

Corporate Social Responsibility

SARAH A. ALTSCHULLER, AMY LEHR, SUZANNE A. SPEARS*

I. Business and Human Rights: Policy and Legislative Developments

A. INTERNATIONAL

1. *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 2009, operating under his second three-year mandate, which commenced in June 2008.¹ His work included consultations and other ongoing research in consideration of how best to operationalize the business and human rights framework first introduced in his April 2008 report to the U.N. Human Rights Council (UNHRC). This framework consists of three core principles: the state duty to protect against human rights abuses, the corporate responsibility to respect human rights, and the need for effective access to remedies.²

In April 2009, the UN SRSG submitted an interim report to the UNHRC, *Business and Human Rights: Towards Operationalizing the “Protect, Respect, and Remedy” Framework*.³ The report provided an update on his work under the second mandate and provided preliminary observations on issues raised during the UN SRSG’s ongoing stakeholder consultations. The report also took note of the worldwide economic crisis and observed that “human rights are most at risk in times of crisis, and economic crises pose a particular risk to economic and social rights.”⁴ In the face of this risk, the UN SRSG observed:

* Sarah Altschuller and Amy Lehr are associates in the Corporate Social Responsibility Practice Group of Foley Hoag LLP. Suzanne Spears is counsel at WilmerHale LLP.

1. 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. The second mandate is intended to provide the UN SRSG with the opportunity to operationalize the framework proposed in his April 2008 report.

2. 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.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf.

3. Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

4. *Id.* ¶ 118.

Now more than ever, therefore, the business and human rights agenda matters. Any gains Governments believe can be had by lowering human rights standards for business are illusory, and no sustainable recovery can be built on so flimsy a foundation. Companies must weigh any corresponding temptations against the impact of declining public confidence in business, growing populism and an impending epochal shift in regulatory environments.⁵

The three part framework continues to gain support, including most recently, the endorsement of the European Union Presidency, which recently observed that the “Protect, Respect and Remedy framework provides a key element for the global development of CSR practices.”⁶

2. *Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises*

a. Review of the Guidelines

On June 24-25, 2009, the thirty member countries of the Organisation for Economic Co-operation and Development (OECD) held their annual Ministerial Council Meeting with the stated aim of building “a stronger, cleaner, and fairer world economy” in the wake of the global financial and economic crisis.⁷ Amidst claims that unethical business conduct contributed to the crisis, the Council called for “consultation on the up-dating of the OECD Guidelines for Multinational Enterprises to increase their relevance and clarify private sector responsibilities.”⁸ In response, National Contact Points (NCPs),⁹ in consultation with domestic stakeholders, are currently reviewing their experiences with the Guidelines and drafting recommendations for terms of reference for a possible update of the instrument in 2010. The OECD Secretariat has suggested that the terms of reference might cover the following issues: technical updates, supply chain issues, human rights, disclosure issues, environmental issues, consumer interests, taxation, the OECD “Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones,” and improving the operation of NCPs.¹⁰

b. Specific Instances-National Contact Point Determinations

In September 2009, the NCP for the United Kingdom issued a report on Vedanta Resources, finding that the mining company had disrespected the rights of indigenous people

5. *Id.*

6. PRESIDENCY OF THE EUROPEAN UNION, PROTECT, RESPECT, REMEDY—MAKING THE EUROPEAN UNION TAKE A LEAD IN PROMOTING CORPORATE SOCIAL RESPONSIBILITY (2009), available at <http://www.reports-and-materials.org/EU-Presidency-statement-Protect-Respect-Remedy-Nov-2009.pdf>.

7. Organisation for Economic Co-operation and Development, *2009 Ministerial Conclusions*, C/MIN (2009)5/FINAL, ¶ 1 (adopted June 25, 2009).

8. *Id.* ¶ 15.

9. The OECD Guidelines are implemented, in part, through the operations of NCPs, government offices charged with promoting the Guidelines and handling inquiries in each specific national context. The Guidelines allow individuals and organizations to bring “specific instances,” or allegations of corporate violations of the Guidelines, to the NCPs for assessment and mediation, and in some instances, for a specific determination as to whether or not the Guidelines have been breached.

10. See UNITED KINGDOM NATIONAL CONTACT POINT, PROPOSED UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2009), available at <http://www.berr.gov.uk/files/file53177.pdf>.

in its plans to build an open bauxite mine near the holy mountain of Niyamgiri, in the Indian state of Orissa. The NCP upheld Survival International's allegation that Vedanta had breached Chapter V(2)(b) of the OECD Guidelines, which requires multinational enterprises to communicate and consult with the communities directly affected by their projects. The NCP's report concluded that:

[W]hichever self-regulatory practices Vedanta chooses to adopt in order to minimise the risk of further breaches of the Guidelines in the future, it is essential that these practices, particularly the human and indigenous rights impact assessments and the adequate and timely consultation with all the affected communities of a project, do not remain "paper statements" but are translated into concrete actions on the ground and lead to a change in the company's behaviour.¹¹

Although the report is not binding, the NCP process has been embarrassing and potentially costly for Vedanta. In July 2009, the Church of England announced that it was reconsidering its estimated £2.5 million investment in Vedanta.¹² A week after the NCP report was released, the United Kingdom's Treasury Department was forced to explain before the High Court, in a case brought by environmental campaigners under the 2006 Companies Act, why it had permitted the publicly-owned Royal Bank of Scotland to invest in a company so strongly criticized by another arm of government.¹³

B. DOMESTIC

1. *Inquiry into Business and Human Rights by United Kingdom Parliament's Joint Committee on Human Rights*

In December 2009, the U.K. Parliament's Joint Committee on Human Rights (JCHR) issued a report, *Any of Our Business? Human Rights and the UK Private Sector*, after a nine-month inquiry into the topic of business and human rights.¹⁴ In the JCHR's initial call for evidence, the Committee observed that the inquiry would address:

the way in which businesses can affect human rights both positively and negatively; how business activities engage the relative responsibilities of the UK Government and individual businesses; and whether the existing UK regulatory, legal and voluntary framework provides adequate guidance and clarity to business as well as adequate protection to individual rights.¹⁵

11. Final Statement by the United Kingdom National Contact Point for the OECD Guidelines for Multinational Enterprises, ¶ 80 (Sept. 25, 2009), available at <http://www.berr.gov.uk/files/file53117.doc>.

