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## Corporate Social Responsibility

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# Corporate Social Responsibility

SARAH A. ALTSCHULLER, AMY K. LEHR, AND ANDREW J. ORSMOND\*

## I. International Law and Policy Developments

### A. SPECIAL REPRESENTATIVE OF THE U.N. SECRETARY GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

John Ruggie, Special Representative of the U.N. Secretary-General (“UN SRSG”) on the issue of human rights and transnational corporations, continued his work in 2010. In November, he released a draft of his final report, the *Guiding Principles for the Implementation of the United Nations “Protect, Respect, and Remedy” Framework*, for public comment.<sup>1</sup> The *Guiding Principles* represent the culmination of the UN SRSG’s work, which will conclude when Mr. Ruggie delivers his final report to the U.N. Human Rights Council in June 2011.<sup>2</sup>

The *Guiding Principles* are organized around the three-pillar policy framework first introduced in the UN SRSG’s April 2008 report.<sup>3</sup> The framework consists of three core principles: (i) the state duty to protect against human rights abuses; (ii) the corporate responsibility to respect human rights; and (iii) the need for effective access to remedies. The draft *Guiding Principles* emphasize that companies have a responsibility to respect human rights: this means that companies must act affirmatively to avoid infringing on the human rights of others. Companies must also address any adverse human rights impacts associated with their operations.<sup>4</sup> The *Guiding Principles* suggest that companies integrate

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1. Special Representative of the Secretary-General, Draft, *Guiding Principles for the Implementation of the United Nations’ ‘Protect, Respect, and Remedy’ Framework*, U.N. Doc. A/HRC (Nov. 22, 2010), available at <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf> [hereinafter UN SRSG Guiding Principles].

2. In June 2008, the U.N. Human Rights Council renewed the UN SRSG’s mandate for three additional years. His first mandate ran from June 2005 to June 2008.

3. Special Representative of the Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

4. UN SRSG Guiding Principles, *supra* note 1, p. 12.

human rights into their management systems by adopting policy commitments to human rights and by conducting due diligence intended to identify, prevent, mitigate, and remediate the actual and potential human rights impacts of their operations.<sup>5</sup> The *Guiding Principles* also state that companies should engage in meaningful consultations with external stakeholders and should report on the impacts of their activities.<sup>6</sup>

The UN SRSG's draft *Guiding Principles* stress that the corporate responsibility to respect human rights applies across a company's business activities and through its relationships with third parties, such as suppliers, business partners, or host governments. It also applies to all enterprises, regardless of size or ownership structure.<sup>7</sup>

In April 2010, the UN SRSG submitted an interim report to the UNHRC entitled *Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect, and Remedy" Framework*.<sup>8</sup> The report provided an update on work under the second mandate and noted that three-pillar "Protect, Respect, and Remedy" framework continues to gain support. Mr. Ruggie noted that "several countries have referenced the framework in conducting their own policy assessments" and that "[s]everal global corporations have already aligned their due diligence processes with the framework."<sup>9</sup> The April 2010 report also noted that the UN SRSG has consulted with the Organization for Economic Co-operation and Development ("OECD") and the International Finance Corporation ("IFC"). The OECD is currently revising its Guidelines for Multinational Enterprises, and the IFC is revising its Performance Standards.

#### B. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT GUIDELINES FOR MULTINATIONAL ENTERPRISES

In April 2010, the forty-two governments that adhere to the OECD Guidelines for Multinational Enterprises agreed on the terms of reference for an update to the guidelines. According to the Terms of Reference, "the update aims to ensure the continued role of the Guidelines as a leading international instrument for the promotion of responsible business conduct."<sup>10</sup> The Terms of Reference specifically call for a review and possible revision of the Guidelines' provisions on supply chains, human rights, disclosure, labor and industrial relations, anti-corruption, environment, consumer interests, and taxation.

With regard to human rights, the Terms of Reference explicitly note the need to develop more elaborate guidance on human rights, including, "if deemed appropriate," a separate chapter drawing on the work of the UN SRSG.<sup>11</sup> The Terms of Reference also suggest that "the update could also explore the merits of making due diligence one of the

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5. *Id.* at 14-15.

