsed by global leaders including Bill Clinton, German Chancellor Angela Merkel and Rupert Murdoch, the voluntary disclosures by some of the largest transnational corporations representing a broad cross-section of the leading sectors have become fundamental components of some corporate CSRs.

Among those leading edge corporations are Air France-KLM and British Airways in the aviation sector. Air France-KLM is among the sector's leaders in CSR and public disclosure, illustrating why taking a proactive stance can create a competitive advantage as the company continues to post profit gains and position itself as an industry leader poised to make offers for European rivals.

The implementation of CSR in an organization, which includes stakeholder engagement, allows the organization to demonstrate that it is a part of the solution and is making a genuine effort to work with others impacted by its activities. In so doing, reputation is enhanced among those in the general public; risk can be reduced by being a cooperative partner with the regulatory community (though this does not mean total agreement on all issues); and branding is promoted, increasing the attractiveness of the organization for those in the supply chain.

A particularly powerful illustration of the last point - especially for those in the aviation sector - is to consider how corporate and organizational travel managers select vendors. In a recent meeting of the Association of Corporate Travel Executives,

corporate managers were advised to use CSR criteria such as participation in carbon offset and GHG trade programs when selecting an airline carrier.

On December 5, 2007, it was announced that a coalition of environmental groups along with a group of state and regional officials filed petitions with the federal government urging the EPA to establish airline emissions standards. This, combined with the recently filed SEC petition requesting it to clarify existing regulations by requiring publicly traded companies to assess and disclose their financial risk from climate change, should be all that is needed to put climate change and risk disclosure on the radar screens of senior management.

### Aviation Context (And Controversy)

The International Air Transport Association, representing more than 240 airlines that make up almost 95 percent of all scheduled international air traffic, estimates that CO<sub>2</sub> emitted from aircraft accounts for about 2 percent of global carbon dioxide emissions. Assuming that this is a relatively accurate figure, even if commercial airlines more than doubled their emissions, airline emissions would still fall below that of the cement industry.

With the aviation sector still recovering from 9/11 and steep gas price increases, airline profit margins are increasingly squeezed. An additional challenge faced by the airlines is the globalization of emissions regulation via the EU ETS, which the Wall Street Journal recently called "regulatory imperialism." With all flights departing or arriving in the EU subject to EU ETS regulations starting in 2012, non-European airlines must now plan for the impact of European regulation. Not only will this result in increased costs for both carriers and their customers, but in the need for more specialized lawyers who are expert in climate change and ETS transactions. Many American lawyers will increasingly require education well beyond their local and domestic jurisdictions as the scope of foreign legal regimes penetrates the U.S. marketplace.

This is not to suggest that airlines should be excluded from emissions regulation or not held accountable for greenhouse gas emissions. But how do we take account of aviation-generated GHGs and CO<sub>2</sub> in particular, given that there does not yet exist a consensus among experts about how much CO<sub>2</sub> is

emitted by aircraft, what the current levels are or what they will be in the coming years?

The fact that controversy and vigorous debate exists should indicate that there is still a great deal of uncertainty in this area. At the same time, this controversy provides a foundation on which the expert community and aviation stakeholders can get together and continue the dialogue in an effort to reach agreement, particularly since consumer watchdog groups, public officials, investors, customers and the airlines themselves have nothing but a common goal: To maintain safety and environmental health to ensure a sustainable business, with sustainable profits and a sustainable demand by consumers who can afford the product or service.

### Practical Points

In the maturing CSR movement, best practices dictate that companies meet with and maintain communication with external, as well as internal, stakeholders. For the airline industry, this means that engaging in a continuing dialogue with carbon offset funds or conservation groups will allow the companies to enhance branding, reputation and bottom line when potential passengers and corporate travel managers seek the "greenest" airline. Corporate initiatives to advance scientific knowledge and technological breakthroughs also serve the industry, position the corporation as a leader in the industry and a cooperative partner with the regulatory community, and make the corporation more attractive to the growing socially responsible investing (SRI) portfolios of investment managers and financial analysts in leading financial institutions.