12. See S. Kalyana Ramanathan, *UK Reprimands Vedanta over Orissa Mining Project*, BUS. STANDARD, Oct. 13, 2009, <http://www.business-standard.com/india/storypage.php?autono=373110>.

13. See Terry Macalister, *Treasury Taken to Court for RBS Loans to Vedanta Resources*, THE GUARDIAN, Oct. 18, 2009, <http://www.guardian.co.uk/business/2009/oct/18/rbs-vedanta-loan-court-case>.

14. UNITED KINGDOM JOINT COMMITTEE ON HUMAN RIGHTS, *ANY OF OUR BUSINESS? HUMAN RIGHTS AND THE UK PRIVATE SECTOR* (2009), available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf> [hereinafter UK Any of Our Business].

15. UNITED KINGDOM JOINT COMMITTEE ON HUMAN RIGHTS, *CALL FOR EVIDENCE-BUSINESS AND HUMAN RIGHTS* (2009), available at <http://www.reports-and-materials.org/Joint-Committee-call-for-evidence-6-Mar-2009.pdf>.

In the final report, the Committee observed that “[t]he Government should send a clear message to business on the human rights standards which the UK expects its businesses to meet in order to prevent allegations of human rights abuse and to reduce the numbers of individuals who may need to seek a remedy through judicial or other means.”¹⁶ The Committee also observed that the Government’s reporting on CSR had been “unduly focused on voluntary measures and underestimates the extent to which businesses have human rights responsibilities.”¹⁷ The report includes suggestions for actions that the Government could take in order to provide a “clearer and more coherent strategy” linking the work of various Government offices in the area of business and human rights. The specific suggestions contained within the report address: clearer standards in guidance and support, public procurement, public investments, Export Credit Guarantees, company law and reporting standards, investment policy and listing rules, and the operation of firms in conflict zones.¹⁸

Notably, in the report, the Committee acknowledged that the “main focus of the international debate” on business and human rights is the work of the UN SRSG, and stated, “[W]e welcome his work, which is carefully building a global consensus on how businesses can respect and promote human rights.”¹⁹

2. *United States Securities and Exchange Commission Review of Disclosure Obligations*

In 2009, the U.S. Securities and Exchange Commission (SEC) signaled that it would take stronger steps under the new leadership of Chairman Mary Schapiro than it did during the Bush Administration to protect the interests of investors, and socially responsible investors in particular. There were significant developments with respect to disclosure obligations and actions required in response to shareholders’ resolutions regarding environmental, social, and governance (ESG) matters. First, in June, the SEC established an Investor Advisory Committee to advise the Commission on matters of concern to investors in the securities markets, including possible changes in regulation.²⁰ At its first meeting, the Committee resolved to examine whether, “the information that investors currently receive [with respect to EST matters]—both before making an investment decision and afterwards—meets their needs, and if not, what changes are necessary [to SEC disclosure obligations] to ensure that investors have the information that they need, when they need it[.]”²¹

While the SEC requires disclosure of all matters that are material to investors, it does not specifically require disclosure of ESG matters in all circumstances.²² To bring its practice in line with the requirements of emerging stock exchanges and evolving disclo-

16. UK Any of Our Business, *supra* note 14, at 4.

17. *Id.*

18. *Id.* at 65-82.

19. *Id.* at 3.

20. See SEC Press Release, SEC Announces Creation of Investor Advisory Committee, June 3, 2009, *available at* <http://www.sec.gov/news/press/2009/2009-126.htm>.

21. SEC, Announcement from the SEC Investor Advisory Committee, SEC NEWS DIGEST, July 29, 2009, *available at* <http://www.sec.gov/news/digest/2009/dig072909.htm>.

22. SEC STAFF BRIEFING PAPER FOR SECURITIES AND EXCHANGE COMMISSION INVESTOR ADVISORY COMMITTEE, POSSIBLE REFINEMENTS TO THE DISCLOSURE REGIME, 6 (2009), *available at* <http://www.sec.gov/spotlight/invadcomm/iacmeeting072709-briefingpaper.pdf>.

sure requirements in Europe, and to reflect the growing tendency of global companies to issue sustainability reports, the SEC staff has suggested that the SEC consider making such disclosure mandatory.²³

Second, in October 2009 the SEC's Division of Corporation Finance reversed a 2005 SEC decision that had disallowed shareowner resolutions addressing questions of financial risk relating to ESG issues.²⁴ The ruling, Staff Legal Bulletin No. 14E, arrived in time for the 2010 proxy season, which began in November.

