THINK GLOBALLY SUE LOCALLY

Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases



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THINK GLOBALLY, SUE LOCALLY: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases

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**None of the views or statements contained in this report are necessarily shared or approved by any company or individual referenced herein.*

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Executive Summary

THINK GLOBALLY, SUE LOCALLY: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases

Over the past 15 years, there has been a sharp rise in lawsuits brought against United States companies, as well as foreign companies with a substantial U.S. presence, that are premised on alleged personal or environmental injuries that occur overseas. Most of those transnational tort lawsuits have been filed in the United States by plaintiffs' class action firms, public interest attorneys, and Non-Governmental Organizations ("NGOs"); some have been brought in federal courts under the Alien Tort Statute (28 U.S.C. § 1350) ("ATS"), while many more have been filed in state courts under traditional bases of jurisdiction. A growing number of notable actions also have been filed in foreign courts, with the plaintiffs seeking to obtain judgments they can enforce in the United States.

With increasing frequency, plaintiffs, their attorneys, and their advocates are employing aggressive out-of-court tactics that approach, straddle, and sometimes cross ethical lines in seeking to gain litigation advantages. The tactics, which may vary between cases, have clearly demonstrable patterns. Among them are:

- *Aggressive media tactics*: Sometimes launched with the help of public relations professionals, plaintiffs and their advocates use a variety of media-related tactics to broadcast their cause, garner support, and inflict negative publicity on corporate defendants.

- *Community organizing tactics*: Plaintiffs and their representatives organize protests and boycotts of the goods or services of corporate defendants, partner with NGOs and advocacy groups in advancing their claims, and engage in other community organizing tactics.

- *Investment tactics*: Plaintiffs commonly pursue corporate stock divestment efforts, introduce shareholder resolutions, attempt to influence institutional investors, contact the Securities and Exchange Commission ("SEC") or state regulatory authorities to initiate investigations, and/or speak at shareholder meetings.

- *Political tactics*: Plaintiffs' lawyers often seek to utilize Congressional hearings and other political processes and pressures in the United States and abroad.

- *Fraudulent misconduct*: Although this study focuses on out-of-court tactics, in several instances, there have been judicial findings or credible evidence of plaintiffs and their lawyers fabricating serious or fatal harms, of judicial corruption, and of material misrepresentations by plaintiffs' counsel. Although this troubling conduct arose in differing circumstances and perhaps from differing motives, the nature of transnational tort actions – involving facts that can be difficult to verify, foreign plaintiffs frequently living in abject poverty, zealous attorneys acting from greed or cause, and foreign judiciaries susceptible to mischief – appear to create particular vulnerabilities for misconduct. Also observed were a variety of aggressive legal tactics, including overt forum shopping, creative attempts to avoid the federal court removal trigger in the Class Action Fairness Act, filing multiple actions in the U.S. and sometimes abroad covering the same subject matter, and suing in overseas courts only foreign corporations but not state companies or state-owned entities.

Through the out-of-court tactics, plaintiffs and their advocates increasingly are seeking to obtain advantages

in litigation through negative publicity and other external pressures on corporate defendants, and sometimes in foreign legal systems that maintain a fragile hold on consistency and fairness. In some cases, litigation may serve as a tactic itself, part of a larger corporate campaign intended to pressure companies to pursue desired changes. Although this study does not reach conclusions regarding the financial or economic impact of the tactics or cases studied, it is logical that companies assessing whether to pursue or continue overseas operations in emerging markets must consider the potentially significant risks associated with the trend.

The Case Studies

BACKGROUND

The ATS, part of United States law since 1789, permits non-U.S. nationals to file actions in U.S. federal courts based on "violations of the laws of nations." In the late 1970s there began a trend of using the ATS to bring actions against foreign officials and repressive regimes to establish human rights violations abroad, which often were not opposed but brought primarily to document and validate human rights abuses. In the mid-1990s, corporate defendants began to be targeted with regularity.

To date, there have been some 150 ATS cases filed against corporations, with 120 (~80%) arising in the past 15 years. The majority of ATS cases now filed are against corporate defendants, and since 1994, roughly 6 to 10 new corporate ATS cases have been filed annually. At present, roughly one-third of the corporate cases involving ATS claims remain pending before federal trial or appellate courts. Of the 150 ATS cases involving colorable ATS-related claims, 21 industries in total have been the subject of one or more ATS lawsuits – most commonly the extractive industry, the financial services industry, food and beverage companies, transportation companies, manufacturing companies, and communications/media companies. The cases have arisen in roughly 60 different countries, most commonly from the Middle East, South America, Africa, and Asia. They involve a variety of alleged underlying conduct, most commonly acts by foreign security forces, labor-related issues, environmental claims, or against companies that provide support, goods or services to allegedly repressive political regimes. These ATS cases have been filed in some 25 different federal districts, but with substantial clusters in federal courts in New York and California. Most have been filed by a relatively small cadre of NGOs, public interest firms, and class action firms, who may obtain substantial recompense – either to enrich personal wealth or to fund future cases – if they succeed at trial or in securing a lucrative settlement. While most of the cases have resulted in dismissals, there have been more trials (mostly resulting in defense verdicts), plaintiffs' judgments (ranging from $1.5 million to $80 million), and settlements (ranging from $15.5 million to reportedly $30 million) in recent years.

In addition to ATS cases, a much larger pool of non-ATS cases based on transnational torts have been brought in United States federal and state courts over the past decade. These arise from corporate activities around the globe, and often involve individual actions. While these cases typically have been brought in the U.S. in the first instance, recently plaintiffs have begun seeking to obtain recoveries in foreign courts that they then attempt to enforce in the U.S. As with the ATS cases, the success rates in these matters have been mixed, with many dismissals and several multi-million dollar jury verdicts or settlements. When actions are brought in foreign jurisdictions, U.S. companies may face litigation in unpredictable legal systems subject to political and other external influences.

Accompanying this rise of transnational tort cases, wherever they originate, are an increasing variety of out-of-court tactics by plaintiffs and their advocates. The tactics, and the motives behind them, are clearly visible in the two case studies.

DBCP IN NICARAGUA: A TRILOGY OF FRAUD

The brazen tactics of plaintiffs' lawyers in the transnational tort context are readily visible in the cases arising from Nicaragua involving claimants allegedly exposed to the pesticide Dibromochloropropane ("DBCP") on banana plantations. After repeated dismissals in U.S. courts, plaintiffs' lawyers lobbied for the passage of Special Law 364 in Nicaragua. The law stripped basic due process protections from defendant companies, and is intended to present a scheme so hostile to corporate defendants that they will choose to litigate in the United States and thus allow plaintiffs to circumvent *forum non conveniens* dismissals. An influx of U.S. plaintiffs' lawyers then descended on Nicaragua.

As judicial findings detail, they engaged in a variety of dubious practices to enlist clients, many of whom never worked on banana plantations or suffered the injuries alleged, and taught them their "stories." They also engaged in a conspiracy with laboratories to fabricate scientific evidence, and with a local Nicaraguan judge to "fix" judgments in Nicaragua for later enforcement in the U.S.

Their efforts were accompanied by a host of tactics designed to pressure the defendant companies, including efforts by sympathetic NGOs in the U.S. The tactics included documentaries that lauded the plaintiffs' attorneys and harshly criticized the defendants, marches and protests, massive rallies, radio advertising, issuing press releases, and numerous other measures.

The tactics have not yielded success, however, either as direct actions filed in the U.S. or as proceedings to enforce judgments issued in Nicaragua. In 2004, plaintiffs' attorney Juan Dominguez filed three separate actions on behalf of purported banana workers in Los Angeles County Superior Court, seeking damages as a result of alleged exposure to DBCP in Nicaragua. The three cases are *Mejia v. Dole Food Co.*, Case No. BC 340049 ("*Mejia*"), *Rivera v. Dole Food Co.*, Case No. BC 379820 ("*Rivera*"), and *Tellez v. Dole Food Co.*, Case No. BC 312852 ("*Tellez*"). In November 2007, a jury returned a partial plaintiffs' verdict in *Tellez*. When the case was on appeal, one of the defendants discovered and notified the court of the rampant misconduct in Nicaragua. After a three day hearing focusing on the alleged fraud, Judge Chaney dismissed the *Mejia* and *Rivera* cases, finding that many of the plaintiffs never had been employed at the plantations, and detailing the conspiracy in Nicaragua. She found that U.S. plaintiffs' lawyers had conspired with a Nicaraguan judge to fix judgments in Nicaragua. Regarding the cases at hand, she found that Dominguez and his Nicaraguan law partner suborned perjury, bribed and intimidated witnesses, intimidated defense investigators, and made false allegations of bribery against the defendants.

Efforts to enforce massive judgments issued in Nicaragua under Special Law 364 encountered similar problems. In August 2007, a group of 150 alleged former Nicaraguan banana workers, claiming they had been exposed to DBCP, filed suit in Florida state court to enforce a $97 million Nicaraguan judgment against Dole Food, Dow Chemical, Occidental Petroleum and Shell Oil. That judgment had been obtained under Special Law 364, and issued by the Nicaraguan judge identified by Judge Chaney in her opinion as being part of the larger conspiracy. After the case was removed to federal court, Judge Paul Huck refused to enforce the judgment. In *Sanchez Osorio v. Dole Food Co.*, Judge Huck ruled that (1) the Nicaraguan courts did not have jurisdiction over the defendants due to an opt-out provision in Special Law 364 that the defendants had invoked; (2) Special Law 364 did "not even come close" to the "basic fairness" required by the "international concept of due process"; (3) the marked shortcomings in the process were incompatible with Florida's public policy; and (4) "the judicial branch in Nicaragua … does not dispense impartial justice" and the underlying trial in Nicaragua was conducted in an "*ad hoc*, unpredictable, discriminatory and confusing manner."

Similarly, *Franco v. Dow Chemical Co.,* was a 2003 action filed in Los Angeles to enforce a $489 million Nicaraguan judgment on behalf of 465 alleged former Nicaraguan banana workers. The Nicaraguan complaint was filed against The Dow Chemical Company and Shell Oil, as well as Dole Food *Corporation*, an entity that does not exist, but not the Dole Food *Company*, the agricultural concern. Before they filed the enforcement action, the plaintiffs' lawyers became aware that no judgment could be enforced against Dole Food Company, as it was absent from the Nicaraguan litigation. Nevertheless, they filed their judgment enforcement action against Dole Food Company, relying not on the actual writ of judgment, but on an affidavit of a notary public that mistranslated Dole Food *Corporation* (the nonexistent entity) into Dole Food *Company*. Although they were aware of the issue, the plaintiffs' lawyers in their briefs falsely relied on the mistranslation and other inaccuracies surrounding the substance of the judgment. Those misstatements were made in state court, and then repeated to federal district and appellate courts after the case was removed. On the eve of the appellate argument, the plaintiffs dismissed the appeal upon advice of appellate counsel. A Special Master was appointed to consider the attorneys' alleged misconduct. In March 2008, he issued a Report and Recommendation, amended late the following year, finding that the filings "were made in bad faith," that the lawyers' "factual contentions were so weak – they were baseless and made without reasonable and competent inquiry – that they provide objective evidence of improper purpose," and their "efforts went beyond the use of 'questionable tactics' – they

crossed the line to include the persistent use of known falsehoods . . . ." He suggested fines totaling nearly $400,000.

CHEVRON-ECUADOR: 17 YEARS OF LITIGATION

In the series of matters surrounding the claims against Texaco arising from its activities in Ecuador, the study observed many of the same legal and out-of-court activities. After the dismissal of an ATS case alleging environmental degradation by a Texaco subsidiary in connection with operations in Ecuador's Oriente Region, which was being financed by a Philadelphia plaintiff's firm, the primary plaintiffs' lawyer helped file two lawsuits, one in the U.S. and one in Ecuador.

In the U.S., *Gonzales v. Texaco* was a personal injury action filed in 2006 in federal court in San Francisco. Although the plaintiffs claimed to suffer from cancer as a result of Texaco's operations, during discovery it became clear that several of the plaintiffs' claims of illness were blatantly false. When the court learned of these fabricated claims, it dismissed the three plaintiffs and issued Rule 11 sanctions *sua sponte* against the plaintiffs' counsel. It found that the plaintiffs did not understand or expect that a lawsuit would be brought in their names, that counsel "relied on the unsophistication of plaintiffs" in bringing the cases, and that "[t]his is not the first evidence of possible misconduct by plaintiffs' counsel in this case." The court granted a motion for summary judgment dismissing the rest of the case.

In Ecuador, a lawsuit was filed in Lago Agrio, alleging environmental harms. The same Philadelphia plaintiffs' firm is financing the suit. The Amazon Defense Coalition, which had been represented by the plaintiffs' counsel until 2006, is the trustee in charge of administering any money awarded for remediation. As in the DBCP context, the lawsuit was based on a newly enacted law, lobbied for by the plaintiffs' lawyer, for which he sought retroactive application.

Also as in the DBCP context, the plaintiffs have unveiled a striking series of out-of-court tactics to pressure Chevron (a subsidiary had merged with Texaco) to settle. They have received substantial assistance from a variety of NGOs in Ecuador and the U.S. with whom they have been working, as well as from a powerful public relations and lobbying team. The tactics have included: internet campaigns, which include "fact" sheets, press kits, press releases, letter-writing and other such campaigns, social and scientific reports on different topics, calls for boycotts and city resolutions, news items, photos, videos, plaintiffs' court documents, videos and mini-documentaries created by plaintiffs, television ads, and links to other plaintiffs' websites; an alternative annual report created by a sympathetic NGO; soliciting the creation of the film *Crude* to tell the plaintiffs' story; creating plaintiff-friendly videos on YouTube; recruiting celebrities to champion their cause; appearances in television and radio broadcasts; conducting interviews and authoring opinion editorials in newspapers and magazines; introducing shareholder resolutions, targeting institutional investors for divestment, and contacting regulatory authorities; and engaging a variety of political efforts in the U.S.