6. *Id.* at 16.

7. *Id.* at 12-13.

8. Special Representative of the Secretary-General, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010), available at <http://www.reports-and-materials.org/Ruggie-report-2010.pdf>.

9. *Id.* ¶¶ 13-14.

10. Organization for Economic Co-operation and Development, *Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises* (May 4, 2010), available at <http://www.oecd.org/dataoecd/61/41/45124171.pdf>.

11. *Id.* at 3-4.

general operational principles.”<sup>12</sup> With regard to the environment, the Terms of Reference state that given “growing concerns over climate change and increased attention given to green growth, eco-innovation, bio-diversity and sustainability issues,” parties drafting the update should consider whether there is a need to update or revise the existing environmental guidelines.<sup>13</sup>

The update of the OECD Guidelines officially began at the June 2010 Annual Meeting of the National Contact Points (“NCPs”) and should be completed in 2011. Several major consultations have occurred as a part of the overall review process. In June, at the time of the Annual Meeting of the NCPs, the OECD organized a roundtable on corporate social responsibility. The roundtable brought together representatives from governments, companies, labor organizations, non-governmental organizations, and academia. In October, the UN SRSG consulted the forty-two adhering governments to discuss the role of the Guidelines in putting the “Protect, Respect, and Remedy” framework into operation. Finally, in December 2010, the OECD organized a special consultation between delegates of the forty-two adhering governments and a wide range of stakeholders to discuss human rights, employment, due diligence, supply chains, and procedural provisions, including those relating to the functioning of NCPs.

#### C. EUROPEAN PARLIAMENT RESOLUTION ON CORPORATE SOCIAL RESPONSIBILITY IN INTERNATIONAL TRADE AGREEMENTS

In November 2010, the European Parliament adopted a resolution on corporate social responsibility in international trade agreements. The resolution states that “in light of the key role played by corporations, their subsidiaries and their supply chains in international trade, that corporate social and environmental responsibility must become an integral part of the European Union’s trade agreements.”<sup>14</sup> The resolution calls for CSR to be incorporated into the generalized system of preferences regulation “when it is next revised” and calls on the European Commission “to ensure that transnational corporations, whether or not they have their registered office in the European Union, whose subsidiaries or supply chains are located in countries participating in the GSP, and in particular in GSP+, are required to comply with their national and international legal obligations in the areas of human rights, labour standards, and environmental rules[.]”<sup>15</sup> The resolution also proposes that “future trade agreements negotiated by the [European] Union should incorporate a chapter on sustainable development which includes a CSR clause, based, in part, on the 2010 update of the OECD Guidelines for Multinational Enterprises.”<sup>16</sup>

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12. *Id.* at 4.

13. *Id.* at 5.

14. European Parliament resolution of 25 November 2010 on corporate social responsibility in international trade agreements (2009/2201(INI)), ¶ 7.

15. *Id.* ¶ 20.

16. *Id.* ¶ 25.

## D. ISO 26000

In November 2010, the International Organization for Standardization ("ISO") released its guidance on social responsibility, ISO 26000.<sup>17</sup> The guidance consists of voluntary guidelines. Unlike ISO 14001, ISO 26000 is not a certification standard. The guidance is intended for use by organizations of all types, in both public and private sectors. It covers labor, human rights, the environment, corruption, consumer concerns, and other issues pertinent to social responsibility. Ninety-nine ISO member countries, a wide range of stakeholder organizations, and individual experts participated in developing the guidance. ISO 26000 was developed to complement key U.N. declarations and conventions, including the core ILO Conventions.

## E. INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS

In November 2010, fifty-eight private security companies gathered in Geneva, Switzerland, to sign an International Code of Conduct for Private Security Service Providers.<sup>18</sup> The aim of the Code is to create a set of universally recognized standards for private companies engaged in providing security services. The Swiss Government sponsored this multi-stakeholder initiative, which it launched in 2009. In the Preamble to the Code, the signatories explicitly endorsed the principles set forth in the *Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies* and the UN SRSG's "Respect, Protect, Remedy" framework. Getting this Code signed and published is a milestone achievement.