Promoting the transparency of the organization - an inherent CSR goal - minimizes its legal and financial risk. As companies are increasingly called on to disclose material climate risk as part of their 10K preparation, not doing so will expose the company to litigation risk and financial loss. According to some experts, climate risk disclosure appears to be dwarfing other environmental disclosures. In addition, state and regional initiatives, such as the Northeast Regional Greenhouse Gas Initiative, may set limits more stringent than federal limits, even if the U.S. Congress eventually does approve current legislative proposals to cap such emissions.

In this rapidly changing regulatory environment, companies should pay special attention to 10k disclosures and seek the advice of environmental lawyers when preparing disclosures. Although corporations are currently only required to disclose material risks to themselves, the writing is on the wall that this may ripen into a duty to disclose the risks to others.

Because CO2 emissions are considered by a consensus of experts to be contributing to climate change, airlines must consider how this will affect their businesses in the future, as well as how and what to report in financial disclosures.

Remaining sensitive to the fact that investors can file litigation if there is a discrepancy between federal returns and what is represented in a sustainability or environmental, health and safety report is also imperative.

If "climate risk" is not disclosed in the 10k - as many institutional investors, governors, mayors and others are legally demanding - but is acknowledged in the company's EHS or sustainability report, the company could be exposing itself to one of the increasing number of lawsuits being filed against corporations that "fail to disclose."

### **Khulumani** (continued from Page 1)

The *Khulumani* plaintiffs allege that the defendants, including many of the world's most recognized corporate brands, aided and abetted South Africa's implementation of apartheid by collaborating with and providing materials to the South African government.

The Alien Tort Claims Act was part of the Judiciary Act of 1789 and states in full that, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Rarely referenced for almost 200 years, ATCA has recently been used by plaintiffs to sue individuals and corporations for alleged violations of international law, such as arbitrary detention, torture and forced labor.

Among the questions that remain in this developing area of the law are whether and how a corporation can be held liable for aiding and abetting human rights

### **It's Inescapable**

This is not a zero-sum game. Sustainability is not merely a worthy pursuit; it is inescapable if people, the planet and business are to survive. Although companies, organizations and individuals are being forced to face tough choices, what should be apparent by now is that there simply can be no trade-off between profits, people and the environment. Each is a pillar in a sustainable economy, sustainable environment and sustainable life.

It has been argued by some that the aviation sector contributes tremendously to the overall global economy, and by others that its contribution is overstated. Common ground is available on which to reach tough but fair solutions that will benefit everyone concerned. What it will take is a willingness to be a part of the process and the solution - both requiring a great deal of creative thinking.

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violations and whether the practical foreign relations issues often present in ATCA cases prevent U.S. courts from being able to adjudicate them under the "political question doctrine."

### **Aiding And Abetting**

In *Khulumani*, the Second Circuit issued a *per curiam* opinion on October 21, 2007, allowing the case to go forward. The decision focuses on whether and how ATCA defendants can be held liable for aiding and abetting violations of international norms. Two judges on the panel, including one District Court judge sitting by designation who dissented from the main opinion, agreed that aiding and abetting claims can be brought under the statute, although they disagreed on whether the aiding and abetting standard should be derived from international law or from federal common law.

*Khulumani (cont.)*

Although the standard has not been clarified, this opens the door for plaintiffs for ATCA suits based on an aiding and abetting theory. Corporations that are based or do business in the U.S., so that they may be subject to the jurisdiction of U.S. courts, should evaluate their international operations for potential ATCA liability based on an aiding and abetting theory.

The *Khulumani* case was remanded to Judge John Sprizzo, who must now decide which aiding and abetting standard to apply. Based upon his initial view that the case should be dismissed, it is possible that he may apply the more demanding international law standard, derived from the Rome Statute, which may impose a burden upon the plaintiffs that they are unable to meet.

### **The Sosa Effect**

The *Khulumani* defendants petitioned the Supreme Court for a writ of certiorari in January. This gives the Supreme Court an opportunity to clarify its June 2004 ruling in the *Sosa* case, which limited the type of claims that could be brought under ATCA to the few international norms that are "accepted by the civilized world" and are sufficiently defined.