In addition, as in the DBCP context, the Lago Agrio case has been beset by questionable tactics within the judicial system. In late 2009, three videos surfaced that appear to show the judge then-presiding over the Lago Agrio litigation confirming that he will rule against Chevron and hold the company liable for roughly $27 billion. At a minimum, the videos display the judge's clear plaintiff sympathies. Likewise, Chevron identified compelling evidence calling into question the impartiality of the "independent" expert appointed by the court, who determined that Chevron is responsible for that $27 billion in damages.

There also have been overt political efforts designed to influence the court. Ecuadorian President Rafael Correa has openly championed the plaintiffs' cause, and called upon the State Prosecutor to investigate Chevron personnel for fraud in signing remediation contracts with the State. Although allegations to that effect had been deemed baseless twice before, the State Prosecutor issued charges and then recused himself from the case.

CASE STUDIES CONCLUSION

In the two transnational tort case studies, there were ample differences in the facts, postures, and allegations. Yet in both circumstances, plaintiffs and their representatives advocated for the passage of retroactive foreign laws that provided opportunities for litigation to proceed, there are judicial findings of outright fraud by certain plaintiffs and their lawyers, it appears that highly impoverished and susceptible plaintiffs may have been induced to participate in dubious litigation schemes, there is evidence of local corruption and pres-

sures on judiciaries with reputations for malleability, there is evidence of impropriety by local laboratories and/or experts, and there are manifest out-of-court tactics designed in different ways to pressure the corporate defendants. The tactics seem designed to influence the corporate defendants in the litigation through pressures outside the courtroom – negative publicity, shareholder skepticism, regulatory and political inquiries, and other means. Through such external leverage, the plaintiffs' attorneys try to inflict a maximum penalty on the corporations defending themselves in court.

The International Plaintiffs' Lawyer Playbook: Patterns of Tactics In The Larger Set of Transnational Tort Cases Reviewed

INTRODUCTION

The study did not identify the same type of evidence or judicial findings of fraudulent activities in the other cases reviewed, but many of the same aggressive strategies outside the courtroom by plaintiffs and their advocates, operating from a similar holistic litigation approach, clearly were identified. On the whole, the study considered some 25 individual and consolidated lawsuits (exceeding 40 in total based on individual filings). The cases all are tort actions involving alleged overseas harms that have been filed over the past 15 years against substantial corporate defendants. The cases differ widely in their facts, posture, and in other respects. Within those cases, the study closely scrutinizes some 24 tactics and reaches conclusions based on publicly available materials. Because the study is based on public information, the patterns and tactics likely are more pronounced than appear herein.

GENERAL ISSUES AND PATTERNS

In the rest of the cases, outside of the DBCP and Chevron in Ecuador matters, there appeared at least one and usually many more of the 24 tactics studied.

Patterns Observed

The tactics studied can be grouped according to four different categories: the use of the media, community organizing tactics, investment tactics, and political tactics.

Timing Considerations

From an evolutionary standpoint, the number and variety of tactics continue to grow. Although in the 1990s certain cases generated substantial publicity, that appears to have emanated organically from the underlying events rather than from conscious efforts of plaintiffs or their advocates to further litigation goals. In essence, the study observed a greater frequency of tactics in more recent years, as plaintiffs and their attorneys are learning new gambits from each other and recycling them in their cases. Several of the cases studied also had plaintiffs' attorneys in common, and many of the plaintiffs' lawyers seem to have worked together in other matters. The growth of tactics also is perhaps attributable in part to the traditional lack of success plaintiffs have had in the transnational tort cases, as the tactics may be perceived as a means of overcoming the historical difficulties in the cases.

Not only have the variety and uses of tactics evolved over time, but how they have been used has become more sophisticated. For example, in several instances to help generate publicity, plaintiffs coordinated the filing of lawsuits with various events, such as the release of a film about the matters at issue or a shareholder event.

Case Variances

While in every case there appeared one or more of the tactics studied, substantial variances in the number and types of tactics exist between cases. Some cases involved nearly all of the tactics. Others involved relatively few. While in certain cases the relative paucity of tactics is explicable – such as those involving less well-known corporate defendants, relatively rapid dismissal by the courts, or gag orders – for others the reasons are not readily evident. In addition, in some cases documentation directly connects the tactics to plaintiffs and their attorneys; in others, public information does not include such a connection between activities being conducted by sympathizers, and the plaintiffs or their representatives. That does not mean that the plaintiffs did not play a role in organizing or implementing the tactic, but only that the study identified no information that makes such a connection. In fact, plaintiff involvement might be inferred since the alternative possibility – that similar

tactics coincidentally were performed on a repeated basis without some plaintiff role – seems less plausible.

Litigation as a Tactic and Larger Campaigns

It is seminal to note the existence of larger anti-corporate campaigns and the use of litigation itself as a tactic. For several of the cases studied, there were extant coordinated anti-corporate efforts that bear a direct relation to – and perhaps are the genesis for – the lawsuits themselves. In several other cases, plaintiffs' attorneys, shortly after having had cases dismissed, filed lawsuits that largely repeated the underlying allegations in the cases just rejected. In these subsequently filed actions, success on the merits almost certainly cannot be the primary motive for their initiation. Instead, in cases such as these, the out-of-court tactics may not be designed to further litigation goals, as much as the filing of the litigation serves as an outlet to generate further negative corporate publicity. In those cases, the litigation itself can be viewed as one tactic among several that the plaintiffs and their attorneys may utilize to pressure corporations to achieve certain larger social goals.

Media Tactics

The majority of the plaintiffs' tactics are media-related. The study observed them in all of the cases reviewed. It is common for plaintiffs and their attorneys to generate media attention by issuing press releases and holding press conferences timed to coincide with external events, such as announcements by the companies or developments in the legal cases. While occasionally plaintiffs are profiled or otherwise have an opportunity to plead their cause in mass media, the majority of their efforts do not appear to reach larger audiences.

Internet campaigns

The Internet is a major focus of plaintiffs and their advocates (21 cases). A website is inexpensive and easy to maintain, and information can be fully controlled. The Internet also has remarkably broad reach, operating on a worldwide basis, and can host multi-media sources.

Case-related internet campaigns operate as public relations, advocacy, and community organizing vehicles, and commonly consist of various elements. They include "fact" sheets setting out the core case details from the plaintiffs' perspectives; summaries of the legal proceedings and legal documents; press kits, composed of media backgrounders, key documents, press releases, and other case details for members of the media interested in providing coverage; a collection of the press releases that have been issued by the plaintiffs' attorneys or sympathetic third-parties; reports of various types; favorable news articles; campaign posters and postcards to express support for the effort; photographs of different varieties; videos of plaintiffs, attorneys, and others; trial coverage, where applicable; and blogs in which participants, typically pro-plaintiff, can discuss their views of the case.

A particular focus of the internet campaigns are calls-to-action that frequently include: exhortations for letter writing campaigns to company executives, board members and defendant supporters, along with form letters; student activism kits, which may describe how students can become educated about the issues and then educate others on campus through forums and rallies; calls for protests; demands for cities, universities, and the public to boycott the defendants' products, and explanations for how the public citizenry can seek the same; and calls for sympathizers to write op-eds or letters to the editor, attend trial or hearings, host video screenings of sympathetic documentaries, and engage in other activism. Many of the internet campaigns also include connections to the social media sites Facebook and Twitter, where part of the campaign is lodged for supporters.

News articles

The study identified articles in newspapers, journals, and magazines (in print and on-line) in every case studied. Articles spike around the time of major events in the lawsuits. Plaintiffs or their attorneys also appeared in one or more articles in every case, often providing dramatic and inflammatory quotes. Some of those articles appeared organically, but they often result from press releases issued by plaintiffs' attorneys and organizations (20). In several instances, the study identified op-eds and articles directly authored by plaintiffs or their advocates. Obviously, through such articles, the plaintiffs and their attorneys hope to raise the profile of their action, and advocate and draw sympathy to their cause, while inflicting sharp negative publicity on the corporate defendants.

Television/radio broadcasts

Fifteen of the cases studied included television and radio broadcasts, a number that is likely unduly low because of the lack of publicly available materials for research. The broadcasts typically appear on local stations, with a minority involving national coverage. They include interviews with plaintiffs and their attorneys, interviews with individuals or groups sympathetic to the plaintiffs, and coverage of various case-related or activist events. While some of the television and radio broadcasts developed organically, the programs often have a pro-plaintiff slant or repeat the allegations in the case, thereby furthering negative corporate publicity. Television and radio broadcasts often are posted on plaintiffs' attorneys' websites, expanding their reach and continuing their shelf-life. As with all media coverage, television and radio appearances increase at the filing of a lawsuit or commencement of a trial, any important court rulings, and around events planned by plaintiffs' organizations, which are designed to garner attention and publicity.

Films, documentaries & mini-documentaries

Thirteen of the cases studied included related films, documentaries and mini-documentaries. While in some instances it is unclear whether plaintiffs are directly involved in the funding or artistic direction of the documentaries, in most the films are made with the cooperation of the plaintiffs or their attorneys, who often play central roles. Plaintiffs and their advocates help advertise the films, include clips on their websites and internet campaigns, and plan activism events around showings. In this way, plaintiffs use the documentaries to generate more publicity for themselves, create more negative publicity for corporate defendants, and serve as a teaching tool about the underlying cause.

In particular, the "mini-documentary" – akin to a political campaign video – made by plaintiffs or their attorneys has become popular. These typically run for roughly 10 minutes, emphasize key arguments and evidence, can carry the visual message of the plaintiffs in a powerful manner, and may include celebrity participation. Their brevity, and the fact that they typically are posted on YouTube or plaintiffs' websites, renders them readily accessible to viewing audiences. Some of these videos have been seen by tens of thousands of viewers, as anyone with an internet connection can access them. At least one was released shortly before a scheduled trial, suggesting an intent to increase pressure on the corporate defendants and rally supporters, if not influence the jury pool.

Other media publicity: press conferences, reports and seminars

Plaintiffs and their attorneys may hold press conferences to coincide with the filing of lawsuits and other events (7), or speak on university campuses and in other fora (5) to publicize their cases and encourage activism. Another tactic is the publication of detailed subject matter reports (4), whether prepared by plaintiffs' organizations themselves, or by outside consultants, on the issues surrounding the lawsuits. Sometimes the reports are based on supposed evidence collected by the plaintiffs and their advocates through in-country "fact finding" missions. They are often posted as part of plaintiffs' internet campaigns, and provide an occasion for the plaintiffs to launch a media event, such as a press release or press conference.

Community Organizing Tactics

Partnering with like-minded organizations

In most of the cases studied, one or more of the plaintiffs' attorneys were from non-profit legal organizations or public interest firms. Thus, they maintain relationships with like-minded human and labor-rights organizations, leading to joint efforts in advancing their common causes (15). In six cases, plaintiffs' organizations formed new coalitions to support the legal action, and labor unions are a frequent partner for the plaintiffs' organizations in cases alleging mass labor violations and violence against labor unionists. In two instances observed, plaintiffs' attorneys filed the lawsuit in part on behalf of institutional plaintiffs. In all of the cases but one, plaintiffs' organizations were observed working or partnering with like-minded groups on certain activism events, internet campaigns or media publicity.

Protests

Protests were observed in most of the cases (15). Plaintiffs and their advocates often organize protests near the defendants' corporate headquarters or to coincide with an event that involves a corporate defendant, such as shareholder meetings.

Boycotts

Boycotts were observed in most of the cases (17). That can include calls for boycotts of goods and services. Schools and universities, in particular, are common targets for boycott efforts.

Investment Related Tactics

The study identified numerous instances of investment-related tactics (17), although the study did not identify evidence that the strategies succeeded in any measurable respect.

Plaintiffs' attendance at annual and shareholder meetings

Given its ease and lack of expense, shareholder meeting participation is a popular plaintiffs' tactic (8). They often generate media attention in the process, and plaintiffs have timed the filing of complaints to coincide with annual shareholder meetings. Of the tactics studied, attendance at shareholder meetings also is among the most likely to be underrepresented in the number of times it has been used, since it may not generate the type of publicly retrievable documentation primarily used in this review.

Introducing resolutions at shareholder meetings

Introducing resolutions was the most frequently identified investment tactic (16). Although the resolutions rarely pass, they are designed to raise the plaintiffs' concerns to the company's board of directors, management, employees, and shareholders. In particular, plaintiffs may encourage institutional investors to file the resolutions, no doubt to send a message of discontent from a substantial shareholder.

Of the cases reviewed, in some instances the involvement of the plaintiffs was clear; in others, it was not. That does not signify that the plaintiffs were uninvolved, but only that publicly available evidence of plaintiff involvement was not obtained. The pattern of resolutions being introduced that bear a correlation to the facts at issue in the underlying cases, however, certainly raises a question – if not an inference – of plaintiff involvement.

Pressuring shareholders to divest stock in defendant companies

Pressure to divest stock holdings was observed in seven cases. The study observed several instances of modest divestiture. Those generally followed negative ratings on defendant companies by investment firms who make decisions based on social criteria, which often cited then-outstanding litigation. Among those most likely to divest are universities and pension funds. In most of the instances of divestiture, public information did not contain a direct causal link to the plaintiffs, though that cannot be construed to signify a lack of plaintiff involvement. Notably, the impact of the divestiture efforts did not appear to be especially significant in any instance reviewed.

Political Tactics

Of the categories of tactics studied, political tactics (14) appeared the least frequently.

Congressional hearings

In 10 of the cases reviewed, the plaintiffs or their supporters testified at Congressional hearings. In several instances, Congressional hearings were held to immediately precede scheduled trials, likely a tactical maneuver to increase publicity and further pressure corporate defendants and perhaps influence judges and juries.

