

Courting International Business

BY SUSAN ARIEL AARONSON

*What are the
human rights
obligations of
global capitalism?*

In recent years, many of America's largest and most prominent multinational companies have been called to court to defend their international business practices. For example, Exxon Mobil was sued by the International Labor Rights Fund (ILRF) for allegedly aiding and abetting human rights violations by the military in Indonesia. Del Monte has been sued by the ILRF for allegedly permitting local managers to torture union leaders in Guatemala. And Coca-Cola has been sued by the United Steel Workers for allegedly hiring right-wing death squads to frighten workers at its bottling plant in Colombia.

These cases have been brought under two laws, the Alien Tort Claims Act of 1789 and the Torture Victim Protection Act of 1992. The Alien Tort Claims Act (ATCA) provides federal courts with jurisdiction over violations of the "law of nations," and the Torture Victim Protection Act applies only to torture and extrajudicial killing. The plaintiffs seek to determine whether corporations can be held accountable in U.S. courts for human rights and other abuses carried out by foreign governments against non-U.S. citizens. Although many of these cases have progressed in U.S. courts, not one has yet proceeded to trial. Nonetheless, business leaders are very concerned.

Most of these cases have been brought by international human rights organizations such as the Earth Rights Institute, Amnesty International, and the ILRF mentioned above. However, last year, attorneys brought two broad class action lawsuits under the ATCA which allege injury based on vicarious or indirect liability. The plaintiffs allege that some of the world's most visible multinationals indirectly caused injury when products or services they sold to the South African government were used to undermine human rights during the apartheid era. The first suit was filed in June, 2002, by Ed Fagen (one of the lawyers who pioneered the lawsuits against insurance companies, banks, and corporations that profited from property and labor stolen during the Holocaust). This suit seeks damages for

personal injuries inflicted on the plaintiffs through a variety of means during the apartheid era (1948–1993) based on the theory that the defendants' actions caused the injuries by perpetuating the apartheid regime. The defendants were charged with culpability for lending funds used to bolster police and armed forces under the apartheid regime. On November 11, 2002, a similar case was brought against some of America's most admired and socially responsible companies such as Ford, General Motors, IBM, and Hewlett Packard. Interestingly, the South African government has not supported these class action suits, fearing that they would undermine foreign investment.

Such lawsuits have not been addressed solely at U.S. multinationals nor limited to U.S. courts. Similar cases have also been brought in Australia, Belgium, Canada, France, and the United Kingdom. Ambassador Tom Niles, president of the U.S. Council for International Business (the U.S. arm of the International Chamber of Commerce), recently warned that these cases place executives and directors of companies that have done or are now doing business in countries with undemocratic regimes at increased risk of liability. Executives have also argued that trial lawyers will reap huge verdicts in frivolous cases against multinationals. And finally, they have asserted that the proliferation of these cases will force companies to reduce their investment in the developing world.

International law clearly delineates that companies have human rights responsibilities, although some of the specific responsibilities are ambiguous. The Universal Declaration of Human Rights calls upon all organs of society, whether civic groups, corporations, or governments, to protect and promote human rights. United Nations Secretary Kofi Annan has argued that corporations have a social responsibility and moral duty to use the power of markets to make globalization a positive force

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for all. At the February, 2002, meeting of the World Economic Forum, he argued that business leaders must take the lead in developing actions “that translate into concrete results for the downtrodden, exploited, and excluded.” The

UN Global Compact based on nine norms of international law calls on companies to make sure they are not complicit in human rights abuses. More than four hundred companies have signed the Compact. Moreover, in 1999, the United Nations Sub-Commission on Human Rights established a working group to develop draft principles related to the human rights conduct of multinational businesses. That draft has been repeatedly revised and was most recently adopted by the Working Group. Finally, a growing number of multinationals publicly acknowledge their human rights responsibilities (a listing of firms with specific human rights priorities is available at www.business-humanrights.org.)

Most cases, especially frivolous cases, against multinational corporations (whether in the United States or abroad) have been dismissed. For these cases to succeed, corporations must be directly implicated in violations of fundamental human rights that are clearly defined under international law. At the same time, however, policymakers have not adequately clarified whether companies are responsible for the actions of their suppliers or subcontractors.

Finally, executives around the world have argued that the multiplicity of these lawsuits will undermine investment in the developing world. Companies invest overseas in the hopes of increasing their return (accounting for risks and the costs of transfer), improving their productivity, or gaining access to new markets or technology. There is no evidence that firms deliberately seek locations with inhumane governance to lower their costs. Moreover, a growing number of firms understand that their future growth will occur in the developing world, given the aging of populations in Europe, Japan, and North America. They recognize that creating conditions conducive to social and environmental progress will help them gain greater market access and stability. By treating their stakeholders well, they are more likely to ensure that their stakeholders can afford the goods and services they produce (a 21st-century version of Fordism). Inordinate time and resources spent fighting lawsuits undermines these goals.

Citizens and policymakers should pay close attention to these cases because they have significant implications for global political and economic stability, as well as for efforts to promote global corporate social responsibility. First, foreign investment has diplomatic as well as economic objectives. Investors bring much-needed funds and they disperse their home countries’ values, norms, and priorities worldwide. In Africa and Central America in particular, multinational companies are often the largest single economic entity operating within a coun-

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try. That economic clout often brings political clout, but it also brings responsibility to ensure that economic growth yields economic and social opportunities. That responsibility is especially important today, when globalization is

so contentious and when terrorism threatens to make many countries more insular and less tolerant.

Second, the efforts to litigate human rights come at a tense time for activists and executives who wish to encourage global corporate responsibility as a strategy to improve global social and environmental conditions. On January 10, 2003, the U.S. Supreme Court decided to take a case regarding whether the communications of Nike, the sporting goods company, on its global labor practices are free speech and therefore protected by the First Amendment or commercial speech, which can be regulated. The California high court ruled in a 4–3 decision that Nike was engaged in “commercial speech” when it described how it had improved its global labor conditions. Thus, according to the court, the company was “in a position to readily verify the truth of any factual assertions it made on these topics.” If such communication can be regulated and verified for its veracity, this case could have a major impact on corporations’ willingness to discuss their overseas business practices with their stakeholders. Activists hope to use sunshine to expose and reward positive human rights practices or to punish negative practices. Some governments such as France now require companies to report on their global social and environmental practices, but they do not require such reports to be verified. If the Supreme Court upholds the California decision, global companies may not provide such information, fearing that the legal risks of issuing statements about their human rights and environmental performance will outweigh the business benefits.

Calling companies to court to account for their human rights performance can have a positive effect for the global economy. These cases have brought much-needed attention to the human rights responsibilities of global business. But they are not an effective means of improving human rights performance in the developing world. Moreover, corporations can be important allies in improving the rule of law in the developing world. But the fear of litigation may make alliances between the business world and human rights groups more difficult.

Nothing rankles corporations, especially American corporations, more than the threat of large tort cases. Many executives claim that engagement with oppressive governments is the most effective way to improve social and environmental conditions in those countries. Yet ironically, while some executives have sought to limit ATCA cases, they have not sought greater specificity regarding their human right obligations. Consequently, they are left in limbo to decide whether or not to invest in nations which deny their citizens rights that their shareholders take for granted. ♦