Justice David Souter, writing the *Sosa* majority opinion, called for "judicial caution" in this arena and specifically referenced the pending *Khulumani* case in a footnote of the opinion. The footnote indicates that the court should give "serious weight to the Executive Branch's view of the case's impact on foreign policy," noting that both the U.S. State Department and South African government oppose the litigation. Additionally, since the *Sosa* decision, the Supreme Court's membership has changed with Chief Justice John Roberts and Associate Justice Samuel Alito joining the Court as replacements for former Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor. One can expect the Supreme Court to focus on the foreign relations issues associated with this case if it grants the *Khulumani* defendants' certiorari petition. With the future of ATCA litigation at stake, CSR professionals and their counsel will be closely following the developments of the *Khulumani* case.

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## **Proactive Management of Legal Risk**

By Sarah A. Altschuller

Attorneys advising multinational corporations have reason to pay close attention to current trends in the field of corporate social responsibility, especially recent developments in U.S. courtrooms.

Litigation under both the Alien Tort Claims Act (ATCA) and general tort law increasingly present corporate counsel with the need to assess - and respond to - changing notions of corporate responsibility and associated shifts in legal and reputation risk.

Companies are increasingly being held accountable to human rights standards established in international law. These developments in both the law and in societal expectations present specific challenges for companies, especially those that have not already engaged in rigorous assessments of the social and environmental impacts of their operations. Corporate attorneys have a role to play in helping companies conduct these assessments, and in assisting companies in navigating a world of shifting notions of

responsibility and heightened expectations for corporate behavior.

### **Human Rights In the Courts**

The Second Circuit Court of Appeals' recent decision in *Khulumani v. Barclay National Bank, Ltd.* and *Ntsebeza v. DaimlerChrysler Corp.*, 504 F.3d 254 (2d Cir. 2007) provides a notable example of the shifting expectations set forth in U.S. domestic jurisprudence. This ATCA case was brought by South African plaintiffs who alleged that more than 50 corporate defendants "aided and abetted" the South African apartheid regime's commission of grave human rights abuses by conducting operations in the country during that time (See [Corporate Counsel Should Evaluate Second Circuit's Khulumani Ruling](#) in this *CSR Journal*).

In setting a potential standard for aiding and abetting liability, two of the judges, one in the majority and one in dissent, found that a company "may be held liable

under international law for aiding and abetting the violation of that law by another when [it] (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating that crime." This standard of liability was derived from the Rome Statute of the International Criminal Court.

Similar issues were raised in another recent case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp .2d 633, 668 (S.D.N.Y. 2006), a case in which Sudanese plaintiffs alleged that Talisman Energy aided and abetted the government of Sudan in committing genocide, war crimes and crimes against humanity. The court, while ultimately dismissing the claims, found that aiding and abetting liability did exist for ATCA claims, and that a defendant could be held liable for aiding and abetting a violation of international law if it "specifically directed" its acts to assist in the violation. This case is currently on appeal to the Second Circuit. These cases have left significant outstanding questions remaining about the nature of "practical assistance" and the manner in which a company's purpose or intent might be ascertained in order to determine ultimate liability.

Despite these questions, these cases have made clear that companies must be cognizant of the moral and legal implications of conducting operations in countries with questionable human rights records.

Companies must not only assess the human rights records of governments in the regions in which they operate, but must also assess and monitor the activities of the public and private contractors they might engage during the course of their operations. Companies that contract with public and private security providers must be especially vigilant, as many cases have been brought against companies holding them accountable for actions taken by security personnel. Recently, the District Court for the Northern District of California found that Nigerian plaintiffs could bring claims under ATCA alleging that Chevron Corporation was complicit in abuses committed by the Nigerian military in the case of *Bowoto v. Chevron Corp.*, 2007 WL 2349336 (N.D. Cal. 2007). In another case, the D.C. Circuit Court of Appeals found that Exxon Mobil could be tried under state tort law for allegedly providing material support to Indonesian security forces charged with committing atrocities against Achenese villagers, according to *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007). Notably, both the Chevron and the Exxon Mobil cases are scheduled for trial in 2008.