Other political pressure

Plaintiffs and their advocates have sought to heap other forms of political pressures on corporate defendants (10). That includes seeking supportive letters from political figures and submitting letters to U.S. courts by foreign governments. On a local level, there was at least one instance of a city passing a resolution supportive of the plaintiffs, and plaintiff-related efforts to pass many more. Other political pressures observed include politicians participating in press conferences, submitting supporting briefs to courts in favor of plaintiffs, and visiting affected plaintiffs on fact-finding missions and then releasing plaintiff-friendly reports.

Conclusions

Plaintiffs are employing a variety of aggressive out-of-court tactics in transnational tort cases designed to pressure corporate defendants involved in litigation. Although the cases reviewed differed widely in numerous key respects, the two most visible links between the cases were: (1) they involved transnational tort cases against substantial companies, and (2) they involved extra-legal tactics employed by plaintiffs, their representatives, and their sympathizers. These efforts emanate from a desire to maximize leverage against corporate defendants in connection with filed litigation and, in some cases, are one tactic that are part of a larger campaign against the targeted company. In all likelihood, that holistic approach has been furthered, at least in part, by a perceived need to overcome a historical lack of success on the merits in the cases.

Looking forward, the overall trends identified can be expected to continue and even grow. Transnational tort cases themselves are on the rise, and the prospect of substantial recoveries provides potential personal enrichment to the lawyers, as well as the capacity to finance future cases. Plaintiffs' lawyers are learning tactics from each other, and today use more and varied tactics than in years past. Transnational tort cases also are remaining in litigation for longer periods of time, which allows for the use of additional tactics.

Finally, the economic threats posed by these lawsuits and corporate campaigns are difficult to wholly ignore. Certainly, multi-national companies seeking to invest in or enter emerging markets must be conscious that a perceived failure to adhere to certain social expectations – sometimes regardless of local legal requirements – can lead to a high-profile lawsuit seeking a large damage award, and with it an accompanying set of aggressive tactics aimed at hurting the company's image. While this study does not consider or reach conclusions on the potential deterrent effects to companies pondering such overseas investments, it seems logical that such effects do, or given the trends, soon will exist.

Introduction

Over the past 15 years, there has been a sharp rise of lawsuits brought against United States domiciled companies, as well as foreign companies with a substantial U.S. presence, that are premised on alleged personal or environmental injuries that occur overseas. Most of those lawsuits have been filed in the United States by plaintiffs' class action firms, public interest attorneys, and Non-Governmental Organizations ("NGOs"); some of these U.S. lawsuits have been brought as human rights cases in federal courts under the Alien Tort Statute (28 U.S.C. § 1350) ("ATS"), while many more have been filed in state courts under traditional bases of jurisdiction. A growing number of notable actions also have been filed in foreign courts, with the plaintiffs seeking to obtain judgments they can enforce in the United States.

With increasing frequency in these high-stakes transnational corporate tort cases, plaintiffs, their attorneys, and their advocates are employing aggressive out-of-court tactics that approach, straddle, and sometimes cross ethical lines in seeking to gain litigation advantages. The tactics, which run the spectrum from the subtle to the brazen, vary between cases. Nonetheless, a review of transnational tort cases reveals clearly demonstrable patterns. Among them are:

- *Aggressive media tactics*: Every case reviewed included plaintiff media-related efforts. While the degree and type of media usage varied substantially between cases, some include slick media strategies launched with the help of public relations professionals. The plaintiffs' media strategies often included running sophisticated internet campaigns, sponsoring incendiary documentaries and mini-documentaries, using celebrities to champion their legal causes, issuing press releases and holding press conferences, and otherwise seeking to generate public attention of different types.

- *Community organizing tactics*: In nearly every case reviewed, plaintiffs, their lawyers, or their advocates engaged in community organizing tactics of some sort. That includes publicized protests, boycotts of the goods or services of corporate defendants, and partnering with NGOs and advocacy groups in advancing their cause.

- *Investment pressures*: As reflected in the cases reviewed, investment-oriented tactics commonly are seen in the transnational tort context. That includes tactics designed to create unease among stockholders and drive down stock prices, whether through divestment efforts, influencing institutional investors to introduce shareholder resolutions or divest, contacting the Securities and Exchange Commission ("SEC") or state regulatory authorities to initiate investigations, and speaking at shareholder meetings.

- *Political pressures*: Political pressures, in the United States and abroad, also constitute an identifiable trend in the cases reviewed. Plaintiffs and their advocates frequently initiated, and participated in, Congressional hearings held by sympathetic politicians, obtained letters of support signed by political figures, and sought local government resolutions condemning the activities of corporate defendants. In cases litigated abroad, plaintiffs may likewise enlist the support of foreign politicians.

- *Fraudulent misconduct*: In addition, although the study focuses on out-of-court tactics, in several instances, there have been judicial findings or credible evidence presented of misconduct by plaintiffs or their representatives. Plaintiffs or their attorneys, claiming that multi-national companies caused them serious or fatal harms in their native lands, fabricated alleged injuries and engaged in schemes of varying depth and complexity to conceal that fact. Other cases have findings or strong evidence of corrupt or tainted foreign legal proceedings. In several matters, courts have noted material misrepresentations by plaintiffs'

counsel, including the subornation of perjury, and additional questionable legal and strategic efforts. Although this troubling conduct arose in differing circumstances and perhaps from differing motives, the nature of transnational tort actions – involving facts that can be difficult to verify, foreign plaintiffs frequently living in abject poverty, zealous attorneys acting from greed or cause, and foreign judiciaries susceptible to mischief – appear to create particular vulnerabilities for misconduct.

Although the motives behind such tactics must in some cases be inferred, they are rather transparent. Plaintiffs and their advocates increasingly are seeking to obtain advantages in litigation through negative publicity and other external pressures on corporate defendants, and sometimes in foreign legal systems that maintain a fragile hold on consistency and fairness. In addition, in some cases, filed litigation may serve as a tactic itself, part of a larger anti-corporate campaign intended by plaintiffs to pressure companies to pursue desired changes.

This report will discuss the prominent trends and tactics that appear in high profile transnational tort cases. Part I sets forth the methodology used. Part II includes two in-depth case studies of perhaps the most well-known sets of transnational tort cases: the U.S. and foreign litigations involving Nicaraguan plaintiffs allegedly exposed to the pesticide Dibromochloropropane ("DBCP"), and the U.S. and foreign proceedings involving alleged environmental harms and related illnesses attributed to the activities of Texaco in Ecuador. Both matters include instances of foreign plaintiffs and their attorneys falsely claiming serious injuries yet seeking to convince United States juries of permanent and/or fatal harms, involve evidence of local judicial corruption in weak legal systems notably susceptible to external influences, and feature other questionable conduct by plaintiffs and their advocates. Both matters also present a bevy of out-of-court strategies that, when analyzed against the plaintiffs' aggressive litigation tactics, illustrate their desired purpose. These case studies were selected not because they are representative of the cases analyzed – they are not – but because they include a full array of the out-of-court tactics, and provide a clear illustration of the motives behind the tactics in the majority of the cases that were analyzed.

Part III then places those extra-legal tactics into a larger context, demonstrating that their usage and desired effect are part of an identifiable trend. This Part will discuss the pattern of media usages, community-organizing techniques, investment-related efforts, and political involvement by United States and foreign officials in the larger body of transnational tort cases reviewed in the study. Part IV contains the report's conclusions. Namely, in highly charged transnational tort cases involving corporate defendants, plaintiffs and their lawyers, from motives perhaps pure and impure, are unafraid to employ a predictable but aggressive range of extra-legal measures to create leverage and further their litigation and social goals. In addition, although this study does not reach conclusions regarding the financial or economic impact of the tactics or cases studied, it seems logical that companies assessing whether to pursue or continue overseas operations in emerging markets must consider the potentially significant risks associated with the trend.

A chart of the tactics studied and the results, including whether any given tactic in a case could be linked to the plaintiffs or their attorneys (as opposed to others who may sympathize with the plaintiffs), is included in Appendix A. A list and description of the cases studied appears in Appendix B.

Methodology

Depending on how they are counted, some 25 cases, involving numerous different companies, were reviewed as part of the study.[1] The selection methodology for that case sample was not, and does not purport to be, scientific or wholly random. The cases selected all are transnational tort actions – e.g., tort actions involving alleged overseas harms – that have been filed over the past 15 years against substantial corporate defendants.[2] To isolate the tactical patterns, cases were selected that have a diverse set of characteristics. They involve individual and class actions; involve dozens of companies that operate in a variety of sectors, including chemicals, agriculture, oil and gas, mining, manufacturing, pharmaceuticals, finance, and the Internet; arise from underlying conduct in Nicaragua, Ecuador, Colombia, Nigeria, Liberia, Cote D'Ivoire, Indonesia, Egypt, South Africa, China, Papua New Guinea, Peru, Argentina, Turkey, India, Saipan, and still other locations; involve companies more and less known to the public; and are premised on many different alleged acts, including chemical exposure, environmental harms, working conditions, child labor, attacks on union leaders, violence caused by state security forces or paramilitary units, non-consensual medical experimentations, involvement with repressive governmental regimes, and other purported corporate misconduct.

Within those varied cases, the study closely scrutinizes some 24 tactics.[3] Certain additional tactics were observed in several cases during the study; while the tactics do not appear in the chart at Appendix A, some may be noted within the text.

In studying the tactics of the selected cases, the source of materials was publicly available information. That includes: reviewing thousands of pages of documents, such as court records, judicial decisions, publications and reports, transcripts, press releases, public emails and correspondence, and news articles; viewing dozens of hours of documentaries, mini-documentaries, television programs, and video clips; and visiting hundreds of webpages, web-logs ("blogs"), and other internet media. To the extent possible, the report contains citations for all findings. Interviews also were conducted with knowledgeable personnel from several corporations to gain clarity surrounding certain facts. However, the report makes no findings based on such interviews; it relies only upon information independently verifiable through public materials.

Of particular note, the findings of this report are underinclusive. Without doubt, in some of these litigation matters, tactics occurred that were not reflected in public materials located during the review. In addition, as noted above, tactics occurred in the individual cases reviewed beyond the 24 tactics scrutinized. Thus, while patterns of tactics have been identified based on the information located, the patterns and tactics are more pronounced than appear herein.

As a final caveat, it must be emphasized in the strongest possible terms that this study in no way opines on the underlying merits of any of the cases studied. While

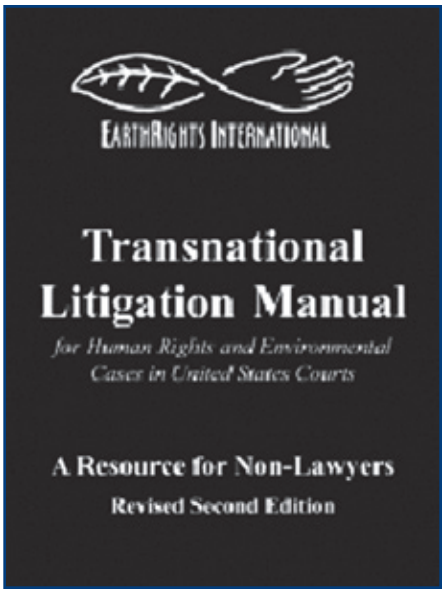
[1] Some of these cases are related, and some were consolidated by courts, as indicated in Appendix B. Related and consolidated cases are treated as one case for purposes of this study; based on individual filings, the number of cases studied exceeds 40 in total.

[2] A further review of additional cases also may identify additional tactical patterns.

[3] Additional tactics and tactical patterns no doubt appear in these cases that were not observed or identified.

the allegations in many of the cases involve grave claims of wrongdoing that, if true, are deeply disturbing, the report analyzes cases in which both plaintiffs and defendants have prevailed, cases that have settled, and cases that are ongoing. The report also does not analyze tactics utilized by corporate defendants in these same or other transnational tort cases that, upon examination, may be similar or dissimilar to those used by plaintiffs in any given action or in the aggregate.[4] Instead, the review narrowly focuses on the trends of and motives behind out-of-court tactics employed by plaintiffs, their attorneys and representatives, and their advocates in the transnational tort context, and reaches relevant conclusions about them.

Those issues aside, the conclusions of this study based on the materials reviewed are clear and unmistakable: while not every tactic appears in every case, there are identifiable patterns of aggressive activities between transnational tort cases that are employed by claimants and their representatives, designed to foster litigation advantages for plaintiffs by creating external pressures on corporate defendants.



Manual explaining the mechanics for filing a human rights lawsuit by NGO EarthRights International

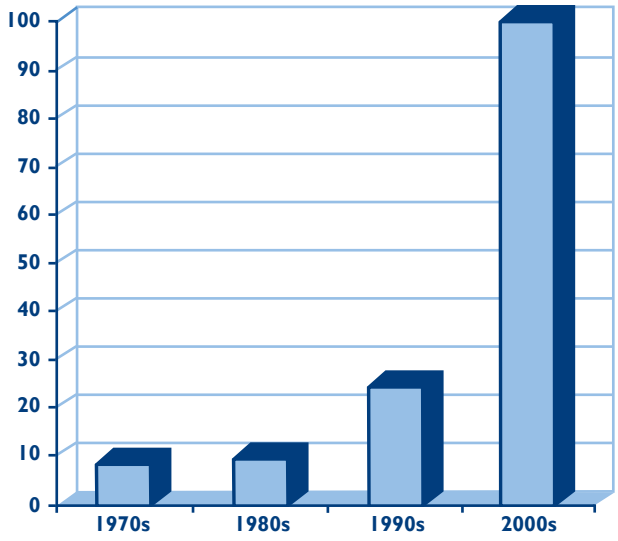
[4] In addition, the tactics and patterns discussed may not be unique to the transnational tort setting, but also could be found in other types of litigation, though such an analysis is well beyond the scope of this study.