Representatives of industry, civil society, and participating and supporting governments attended the signing ceremony. These representatives included Swiss Secretary of State, Peter Maurer; U.K. Ambassador, John Duncan; and U.S. Department of State Legal Advisor, Harold Hongju Koh. Mr. Koh highlighted the significance of the Code: "for by bringing together all of the key stakeholders—states, civil society organizations, relevant experts, clients, and the private security companies themselves—this initiative has the potential to address gaps in oversight and accountability left by traditional regimes."<sup>19</sup>

Included in the Code are requirements that govern the vetting, training, and conduct of PSC personnel. Signatories also commit to implementing accessible incident reporting and grievance procedures aimed at preventing and/or enhancing the investigation of alleged abuses. The Code calls for the establishment, within eighteen months, of "objective and measurable standards for providing Security Services based upon [the] Code,"<sup>20</sup> and further calls for the development of transparent and effective oversight and auditing mechanisms to which participants will be expected to submit.

17. ISO 26000:2010—Guidance on Social Responsibility, *available at* <http://www.iso.org>.

18. International Code of Conduct for Private Security Providers, *available at* <http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf> [hereinafter International Code of Conduct].

19. Nils Rosemann, Swiss Federal Department of Foreign Affairs, International Code of Conduct for Private Security Providers: A Multi-Stakeholder Initiative of the 21st Century? (Nov. 24, 2010), *available at* [http://www.instituthehrb.org/blogs/guest/international\\_code\\_of\\_conduct\\_for\\_private\\_security\\_providers.html](http://www.instituthehrb.org/blogs/guest/international_code_of_conduct_for_private_security_providers.html).

20. International Code of Conduct, *supra* note 18, ¶ 7.

## F. REVIEW AND UPDATE OF THE IFC SUSTAINABILITY FRAMEWORK

In late 2009, the IFC launched a review and update of its sustainability framework. This update includes the Sustainability Policy, the Performance Standards on Social and Environmental Sustainability, and the Policy on Disclosure of Information. The IFC applies the Performance Standards to manage social and environmental risks and impacts associated with IFC-financed projects. During 2010, the IFC engaged in formal and informal consultations with the communities directly affected by the projects that it funds. Revisions of the IFC sustainability framework should be completed in early 2011.<sup>21</sup>

After the IFC completes its sustainability framework review and update, especially the update of the IFC Performance Standards, the Equator Principles Association is expected to begin a review and update of the Equator Principles in late 2011. The Equator Principles are a voluntary set of standards for determining, assessing, and managing social and environmental risk in project financing. They are based, in part, on the IFC Performance Standards. Financial institutions in nearly thirty countries have adopted the Equator Principles.<sup>22</sup>

## II. Domestic Law and Policy Developments

### A. U.S. FEDERAL LEGISLATION

#### 1. *Conflict Minerals and the Dodd-Frank Wall Street Reform and Consumer Protection Act*

President Obama signed Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act into law on July 21, 2010 (Dodd-Frank).<sup>23</sup> Dodd-Frank requires publicly traded companies that utilize certain “conflict minerals” to report the due diligence steps they have taken to demonstrate that their products are not fueling conflict in the Democratic Republic of Congo (“DRC”). “Conflict minerals” include tantalum (coltan), cassiterite (tin), wolframite (tungsten) and gold. The sale of conflict minerals, it is believed, helps armed groups fund the purchase of weapons and allows them to continue hostilities in the DRC. The minerals in question are commonly used in a variety of commercial products. Thus, Dodd-Frank affects a broad spectrum of industries, including mining, automotive, aerospace, and jewelry. The aim of the legislation is not to ban the use of these minerals just because they originate from the DRC. Instead, Section 1502 seeks to ensure that the minerals do not come from conflict areas of the DRC or otherwise help fund the conflict.

Under Dodd-Frank, companies that use conflict minerals have a duty to produce an annual disclosure to the Securities and Exchange Commission (“SEC”) if the minerals are “necessary to the functionality or production of a product” manufactured by the company.<sup>24</sup> The annual disclosure must state whether the conflict minerals originated in the

21. See generally, *About the Review and Update*, INT’L FIN. CORP., <http://www.ifc.org/ifcext/policyreview.nsf/Content/AboutReview> (last visited Jan. 26, 2011).