While many of the cases charging companies with direct or indirect violations of international human rights law have been against companies in the extractive sector, other companies must also be cognizant of the human rights implications of their operations.

Numerous lawsuits were filed in 2007 by Colombian plaintiffs against Chiquita Brands International after the company admitted it had provided payments to the United Self-Defense Forces of Colombia, a paramilitary group, that is accused of many atrocities. Also, in November 2007, Yahoo! Inc. settled a case involving claims that the company knowingly caused plaintiffs' arrest, detention, and torture by providing identifying user information to authorities of the People's Republic of China.

Notably, only one ATCA case has gone to trial. In July 2007, a jury trial was held in *Rodriguez, et al. v. Drummond Company*, a case involving claims that Drummond aided and abetted the killings of three Colombian labor union leaders by paramilitary groups. The jury in the District Court for the Northern District of Alabama found in favor of Drummond.

This case was closely watched by the corporate law and human rights communities and the ultimate verdict did little to take away from the case's importance in demonstrating the potential viability of these claims.

### **The Costs Of Complacency**

Corporate executives who might be tempted to dismiss the negative business impacts that complacency in the area of human rights can have should reflect upon the words of Cynthia Williams, a professor of business law at the University of Illinois, who, after the Drummond verdict, observed, "One negative jury verdict is not that important. . . . It is significant that these cases can withstand motions to dismiss and go into discovery and ultimately trial - the process of discovery will allow a procedure for getting the facts developed under oath and getting access to internal documents, e-mails, and other material." These cases can have significant costs in terms of legal defense fees and associated opportunity costs, but are also costly in terms of the damage caused to companies' reputations both by initial allegations of poor human rights practices and by lingering perceptions that companies are indifferent to such accusations.

Company stakeholders are increasingly sophisticated in using a wide variety of legal and economic pressure points to hold companies accountable. Given the wide range of social and political contexts in which they operate, companies should expect that human rights abuses will occasionally occur in areas where they operate, and should be responsible in not trying to hide from or cover up this unfortunate fact. Rather, companies and their attorneys should develop business policies meant to leverage both their abilities to prevent such abuses and their capacities to respond proactively and responsibly when they do occur.

Sound corporate social responsibility practices can forestall or avoid not only ATCA and other tort claims, but also boycotts, hostile shareholder resolutions, divestment efforts, attacks on corporate property, negative media attention and NGO campaigns.

Attorneys advising companies concerned about legal and reputation risks must begin from the standpoint that the potential for liability or significant operational costs is real. Corporate attorneys may be the first to inform senior management that human rights issues are a subject that must be considered when reviewing current and potential corporate investments. Companies would be well-advised to assess the concerns posed by their operations, and to develop their responses to those concerns, before the lawsuits are filed and the protests begin. Decisions made in response to litigation or in reaction to attacks from stakeholders may be hasty and not guided by company-wide understandings of the values that guide the companies' decision-making.

Complacency also leads to poor reactions by managers who have insufficient information about the concerns at hand. Companies that have not identified human rights as a priority with regard to their operations will not be asking the right questions during routine oversight efforts and will not be creating sufficient accountability systems to ensure that problems are brought to the attention of management personnel.

Finally, and certainly not secondarily, at the end of the day it is crucial to remember that sound corporate responsibility practice can have significant positive effects on the lives of those impacted by company activities. Companies have an important role to play as powerful societal actors with the ability to bring about real social change: as promoters of the rule of law; as advocates for transparency and reduced corruption;

as good environmental stewards; and as good citizens generally.

Implementing comprehensive corporate social responsibility programs can also help to produce a range of tangible benefits for companies, including increased customer and employee loyalty and retention, better morale, and improved relationships with stakeholders and public opinion leaders.

### **Developing Policies**

Merely stating that companies should develop policies and practices that incorporate concern for human rights and promote the rule of law is relatively straightforward, if not entirely uncontroversial. However, actually developing and implementing those policies is tricky.

At the outset, it is easy to draft policies and then not to implement them. But policies do little in and of themselves. The hard part is developing and implementing policies and practices that reflect a company's true values and commitments and that are effective in proactively managing risk.