The Case Studies

The Case Studies

BACKGROUND

The ATS, part of United States law since 1789, provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The key relevant substantive term of the ATS – "violations of the law of nations" – has been construed to cover a limited class of alleged harms that are construed according to international law principles. They include torture, extrajudicial killing, genocide, war crimes, crimes against humanity, forced labor, slave labor, child labor, human trafficking, forced disappearances, prolonged arbitrary detention or arrest, forced exile, rights of association (in the labor context), systematic racial discrimination, and cruel, inhuman or degrading treatment.



Rise in ATS cases by decade

In the late 1970s, there began a trend of using the ATS to bring actions against foreign officials and repressive regimes to establish human rights violations abroad. These actions often were not opposed; they were brought primarily to document and validate human rights abuses with a judicial finding, but presented no meaningful prospect of recovery. In the mid-1990s, corporate defendants began to be targeted in ATS cases with regularity.[5] To date, there have been some 150 ATS cases filed against corporations, with 120 (~80%) arising in the past 15 years.[6] The majority of ATS cases now filed are against corporate defendants, and since 1994, roughly 6 to 10 new corporate ATS cases have been filed annually.

The reasons these cases are brought in U.S. courts are several. Foremost are: (1) as a law that permits the filing of tort actions that lack a factual nexus to the locale where the underlying acts occurred, the ATS is unique among modern legal systems; (2) the availability of the class action, contingency fee, and pre-trial discovery mechanisms in the U.S.; (3) the widespread belief that damage awards are higher in U.S. courts, which includes the potential for punitive damages; (4) a plaintiffs' bar with multiple motives for bringing ATS lawsuits; and (5) a perception among claimants and the plaintiffs' bar that foreign courts may be hostile to their claims. At present, roughly one-third of the corporate cases involving ATS claims remain pending before

[5] *See, e.g.*, *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932 (9th Cir. 2002), *vacated 403 F.3d 708 (9th Cir. 2005); Aguinda v. Texaco, Inc.*, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994).

[6] That calculation includes similar actions that later were consolidated.

federal trial or appellate courts.[7]

In looking at the general trends associated with these roughly 150 ATS cases, 21 industries in total have been the subject of one or more ATS lawsuits – most commonly the extractive industry (25%); the financial services industry generally (18%) and banks in particular; food and beverage companies (10%); transportation companies (6.5%) such as airlines, ship companies, and railroads; manufacturing companies (6.5%); and communications/media companies (5%). They have arisen in roughly 60 different countries, most commonly from the Middle East (23%) and Iraq in particular; South America (20%) and Colombia in particular; Africa (15%) and Nigeria in particular; and Asia (15%). They involve a variety of alleged underlying conduct – most commonly acts by foreign security forces (25%); labor-related issues (20%); environmental claims (12%); or against companies that provide support, goods or services to allegedly repressive political regimes.

In addition, cases have been filed in some 25 different federal districts, although they clearly cluster in several different jurisdictions, particularly in New York and California.[8] The majority of ATS cases have been filed by a relatively small cadre of NGOs,[9] public interest firms,[10] and class action firms.[11] That cadre has been involved in some 55% of the cases involving colorable ATS claims, with more than 40% of the cases involving the seven NGOs and public interest firms alone.[12] The attorneys who bring these actions, frequently operating on a contingency fee basis and seeking tens of millions of dollars in damages, if not more, can obtain substantial recompense if they succeed at trial or in securing a lucrative settlement.

In that vein, most of the cases have resulted in dismissals – one potential explanation for the growth in the out-of-court tactics discussed below. More recently,

[7] Plaintiffs in corporate ATS cases generally do not contend that the companies themselves have committed the underlying harms. Instead, they tend to rely on theories of secondary or vicarious liability. The theories utilized include agency, conspiracy and, most commonly, aiding and abetting. As a legal matter, those theories have met with mixed success by courts, which alternatively have recognized, rejected, and offered competing and sometimes inconsistent interpretations of theories of secondary liability. *See*, *e.g.*, *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2nd Cir. 2009); *Doe v. Unocal*, 395 F.2d 932, 947-51 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005); *Barrueto v. Fernandez Larios*, 205 F. Supp.2d 1325, 1333 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148, 1159 (11th Cir. 2005); *Doe v. Exxon Mobil Corp.*, 393 F. Supp.2d 20, 24 (D.D.C. 2005). In addition, unlike non-ATS cases, because the reach of international criminal law traditionally has been restricted to misconduct by states or state officials, all but a few cognizable causes of action contain a "color of law" requirement. In construing the "state action" aspect of the ATS, federal courts generally have borrowed from the civil rights jurisprudence of 42 U.S.C. § 1983. *See, e.g., Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995), *overruled in part*, 504 F.3d 254 (2d Cir. 2007); *but see Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). Accordingly, outside of cases premised on theories of genocide, war crimes, crimes against humanity, and a few others that do not require state action, to satisfy the ATS the underlying acts must be committed either by (a) government agents acting on behalf of the company, or (b) the company or its employees if vested with the imprimatur of government power.

[8] In New York (30%), most have been filed in the Southern District of New York. In California (20%), most have been filed in the Central District of California. In addition, clusters of cases have been filed in the District of Columbia (10%) and the Southern District of Florida (10%).

[9] Three NGOs have collectively appeared in 25% of ATS cases filed against corporations: (1) International Rights Advocates ("IRA"), which has a labor and employment focus and, until he affiliated with the law firm Conrad & Scherer, was directed by Terry Collingsworth. Collingsworth has been involved in 23 ATS cases on behalf of Conrad & Scherer and/or IRA; (2) The Center for Constitutional Rights (10 ATS cases); and (3) EarthRights International (ERI) (9 ATS cases).

[10] The four attorneys at public interest law firms who most frequently appear in ATS cases are: (1) Susan Burke, who has focused on Iraq-related issues (13 ATS cases); (2) Paul Hoffman, former Legal Director of the ACLU in Los Angeles (11 ATS cases); (3) Judith Brown Chomsky (6 ATS cases); and (4) Cristobal Bonifaz (6 ATS cases).

[11] Those who appear most frequently are: Hausfeld LLP, Cohen Milstein Sellers Toll, Lieff Cabraser, Motley Rice, Milberg Weiss, and Kohn Swift & Graf.

[12] Many of these NGOs and public interest firms began their ATS efforts in cases against *Unocal* in the mid-1990s, and 30% of the colorable ATS cases now involve one or more of the *Unocal* attorneys.

however, different outcomes and litigation patterns can be observed. [13] Four corporate ATS cases have proceeded to trial, resulting in one plaintiffs' verdict. [14] Two have resulted in court-ordered judgments of $7.7 million [15] and $80 million. [16] There also have been settlements with publicly reported ranges from $15.5 million to $30 million. [17]

In addition to ATS cases, a much larger pool of non-ATS cases based on transnational torts have been brought in United States federal and state courts over the past decade. Some of those cases, based on human and environmental rights claims, closely resemble ATS cases in form and substance. [18] That similarity includes the sectors targeted, the attorneys involved, and the underlying conduct alleged. Many others are based on traditional commercial and personal injury theories. As with ATS cases, this larger pool of transnational tort cases continues to grow, arising from corporate activities all over the globe, though a notable percentage of cases arise from Latin America. They often involve individual actions, with class actions being filed in particular in connection with airplane, helicopter, and train accidents, alleged harms from pharmaceutical and other health-related products, and exposure to chemicals. These cases typically have been brought in the U.S. in the first instance; recently, plaintiffs have begun seeking to obtain recoveries in foreign courts that they then attempt to enforce in the U.S. As with the ATS cases, the success in these matters have been mixed, with many dismissals and several multi-million dollar jury verdicts or settlements. [19] When actions are

[13] Numerous provisions associated with the ATS remain in substantial dispute. That includes the definitions associated with theories of secondary liability, whether color of law requirements should be construed under international or domestic standards, and even the applicability of the ATS to corporations.

[14] *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp.2d 375 (E.D.N.Y. 2008); *Jama v. Esmor Corr. Servs.*, 2009 U.S. App. LEXIS 17950 (3d Cir. N.J., Aug. 12, 2009); *Bowoto v. Chevron*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003). The jury returned a verdict for the plaintiff in *Chowdhury*.

[15] *See Aguilar v. Imperial Nurseries*, 2008 WL 2572250 (D. Conn. May 28, 2008) (involving alleged labor trafficking for agricultural purposes).

[16] *Licea v. Curacao Drydock Co., Inc.,* 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (involving alleged labor trafficking and slave labor working conditions in connection with a drydock company). Although the large majority of such cases have been brought in the U.S. under the ATS, similar matters also can be, and have been, raised in foreign domestic courts – particularly in countries where companies are domiciled or where alleged torts occur – as well as in international tribunals. *See, e.g., Ramirez v. Copper Mesa Mining Corp.*, CV09-37504 (Ont. Sup. Ct. March 3, 2009) (Canada); *Oguru v. Royal Dutch Shell PLC, Court of the Hague*, Docket Number HA ZA 09-579 (Netherlands); *Dagi v. The Broken Hill Proprietary Company Ltd.*, [1997] 1 V.R. 428 (Australia); *Lubbe v. Cape Plc.*, [2000] 4 All E.R. 268 (England); *Guerrero v. Monterrico Metals PLC*, [2009] EWHC 2475 (QB); *Pedro Emiro Florez Arroyo v. BP Petroleum (Colombia) Ltd.*, Particulars of Claim, Claim No. HQO8X00328 (High Court of Justice Dec. 1, 2008); *Gagarimabu v. Broken Hill Proprietary Co. Ltd.,* [2001] VSC 517 (Sup. Ct. Victoria 2001); *U.K. Action over "Toxic Waste Case*," BBC News, Feb. 2, 2007; Robert Verkaik, *BP pays out millions to Colombian Farmers*, Independent, July 22, 2006; Robert Verkaik, *Farmers 'terrified out of their homes' to sue BP for £15m*, Independent, July 18, 2005; *Leigh Day return to Colombia to meet more farmers*, March 18, 2008, http://www.leighday.co.uk/news/news-archive/leigh-day-return-to-colombia-to-meet-more-farmers; *PNG villagers sue BHP, Ok Tedi miners*, Sydney Morning Herald, Jan. 19, 2007; Mineral Policy Institute, *Cracks in the Facade of BHP's exit from Ok Tedi Mining Disaster Appear*, Jan. 22, 2007. Given the rise of transnational tort cases generally, it can be expected that more will occur in the future.

[17] *See, e.g.,* Michael Goldhaber, *A Win for Wiwa, A Win for Shell, A Win for Corporate Human Rights*, The American Lawyer, June 11, 2009; Paul Magnusson, *A Milestone for Human Rights*, Business Week, Jan. 24, 2005; Jenny Strasburg, *Saipan Lawsuit Terms OK'd: Garment Workers Get $20 million,* S.F. Chron., Apr. 25, 2003, at B1.

[18] *See, e.g., Perez v. Dole Food Co.,* Los Angeles Superior Court, April 28, 2009 (complaint available at http://www.iradvocates.org/4.27.09%20Dole%20Complaint%20FINAL.pdf).

[19] Multiple surveys have confirmed that a small percentage of cases are refiled abroad after having been dismissed from U.S. courts. *See*, *e.g.*, Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 Cornell L. Rev. 650, 672 (1992); Hilmy Ismail, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. Third World L. J. 249, 250 n.7 (1991).

refiled in foreign jurisdictions, U.S. companies may face litigation in unpredictable legal systems subject to political and other external influences. No doubt because of that concern, in addition to the case studies discussed *infra*, Pfizer, after having prevailed on a *forum non conveniens* argument in the District of Connecticut in an ATS case involving alleged involuntary medical experimentation in Nigeria, changed its mind and conceded the *forum non conveniens* point on appeal. [20]

Accompanying this rise of transnational tort cases, whether they originate in the U.S. or abroad, or are premised on the ATS or other theories, are an increasing variety of out-of-court tactics by plaintiffs and their advocates. Although this study focuses on such external efforts, in reality, they are part of a larger plaintiffs' strategy. The strategy typically is designed to pressure corporate defendants inside the courtroom through plaintiff-directed activities outside of it, creating maximum leverage to compel corporate defendants to consider settling or pay a steep price for refusing. In some cases, the litigation itself is a tactic, one strategic tool among many employed by advocates seeking corporate change. Those holistic litigation approaches, and in particular the motives of the plaintiffs, is most clearly visible in the two case studies. For that reason, this study first provides a treatment of the DBCP in Nicaragua and Chevron-Ecuador matters, and then demonstrates through an analysis of the larger body of cases reviewed that the out-of-court tactics pursued by plaintiffs, emanating from similar plaintiff goals, are part of clear overall trends in the transnational tort context.

[20] *See Abdullahi* v. *Pfizer, Inc.,* 562 F.3d 163 (2d Cir. 2009).

DBCP IN NICARAGUA: A TRILOGY OF FRAUD

Perhaps no set of cases illustrates the aggressive, and indeed brazen, tactics of plaintiffs' lawyers more than those surrounding alleged injuries in Nicaragua attributed by claimants to the pesticide Dibromochloropropane ("DBCP"). The cases have been launched against Dole Food Company, The Dow Chemical Company, Shell Oil Company, and others, alleging that the production and use of DBCP on banana plantations in Nicaragua caused the sterilization of thousands of laborers. The cases, however, have resulted in startling judicial findings by state and federal courts, including that plaintiffs' lawyers suborned perjury, intentionally misled U.S. courts, located and coached plaintiffs to lie about bogus experiences on banana plantations, used corrupt foreign laboratories to bolster false claims, and assisted in enacting foreign laws so overtly hostile to U.S. companies that they violate the most basic notions of fairness. These tactics were accompanied by aggressive media, social, and political efforts, heightening the pressures on the corporate defendants through extra-legal means. The DBCP litigation is a classic case study in "win at all costs" litigation, in which audacious attorneys, representing susceptible plaintiffs who struggle with extreme poverty, may transgress ethical and legal lines in the name of a financial recovery. [21]

DBCP Background

For years, DBCP was used to combat pests that damage the roots of various crops, including bananas, grapes, tomatoes and pineapples. [22] It was used widely in the United States until 1979, when the Environmental Protection Agency deregistered DBCP for all crop uses except pineapples. [23] However, its use continued abroad. [24]

Early DBCP Litigation

In the early 1980s, the first round of DBCP litigation premised on overseas use began. Attorneys brought cases in Florida, California, Texas and elsewhere on behalf of thousands of foreign plaintiffs, as lawyers raced to locate a favorable venue for these transnational claims. In large part, courts recognized these cases as inappropriate attempts to seek justice in the United States. [25] Indeed, one federal court characterized the DBCP litigation onslaught as "one of the most wide ranging efforts at forum shopping in our legal

[21] While this section focuses on DBCP litigation from Nicaragua, there is also litigation in the U.S. over the use of DBCP in the Ivory Coast, Costa Rica, Honduras, Panama, and Guatemala.