22. See generally, *About the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/abouttheeps.shtml> (last visited Jan. 26, 2011).

23. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 12 U.S.C. § 1502 (2010).

24. *Id.*

DRC or an adjoining country (including Angola, Burundi, Central African Republic, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda, and Zambia). If the minerals used by the company originate in the DRC or an adjoining country, the company must report on the due diligence measures that it took regarding the source and chain of custody of those minerals. Due diligence should include an audit by an independent professional audit company.

Companies must also submit a description of any products manufactured by the company that are not “DRC conflict free.”<sup>25</sup> Products are conflict free if they do not contain minerals that directly or indirectly finance or benefit armed groups in the DRC or an adjoining country. Products are considered to benefit such groups if they come from areas where armed groups physically control mines or force civilians to mine, transport, or sell conflict minerals; tax, extort, or control any part of trade routes for the minerals up to the point of export; or tax, extort, or control trading facilities, in whole or in part.

Final implementing regulations for Section 1502 are expected to be issued no later than April 15, 2011.

## 2. *Extractive Industry Transparency and the Dodd-Frank Wall Street Reform and Consumer Protection Act*

Section 1504 of Dodd-Frank contains broad-reaching transparency provisions requiring oil, gas, mining, and other extractive industry companies to report annually to the SEC on their payments to governments.<sup>26</sup> Specifically, under Section 1504, companies that are securities issuers under U.S. law must report annually to the SEC on their payments to the U.S. and foreign governments. Their subsidiaries and controlled entities have the same duty. Companies must report on the type and total amount of payments made on a project basis. They must include taxes, royalties, fees, production entitlements, bonuses, and other material benefits, to the extent that the SEC determines that these are part of the commonly recognized revenue stream for extractive projects. Congress did not specify whether the annual report must be part of the company’s 10K or another form of reporting but instead left this decision to the SEC rule-making process. It is likely that the penalties related to fraudulent or deceptive reporting to the SEC will apply.

The legislation is intended to reinforce the Extractive Industries Transparency Initiative, which is a multi-stakeholder initiative consisting of oil, gas, and mining companies; civil society; and governments. Under the Extractive Industries Transparency Initiative, many U.S. companies already report their payments to some, although not all, governments around the world. Dodd-Frank may require that companies report more detailed payment information than the Extractive Industries Transparency Initiative currently demands. These details will depend on the SEC’s interpretation of the legislation. Implementing regulations for Section 1502 are expected to be issued no later than April 15, 2011.

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25. *Id.*

26. *Id.* § 1504.

## B. U.S. STATE LEGISLATION

### 1. *The California Transparency in Supply Chains Act of 2010*

On September 30, California Governor Arnold Schwarzenegger signed The California Transparency in Supply Chains Act of 2010 into law.<sup>27</sup> The legislation will require companies to disclose their efforts to ensure that their supply chains are free from slavery and human trafficking. The legislation will go into effect on January 1, 2012. It applies to retail sellers and manufacturers doing business in California that have annual gross receipts exceeding one hundred million dollars.

Once the legislation goes into effect, companies will be required to disclose what actions they are taking, if any, to evaluate, and address the risks of human trafficking and slavery in their product supply chains. Companies must also disclose their efforts to audit their suppliers' compliance with company standards regarding trafficking and slavery. Companies must also develop and maintain accountability mechanisms for employees or contractors who fail to meet company standards regarding slavery and human trafficking. Companies are required to make these disclosures on their websites. If a company does not have a website, the information must be made available in writing within thirty days of a consumer request for the disclosure. The exclusive remedy for failure to comply with the law is an action brought by the Attorney General of California for injunctive relief.

Initial estimates suggest that the legislation will impact approximately 3,200 companies.<sup>28</sup> The intent of the legislation is to provide consumers with the information they need to make purchasing decisions free of slavery and human trafficking.