Companies seeking to develop human rights policies and associated codes of conduct or operational guidelines are well-advised to think carefully and to seek advice about the nature of the statements they are making. Policies should reflect the values of the company and should be developed with the aspiration and commitment to close the gap between stated goals and commitments and actual business operations. Taking the time to assess the nature of potential commitments and policy goals is an important step when developing policies that will serve the company effectively. These statements, in addition to providing a set of operating principles that can guide company operations, also provide platforms for dialogue with both employees and external stakeholders. Such statements provide for a consistency in approach that facilitates both daily operations and crisis management.

That's why companies should take the time to develop policies that work for them and that address the actual issues that come up in their specific business operations. All companies can develop policies on child labor, discrimination, and corruption, but some companies may find that such policies do not touch the major issues that arise in their business operations.

Boilerplate language can get in the way of developing effective guidelines that manage actual risk. Companies should see the development of effective policy guidelines as key components to risk management and therefore should approach the task with seriousness of purpose and time for reflection.

### **Key References**

It is a reality that not all companies will wish to be industry leaders in terms of commitments to best practices and relevant voluntary standards. Some will, however. In developing statements of policy, many companies have explicitly referenced key international documents like the Universal Declaration of Human Rights, International Labour Organization Conventions, and the International Covenant on Civil and Political Rights.

Companies have also made commitments of participation or membership to initiatives and groups like the Voluntary Principles on Security and Human Rights or the Fair Labor Association. Corporate counsel can provide advice on the nature, scope and implications of specific commitments, standards and guidelines so that company executives can make informed internal determinations before making public statements.

### **Implementing Policies**

As companies draft policies, it is important to be mindful of the challenges of implementation. Commitments should not be made by corporate social responsibility officers alone. Moments of crisis are not the time to determine that senior executives don't know or understand what statements the company has made; everyone needs to speak the same language. That's why training and education initiatives are important for all management and employees.

Obviously, different levels of training will be required depending upon the nature and level of responsibility that particular individuals have. Country managers should be especially aware of company commitments that address issues that arise in their spheres of operation.

Companies should also take the time to benchmark their current practices against the relevant standards and guidelines reflected in their policies. Benchmarking is not always an easy exercise. The

individual action items required for the implementation of specific standards can be hard to identify, and can differ depending on the nature of the company's operations. Companies should seek advice on effective benchmarking in order to establish real baselines that will allow for monitoring of future progress and potential reporting. Benchmarking will add significant substance to the future analysis of the auditing and monitoring efforts that are required to ensure that company commitments are being met.

### **External Monitors**

With regard to monitoring and auditing, companies should have dedicated personnel who are tasked with verifying the proper implementation of company policies. But companies are well-advised to work with external monitors as well.

External monitors may frequently identify concerns that internal monitors may not be aware of. External monitors, especially those with expertise and familiarity in the area of a company's operations, can often identify concerns of employees and community stakeholders more effectively than company personnel. External monitoring may also provide stakeholders with more assurance as to the validity of any publicly reported monitoring results.

Different companies, depending on their external commitments and internal comfort levels, will practice different levels of transparency with regard to the sharing or publication of auditing and monitoring reports. In thinking about reporting, corporate counsel can assist companies in understanding the benefits and risks of transparency with regard to monitoring efforts generally, and with regard to specific issues in cases where concerns are identified.

### **Working With Third Parties**

Companies frequently face legal and reputation risks as the result of actions taken by contractors and suppliers and must carefully consider how to manage this risk. With each set of contractual relationships, companies should determine what areas of risk are implicated by the particular relationship. Executives should then assess the capacity and commitment of their business partners to operate in a manner that is consistent with their standards. Consultations with stakeholders can provide valuable feedback in

assessing the risks associated with particular business relationships.

When entering into contractual relationships, companies should consult with counsel in determining to what extent company policies should be explicitly incorporated into standard contractual language. Assessments should be made as to what should be specifically required of contractors and suppliers at each level of operation, and executives also should think through the consequences for contractors and suppliers that fail to comply with contractual commitments and how those consequences should be embedded into contractual language.

