

Business befriends human rights

Companies and their legal advisers are waking up to the fact that upholding human rights not only creates a stable environment based on the rule of law, it is also vital for commercial success, says **Mark Ellis**, Executive Director of the International Bar Association

The majority of commercial lawyers I deal with acknowledge that business and the rule of law are parallel to each other: first, their clients with international interests have human rights responsibilities and potential liabilities in relation to their dealings in foreign places, and growing numbers are being held to account. Second, and more fundamentally, without support for the rule of law in a jurisdiction, there is no secure framework for commercial operations.

Foreign investors understand that there is a legal risk for those who ignore rule of law issues and businesses operating in a country with a poor human rights record must now be on the alert for potential corporate liability. The recent reaffirmation by the US Supreme Court of the Alien Tort Claims Act (ATCA) has given multinational companies a clear signal that they can be held liable for human rights abuses while operating overseas.

Under the ATCA some of the biggest corporations including Coca-Cola, ExxonMobil, Unocal, Nike, ChevronTexaco and Ford Motor Company, have been dragged to court. The Unocal case went to trial but was ultimately settled out of court. It was filed on behalf of farmers from Myanmar, formerly Burma, who alleged that the Burmese used them as forced labour to clear and build roads for a gas pipeline.

Significantly, the plaintiffs never alleged that Unocal officials directly carried out the human rights violations; only that they were aware these violations were conducted by the state's military and did nothing to stop them. Also, it was irrelevant that Unocal did not control the Myanmar military – it is not necessary to satisfy the state action requirements where there are egregious human rights violations, such as genocide, crimes against humanity or war crimes.

In response to this potential liability, corporations are looking more closely at the issue of corporate responsibility. They

are beginning to see that business and human rights are not, as conventional wisdom has suggested, distinct and separate. It is in their own commercial interest for corporations to be concerned with the protection of human rights.

According to Amnesty International, 40 large international corporations have adopted human rights principles into their company policies which are consistent with good governance guidelines developed by the United Nations in 2003. Although the guidelines are not obligatory, they set standards that companies should strive to embrace.

Within this global environment, corporations cannot afford to operate with ignorance or indifference towards human rights and the rule of law, and the role of lawyers in this field has significantly expanded. Lawyers need to develop new skills to plan, negotiate and structure transactions for their clients that will be sensitive to and not contravene international human rights standards. To be able to do this effectively, corporate lawyers must continue to expand their knowledge of rule of law and human rights issues.

Multinational clients – and their advisers – recognise more clearly than most the benefits of having new markets and know that these will only be created by greater stability in more parts of the world. A strong and stable business environment can only exist if the host state respects the rule of law and protects human rights, and if its judiciary is independent. Without these fundamental elements it is difficult, if not impossible, for a commercial venture to succeed. Often, countries which experience a decline in the rule of law and respect for human rights, or where these conditions cease to exist, will also experience a decline in the economy.

Zimbabwe is an example of a country whose economic demise is directly related

to its decline in upholding the rule of law. Between 1998 and 2001, a particularly bleak time for the rule of law in Zimbabwe, foreign investment inflows dropped from US\$436 million to US\$5.4 million.

The link between business and the rule of law became clear to me during my years as consultant to the World Bank's Foreign Investment Advisory Service (FIAS). During this time, I witnessed the ongoing struggle of foreign investors to secure a business-friendly environment. They were always mindful of the economic, tangible aspects of investment and would rightfully focus on issues such as tax incentives, capital gains tax, profit repatriation, and tax levels. They were also keen on the day-to-day legal protections that were available, such as protection of trademarks and intellectual property, simplified company registration process, secured transactions, land ownership and dispute settlement mechanisms.

However, above all, foreign investors were concerned about the intangible aspects of doing business. Transparency in law, reliable and easily accessible legislative instructions, openness in government, enforceable judgments, and fairness in courts were some of the aspects they were looking for. In essence, they wanted an investment climate based on the rule of law, which they understood to be an essential element in any foundation for economic development and providing the legal framework within which businesses can operate.

Human rights and the rule of law are no longer tangential issues, hidden on the periphery of business transactions. They require attention and should be embraced, not only because it is the right thing to do but because it is good for business. ■

In addition to his IBA role, the author is a consultant to the World Bank on investment policies in Central and Eastern Europe