Observing that "[w]e have recently witnessed a marked increase in the number of no-action requests in which companies seek to exclude proposals as relating to an evaluation of risk," the SEC stated that its Bush-era ruling "may have resulted in the unwarranted exclusion of proposals that relate to the evaluation of risk but that focus on significant policy issues."²⁵ Going forward, the SEC said, "[t]he fact that a proposal would require an evaluation of risk will not be dispositive of whether the proposal may be excluded."²⁶

3. *Reviews of Bilateral Investment Treaties*

The year 2009 marked the Golden Jubilee of the first Bilateral Investment Treaty (BIT), signed on November 25, 1959, by the Federal Republic of Germany and the Islamic Republic of Pakistan. The year also marked the launch of a number of initiatives aimed at assessing whether BITs and host-government agreements (HGAs) preserve enough policy space for host-states both to protect foreign investment and to regulate in the public interest. Concerns have arisen in that regard because, under threat of international arbitration to enforce protections found in BITs and HGAs, foreign investors may be able to insulate their businesses from new laws and regulations, or seek compensation from the Government for the cost of compliance.

At the international level, the UN SRSO continued to explore concerns he expressed in his 2008 and 2009 reports about BITs and HGAs unduly constraining host-governments' abilities to achieve their international human rights obligations, and about the lack of transparency in international investment arbitration.²⁷ Indicating that they may have similar concerns, a number of governments have launched reviews of their own BITs at the domestic level.

a. United States Review of its Model BIT

The United States has, for example, embarked on a review of its Model BIT, which it adheres to closely in its BIT negotiations with other countries.²⁸ The BIT review follows campaign pledges by President Barack Obama, in which he committed to "ensure that

23. *Id.*

24. SEC DIVISION OF CORPORATION FINANCE, STAFF LEGAL BULLETIN NO. 14E (CF), (2009), *available at* <http://www.sec.gov/interp/leg/cfs14e.htm>.

25. *Id.*

26. *Id.*

27. See UNITED NATIONS, STATEMENT OF THE SPECIAL REPRESENTATIVE OF THE UN SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATION AND OTHER BUSINESS ENTERPRISES TO THE DEPARTMENT OF TRADE AND INDUSTRY, SOUTH AFRICA (2009), *available at* <http://www.reports-and-materials.org/Ruggie-statement-to-S-Africa-Govt-re-review-of-BITs-4-Sep-2009.pdf>.

28. See Department of State, Office of the U.S. Trade Representative, Public Notice 6693, 74 Fed. Reg. 34,071 (July 14, 2009).

foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest.”²⁹

The U.S. Model BIT underwent its last revision in 2004, when procedural rules granting greater transparency in investor-state arbitrations were added to the text and substantive changes were made to provisions on expropriation and minimum standard of treatment.³⁰ At the time of the revision, some criticized what they perceived as backtracking from the unqualified protection of investors’ rights found in the previous 1994 Model, while others criticized the 2004 Model for not going far enough to preserve governments’ rights to regulate in the public interest.

The debate about whether the U.S. Model BIT strikes the right balance between these demands has been revived in the context of the current review. On October 1, 2009, the U.S. State Department’s Advisory Committee on International Economic Policy (ACIEP) submitted a report on the U.S. Model to the Secretary of State that showed serious divisions existed between members of the subcommittee that drafted the report on this issue.³¹

Some members of the subcommittee argued that the Administration should consider codifying the position taken by the State Department in a recent NAFTA arbitral proceeding, *Glamis v. United States*, narrowly defining the minimum standard of treatment owed to investors.³² Others argued that the Administration should restore the broad definition found in the 1994 Model BIT. Members of the subcommittee were also divided as to whether the Model BIT should be revised to establish an exemption for governmental measures related to the protection of human, animal, or plant life or health, or to the conservation of natural resources, and to establish requirements for governments to adopt and maintain laws and regulations protecting the environment and labor rights. Those who opposed these changes argued that they would either make it impossible for the United States to negotiate BITs in the future or create a competitive disadvantage for the United States.

It remains to be seen how the Obama Administration will use the report and the lengthy annexes to it, wherein members were allowed to express their divergent views. The internal, interagency process coordinated by the State Department to produce a new model BIT is ongoing.

29. Sen. Barack Obama, Pennsylvania Fair Trade Coalition 2008 Presidential Candidate Questionnaire (Apr. 2, 2008), available at http://www.citizenstrade.org/pdf/QuestionnairePennsylvaniaFairTradeCoalition040108FINAL_SenatorObamaesponse.pdf.

30. See 2004 Model BIT, Treaty Between the Government of the United States of America and the Government of [COUNTRY] Concerning the Encouragement and Reciprocal Protection of Investment, available at <http://www.state.gov/documents/organization/117601.pdf>.

31. See Letter from Theodore Kassinger, Chairman, Advisory Committee on International Economic Policy et al., to Secretary Clinton Regarding the Model Bilateral Investment Treaty (Oct. 1, 2009), available at <http://www.state.gov/e/eeb/rls/othr/2009/130289.htm>; U.S. DEPARTMENT OF STATE, REPORT OF THE SUBCOMMITTEE ON INVESTMENT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY, (2009), available at <http://www.state.gov/e/eeb/rls/othr/2009/130287.htm>

32. See *Glamis v. United States*, Int’l Cent. for Settlement of Inv. Disputes, Awards (2009), available at <http://www.state.gov/documents/organization/125798.pdf>.

b. Other Reviews of BITs

South Africa has also launched an official policy review of its BITs, explaining that “the Executive had not been fully apprised of all the possible consequences of BITs,” including those for human rights, when the young post-apartheid government began entering into BITs in 1994.³³ The current government fears that the country’s investment agreements now threaten its post-apartheid policies designed to advance social justice. Commentators point, by way of example, to an international arbitration brought against the country under BITs by investors from Italy and Luxembourg who allege that certain mining provisions of the Black Economic Empowerment Act amount to expropriation, entitling them to compensation.³⁴

A number of other countries are reviewing their BITs as well. Countries that acceded to the European Union in 2004 and 2007, for example, are examining their BIT obligations to determine whether they are compatible with EU law and, in some cases, have already or are currently renegotiating their BITs to ensure compliance.³⁵ Ecuador, which announced its intention to “denounce,” or terminate, thirteen of its BITs in October 2009,³⁶ has given some indication that it might be inclined to renegotiate them and is in the process of drafting a model BIT of its own.³⁷ Such negotiations would provide opportunities for stakeholders to raise concerns about governments’ rights to regulate in the public interest in the context of BITs.