Management will need to assess carefully the particular legal context in which contractors and suppliers are operating. Where local law is less stringent than or contradictory to corporate policies, companies should be explicit as to the specific expectations the company has of its contractors and suppliers.

Entering into these relationships involves difficult tradeoffs between maintaining the independence of third parties and ensuring that adequate oversight exists to ensure that company standards are being met. Contractual relationships do not always insulate companies from legal liability and they certainly do not protect a company's reputation. Companies must make complicated determinations regarding how to operate in a manner consistent with explicit commitments while respecting inherent limitations on the ability to control third parties.

These issues frequently become especially challenging when working with security personnel, both public and private. In these relationships, companies should consider requiring that security personnel receive specific training on human rights law and company policies. This is an area of high risk for companies, and it is an area that requires thoughtful attention and planning.

### **Due Diligence**

In building business policies that incorporate human rights, companies should increasingly approach human rights risk management as they would any other type of risk management. Potential projects and business relationships should be assessed for the

manner in which they will challenge and possibly violate company values and policies. In some cases, particular investments may be deemed too risky. In other cases, specific risks will be identified and thoughtful planning as to how to manage those risks should begin.

Undertaking comprehensive human rights impact assessments for specific projects is an important component of implementing sound corporate social responsibility practices.

In March 2007, John Ruggie, Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations and other business enterprises, submitted a report to the U.N. Human Rights Council in which he provided an overview of key components of effective human rights impact assessments. The report included cataloging the legal, regulatory, and administrative standards to which the company's activity is subject; describing the human rights conditions in the area with an incorporation of the input of human rights experts and local stakeholders; assessing how the proposed company activity is likely to impact the human rights conditions in the area; prioritizing human rights risks and recommendations on how to mitigate those risks; and discussing best practices.

With such recommendations in mind, companies should seek advice on how to best undertake these assessment efforts for particular projects and in particular regions. Working effectively with advisors and stakeholders to gather information about issues of concern, and then to evaluate and manage specific investments, is an important part of responding to the shifting expectations that exist in the field of corporate social responsibility today.

Managing these expectations successfully is an important component of protecting companies from legal and reputation liability and for leveraging corporate capability to promote human rights throughout their business operations.

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## South African CSR: The Strain of 'Need'

*By J. Michael Judin and Gareth Cremen*

Corporate Social Responsibility (CSR) is a relatively new concept of which there is no exact or universally accepted definition. The concept revolves around the notion that organizations are "obliged" to take responsibility for their activities that have an impact not only on their employees and customers, but also on the environment and affected communities as a whole. In other words, these organizations must look at the interests of society.

The 2002 King Report (King II), South Africa's Corporate Governance Report, defined CSR as "business decision-making linked to ethical values, compliance with legal requirements and respect for people, communities and the environment proved by a comprehensive set of policies, practices and programmes that are integrated throughout business operations and decision-making processes that are supported and rewarded by top management." Often organizations go beyond mere statutory obligations and voluntarily help improve the lives of employees, communities and societies.

### **The Birth Of CSR**

Due to our past political history of apartheid, many organizations, including many multinational corporations, benefited from a close relationship with the minority regime. During the height of this political period, many companies were in violation of human and trade union rights. Apartheid was highly profitable for certain businesses that secured state contracts and subsidies and exploited cheap labor policies. Labor laws under apartheid, cheap labor and forced removals were all to the advantage of organizations operating in South Africa during this period.

In 1977, the Sullivan Principles were created in the United States. They provided that all American companies in South Africa had to treat their African employees the same as they would treat their American employees. The objectives behind the Principles were to encourage companies, enforce and support human rights, train and advance disadvantaged workers for various positions in a company, and promote equality and equal opportunity at all levels of employment. During this period CSR in South Africa was shaped by apartheid. The most important part of the Sullivan Principles was that multinational companies had to strictly adhere to them if they did not choose to disinvest from the country.

This, as well as the sanctions imposed against the South African government in the 1970s, created the foundation for CSR within South Africa.