## C. U.S. LITIGATION—LITIGATION UNDER THE ALIEN TORT STATUTE

### 1. *Kiobel v. Royal Dutch Petroleum*

In September 2010, the Second Circuit Court of Appeals held in *Kiobel v. Royal Dutch Petroleum Co.* that corporations cannot be properly sued under the Alien Tort Statute ("ATS") for violations of customary international law.<sup>29</sup> The case is one of a series of cases arising from claims that Royal Dutch Petroleum was complicit in human rights abuses against the Ogoni people in Nigeria. Three related cases (the "Wiwa cases") settled on the eve of trial in June 2009 for a disclosed settlement of \$15.5 million.<sup>30</sup>

In an opinion written by Judge Jose Cabranes, the Second Circuit concluded that:

No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable,

27. CAL. CIV. CODE § 1714.43 (West 2010).

28. *Christian Brothers Investment Services Leads Investor Coalition to Encourage Governor's Support of California Supply Chain Transparency Bill*, PRNEWswire, Sept. 16, 2010, <http://www.prnewswire.com/news-releases/christian-brothers-investment-services-leads-investor-coalition-to-encourage-governors-support-of-california-supply-chain-transparency-bill-103058499.html>.

29. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

30. Ingrid Wuert, *Wiwa v. Shell: The \$15.5 Million Settlement*, 13 ASIL INSIGHT 14, Sept. 9, 2009, available at <http://www.asil.org/insights090909.cfm>.



much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS.<sup>31</sup>

The question of whether corporations are properly liable under the ATS was left unsettled by the Supreme Court in *Sosa v. Alvarez-Machain*.<sup>32</sup> In *Kiobel*, the majority stated that “the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS).”<sup>33</sup> With this statement, the *Kiobel* Court directly addressed the question posed in a footnote in *Sosa*. In that footnote, the Supreme Court stated that an evaluation of whether a norm of international law was sufficiently definite to support a cause of action under the ATS involved the “related consideration” of “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>34</sup> The Court in *Kiobel* took up this “related consideration” and found that corporations are not proper defendants in ATS cases because “the principle of individual liability for violations of international law has been limited to natural persons—not ‘juridical’ persons such as corporations.”<sup>35</sup>

Before *Kiobel*, several post-*Sosa* appellate court decisions have upheld jurisdiction over corporate defendants. In *Presbyterian Church v. Talisman*, the Second Circuit assumed (without deciding) that corporations may liable for the violations of customary international law.<sup>36</sup> In *Khulumani v. Barclays National Bank Ltd.*, decided in 2007, defendants did not raise the question of corporate liability on appeal, but the Second Circuit observed that “[w]e have repeatedly treated the issue of whether corporations may be held liable . . . as indistinguishable from the question of whether private individuals may be.”<sup>37</sup> In *Kiobel*, the Second Circuit noted that its earlier decisions had contained this uncertainty, and then declined to find corporate liability under the ATS.

Advocates for corporate liability will find support in the concurring opinion in *Kiobel*, written by Judge Pierre Leval, in which he strongly criticized the majority opinion’s finding on corporate liability as “[w]ithout any support in either the precedents or the scholarship of international law.”<sup>38</sup> In his critique, Judge Leval questioned the potential impact of the majority’s ruling, stating that:

[a]ccording to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.<sup>39</sup>

The *Kiobel* decision represents one of the most significant ATS decisions in years. That said, it is far too early to conclude that this is the end of ATS litigation for companies.

31. *Kiobel*, 621 F.3d at 148-49.

32. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

33. *Kiobel*, 621 F.3d at 118.

34. *Sosa*, 542 U.S. at 732 n.20.

35. *Kiobel*, 621 F.3d at 119.

36. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009).

37. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring).

38. *Kiobel*, 621 F.3d at 150 (Leval, J., concurring).

39. *Id.* at 149-50.