II. Litigation in United States Courts

A. LITIGATION UNDER THE ALIEN TORT STATUTE

The Alien Tort Statute (ATS)³⁸ remains the primary statutory tool for proponents seeking to enforce international human rights law against companies in American courtrooms. Jurisprudence in 2009 continued to provide further definition of the scope of liability for corporate defendants under the statute.

1. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*

In October 2009, the Second Circuit Court of Appeals issued its long awaited decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, upholding the dismissal of the case

33. SOUTH AFRICAN DEPARTMENT OF TRADE AND INDUSTRY, BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW, (2009), available at http://www.thedti.gov.za/ads/bi-lateral_policy.pdf.

34. See Piero Foresti, Laura de Carli & others v. Republic of South Africa, Int’l Cent. For Settlement of Int’l Disputes (ICSID Case No. ARB(AF)/07/1), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C90&actionVal=viewCase>. On November 2, 2009, the Claimants requested the discontinuance of the proceeding.

35. See Stanimir Alexandrov et al., *The Future of Investment Treaty Protection in Eastern Europe*, THE EURO. & MIDDLE E. ARB. REV. (2009), available at <http://www.globalarbitrationreview.com/reviews/14/sections/53/chapters/511/the-future-investment-treaty-protection-eastern-europe>.

36. *Ecuador to Denounce Remaining BITs*, GLOBAL ARB. REV., Oct. 30, 2009, <http://www.globalarbitrationreview.com/news/article/19251/ecuador-denounce-remaining-bits>.

37. Fernando Carbrera Diaz, *Ecuador Continues Exit From ICSID*, INVESTMENT TREATY NEWS, June 8, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/ecuador-continues-exit-from-icsid.aspx>.

38. 28 U.S.C. § 1350 (2007).

by the District Court for the Southern District of New York in 2006.³⁹ The case involved allegations that Talisman Energy aided and abetted the Sudanese Government in committing human rights abuses in Southern Sudan.⁴⁰ In an earlier decision in 2007, *Kbulumani v. Barclay Nat'l Bank Ltd.*, the Second Circuit endorsed the theory of aiding and abetting liability under the ATS.

In its October ruling, the Second Circuit held that companies may only be found liable for violations of international human rights 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 held 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.”⁴¹ The Court specifically found that “[e]ven if there is sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law[.]. . . no such consensus exists for imposing liability on individuals who *knowingly* (but not *purposefully*) aid and abet a violation of international law.”⁴²

In its decision, the Court also looked to international law in determining that conspiracy liability is not available under the ATS.⁴³ The Court specifically observed that “[t]he analog to conspiracy as a completed offense in international law is the concept of a ‘joint criminal enterprise’ and that ‘an essential element of a joint criminal enterprise is ‘a criminal intention to participate in a common criminal design.’”⁴⁴ The Court found that “under a theory of relief based on joint criminal enterprise, plaintiffs’ conspiracy claims would require the same level of *mens rea* as their claims for aiding and abetting.”⁴⁵

2. *In re South African Apartheid Litigation*

In April 2009, the District Court for the Southern District of New York denied in part and granted in part a motion to dismiss in *In re South African Apartheid Litigation*.⁴⁶ The litigation involves allegations by South African plaintiffs who allege that they or their

39. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); see also *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

40. In an earlier decision in 2007, *Kbulumani v. Barclay Nat'l Bank Ltd.*, the Second Circuit endorsed the theory of aiding and abetting liability under the Alien Tort Statute (ATS). See *Kbulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007), *aff'd sub nom* (finding that “in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS].”)

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

42. *Id.*

43. *Id.* at 260. Plaintiffs had urged the Court to apply the *Pinkerton* doctrine, which would allow for the defendant to be found guilty of conspiracy “without specific evidence that he committed the act charged if it is clear that the offense had been committed, that it had been committed in the furtherance of an unlawful conspiracy, and the defendant was a member of that conspiracy.” *Id.*, n. 10 (citing *United States v. Bruno*, 383 F.3d 65, 89 (2d Cir. 2004) (quoting *United States v. Miley*, 513 F.2d 1191, 1208 (2d Cir. 1975)). The Second Circuit found that “plaintiffs have not established that ‘international law [universally] recognize[s] a doctrine of conspiratorial liability that would extend to activity encompassed by the *Pinkerton* doctrine.” *Id.* at 260 (citing *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 663).

44. *Presbyterian Church of Sudan*, 582 F.3d at 260 (citing *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶ 206 (July 15, 1999)).

45. *Id.*

46. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). The District Court dismissed the cases in 2004, stating that aiding and abetting liability is not a theory available under the ATS.

family members were the victims of human rights abuses during the apartheid era. The plaintiffs allege that more than fifty corporate defendants aided and abetted apartheid and its associated human rights violations by operating in South Africa.