[22] http://www.epa.gov/safewater/contaminants/basicinformation/1-2-dibromo-3-chloropropane.html.

[23] Factsheet #50, Cornell University, Program on Breast Cancer and Environmental Risks, *Pesticides and Breast Cancer Risk: Dibromochloropropane (DBCP)* (July 2004), http://envirocancer.cornell.edu/FactSheet/pesticide/fs50.dbcp.cfm. Pineapple use was subsequently deregistered in 1985. *Id.*

[24] *Osorio v. Dole Food Co.*, 665 F. Supp.2d 1307, 1312 (S.D. Fla. 2009). *Osorio*, involving an unsuccessful attempt by plaintiffs to enforce a $97 million judgment by Nicaraguan plaintiffs under Special Law 364, is discussed in detail below.

[25] *See, e.g., Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985).

history."[26] As a result, most DBCP cases were dismissed on *forum non conveniens* grounds.[27]

DBCP in Nicaragua

Nicaraguan Special Law 364[28]

In late 2000, in response to these losing efforts, plaintiffs' lawyers lobbied the Nicaraguan legislature to pass Special Law 364.[29] The *Asociacion de Trabajadores y Ex Trabajadores Afectados por Nemagon-Fumazone* (ASOTRAEXDAN, or the Association of Workers and Former Workers Affected by Nemagon) substantially aided those efforts. ASOTRAEXDAN was formed in 1999 to assist in seeking DBCP related recompense, and was a key part of the lobby that successfully won the passage of Special Law 364.[30]

By its terms, Special Law 364 specifically addresses the claims of individuals allegedly exposed to and injured by DBCP on banana plantations, includes numerous provisions that openly aid claimants, and compels corporate defendants to choose between litigating in a forum where they are nearly certain to lose, or agreeing to litigate in the United States and thus allow plaintiffs to circumvent *forum non conveniens* dismissals.[31] Such provisions include:

- An irrefutable presumption of causation where the plaintiffs present medical test results as proof of injuries.[32]
- The elimination of the statute of limitations for claims by plaintiffs.[33]
- A requirement that defendants post a bond of 300,000,000 NCD (approximately $14.6 million) to appear in the case to ensure adequate means of satisfying a judgment.[34]
- The adoption of the so-called "3-8-3" schedule: the defendant has 3 days to answer the complaint, the parties have 8 days for discovery, and the judge has 3 further days to issue a judgment.[35]
- Upon proof of liability, individual plaintiffs are entitled to at least $100,000 in damages.[36]

[26] *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 837 (S.D. Fla. 1987), *aff'd in relevant part*, 883 F.2d 1553 (11th Cir. 1989).

[27] *See, e.g., Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1362 (S.D. Tex. 1995).

[28] Ley de Emergencia para los Trabajadores Bananeros Damnificados por el Uso de Pesticidas Fabricadas a Base de DBCP [Emergency Law for Banana Workers Injured by Usage of DBCP-Based Manufactured Pesticides], No. 364, Oct. 5, 2000 (Nicar.) [hereinafter "Law 364"], *translated in* Henry S. Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. Miami Inter-Am. L. Rev. 21, 50–53 (2004).

[29] *Mejia v. Dole Food Co. & Rivera v. Dole Food Co.,* Los Angeles Superior Court Case Nos. BC340049, BC379820 (June 17, 2009) (Findings of Fact and Conclusions of Law Supporting Order Terminating *Mejia* and *Rivera* Cases for Fraud on the Court) (hereinafter "*Mejia Op.*") at 23.

[30] *Victims of Nemagon Hit the Road*, Envio Magazine, June 2005, http://www.envio.org.ni/articulo/2972.

[31] As the court in *Osorio* found, however, even where corporate defendants choose to opt-out by refusing to make a required deposit, plaintiffs nonetheless will bring an action and local courts will assume jurisdiction and issue a judgment. Defendants then are not permitted to challenge that judgment in Nicaragua, even on jurisdictional grounds, without consenting to participate in the case. *Id.* at 1339.

[32] *Osorio v. Dole Food Co.*, 665 F. Supp.2d at 1314; Law 364 Art. 9.

[33] *Osorio*, 665 F. Supp.2d at 1315; Law 364 Arts. 6, 14, 15.

[34] *Mejia Op.* at 23; *Osorio*, 665 F. Supp.2d at 1315; Law 364 Art. 8.

[35] *Mejia Op.* at 23; *Osorio*, 665 F. Supp.2d at 1315; Law 364 Arts. 6, 14, 15.

[36] *Osorio*, 665 F. Supp.2d at 1314; Law 364 Art. 12.

- Highly curtailed appellate procedures, including no ability to appeal a decision to the Nicaraguan Supreme Court. [37]

In addition, perhaps most telling of the law's intent, Special Law 364 contains a clause allowing defendants to opt-out of the Nicaraguan litigation if they agree to submit to jurisdiction in the United States. [38] Accordingly, Special Law 364 effectively creates a litigation system that pressures corporate defendants to affirmatively opt to litigate in the United States, or face the prospect of massive and pre-ordained judgments in Nicaragua that plaintiffs' attorneys then could bring to the United States for attempted enforcement. [39]

After Nicaragua passed Special Law 364, the country's Attorney General lodged a protest, arguing that the statute was unfair; that included an argument that by its very terms the law did not contemplate that a plaintiff could possibly lose a case. [40] The Nicaraguan Supreme Court upheld the law, however, reasoning that Special Law 364 did not offend due process because the defendants may opt-out of the litigation (albeit if they submit to jurisdiction in the United States). [41] To date, over 10,000 plaintiffs have brought claims under the law, and Nicaraguan judges have awarded over $2 billion. [42]

Influx of Lawyers to Nicaragua and Out-Of-Court Tactics

THE INVASION OF PLAINTIFFS' LAWYERS

After Nicaragua passed Special Law 364, United States attorneys and law firms quickly partnered with local attorneys and opened offices in Chinandega, Nicaragua, near the former banana farms. Juan Dominguez, a personal injury lawyer from Los Angeles, in particular sought to capitalize on cases in Nicaragua, opening a law office aptly named the Oficinas Legales Para Los Bananeros, or "Law Office of the Ex-Banana Workers."[43] Provost Umphrey, a Texas-based plaintiffs' firm, also became heavily involved in the cases. [44] Walter Lack and Thomas Girardi, two prominent plaintiffs' lawyers well-known for their involvement in the "Erin Brockovich" case, also began participating in the cases, affiliating with the Nicaraguan law firm Ojeda, Gutierrez and Espinoza ("Ojeda"). [45]

[37] *Osorio*, 665 F. Supp.2d at 1315-16.

[38] *Id.* at 1315; Law 364 Art. 7.

[39] Nicaragua is not alone in passing laws to force litigation into the United States' courts. For example, in Guatemala, the government passed a law that withdrew jurisdiction for local courts if a lawsuit first had been filed in any other jurisdiction. *See* Hal Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 Harv. Int'l L.J. Online 95, 100 (2009). The theory was that, if a plaintiff from Guatemala filed a case in the United States, the law would make a *forum non conveniens* dismissal less likely, since the law forecloses Guatemalan courts as an adequate alternative, which is a key *forum non conveniens* consideration. *Id.* A number of other countries, particularly in Latin America, have enacted blocking statutes, seeking to discourage *forum non conveniens* dismissals. *See, e.g.*, M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in International Litigation,* 4 B.Y.U. Int'l L. & Mgmt. Rev. 21 (2007). These blocking statutes have met with limited success in the U.S. in deterring dismissals. *See, e.g.*, *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 673-74 (5th Cir. 2003); *Morales v. Ford Motor Co.*, 313 F. Supp.2d 672 (S.D. Tex. 2004); *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719 (E.D. La. 2002); *Chandler v. Multidata Sys. Int'l Corp.*, 163 S.W.3d 537 (Mo. Ct. App. 2005).

[40] *Osorio*, 665 F. Supp.2d at 1316.

[41] *Id.* at 1317-18.

[42] *Id.* at 1312.

[43] *Mejia Op.* at 24.

[44] *Id.* at 2, 24, 27-29.

[45] *Franco v. Dow Chem. Co.*, No. 03-05094, Amended Report & Recommendation of the Special Master at 4 (Oct. 7, 2009) (hereinafter "Report & Recommendation").

These offices have become clearinghouses for the thousands of plaintiffs alleging harm from DBCP. Dominguez and others have staged rallies and demonstrations against DBCP and the corporations that allegedly used it. Indeed, newspaper accounts note that Dominguez rented a football stadium in Nicaragua to hold one such rally.[46] Dominguez also advertised on the radio and broadcast information about DBCP exposure[47] to spread promises of substantial recoveries.

Juan Dominguez giving a speech in Estelí, Nicaragua

Ex-banana workers marching in Managua (nicaraguaphoto.com)

NGOS AND DOCUMENTARIES

There have been numerous efforts, by plaintiffs' lawyers or others in concert with them to disseminate news of the DBCP cause, as well as to create pressures on the corporate defendants. Indeed, in Nicaragua, railing against DBCP and the corporations that used and manufactured it has become a "political movement."

ASOTRAEXDAN has assisted in those efforts, organizing yearly marches on the capital, and overseeing other protests.[48] Other NGOs likewise have espoused the plaintiffs' cause. The NGO Alliance for Global Justice, which seeks to create social justice through grassroots organizing,[49] has a project called "Nica Net" or The Nicaragua Network, which touts itself as a "leading organization in the United States committed to social and economic justice for Nicaragua."[50] While Nica Net does not solely focus on the DBCP claims, its website has published articles about related trials (including press releases by Dominguez's law firm[51]) and regularly included updates on the legal proceedings in its weekly "Nicaragua Network Hotline" news bulletin.[52] Nica Net also has published a fact sheet about DBCP, talking points and a sample letter urging the companies to respect a Nicaraguan court decision awarding plaintiffs over $490 million.[53]

[46] Alan Zarembo & Victoria Kim, *L.A. lawyer accused of fraud in pesticide litigation*, Los Angeles Times, Aug. 5, 2009, http://articles.latimes.com/2009/aug/05/local/me-dominguez5.

[47] *Id.*

[48] *Victims of Nemagon Hit the Road*, Envio Magazine, June 2005, http://www.envio.org.ni/articulo/2972.

[49] *See* http://www.clrlabor.org/afgj/index.html.

[50] The Nicaragua Network, "About Us" section (titled "About the Nicaragua Network: Over 30 Years of Solidarity with the People of Nicaragua"), http://www.nicanet.org/?cat=24.

[51] *See, e.g.*, Press Release, The Nicaragua Network, *Nemagon Case Goes to Jury in California!*, (Oct. 15, 2007), http://www.nicanet.org/?p=368.

[52] *See, e.g.*, The Nicaragua Network, Nicaragua Network Hotline (October 13, 2009), *Dole Tries to Squash 'Bananas'; Activists fight back via Internet; Dole drops suit!*, http://www.nicanet.org/?p=839.

[53] *See* The Nicaragua Network, *Nicaraguan Banana Workers Poisoned by Nemagon - Tell Dow, Shell and Dole to Pay Up!*, http://www.nicanet.org/?p=11.

Perhaps the most publicized out-of-court effort, however, has been the professional documentary, *Bananas!**. The film is a chronicle of Dominguez's efforts in the DBCP cases, describing itself as follows:

> Juan "Accidentes" Dominguez is on his biggest case ever. On behalf of 12 Nicaraguan banana workers he is tackling Dole Food in a ground-breaking legal battle for their use of a banned pesticide that was known by the company to cause sterility. Can he beat the giant, or will the corporation get away with it? In the suspenseful documentary BANANAS!*, filmmaker Fredrik Gertten sheds new light on the global politics of food. [54]

In June 2009, *Bananas!** premiered at the Los Angeles Film Festival, and has been screened in Europe and North America. [55] The makers of the documentary also have used other forms of social media, including a website and Twitter to gain publicity. [56] Indeed, *Bananas!** has over 6,500 "friends" on the social media website Facebook. [57]

Yet another documentary, *Missing Seeds,* focuses on the plight of those in a shantytown that has grown outside of the national legislature in Managua.[58] People claiming to suffer the ill effects of DBCP exposure populate the shantytown, which is overseen by *Asociacion de Obreros Afectados por Nemagon* (Association of the Working Class Affected by Nemagon), a grass-roots organization dedicated to supporting former banana workers.[59] The documentary, made by students at Bucknell University in the United States, focuses on the shantytown, and features Antonio Hernandez Ordenana, the Nicaraguan law partner of Juan Dominguez. The documentary sympathizes with those living in the shantytown and is sharply critical of companies that used DBCP, attributing at least 2,500 deaths to DBCP in Nicaragua alone.[60] Such efforts have championed the case of the plaintiffs, heaping biting and negative publicity on the corporate defendants.

[54] Bananas!* "The Film" section, "About the film" page, http://www.bananasthemovie.com/about-the-film.

