

Managing Alien Tort Claims Act Risk Through Preventive Compliance

Association of General Counsels

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Our Agenda Today

How to minimize the risk of lawsuits, potential liability, and reputational collateral damage from human rights claims

Conventional Wisdom on Established Principles of Risk Management

Global Sullivan Principles

- In 1999, the Rev. Leon H. Sullivan created the Global Sullivan Principles for companies operating in South Africa during apartheid to promote corporate responsibility for the communities in which they operate.

Global Sullivan Principles (cont'd)

■ True or False?

- “Companies that endorse the Sullivan Principles – principles to support social, political and economic justice by companies where they do business – do not have to feel threatened by the [Alien Tort] statute.”

Jo Marie Griesbraber
Oxfam America

Global Sullivan Principles (cont'd)

■ **False.**

- Many of the original signatories are now defendants in multidistrict ATS litigation. *In re: South African Apartheid Litigation.*

Voluntary Principles on Security and Human Rights

- U.S. and U.K. Governments, NGOs and companies in the extractive and energy sectors drafted the Voluntary Principles as guidelines for conducting business in a manner which protects the security and stability of operations while safeguarding human rights.
- The Voluntary Principles address proper conduct of risk assessments, interactions between company and public security forces, and interactions between company and private security forces.

Voluntary Principles on Security and Human Rights (cont'd)

■ True or False?

- Conducting business in accordance with the Voluntary Principles – voluntary guidelines for providing for operations security while respecting human rights – will insulate companies from liability for human rights claims.

Voluntary Principles on Security and Human Rights (cont'd)

■ **False.**

- There are no procedures that will immunize companies from ATS liability.

Estate of Rodriguez v. Drummond Co.

(April 14, 2003)

- U.S. corporation sued after Colombian paramilitary security forces allegedly murdered the president, vice-president, and successor president of a union with which the defendant had engaged in heated union contract negotiations.
- Plaintiff brought claims under the TVPA and ATS for extra-judicial killing, torture and denial of rights to associate and organize.
- Question: Can interference with labor rights constitute cognizable torts under ATS?

Estate of Rodriguez v. Drummond Co.

(April 14, 2003) (cont'd)

- Answer: Yes.
- Rationale: The court analyzed international conventions, customs, treaties, and judicial decisions, and concluded that the rights to associate and organize, as reflected in Conventions 87 and 98 adopted by the International Labor Organization (“ILO”), are “well-established norms” of international law.
- Court so held despite fact that U.S. has never ratified ILO Conventions 87 and 98.

Flores v. Southern Peru Copper Corp.

(August 29, 2003)

- Multinational was sued for alleged violations of rights to life, health, and sustainable development caused by pollution from defendant's mining operations.
- Question: Are such environmental torts cognizable under the ATS?

Flores v. Southern Peru Copper Corp.

(August 29, 2003) (cont'd)

- Answer: No. But see Rio Tinto (right to sustainable development).
- Rationale: Court held that law of nations limited to well-established, universally recognized norms of international law as set forth in international conventions, customs, and practices. Body of international law addressed to intranational pollution not sufficiently well established to give rise to claim under ATS.
- Different result if plaintiffs pled forced displacement or violation of indigenous rights?

Practical Steps for Managing Risk

Human Rights Compliance

- Conduct a country-specific risk assessment.
Useful sources of information include:
 - State Department Country Reports
 - Security firms
 - Multilateral institutions (*e.g.*, World Bank)
 - NGOs

Dialogue with NGOs

■ Benefits

- more information regarding issues afflicting the geographical area of operations
- credibility
 - demonstrates corporate responsibility
 - demonstrates transparency

■ Drawbacks

- *Unocal*– statements made during meeting with NGOs used against the company in an ATS lawsuit
- company put on notice of potential violations in area of operations
- create tensions with host government

Human Rights Compliance (cont'd)

- Assess your company's operations:
 - Reliance on foreign governments for resources, land, or infrastructure
 - Reliance on foreign governments for security
 - Joint venture relationships
 - Payments to foreign governments/officials
 - Other interaction with foreign governments

Limit Relationships with Host Governments

- Carefully structure any joint venture relationships with host governments.
- Avoid exercising quintessential government functions or exercising direction or control over government activities.
- Avoid directly hiring government security personnel.

Other Drivers

- Is the ATS the only issue here?
 - Shareholder pressure
 - Consumer pressure
 - Increase in socially responsible investing (“SRI”) funds
 - Injury to reputation
 - FCPA

Public Relations

- Promote programs to support the community.
- Project positive image of corporate responsibility.
- Publicize accomplishments and public relations successes in the host country and at home.
- Understand reputational issues.

Set and Maintain Standards

- Adopt human rights policies appropriate to the situation.
- Communicate the company's expectations to the host government and foreign suppliers, contractors, and business partners.
- Monitor compliance.
- Respond to allegations.

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