In its decision, the Court observed that “simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law” and that “[i]nternational law does not impose liability for declining to boycott a pariah state or to shun a war criminal.”⁴⁷ The Court noted that the parties did not dispute that “[t]he *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime.”⁴⁸ In defining what is meant by a “substantial effect” on the perpetration of a crime, the Court found that, “in the context of commercial services, provision of the means by which a violation of the law is carried out is sufficient to meet the *actus reus* requirement of aiding and abetting under customary international law.”⁴⁹

With regard to the applicable *mens rea* standard for aiding and abetting liability, in contrast to the Second Circuit’s subsequent decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the District Court found that “[o]ne who substantially assists a violator of the law of nations is equally liable if he or she desires the crime to occur or if he or she knows it will occur and simply does not care.”⁵⁰ Finding that “[t]he vast majority of international legal materials clearly prescribe knowledge as the *mens rea* requirement for aiding and abetting[.]”⁵¹ the Court concluded that “customary international law requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations.”⁵²

The District Court declined to find that the plaintiffs could pursue a conspiracy claim under the ATS, observing that “*Sosa* requires that this Court recognize only forms of liability that have been universally accepted by the community of developed nations. Conspiracy does not meet this standard.”⁵³

3. *Abdullahi v. Pfizer*

In January 2009, the Second Circuit Court of Appeals found that the plaintiffs could properly bring a claim under the ATS for “violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent.”⁵⁴ This decision represents the first time in which a court has found that the failure to gain informed consent for medical testing is a cognizable claim under the ATS. Pfizer has requested Supreme Court review of the case.⁵⁵

In 2007, the Second Circuit reinstated the ATS claims and endorsed a theory of aiding and abetting liability under ATS. *Kbulumani*, 504 F.3d 254.

47. *In re South African Apartheid Litigation*, 617 F. Supp. 2d at 257.

48. *Id.* (citing *Kbulumani*, 504 F.3d at 277).

49. *In re South African Apartheid Litigation*, 617 F. Supp. 2d at 259.

50. *Id.* at 262.

51. *Id.* at 259.

52. *Id.* at 262.

53. *Id.* at 263.

54. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009). Related Nigerian court action appears in Part III(A) of this article.

55. *Id.*

The Second Circuit's decision addressed consolidated appeals in two cases involving allegations by Nigerian plaintiffs that Pfizer tested Trovan, an experimental antibiotic drug, on children during a 1996 bacterial meningitis outbreak in violation of international informed consent laws. The plaintiffs alleged that Pfizer's actions led to the deaths of eleven children and injuries to others. The District Court dismissed the plaintiffs' claims in both cases.⁵⁶

In making its determination that the prohibition on medical experimentation on non-consenting human subjects constituted "a universally accepted norm of customary international law," the Court looked to "the current state of international law by consulting the sources identified by Article 38 of the Statute of the International Court of Justice."⁵⁷ These sources include:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilian nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁵⁸

The Court looked to a wide range of sources including the Nuremberg Code, the World Medical Association's Declaration of Helsinki, the Council for International Organizations of Medical Sciences' International Ethical Guidelines for Biomedical Research Involving Human Subjects, and the International Covenant on Civil and Political Rights, which it found to collectively define a customary international norm prohibiting medical experimentation on human subjects without their knowledge or consent.

4. *Sinaltrainal v. Coca-Cola*

In a recent Eleventh Circuit Court of Appeals decision, the Court applied the pleading standards set forth by the Supreme Court in *Ashcroft v. Iqbal*,⁵⁹ a non-ATS case, in upholding the dismissals of four consolidated cases brought by the plaintiffs alleging that the Coca-Cola Company and two of its Colombian subsidiaries collaborated with the Colombian military to torture and murder Colombian trade union members.⁶⁰ In upholding the District Court's dismissal of the cases, the Eleventh Circuit found that the plaintiffs failed "to sufficiently plead factual allegations" sufficient to establish subject matter jurisdiction.⁶¹ In *Iqbal*, the Supreme Court held that the plaintiffs' complaints must state a plausible claim for relief, and that "[a] claim has facial plausibility when the plaintiff pleads

56. See *Abdullahi v. Pfizer, Inc.*, 2005 U.S. Dist. LEXIS 16126 (S.D.N.Y. 2005); see also *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005).

57. *Abdullahi*, 562 F.3d at 175.

58. *Id.*

59. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

60. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); see also *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006). The District Court found that it lacked subject matter jurisdiction over the plaintiffs' claims, which were brought under the ATS and the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350 note.

61. *Sinaltrainal*, 578 F.3d at 1270.

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁶²

In its decision, the Eleventh Circuit held that

[f]or subject matter jurisdiction to entertain Plaintiffs’ ATS claims, the complaints must sufficiently plead (1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law (or that the war crimes exception to the state action requirement applies) and (2) the Defendants, or their agents, conspired with the state actors, or those acting under color of law, in carrying out the tortious acts.⁶³

In finding that the plaintiffs failed to meet these requirements, the Court found that “[t]he plaintiffs’ conclusory allegation that the paramilitary security forces acted under color of law is not entitled to be assumed true and is insufficient to allege state-sponsored action.”⁶⁴ The Court found that “[a]llegations the Colombian government tolerated and permitted the paramilitary forces to exist are insufficient to plead the paramilitary forces were state actors.”⁶⁵ In making its determination, the Court cited *Iqbal* in stating that “[a]lthough it must accept well-pled facts as true, the court is not required to accept a plaintiff’s legal conclusions.”⁶⁶

5. *Sarei v. Rio Tinto*

In July 2009, the District Court for the Central District of California declined to find that a prudential exhaustion requirement was appropriate in a case involving claims by current and former residents of the island of Bougainville, Papua New Guinea, who allege that they were the victims of numerous violations of international law as the result of the mining operations of Rio Tinto Plc. 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.”⁶⁷ In its 2008 decision, the Ninth Circuit referenced the Supreme Court’s statement in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that exhaustion of local remedies should “certainly” be considered in cases involving ATS claims and held that “[t]his is an appropriate case for such consideration”⁶⁸

In declining to impose a prudential exhaustion requirement, the District Court looked to the Ninth Circuit’s plurality opinion which stated that “[w]here the ‘nexus’ to the United States is weak, courts should carefully consider the question of exhaustion, particu-

62. *Iqbal*, 129 S.Ct. at 1949.