[55] *See* Bananas!* "The Film" section, "Screenings" page, http://www.bananasthemovie.com/screenings. After the subsequent dismissal of the *Mejia* and *Rivera* cases, Dole attempted to stop screenings of the *Bananas!**, or have the makers include a statement explaining that the subject of the documentary was a fraud. *Dole Food Co. v. Gertten*, Los Angeles Superior Court, Case No. BC 417435 (July 8, 2009) (complaint for defamation). The makers of the film refused and continued to screen the movie. After an unsuccessful attempt to stop the screening at the Los Angeles Film Festival, Dole filed a defamation lawsuit. *Id.* In mid-October 2009, Dole voluntarily dropped the lawsuit, citing free speech concerns but continuing to point out that the content of the movie is "fundamentally flawed." News Release, Dole Food Company, Inc., *Dole to Withdraw Defamation Suit* (October 14, 2009), http://www.dole.com/PDFs/dbcp/BananaMoviePressReleaseWithdrawFINAL101409.pdf.

[56] Bananas!*, http://www.bananasthemovie.com; Bananas!* Twitter page, http://twitter.com/bananasmovie; Bananas!* Facebook page, http://www.facebook.com/pages/BANANAS/121163091704.

[57] Bananas!* Facebook page, http://www.facebook.com/pages/BANANAS/121163091704.

[58] *Missing Seeds* (starting with "Missing Seeds: Part 1"), http://www.youtube.com/watch?v=5wD7WRLD5ok.

[59] Hear Out Yellow, http://www.hearoutyellow.org.

[60] *Id.* The documentary also notes that, in addition to sterility, the shantytown residents complain of skin rashes, headaches, blindness, and birth defects; yet none of those physical conditions are suspected effects of DBCP exposure, rendering the documentary's suggested connection between them and DBCP suspect. *Id.*

The conspiracy among lawyers, labs and others

A singular problem for the plaintiffs' law firms, however, is that despite the remarkable publicity efforts, they identified relatively few ex-banana plantation workers in Nicaragua, and even fewer that are in fact sterile.[61] According to detailed judicial findings, to circumvent that hurdle, Dominguez, Provost Umphrey, Ojeda and others engaged in a wide-scale conspiracy to knowingly present overtly false claims, which included collusion with at least one Nicaraguan judge to "fix" judgments for attempted subsequent U.S. enforcement and several Nicaraguan medical laboratories.[62]

FINDING PLAINTIFFS

As relevant legal findings articulate, to identify Nicaraguans who could serve as plaintiffs and train them in the details of their stories, the law firms used local "captains." The captains found potential plaintiffs, brought them to the law offices,[63] and provided them with sufficient facts about banana farm life to enable them to testify about their supposed "experiences."[64]

To help the plaintiffs fabricate their stories, the captains created an elaborate system of false information. They distributed manuals depicting the life of a typical banana worker, including descriptions of alleged DBCP use and other workers on the farm.[65] Captains held teaching sessions to present this information to putative plaintiffs.[66] The plaintiffs visited former banana plantations so they could see and later recount the layout of the farms.[67] Captains also provided plaintiffs with fake documents to use as evidence of their employment.[68] And the captains compelled many of these plaintiffs, who live in abject poverty – likely a reason they agreed to participate in the scheme – to pay for access to this information.[69]

FALSE LAB RESULTS

Teaching plaintiffs the details of their stories, however, was not enough. To solidify the claims, and satisfy the irrefutable presumption of causation provision of Special Law 364, the plaintiffs' lawyers enlisted the aid of local Nicaraguan laboratories. These laboratories, according to court findings, generated false medical reports that indicated sterility, low sperm count, and other afflictions.[70] Additionally, the laboratories suppressed evidence that the plaintiffs had fathered children, which assuredly would have eliminated the prospect of a recovery premised on an alleged claim of infertility through exposure to DBCP.[71] In fact, the medical labs, in collusion with plaintiffs' attorneys, did not even test some samples.[72] Some plaintiffs

[61] *Mejia Op.* at 26-27.

[62] *Id.*

[63] *Id.* at 24-25, 32-33.

[64] *Id.*

[65] *Id.* at 30.

[66] *Id.* at 35-36.

[67] *Id.* at 31.

[68] *Id.* at 30, 37-38.

[69] *Id.* at 31. As one plaintiff stated, "I don't feel good about this … I feel I was involved in foul play." Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, The Wall Street Journal, August 19, 2009, http://online.wsj.com/article/SB125061508138340501.html.

[70] *Mejia Op.* at 30, 37-38.

[71] *Id.* at 31-32.

[72] *Id.*

also provided no samples, while others altered the samples before giving them to the labs to increase the probability that the sample would be deemed sterile.[73] Through these efforts, plaintiffs' lawyers sought to manufacture both plaintiffs and cases to obtain recoveries.

Nicaraguan Litigation in the U.S.

Direct actions

Despite such efforts, the cases brought by plaintiffs and their attorneys based on alleged exposure to DBCP in Nicaragua have not yielded recoveries, either as direct actions filed in the United States, or in seeking to enforce judgments in the United States that had been obtained in Nicaraguan courts.

> **Here, we also have a chimera that is really truly heinous and repulsive. It's been created from separate organisms cemented together by human greed and avarice.**
>
> Judge Victoria Chaney
> *Mejia v. Dole*, April 23, 2009

TELLEZ/MEJIA: THE "BROADER CONSPIRACY OF FRAUD"

In 2004, plaintiffs' attorney Juan Dominguez filed three separate lawsuits on behalf of multiple injured banana workers in Los Angeles County Superior Court: *Mejia v. Dole Food Co.*, Case No. BC 340049 ("*Mejia*"), *Rivera v. Dole Food Co.*, Case No. BC 379820 ("*Rivera*"), and *Tellez v. Dole Food Co.*, Case No. BC 312852 ("*Tellez*"). Each sought damages for alleged Nicaraguan banana workers as a result of exposure to DBCP. In May 2007, the cases were designated "complex cases" and assigned to Judge Victoria Chaney.[74] To identify and determine the relevant issues, *Tellez* was designated a test case and proceeded to trial before the others.[75]

The *Tellez and Mejia* cases received significant press coverage, particularly in the *Los Angeles Times*,[76] but also in publications such as the *Wall Street Journal*,[77] *BusinessWeek*,[78] and *Bloomberg*.[79] Dominguez's law firm also issued press releases at key points in the *Tellez* trial.[80]

Consistent with the recruitment efforts through local captains, in each of *Tellez*, *Mejia* and *Rivera* individual plaintiffs dropped out of the cases at various points. Some left shortly before medical examinations that likely would have exposed their claims as fraudulent.[81]

[73] *Id.* at 38-39.

[74] *Id.* at 5.

[75] *Id.* at 5-6.

[76] *See, e.g.,* Alan Zarembo and Victoria Kim, *L.A. lawyer accused of fraud in pesticide litigation*, The Los Angeles Times, August 5, 2009, http://articles.latimes.com/2009/aug/05/local/me-dominguez5.

[77] *See, e.g.,* Steve Stecklow, *Fraud by trial lawyers taints wave of pesticide lawsuits*, The Wall Street Journal, August 19, 2009, http://online.wsj.com/article/SB125061508138340501.html.

[78] *See, e.g.,* Michael Orey, *A bunch of fake claims against Dole?*, BusinessWeek, July 6, 2009, http://www.businessweek.com/magazine/content/09_27/c4138btw023223.htm?chan=magazine%20channel_the%20business%20week.

[79] *See, e.g.,* Edvard Pettersson, *Dole Uses Judge Attack in Banana Case to Undo $2 Billion Awards*, Bloomberg.com, June 24, 2009, http://www.bloomberg.com/apps/news?pid=20601109&sid=aS5ED.ApmVPk.

[80] *See, e.g.,* Press Release, The Law Offices of Juan J. Dominguez, "Justice for the Community" page, *Attorney Dominguez Sues Multinational Corporations in L.A. for Toxic Chemical Injuries to Nicaraguan Workers* (April 6, 2004), http://www.juanjdominguez.com/justice.html.

[81] *Mejia Op.* at 8.

Others exited on the eve of their depositions,[82] as Dominguez assessed whether, during deposition preparations, the plaintiffs' stories were sufficiently convincing. Those that were not sufficiently prepared left the case without prejudice, able to make further preparations and potentially enter subsequent litigation.

By the time the case went to trial, *Tellez*, which started out with 54 plaintiffs,[83] involved just 12. These plaintiffs alleged various injuries as a result of DBCP exposure, including sterility. A Los Angeles jury heard the case beginning in July 2007.[84] Five months later, in November 2007, the jury returned favorable verdicts for six of the 12 plaintiffs. It ruled against the other six plaintiffs.[85] For the six plaintiffs who prevailed, the jury awarded $5 million in damages, including $2.5 million in punitive damages against Dole.[86] Judge Chaney subsequently reduced the compensatory award to $1.58 million and eliminated the punitive damages against Dole.[87]

While the plaintiffs' judgment was on appeal, and *Mejia* and *Rivera* were proceeding toward trial, Dole discovered and notified the court of the rampant misconduct in Nicaragua. Judge Chaney ceased the litigation, and ordered that fraud discovery proceed.[88] Because the plaintiffs' lead attorney, Juan Dominguez, was the target of some of the fraud allegations, Judge Chaney issued protective orders limiting his involvement in the discovery.

In April 2009, after a three-day hearing, in a stinging opinion Judge Chaney dismissed the plaintiffs' claims, citing wide-ranging and unabashed fraud.[89] Although the plaintiffs premised their claims on the allegation that DBCP rendered them sterile at banana plantations, Judge Chaney found that many of the plaintiffs never had been employed at the plantations, and detailed the recruitment scam involving the local captains working in concert with Dominguez and others.[90] Judge Chaney also issued detailed findings concerning the conspiracy among plaintiffs' attorneys, medical labs and a judge in Nicaragua involved in DBCP litigation filed in that country.[91] She found that Dominguez and his Nicaraguan law partner, Hernandez Ordena, obstructed justice and abused the judicial process, citing a laundry list of misdeeds including: suborning perjury, bribing and intimidating witnesses, intimidating defense investigators, and making false allegations of bribery

[82] *Id.* at 24.

[83] *Id.* at 8.

[84] *Id.* at 6.

[85] *Id.*

[86] News Release, Dole Food Company, Inc., *Dole Food Company, Inc. Wins Court Rulings* (March 10, 2008), http://www.dole.com/servedocument.aspx?fp=documents/dole/punitive-damages-verdict.pdf.

[87] *Id.* She also granted Dole's motion for a new trial against one plaintiff. *See Tellez v. Dole Food Co.*, No. BC 312 852, 2008 WL 744048 (Cal. Super. Ct. L.A. County Mar. 7, 2008) (trial order).

[88] *Mejia Op.* at 10.

[89] *See generally Mejia Op.* As part of the ruling dismissing the *Mejia* and *Rivera* cases, Judge Chaney also ordered that the State Bar of California investigate Juan Dominguez for unethical conduct by an attorney. At this time, there are no public reports as to the status of that inquiry. *Ethisphere Magazine*, a journal dedicated to business ethics, listed Dominguez first on its 2009 worldwide list of the "top ten individuals that have influenced business ethics through professional flubs." Ethisphere, *2009's 100 Most Influential People in Business Ethics* (Dec. 16. 2009), http://ethisphere.com/2009s-100-most-influential-people-in-business-ethics. As part of a story called *Learning from Others' Mistakes: 2009's Top 10 People We Won't Miss*, Dominguez is listed ahead of the former anti-corruption chief of Indonesia who was accused of murdering his lover's lover, and the director of a Vietnamese real estate investment company accused of hiring people to kill the whistleblower accusing him of corruption.

[90] *Mejia Op.* at 1, 24-26.

[91] *Id.* at 24-28, 38-39.

against the defendants.[92] Judge Chaney also found that there was a "broader conspiracy that permeates all DBCP litigation arising from Nicaragua,"[93] naming Provost Umphrey, Ojeda, and others not involved in *Mejia, Rivera* or *Tellez* as playing roles.[94] That included a conspiracy between the U.S. lawyers and a Nicaraguan judge to "manufacture evidence of sterility and otherwise 'fix' those lawsuits in favor of plaintiffs."[95]

Judge Chaney found that the plaintiffs committed fraud on the court and on the defendants, and dismissed the *Mejia* and *Rivera* cases.[96] In doing so, the court noted that the record was "teeming with misconduct" that was "deliberate and egregious," and concluded that "no sanction other than dismissal of the Plaintiff's claims with prejudice would cure the harm here because the misconduct has been so widespread and pervasive such that this Court now questions the veracity of DBCP Plaintiffs coming from Nicaragua."[97] Judge Chaney excoriated the plaintiffs and their attorneys from the bench, stating, "I find by clear and convincing evidence, and, actually, if you want to say that, beyond a reasonable doubt, that each and every one of the plaintiffs in the *Mejia* and the *Rivera* cases have presented fraudulent documents and actively participated in a conspiracy to defraud this court, to extort money from the defendants, and to defraud the defendants."[98] The plaintiffs have appealed.

In July 2009, the Second Appellate Division of the Court of Appeal of California remanded the *Tellez* case to the Superior Court, with an order for the plaintiffs to show cause why that case also should not be dismissed.[99] The court is considering the case as of this writing.

Enforcement actions

The efforts to enforce judgments issued in Nicaragua under Special Law 364 have had similar problems. In *Sanchez Osorio v. Dole Food Co.*,[100] a case brought in Florida, and *Franco v. The Dow Chemical Co.,*[101] a case brought in Los Angeles, courts have denied enforcement requests with accompanying findings in many respects as harsh as those made by Judge Chaney.

[92] *Id.* at 41-50. Dole investigators reported receiving threats against their lives. "Wanted" posters featuring a drawing of one investigator were distributed in Chinandega, asking people for information about his whereabouts. Radio broadcasts also were made, warning citizens not to cooperate with the Dole investigators and threatening harm if people were found to talk to the investigators. There were also false criminal charges pressed against the Dole investigators. *Id.* at 46-50.

[93] *Id.* at 2.

[94] *Id.* at 3, 27-29.