## 2. *Bowoto v. Chevron Corp.*

In September, in *Bowoto v. Chevron Corp.*, the Ninth Circuit Court of Appeals upheld a jury verdict in favor of Chevron Corporation in a case involving plaintiff allegations that Chevron was complicit in human rights abuses committed by Nigerian security forces in 1998.<sup>40</sup> Plaintiffs brought claims under the ATS and the Torture Victim Protection Act (“TVPA”). The primary events at issue in the litigation took place at an offshore platform belonging to Chevron’s Nigerian subsidiary. In December 2008, after a seventeen-day trial, a jury found that Chevron Corporation could not be held liable for abuses committed by the Nigerian government security forces in 1998.<sup>41</sup> Plaintiffs appealed the jury verdict, raising challenges to the jury instructions and the District Court’s evidentiary rulings. Plaintiffs also appealed two points of law, including the District Court’s ruling that the TVPA does not apply to corporations.

The Court of Appeals fully affirmed the District Court’s judgment, including the finding that plaintiffs’ ATS claims were preempted by the Death on the High Seas Act. With regard to the TVPA claims, the Court determined that “the plain language of the TVPA does not allow for suits against a corporation.”<sup>42</sup> This decision conflicts with a 2005 Eleventh Circuit decision where the Court held, without discussion, that the TVPA applied to corporate actors.<sup>43</sup>

## 3. *Sarei v. Rio Tinto*

In October 2010, an *en banc* panel of the Ninth Circuit Court of Appeals referred *Sarei v. Rio Tinto* to a mediator “to explore the possibility of mediation.”<sup>44</sup> The case involved claims by current and former residents of the island of Bougainville, Papua New Guinea, who alleged that they were the victims of numerous violations of international law as the result of the mining operations of Rio Tinto Plc. In July 2009, the District Court for the Central District of California had declined to find that a prudential exhaustion requirement was appropriate given the facts and circumstances of the case.<sup>45</sup> The case had been remanded to the District Court after a December 2008 ruling by the Ninth Circuit Court of Appeals in which the Court found that certain claims brought under the ATS “are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law.”<sup>46</sup> In February 2011, after the appointed mediator “completed the exploration of the possibility of mediation,” the case was returned to the *en banc* court.<sup>47</sup>

40. *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1120 (9th Cir. 2010).

41. *Bowoto v. Chevron Corp.*, No. C 99-02506, 2009 U.S. Dist. LEXIS 38174, at \*7-8 (N.D. Cal. 2009).

42. *Bowoto*, 621 F.3d at 1126.

43. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F. 3d 1242, 1244 (11th Cir. 2005).

44. *Sarei v. Rio Tinto*, 625 F.3d 561, 562 (9th Cir. 2010).

45. *Sarei v. Rio Tinto*, 650 F. Supp. 2d 1004, 1032 (C.D. Cal. 2009).

46. *Sarei v. Rio Tinto*, 550 F.3d 822, 824 (9th Cir. 2008).

47. *Sarei v. Rio Tinto*, Order, No. CV 02-56256 (9th Cir. Feb. 11, 2011).

4. *Doe v. Nestle*

In *Kiobel*, the Second Circuit cited to *Doe v. Nestle*, a decision by the District Court for the Central District of California which pre-dated *Kiobel* by a week and which also found that “corporations cannot be held directly liable under the Alien Tort Statute for violating international law.”<sup>48</sup> The case was brought as a class action suit by plaintiffs from Mali, including children, who alleged that they were forced to work on cocoa plantations in Mali that supplied the defendants. The District Court observed that “domestic courts have almost uniformly concluded that corporations may be held liable for violations of international law”<sup>49</sup> but then found that “[t]here is no support in the relevant sources of international law for the proposition that corporations are legally responsible for international law violations.”<sup>50</sup> Ultimately, the Court stated that, “[t]o the extent that corporations should be liable for violating international law, that is a matter best left for Congress to decide.”<sup>51</sup>