63. *Sinaltrainal*, 578 F.3d at 1266.

64. *Id.*

65. *Id.* The Court also found that the “war crimes” exception to the state action requirement was not applicable because “the alleged murder and torture was not committed in the course of a civil war.” *Id.* at 1267. Specifically, the Court observed that the “Supreme Court’s reminder to exercise ‘vigilant doorkeeping’ persuades us the war crimes exception applies only to claims of non-state torture that were perpetrated in the course of hostilities.” *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

66. *Sinaltrainal*, 578 F.3d at 1260.

67. *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1020 (C.D. Cal. 2009) (citing *Sarei*, 550 F.3d at 824).

68. *Id.* (citing *Sarei*, 550 F.3d at 830).

larly, but not exclusively, with respect to claims that do not involve matters of ‘universal concern.’”⁶⁹ The plurality opinion indicated that two competing interests should be considered when determining whether prudential exhaustion is appropriate in a specific case: principles of international comity and the commitment of U.S. courts to upholding certain universal claims based in customary international law.⁷⁰ Ultimately, the Court found that the plaintiffs’ claims for crimes against humanity, war crimes, and racial discrimination were of sufficiently “universal concern” and that “[i]ndividuals have an interest in obtaining a remedy for such injustices and the United States has an interest in punishing the ‘hostis humani generis, an enemy of all mankind.’”⁷¹ The Court found that despite the weak nexus between the plaintiffs’ claims and the United States, “this consideration is outweighed by the ‘heinous’ nature of the allegations on which the claims are based, and for that reason concludes that it should not, as a prudential matter, impose an exhaustion requirement with respect to the claims.”⁷²

6. *Saleh v. Titan International*

In September 2009, ruling on an interlocutory appeal filed in two consolidated cases, *Saleh v. Titan Corp.* and *Ibrahim v. Titan Corp.*, the District of Columbia Circuit Court of Appeals affirmed an earlier decision by the District Court for the District of Columbia that dismissed the plaintiffs’ claims under the ATS against Titan Corporation.⁷³ The cases involve allegations by Iraqi nationals or their widows that Titan Corporation and CACI International subjected them to abusive treatment or torture while they were held in the Abu Ghraib detention facility in Iraq. In its ruling, the Court observed that even if “appellants had adequately alleged torture (or war crimes)[,] . . . [a]lthough torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors.”⁷⁴

7. *In re: Xe Services Alien Tort Litigation*

In October 2009, the District Court for the Eastern District of Virginia declined to dismiss five consolidated cases brought by Iraqi plaintiffs charging eleven business entities, collectively referred to as the “Xe defendants” with inflicting injuries or deaths upon them or their relatives while providing security services for the U.S. government in Iraq. The plaintiffs’ claims have been brought under the ATS and the Racketeer Influenced and Corrupt Organizations Act (RICO). In declining to grant the defendants’ motion to dismiss, the Court found that “the international law norm governing war crimes . . . is binding, universal, and precisely defined” and that “claims arising under this cause of action

69. *Sarei v. Rio Tinto*, 2009 WL 2762635, *6 (C.D. Cal. 2009) (citing *Sarei*, 550 F.3d at 824).

70. *Id.* (citing *Sarei*, 550 F.3d at 830).

71. *Sarei*, 2009 WL 2762635, *10 (quoting *Sarei*, 550 F.3d at 845 (Reinhardt, J., dissenting)).

72. *Id.* at *17.

73. The ruling addressed consolidated appeals in two cases, *Saleh v. Titan Corp.*, and *Ibrahim v. Titan Corp.* The District Court granted summary judgment on behalf of Titan Corporation on the grounds that plaintiffs’ state tort claims were federally preempted. The District Court denied summary judgment to CACI International Inc. For both cases, the Court dismissed plaintiffs’ ATS claims. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005); *Saleh v. Titan Corp.*, 436 F.Supp.2d 55 (D.D.C. 2006).

74. *Id.*

are cognizable against non-state actor defendants, including corporations.⁷⁵ The Court ultimately found that the plaintiffs had not met the pleading burdens established by *Ashcroft v. Iqbal*,⁷⁶ but granted the plaintiffs leave to amend in four of the five cases.⁷⁷

8. *Wiwa v. Royal Dutch Petroleum*

In June 2009, on the eve of trial, the plaintiffs representing the Ogoni people of Nigeria and Royal Dutch Petroleum Co. and Shell Transport and Trading Co. (Royal Dutch/Shell) settled the case between them for US\$15.5 million.⁷⁸ The case, originally filed in 1996,⁷⁹ involved allegations that Royal Dutch/Shell aided and abetted human rights abuses carried out by the Nigerian authorities against the Ogoni people in the Nigerian Delta. Shell maintained that it was not responsible for the violence carried out by the Nigerian authorities. The settlement did not require the defendants to admit wrongdoing. A significant portion of the settlement, US\$4.5 million, was designated for a trust to benefit the Ogoni people.