[95] *Id. at 29.*

[96] *Id.*

[97] *Id.* at 58.

[98] *Mejia v. Dole Food Co. & Rivera v. Dole Food Co.,* Los Angeles Superior Court Case Nos. BC340049, BC379820 (April 23, 2009) (Oral Ruling at 15).

[99] *Dole Food Co. v. Tellez*, Los Angeles Superior Court, Case No. B216182, B216264 (July 7, 2009) (order to show cause). Recently, plaintiffs have launched allegations that Dole investigators bribed witnesses as part of the fraud investigation, something Dole vehemently denies. *See* Marcos Aleman, *Nicaraguan Workers Deny Conspiracy Against Dole*, Associated Press, May 14, 2010, http://www.google.com/hostednews/ap/article/ALeqM5i-Cj-IL8N0dp5Fx71fswat46h5BAD9FMV13O0.

[100] 665 F. Supp.2d 1307 (S.D. Fla. 2009).

[101] 2003 WL 24288299 (C.D. Cal. 2003).

SANCHEZ OSORIO: "NOT EVEN CLOSE … TO BASIC FAIRNESS"

In August 2007, a group of 150 alleged former Nicaraguan banana workers represented by Provost Umphrey, claiming they had been exposed to DBCP, filed suit in Florida state court to enforce a $97 million Nicaraguan judgment against Dole Food, Dow Chemical, Occidental Petroleum and Shell Oil. That judgment had been obtained under Law 364. It was issued by Nicaraguan Judge Socorro Toruno, the very judge found by Judge Chaney to have participated in the conspiracy with Provost Umphrey and others to "fix" Nicaraguan cases under Special Law 364. When the plaintiffs filed the enforcement action, the defendants promptly removed it to federal court in Florida.

In October 2009, Judge Paul Huck, a federal judge in the United States District Court for the Southern District of Florida, in a harsh rebuke, issued an opinion refusing to enforce the Nicaraguan court judgment. In *Sanchez Osorio v. Dole Food Co.*, Judge Huck cited four separate grounds that rendered the Nicaraguan judgment unenforceable. First, he ruled that the Nicaraguan courts did not have jurisdiction over the defendants. Although the defendants exercised their right to opt out of the case under the opt-out provision in Special Law 364, the plaintiffs and Judge Toruno proceeded anyway to secure the substantial judgment; Judge Huck concluded that the judgment had been rendered against defendants not properly before the Nicaraguan courts, and could not be enforced. [102]

Second, the court ruled that Special Law 364 denied defendants basic due process, [103] citing among other things Special Law 364's "irrefutable presumption" that DBCP exposure caused the plaintiffs' sterility – a presumption Judge Huck found was "the antithesis of basic fairness." [104] That and other procedural failings led the court to hold that the Nicaraguan proceedings did "not even come close" to the "basic fairness" required by the "international concept of due process."[105]

Third, Judge Huck ruled that the marked shortcomings in the process were incompatible with Florida's public policy, concluding that enforcing the judgment "would clearly undermine public confidence in the administration of the law or in the security of individual rights."[106]

Finally, relying on United States Department of State country reports, assessments of various non-governmental organizations, and expert testimony, Judge Huck found that "the judicial branch in Nicaragua is dominated by political forces and, in general, does not dispense impartial justice." [107] Indeed, he wrote that the underlying trial in Nicaragua was conducted in an "*ad hoc*, unpredictable, discriminatory and confusing manner."[108]

Although Judge Chaney took the unusual step of calling Judge Huck to express her concerns regarding the possibility of fraud underlying the Florida action, Judge Huck's opinion did not consider those fraud issues. [109] Nonetheless, the opinion was as scathing

[102] *Osorio*, 665 F. Supp.2d at 1321-26. The also court granted motions to dismiss for lack of personal jurisdiction filed by Shell Oil and Occidental Petroleum due to their lack of contact with Nicaragua.

[103] *Id.* at 1327-45.

[104] *Id.* at 1335.

[105] *Id.* at 1345.

[106] *Id.* at 1345-47.

[107] *Id.* at 1349.

[108] *Id.* at 1343.

[109] *Id.* at 1312, 1321 n.7. The court bifurcated the fraud issue, stating that it would be addressed if the defendants fail to prevail on their other defenses. *Id.* at 1311 n.3.

in its condemnation of justice under Special Law 364 as Judge Chaney's decision revealing the fraudulent conspiracy in Nicaragua. [110] Judge Huck recently denied the plaintiffs' motion for reconsideration, motion for a new trial and motion to amend the judgment. [111]

THOMAS GIRARDI AND WALTER LACK: "[O]BJECTIVE EVIDENCE OF IMPROPER PURPOSE"

A third DBCP case, *Franco v. Dow Chemical Co.,* [112] a 2003 action to enforce a Nicaraguan judgment that was filed in Los Angeles, reveals that the remarkable ethical breaches identified by Judge Chaney in the DBCP context do not stand in isolation. In September 2001, at the direction of Lack and Girardi, 465 alleged former Nicaraguan banana workers sued various American companies in Nicaragua under Law 364. [113] Lack and Girardi had partnered with Ojeda, [114] communicating in substantial part with non-lawyer administrator Walter Gutierrez, who provided them with all relevant documents in the matter. [115] Judge Chaney cited the Ojeda firm, and Gutierrez in particular, as having participated in the recruiting of fraudulent plaintiffs[116]; she noted that Gutierrez himself "manufacture[d] evidence and improperly influence[d] the outcome of DBCP cases pending in Nicaraguan courts in favor of plaintiffs." [117]

The Nicaraguan complaint was filed by the plaintiffs against The Dow Chemical Company and Shell Oil. The complaint also named the Dole Food *Corporation*, an entity that does not exist, but not the Dole Food *Company*, the well-known corporate agricultural concern. [118] Indeed, when Dole Food Company tried to intervene in the Nicaraguan matter, the court expressly ruled that Dole Food Company lacked standing to litigate, because it was not the entity named in the complaint. [119] The Nicaraguan courts awarded the plaintiffs $489 million in damages against the corporate defendants named in that complaint.

Before July 2003, when they brought the judgment enforcement action in Los Angeles Superior Court, Lack and Girardi became aware of their problem; no judgment could be enforced against Dole Food Company in light of the company's absence from the Nicaraguan litigation. [120]

Nevertheless, they filed their judgment enforcement action against Dole Food Company, relying not on the actual writ of judgment from the Nicaraguan Courts, but on an affidavit of a notary public – provided by Gutierrez – purporting to translate the judgment

[110] Plaintiffs' counsel have several other judgments from the Nicaraguan courts, including one for $802 million, that they have yet tried to enforce in the United States. Given the outcome of the *Sanchez-Osorio* enforcement action, their prospects seem dim.

[111] *Osorio v. Dole Food Co.*, Order Denying Plaintiffs' Motions, 2010 WL 571806 (S.D. Fla. Feb. 12, 2010).

[112] 2003 WL 24288299 (C.D. Cal. 2003).

[113] Report & Recommendation at 5.

[114] *Id.* at 4.

[115] *Id.* at 6.

[116] *Mejia Op.* at 2, 24.

[117] *Id.* at 27-28.

[118] Report & Recommendation at 5.

[119] *Id.* at 9.

[120] *Id.* at 11. Lack sent an email noting he was "VERY concerned" and that "the judgment needs to be against Dole Food Company . . . [it] needs to be a perfect match."

into English.[121] The affidavit mistranslated Dole Food *Corporation* (the nonexistent entity) into Dole Food *Company*, among other errors.[122] Although they were aware of the issue, Lack and Girardi in their briefs falsely relied on this mistranslation and other inaccuracies surrounding the substance of the judgment.

In July 2003, shortly after Lack and Girardi filed their complaint, the case was removed to federal court.[123] Lack and Girardi then repeated their false statements surrounding the Nicaraguan judgment, and also submitted several "expert" affidavits in support of their position.[124] The federal district court in Los Angeles dismissed the case, calling the writ of judgment that formed the basis of plaintiffs' claims "suspect."[125] In later depositions, one plaintiffs' expert admitted the affidavits were "inaccurate." Another plaintiffs' expert called the affidavits "totally fraudulent" and said that he had no contact at all with plaintiffs or their attorneys and never signed his purported affidavit.[126]

Girardi and Lack appealed the dismissal, and repeated their misstatements in several rounds of appellate briefing. On the eve of argument in the United States Court of Appeals for the Ninth Circuit, the plaintiffs dismissed the appeal upon advice of appellate counsel.[127] The Ninth Circuit appointed a Special Master, federal judge A. Wallace Tashima, to make a report and recommendation as to whether the plaintiffs' attorneys "should not be required to reimburse the [defendants] for fees and expenses incurred in defending this appeal, and why [the plaintiffs' attorneys] should not be suspended, disbarred or otherwise sanctioned . . . for filing a frivolous appeal, falsely stating that the writ of execution issued by the Nicaraguan court named Dole Food Company, Inc. as a judgment debtor … and falsely stating that the notary affidavit constituted an accurate translation of the writ."[128] In March 2008, Judge Tashima issued a Report and Recommendation, which he amended in October 2009; Judge Tashima recommended fines against Lack, Girardi, several subordinate attorneys and their respective law firms in amounts totaling nearly $400,000.[129]

The Report and Recommendation, like the Chaney and Huck opinions, reached an astonishingly harsh conclusion. Judge Tashima found that the "sanctions are justified in this case because Respondents' filings were made in bad faith," and "recklessly and intentionally misled this Court."[130] The Special Master continued, "Respondents' factual contentions were so weak – they were baseless and made without reasonable and competent inquiry – that they provide objective evidence of improper purpose."[131] The Report and

[121] *Id.* at 18-19.

[122] *Id.*

[123] *Id.* at 22-23.

[124] *Id.* at 27.

[125] *Id.* at 37.

[126] *Id.* at 29-33.

[127] *Id.* at 45 (appellate attorney reviewed case file for only 6 hours before recommending withdrawal of the appeal).

[128] *Id.* at 47.

[129] *Id.* at 64-65.

[130] *Id.* at 49 (citations omitted).

[131] *Id.* at 53.

Recommendation concluded that Girardi and Lack's "efforts went beyond the use of 'questionable tactics' – they crossed the line to include the persistent use of known falsehoods . . . ." [132] The United States Court of Appeals for the Ninth Circuit is considering the recommendation, including potential suspensions from practice for the attorneys, who deny affirmative wrongdoing.

Conclusion

The Nicaraguan DBCP cases present an unprecedented attempt by plaintiffs' lawyers to gain massive recoveries in U.S. courts for transnational torts. Plaintiffs' attorneys have employed audacious and wide-scale legal and extra-legal tactics, from outright forum shopping to manufacturing evidence to creating favorable foreign laws to extensive use of the media to locate plaintiffs, pressure corporate defendants, and obtain favorable judgments.

Although the judicial findings of misconduct, to date, have been limited to Nicaragua, there are inklings of similar problems in cases arising from other locales. Regarding a series of DBCP cases originating from the Ivory Coast, Dole received information from a plaintiffs' coordinator – similar to a Nicaraguan "captain" – that the plaintiffs' attorney had illegally collected sperm samples from over 2,000 potential litigants. [133] In 2009, the lawyer withdrew as counsel of record, in part because he and his staff had become "potential witnesses to an alleged fraud and could not ethically continue to represent the plaintiffs without their expressed consent." [134] The judge then dismissed the case when the plaintiffs, hundreds of peasants, failed to find new counsel or appear themselves.[135] While these fraud allegations have not been substantiated given the withdrawal of the complaint, the allegations certainly resemble those in Nicaragua.[136]

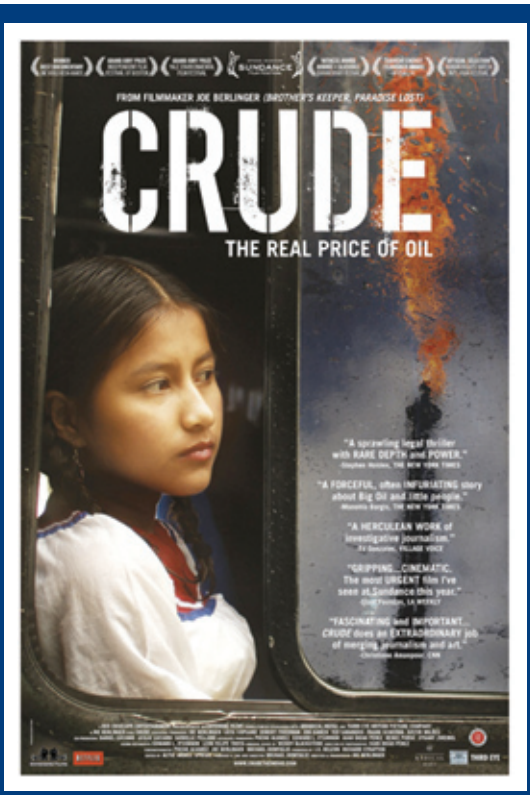
[132] *Id.* at 62-63.

[133] *Abagninin v. Amvac Chem. Corp. Inc.*, Los Angeles Superior Court, Case No. BC 359259 (May 18, 2009) (Dole Defendants Proposed Agenda of Issues for May 19, 2009 Status Conference and attached affidavit), http://amlawdaily.typepad.com/Agenda.pdf and http://amlawdaily.typepad.com/Cuplier%5B1%5D.pdf.

[134] David Bario, *Gibson Dunn Knocks Out African Pesticide Case For Dole*, November 19, 2009, AMLaw Litigation Daily, www.law.com/jsp/tal/digestTAL.jsp?id=1202435667127.