5. *Flomo v. Firestone*

In October, the District Court for the Southern District of Indiana relied upon the Second Circuit’s decision in *Kiobel*,<sup>52</sup> in granting defendant’s motion for summary judgment in an ATS suit against the Firestone Natural Rubber Company. The case, *Flomo v. Firestone Natural Rubber Company*, involved claims by plaintiffs that the company’s Liberia-based subsidiary had forced certain employees of its Liberian rubber plantation to put their children to work.<sup>53</sup> Citing *Kiobel*, the District Court held that the plaintiffs “failed to establish a legally cognizable claim because no corporate liability exists under the ATS.”<sup>54</sup> In a review of the majority and concurring opinions in *Kiobel*, the District Court found that “the approach of the *Kiobel* majority—no corporate liability under the ATS unless and until international law (or Congress) affirmatively approves the doctrine—better comports with the mandate in *Sosa* that ATS liability only attaches after a consensus exists that a defendant’s conduct violates international law.”<sup>55</sup> The Court also cited to an Eleventh Circuit case, *Enahoro v. Abubakar*,<sup>56</sup> in emphasizing the important “door-keeping” role of courts in reviewing the viability of claims under the ATS.

6. *Supreme Court Denies Petitions for Writs of Certiorari in Two ATS Cases*

On two occasions in 2010, the United States Supreme Court denied petitions for writs of certiorari in cases involving claims under the ATS.

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48. *Doe v. Nestle*, No. CV 05-5133, 2010 WL 3969615, at \*62 (C.D. Cal. 2010).

49. *Id.* at \*61.

50. *Id.* at \*74.

51. *Id.*

52. *Kiobel*, 621 F.3d at 120.

53. *Flomo v. Firestone Natural Rubber Co.*, No. 1:06-cv-00627, 2010 WL 3938312, at \*1 (S.D. Ind. 2010).

54. *Id.* at \*7.

55. *Id.* at \*5 (citing *Kiobel* and *Sosa*).

56. *Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005). In *Sosa v. Alvarez-Machain*, the Supreme Court stated that the “recognition of actionable international norms . . . should be exercised on the understanding that the door is still ajar subject to vigilant door keeping, and thus open to a narrow class of international norms[.]” *Sosa*, 542 U.S. at 729.

In October, the Supreme Court denied certiorari in response to plaintiffs' petition, and defendant's conditional cross-petition, seeking review of the Second Circuit's decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*<sup>57</sup> The Second Circuit's decision upheld a lower court decision dismissing the case,<sup>58</sup> which involved allegations that Talisman Energy aided and abetted the Sudanese Government in committing human rights abuses in Southern Sudan. The Second Circuit's earlier decision held that companies may only be found liable for violations of customary international law under an aiding and abetting theory of liability if they provide substantial assistance to the primary violator with the intent of furthering the human rights violation. The Court determined that international law is the proper source for establishing a standard for accessory liability, and that "the mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."<sup>59</sup> Notably, the 2009 decision predates the Second Circuit's recent decision in *Kiobel*, in which the Court held that corporations cannot be sued under the ATS for violations of customary international law.

In June, the Supreme Court declined to grant a petition for a writ of certiorari filed by Pfizer Inc. seeking review of a January 2009 decision by the Second Circuit, which held that Nigerian plaintiffs could properly bring claims against Pfizer under the ATS for "violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent."<sup>60</sup> The Second Circuit decision represents the only time that a court has found that the failure to gain informed consent for medical testing is a cognizable claim under the ATS.

#### D. NON-U.S. LEGISLATION

##### 1. *Bill C-300 in Canada*

In late October, Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, was narrowly defeated in the Canadian House of Commons.<sup>61</sup> Bill C-300, a private member's bill originally introduced by Liberal MP, John McKay, in February 2009, called for the creation of a set of CSR guidelines for use in determining the eligibility of Canadian companies for government support for their international activities. The bill would have also created a complaints mechanism, whereby complaints could be filed with the Ministers of Foreign Affairs and International Trade regarding a company's compliance with the guidelines.

57. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 268 (2nd Cir. 2009).

58. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F.Supp.2d 633, 689 (S.D.N.Y. 2006).

59. *Presbyterian Church of Sudan*, 582 F.3d at 259.

60. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009).

61. Matthew McClearn, *Mining: The End of Bill C-300*, CANADIAN BUS., Dec. 6, 2010, [http://www.canadianbusiness.com/markets/commodities/article.jsp?content=20101206\\_10007\\_10007](http://www.canadianbusiness.com/markets/commodities/article.jsp?content=20101206_10007_10007).