In April 2009, the District Court largely denied defendants' motion to dismiss that challenged the legal sufficiency of the plaintiffs' ATS claims.⁸⁰ In the April decision, the District Court found that the plaintiffs could properly bring claims under ATS for: crimes against humanity; summary execution; cruel, inhuman, and degrading treatment; and arbitrary arrest and detention.⁸¹ The Court found that these claims satisfied the "universal, specific, and obligatory" standard established for ATS claims by *Sosa v. Alvarez-Machain*.⁸² The District Court dismissed the plaintiffs' claims based on rights related to peaceful assembly.⁸³

B. LITIGATION UNDER STATE TORT LAW

1. *Doe v. Exxon Mobil Corp.*

In September 2009, the District Court for the District of Columbia dismissed a case brought by Acehese villagers who alleged that the corporation and its Indonesian subsidiary, ExxonMobil Oil Indonesia (EMOI), were liable for killings and torture committed by the Indonesian military.⁸⁴ The Court dismissed the plaintiffs' claims in an unusual deci-

75. *In re Xe Services Alien Tort Litigation*, 2009 WL 3415129, at *15-16 (E.D. Va. 2009).

76. *Ashcroft v. Iqbal*, 129 S.Ct. 1937.

77. *In re Xe Services Alien Tort Litigation*, 2009 WL 3415129, at *15-16.

78. Press Release, Center for Constitutional Rights, Settlement Reached in Human Rights Cases Against Royal Dutch/Shell, Center for Constitutional Rights (June 8, 2009), available at <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell>.

79. There were actually three related cases in this litigation: *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company*. *Wiwa v. Royal Dutch Petroleum* and *Wiwa v. Anderson* were scheduled to begin trial in 2009. *Wiwa v. Shell Petroleum Development Company* was dismissed by the District Court in March 2008. *Wiwa v. Shell Petroleum Development Company*, No. 04-cv-02665-KMW-HBP (S.D.N.Y. Mar. 4, 2008).

80. *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 381 (S.D.N.Y. 2009).

81. *Wiwa*, 626 F. Supp. 2d at 382-385.

82. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

83. *Wiwa*, 626 F. Supp. 2d at 386.

84. *Doe v. Exxon Mobil Corp.*, No. 07-1022, 2009 WL 3112823 (D.D.C. 2009). The case originally included claims under the ATS and the TVPA Claims Act, but these claims were dismissed by the District

sion relying on the “prudential standing” doctrine. The Court observed that “[s]tanding has two distinct requirements: the case-or-controversy requirements of Article III and the prudential limitations imposed by the courts.”⁸⁵ While the parties did not contest Article III standing, the Court based its decision on “the general rule that non-resident aliens have no standing to sue in United States courts”⁸⁶ and found that “when addressing whether non-resident aliens have standing, courts should apply a case-by-case analysis.”⁸⁷ Specifically, the Court found that “the following factors weigh against plaintiffs’ contention that they have standing: plaintiffs allege that members of the Indonesian military committed the torts, and that the alleged torts were committed during a period of conflict.”⁸⁸ Ultimately, the Court held that there is “no reason to find that plaintiffs have standing in this unique factual context.”⁸⁹

III. Litigation in Courts Outside the United States

A. NIGERIA: LITIGATION AGAINST PFIZER

In July 2009, Pfizer agreed to settle criminal and civil charges pending in the state of Kano, Nigeria, stemming from accusations involving the company’s testing of Trovan, an experimental antibiotic drug, on children during a 1996 bacterial meningitis outbreak. The company has been accused of violating international informed consent laws. Under the settlement agreement, Pfizer will establish a US\$35 million fund to benefit participants in the drug trial, and will contribute US\$30 million to health care initiatives in the state of Kano, Nigeria. The remaining US\$10 million will be paid to Kano’s legal costs related to the litigation. Pfizer still faces related criminal and civil charges brought by the Nigerian federal government.⁹⁰

B. UNITED KINGDOM: LITIGATION AGAINST TRAFIGURA

In September 2009, Trafigura, an international commodities trader based in London, agreed to a settlement agreement in the United Kingdom in a case involving thousands of Ivorian plaintiffs who allege that they were injured by waste the company dumped in Abidjan, Ivory Coast, in August 2006. The waste allegedly contained high levels of caustic soda, a sulphur compound, and hydrogen sulfide, and thousands of people are alleged to have suffered vomiting, diarrhea, and breathing difficulties as a result of exposure to the

Court in October 2005. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). The District Court allowed the plaintiffs to amend their original complaint however, and proceed under D.C. tort law. *Mem. & Op.*, *Doe v. Exxon Mobil Corp.*, Case No. 01-1357 (D.D.C., Aug. 27, 2008).

85. *Doe v. Exxon Mobil Corp.*, 2009 WL 3112823, *2.

86. *Id.* at *3 (citing *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144, 152 (D.D.C. 1976)).

87. *Id.* at *3-4 (citing *Cardenas v. United States*, 733 F.2d 909, 914 (D.C. Cir. 1984)).

88. *Id.* at *4.