During this period, many organizations established trusts for charitable purposes, but in reality these trusts were arguably for tax purposes. By 1990, South Africa had entered a new political era. The breakaway from apartheid led to the ideals of CSR and Corporate Social Investment (CSI). Many programs were implemented during this period and by the time the new government took over in 1994 there were a number of development programs. However, due to the fact that our government was no longer able to achieve sustainable development on its own (as were many others), it turned to businesses for help in the form of financial aid, especially for the fight against HIV/AIDS and crime. This led to an increase in organizations becoming involved in CSR.

### **Righting The Wrongs?**

In light of the past political strife in South Africa, it is understandable why large multi-national or even big local companies would "give back to the community" through various charitable events, fundraisers, donations, education, development and the like. But however understandable it is, is it really a true cause? Are these companies merely giving away profit in order to gain tax benefits or to be seen as charitable in the public eye and increase their profit margins by drawing in sympathy clients?

This is a very controversial topic and it is indeed difficult to tell what the true motives of these money-hungry yet charitably-giving companies are. But do the motives really matter? The way we see it, the poor are receiving donations, the uneducated are receiving education and those in need of other necessities are receiving them. Is it fair for anyone to really question the motives as the ends justify the means?

### **Or do they?**

CSR can no longer be seen as a "chequebook philanthropy," according to Jackie Gray in her article on social responsibility for National Business Initiative. She mentions how the mere concept of CSR envisages an obligation of corporate companies

to aid society and the environment and that due to much criticism over the motives of these companies, there is now a dire need for accountability and lucidity in all spheres. She also discusses pressures that companies face now from customers, NGOs, investors and the government to invest in "causes," which almost create a tacit obligation on them to act accordingly.

Many have argued that South Africa has altogether abandoned CSR in favor of CSI and Corporate Social Opportunity (CSO). CSI as a whole is a vague concept and unclear to many. It has been described as a branch of CSR but it is yet to be defined. It is arguable that in South Africa branded philanthropy is no longer adequate as there is a threat of what Gray calls "donor fatigue." Gray creates a good point here as it falls back to the above-mentioned motives of companies in giving back to the community. It is not necessarily a negative for companies to invest or create self-opportunity by involving themselves in social activities, it is merely an alternative method of reaching the same ends. Companies are becoming "fatigued" at having to give away profits without benefiting in some way. They are also realizing that a market with such a high need for charity, such as in South Africa, can become saturated and create a competition between companies as to who can give the most. Therefore it can be said that CSR is somewhat transforming into a corporate social opportunity.

Many companies have realized the advantage of making contributions to society and those that have adapted to the above have been given an advantage (even if minuscule) over their competitors.

It seems to us that there are different requirements in other countries for CSR, and those employees and communities will have different expectations of the companies in their community or abroad. This is clear in South Africa where there is a fundamental need for basic necessities such as housing, food and education that First World countries do not experience. In our country, there is also this sense among communities that large and wealthy corporations owe the workers who helped to create their wealth and business, especially during apartheid. The problem, however, is that companies are beginning to feel the strain of all the "need" in our country and are feeling somewhat overburdened with requests. These companies need to make a decision as to which will be the most beneficial donation. It is not an easy task, but one which should be considered carefully in order to ensure continued aid is given to those who need it most.

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## **Guidelines for Contributors**

*CSR Journal*, published electronically four times a year by the International Section of the ABA's Corporate Social Responsibility Committee, offers practical articles on topics of interest to lawyers and their clients who practice in the CSR field.

### **Submissions**

- CSR Journal articles present substantive material in a conversational rather than academic style.
- Articles generally run between 500 (for short news items or updates) and 2,000 words (for feature articles).
- Text should be double-spaced, with one-inch margins.
- Avoid excessive document formatting, but include sub-headings for longer articles.
- Number all pages consecutively from beginning to end.
- Use 12-point type, Times New Roman or Courier.
- Include a suggested title and a byline at the top of the first page.
- Include author's contact information (name, affiliation, address, phone, fax, email) on a separate page. You may include a 25 word biography and photo.
- Keep citations to a minimum. For necessary citations, use endnotes and the Bluebook format. If you decide to cite or quote materials, you are responsible for the accuracy and completeness of both the quotation and the citation information.

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