89. *Id.*

90. See Joe Stephens, *Pfizer to Pay \$75 million to Settle Trovan-Testing Suit*, WASH. POST, July 31, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073001847.html>; Ross Todd, *Pfizer Settles Drug Testing Case with Nigerian State for \$75 million*, AM. LAW., Aug. 3, 2009, <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202432695855>.

waste. At least sixteen deaths in Ivory Coast have been blamed on exposure to the waste.⁹¹ The action in the United Kingdom represented one of the largest class actions ever filed in British courts.⁹² Under the settlement agreement, each of the 31,000 claimants is entitled to approximately £950.⁹³

In September 2009, Okechukwu Ibeanu, the U.N. Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, delivered a report to the U.N. Human Rights Council in which he noted the “protect, respect, and remedy” framework of the UN SRSG, and found that Trafigura’s due diligence efforts, in fulfillment of its obligation to respect human rights, had been inadequate in the handling of the waste that was delivered to the Ivory Coast.⁹⁴

C. UNITED KINGDOM: LITIGATION AGAINST MONTERRICO METALS PLC

In October 2009, the High Court of Justice in the United Kingdom issued a freezing injunction obligating Monterrico Metals PLC⁹⁵ to keep at least £5 million of its assets in the United Kingdom pending the outcome of litigation stemming from accusations that the company, and its Peruvian subsidiary, Rio Blanco Copper SA, participated in the torture and arbitrary detention of a group of thirty-one indigenous Peruvians who were protesting the companies’ Rio Blanco copper mine.⁹⁶ Monterrico Metals has asserted that its officers and employees did not have any involvement in the alleged abuses, and that it cannot be held responsible for the actions of the Peruvian police. The plaintiffs in the case, *Mario Alberto Tabra Guerrero & Others v. Monterrico Metals PLC & Rio Blanco Copper SA*, allege that the mining company knew that, by calling in a police force known to abuse protestors, the company was exposing them to the risk of human rights violations. The alleged events took place in 2005. The original request for a freezing injunction was made, and granted, in June 2009. The parties had a full hearing of their claims in July 2009.⁹⁷

91. In 2007, Trafigura paid nearly US\$200 million to the government of Ivory Coast without admitting liability. Trafigura has stated that it hired Compagnie Tommy, a company in the Ivory Coast, to handle the waste. *Two Jailed Over Ivorian Pollution*, BBC NEWS, Oct. 23, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7685561.stm>.

92. Additional information on the various lawsuits filed against Trafigura related the dumping of toxic waste in Ivory Coast can be found at Business & Human Rights Resource Centre, Trafigura Lawsuits, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire> (last visited Jan. 20, 2010).

93. Loucoumane Coulibaly & Reed Stevenson, *Trader Trafigura Says Settles Ivorian Waste Case*, REUTERS, Sept. 20, 2009, <http://www.reuters.com/article/idUSLK593911>.

94. See Okechukwu Ibeanu, Report of the Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, 85-88, U.N. Doc. A/HRC/12/26/Add.2 (Sept. 3, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-26-Add2.pdf>.

95. Monterrico Metals Plc is owned by Zijin Mining Group, a Chinese consortium.

96. Mario Alberto et al. v. Monterrico Metals PLC [2009] EWHC 2475 (QB).

97. See Ian Cobain, *British Mining Company Faces Damages Claim After Allegations of Torture in Peru*, THE GUARDIAN, Oct. 18, 2009, <http://www.guardian.co.uk/world/2009/oct/18/peru-monterrico-metals-mining-protest>; Paddy McGuffin, *Britain-Torture, Murder and Metal Profit*, MORNING STAR, Oct. 20, 2009, <http://www.allbusiness.com/legal/torts-damages/13254646-1.html>.

D. CHILE: LITIGATION AGAINST AGUA MINERAL CHUSMIZA

In November 2009, the Second Chamber of Chile's Supreme Court issued a landmark ruling on indigenous water rights in a case involving the comparative rights of two Aymara ethnic communities in the Tarapacá region in northern Chile and Agua Mineral Chusmiza, a company seeking the rights to bottle and sell freshwater from a source used historically by Aymara indigenous residents.⁹⁸ The ruling ended a fourteen-year legal dispute on community water rights in the world's driest desert, and highlights the growing pressures on limited freshwater resources.

In its decision, the Supreme Court rejected an annulment request submitted by Agua Mineral Chusmiza and upheld rulings by both the Iquique Court of Appeal and the Pozo Almonte local tribunal. The ruling applied Chile's Indigenous Law (Law No. 19.253, of 1993) and Convention 169 of the International Labor Organization (ILO 169), in what constitutes the first judicial application of ILO 169 in Chile. According to the Chilean constitution, human rights conventions that have been ratified by the country have the highest hierarchical value in the national legal system, and therefore, ratification of ILO 169 means Chilean laws must be consistent with the rules of the convention. Chile ratified ILO 169 convention in September 2008, and it took effect on year later.

The Court's decision acknowledged that the Aymara communities of Chusmiza and Usmagama have "customary water rights" to the Chusmiza spring, located in land that belongs to Agua Mineral Chusmiza.⁹⁹ The Supreme Court ruled that "the recognition of these rights . . . in favour of the Aymara and Atacameña communities, does not only involve the waters found in the land that is registered as property of these communities but also the waters that feed the indigenous communities despite being found in lands that belong to third parties."¹⁰⁰ The circumstance that the water spring is located in the property that belongs to the company does not prevent the application of the special protection contained in Article 64 of the Indigenous Law, whose purpose is to "guarantee the water supply . . . which is coherent with the principle that such protection must comprise all waters that are found in the territories that have been occupied or utilized by the beneficiary communities from pre-Columbian times."¹⁰¹ Ultimately, the Court ruled *unanimously* in favor of granting a water flow of nine liters per second to the Aymara communities, based on "the duty of society in general and of the State in particular, to protect, respect, and promote the development of the indigenous peoples, their cultures, families and communities (art 1 par. 3 of Law No. 19.253)."¹⁰²

98. *Aymara Water Rights*, (Alejandro Papic Dominguez Con Comunidad Indígena Aymara Chusmiza v. Usmagama), No. 2840/2008 (Nov. 25, 2009).

99. *Id.* ¶¶ 4-5.

100. *Id.*

101. *Id.* ¶ 7.

102. *Id.* ¶ ¶ 4-5.