[135] *Id.*

[136] Also of note, in *Rojas v. DeMent*, 137 F.R.D. 30 (S.D. Fla. 1991), involving Costa Rican DBCP plaintiffs, the court ordered sanctions against the plaintiff's attorney. The attorney previously brought two similar actions that had been dismissed on *forum non conveniens* grounds. Agreeing with the statement that the DBCP cases were "'one of the most wide-ranging efforts at forum shopping in legal history,'" *id.* at 32 (citation omitted), the court sanctioned the lawyer *sua sponte* for wasting judicial resources. In addition, in DBCP cases arising from non-Nicaraguan locations, the plaintiffs' attorneys have filed a series of copycat cases, each with just under 100 class members to avoid the 100 class member threshold that would permit the defendants to invoke the Class Action Fairness Act (28 U.S.C. § 1332(d)(11)(B)(i)) and remove the case to federal court. *Vanegas v. Dole Food Co.*, 2009 WL 690198 (C.D. Cal. March 9, 2009); *Tanoh v. AMVAC Chemical Corp.*, 2008 WL 4691004, at *5 (C.D. Cal. Oct. 21, 2008). *See also Tonah v. Dow Chem. Company*, 561 F.3d 945 (9th Cir. 2009). One defendant settled, and offered to settle, other claims without admitting liability. *See, e.g.,* Richard Clough, *Dole Proposes New Settlements*, L.A. Daily Business Journal, May 31, 2010, http://labusinessjournal.com/news/2010/may/31/dole-proposes-new-settlements.



"…it's always looking for ways to increase leverage, and increase the cost to Chevron for not doing anything. So what's the cost? The cost right now is the risk of getting a huge multi-billion dollar judgment at trial… it's the cost of all the hassle they have to put up with the environmental groups. It's the cost of their sullied reputation in the media. So there's a lot of costs… whether or not they perceive those costs to be higher than the cost of cleaning up, at the price we think we need, I don't think that's happened yet. But the idea is to move in that direction, I think we're moving in that direction."

–"Crude," U.S. plaintiffs' counsel, Lago Agrio case

CHEVRON-ECUADOR: 17 YEARS OF LITIGATION

Although the underlying facts and postures differ widely between the DBCP cases from Nicaragua and the series of matters surrounding the claims against Texaco arising from its activities in Ecuador, the study observed many of the same legal and out-of-court activities. For the past 17 years, communities in the Oriente region of the Amazon in Ecuador have been seeking compensation against Texaco, and now Chevron (a subsidiary of which acquired Texaco), for alleged physical injuries and environmental degradations. The case originated in a U.S. federal court under the ATS. After its dismissal, the plaintiffs' attorneys filed a lawsuit in Ecuador for environmental harms, and a personal injury case in a different United States federal district court attributing serious injuries to Texaco.

There have been allegations, however, and in some instances judicial findings and video recordings, of improper conduct by various personnel involved. In the United States personal injury action, a federal judge found that the plaintiffs' attorneys had fabricated many of the alleged harms, including fatal illnesses. In Ecuador, troubling evidence has emerged showing judicial bias and overt political pressure on the local courts. That has occurred in concert with aggressive plaintiffs' litigation tactics,[137] and a persistent, well-organized campaign of extra-legal efforts overtly seeking to pressure Chevron in the case.

Background History

In 1964, TexPet, a Texaco subsidiary, acquired the right to explore and drill for oil in Ecuador's Oriente region.[138] Through the 1970s and 1980s, TexPet drilled in Ecuador as part of a consortium consisting of Texaco

[137] Plaintiffs' advocates accuse Chevron of some of the same tactics. *See* Amazon Watch, *Chevron's Ten Biggest Lies About Ecuador*, http://amazonwatch.org/documents/ecuador-press-kit/chevrons-top-ten-lies-long.pdf.

[138] *In re Application of Chevron Corp.*, 2010 WL 1801526, at *1 (S.D.N.Y. May 6, 2010); *Gonzales v. Texaco, Inc.* No. C 06-02820 WHA, Second Amended Complaint, at 1 (N.D. Cal. Nov. 15, 2007). In 2001, a Chevron subsidiary merged with Texaco (of which TexPet was a subsidiary).

and Gulf Oil subsidiaries.[139] TexPet operated under an oil concession granted to the consortium by the Government of Ecuador. Ecuador subsequently joined the consortium and granted its state oil company, CEPE (which later became Petroecuador), a 25% ownership interest.[140] In 1976, Ecuador purchased Gulf's interest in the consortium, thereby becoming the majority owner with 62.5%.[141] At the time, TexPet held a 37.5% interest in the consortium.[142] Although TexPet was a minority owner in the consortium, it largely served as the consortium's operator until July 1990, when Ecuador's state-run oil company, Petroecuador, became the operator.[143] In 1992, TexPet relinquished its interests in the consortium, and Petroecuador assumed sole ownership.[144]

As the oil concession was ending, TexPet, Petroecuador, and the government agreed to divide the responsibility for environmental remediation. Apparently, Petroecuador declined to remediate its share of the operations' environmental impact, and Ecuador directed TexPet to remediate its portion and leave Petroecuador's portion for Petroecuador to complete at a later date.[145] In 1998, TexPet completed a $40 million environmental remediation program, conducted through independent contractors, and representatives of Petroecuador and the Ecuadorian government certified the work.[146] Also in 1998, TexPet and the government, and TexPet and Petroecuador, entered into separate releases discharging TexPet from liability for environmental damage.[147]

Series of Lawsuits

Plaintiffs in Ecuador have filed three primary lawsuits against Chevron/Texaco, involving many of the same lawyers and issues and using many of the same sharp tactics, and even more, observed in the DBCP in Nicaragua context. In short, the plaintiffs claim that TexPet engaged in improper by-product disposal techniques,[148] which contaminated nearby water sources and diffused the Oriente region with

[139] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *1 (S.D.N.Y. May 6, 2010); Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron,* http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf, at 2; *Texaco in Ecuador Timeline*, http://www.texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx.

[140] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *1 (S.D.N.Y. May 6, 2010); Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf.

[141] *See* Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf.

[142] *See id.*

[143] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *1 (S.D.N.Y. May 6, 2010); Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf.

[144] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *1 (S.D.N.Y. May 6, 2010).

[145] *See id.*; Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf.

[146] *See* Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf. According to Chevron, TexPet's remediation program included closing and remediating 161 well pits, closing 18 wells, closing and remediating 7 spills areas, and installing three systems for reinjecting the produced water from the drilling.

[147] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *1-2 (S.D.N.Y. May 6, 2010); Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf.

[148] *See Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, Second Amended Complaint, at 10-11 (N.D. Cal. Nov. 15, 2007).

carcinogenic toxins.[149] That set of allegations is at the core of each of the major legal actions, which have been bolstered by a wide array of out-of-court activities focusing on the media, investment, political, and community organizing activities. Notably, however, while the plaintiffs have filed these actions against Chevron, they have filed none against Petroecuador (or other consortium members).[150]

Aguinda v. Texaco

In 1993, public interest attorneys Cristobal Bonifaz and Steven Donziger, along with others, filed an action in United States federal district court in Manhattan premised on Texaco's activities in Ecuador. The action, *Aguinda v. Texaco*, No. 93 Civ. 7527 (VLB), 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), sought relief under the ATS.[151] The Philadelphia-based plaintiffs' firm Kohn, Swift & Graf PC, financed the suit.[152]

In 1994, Bonifaz filed a similar action, *Ashanga Jota v. Texaco*, No. 94 Civ. 9266 (JSR) (S.D.N.Y.),[153] on behalf of indigenous peoples in Peru, alleging that Texaco's practices in Ecuador polluted a river and thereby impacted the plaintiffs' livelihood. The United States District Court for the Southern District of New York consolidated the *Jota* and *Aguinda* cases.

When Bonifaz filed *Aguinda*, the Frente de Defensa de la Amazonia ("Amazon Defense Front") was formed to support the action.[154] The group purports to be "part of a regional, national and global struggle for environmental and collective rights in the Ecuadorian Amazon."[155] Bonifaz represented the Amazon Defense

[149] *See id.* at 11. The plaintiffs allege that TexPet knew its practices were harmful. *Id.* at 14-15. Texaco's response to these lawsuits is that its practices comported with all applicable standards, and it was provided a clean bill of health by the government. The company states that any contamination is properly attributable to Petroecuador, which continues to pollute, and that water contamination and related illnesses are the product of bacteria unrelated to petroleum. *See Chevron Asks, 'Show us the Evidence,'* http://theamazonpost.com/tag/petroecuador; *Ecuador Lawsuit Myths*, The Amazon Post, http://theamazonpost.com/category/ecuador-lawsuit-myths.

[150] That is true though Petroecuador was the majority partner in the consortium, it has been solely responsible for oil production in the area since 1992, and it had granted TexPet a release from environmental liability. In addition, Petroecuador has a dubious environmental record. The plaintiffs do not deny such facts, but assert that they are not seeking relief against Petroecuador because "the systems put in place by Texaco allowed Petroecuador to go on polluting." *See* Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, The New York Times, May 14, 2009, http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1. Chevron counters that the plaintiffs promised the Government of Ecuador that they would not sue Petroecuador, despite whatever harms it might have caused, likely to win the Government's support in the lawsuits. *See* The Amazon Post, http://theamazonpost.com/news/hidden-deal-in-ecuador-case-lawyers-suing-chevron-strike-agreement-that-spares-petroecuador-from-litigation-and-ensures-government-support; *see also* The Amazon Post, http://theamazonpost.com/wp-content/uploads/Bonifaz-Articles.pdf.

[151] *See Aguinda v. Texaco, Inc.*, No. 93 Civ. 7327, Complaint (S.D.N.Y. Sept. 3, 1993).

[152] *See Aguinda v. Texaco, Inc.,* No. 93 Civ. 7327, 1994 WL 142006 *1 (S.D.N.Y. Apr. 11, 1994).

[153] *Sequihua v. Texaco, Inc.* was also filed in 1993, based on the same allegations. *Sequihua* was dismissed on *forum non conveniens* grounds. *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex 1994). An action similar to *Jota* was later filed against Occidental Petroleum based on its operations impacting Peru. *Carijano v. Occidental Petroleum Co.*, Los Angeles Superior Court No. BC370828 (May 10, 2007). The case, removed to federal court, was dismissed and an appeal is pending.

[154] *See* ChevronToxico, *Communities Mobilize Against Chevron*, at http://chevrontoxico.com/about/affected-communities/communities-mobilize-against-chevron.html (Frente formed in 1993); *see also Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 2-3 (N.D. Cal. Nov. 15, 2007) (Frente formed in 1994); Amazon Defense Coalition, http://www.texacotoxico.org/eng/node/1.

[155] *See* http://www.texacotoxico.org/eng/node/1.

Coalition until 2006.[156]

In 1996, the court dismissed the *Aguinda/Jota* lawsuit on *forum non conveniens* grounds.[157] In 2002, after trial and appellate court proceedings that required Texaco to stipulate to jurisdiction in Ecuador as part of a *forum non conveniens* ruling, the case was finally dismissed from the United States.[158]

After that dismissal, Bonifaz helped file two subsequent lawsuits, one in Ecuador involving alleged environmental harms, and one in the United States involving alleged personal injuries.

This is not the first evidence of possible misconduct by plaintiffs' counsel in this case.

Judge Williams Asup, *Gonzales v. Texaco*, Aug. 3, 2008

Gonzales v. Texaco: another transnational tort fraud

Bonifaz filed the personal injury action, *Gonzales v. Texaco*, in 2006 in federal court in San Francisco. The plaintiffs alleged that Texaco's by-product disposal practices contaminated available water sources, creating various physical maladies for local residents.[159]

According to findings by the court, in January 2006, Bonifaz sent $2,000 to a friend, Gerardo Pena Mateus, in Ecuador. He included a letter requesting that Mateus locate three or four local residents who have cancer, and obtain certifications from a doctor stating that there is at least a 51 percent chance that petrol contamination caused the illnesses. Bonifaz also requested that Mateus obtain authorization by the plaintiffs that court relief be sought in their names.[160] Bonifaz and Mateus then created a one-page intake form for the potential plaintiffs, and Bonifaz asked Mateus' paralegal in Ecuador to gather plaintiffs – which she did. Mateus sent the completed intake forms to Bonifaz.[161] During the litigation,

[156] There are some claims that Donziger formed the group. *See* The Blog Report With Zennie62, *Amazon Defense Coalition is foreign nonprofit corporation*, San Francisco Chronicle, November 12, 2009, http://www.sfgate.com/cgi-bin/blogs/abraham/detail?blogid=95&entry_id=51564. Bonifaz and others dispute that claim. *See* ChevronToxico, *Communities Mobilize Against Chevron*, at http://chevrontoxico.com/about/affected-communities/communities-mobilize-against-chevron.html; *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 2-3 (N.D. Cal. Nov. 15, 2007).

[157] *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996). When the Amazon Defense Coalition learned of the *Aguinda* dismissal, it organized a protest in Ecuador's capital city, Quito. The protest included a sit-in at the Ecuador Attorney General's Office, and the Amazon Defense Coalition threatened to remain there until the Government of Ecuador agreed to support the lawsuit, which it had been opposing. *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 3 (N.D. Cal. Nov. 15, 2007). Shortly thereafter, Ecuador moved to intervene in the litigation and asked for a reconsideration based on its changed litigating position. *Id.* Petroecuador also moved to intervene. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996). The district court refused to permit Ecuador and Petroecuador to intervene, and denied the motion for reconsideration. *Aguinda v. Texaco, Inc.*, 175 F.R.D. 50 (S.D.N.Y. 1997).

[158] *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). In 1998, the Second Circuit reversed the district court for failing to require that Texaco be subject to jurisdiction in Ecuador. *Aguinda v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). The district court dismissed the case again in 2001 after Texaco agreed to suit in Ecuador. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

[159] *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, Second Amended Complaint, at 12, 19 (N.D. Cal. Nov. 15, 2007).

[160] *See Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 56622, *10 (N.D. Cal. Aug. 3, 2007). According to the court, Bonifaz also noted in the letter, "It is possible that with this last action in court that I am planning we will give Chevron 'la copa de gracia'," which is roughly translated to mean "we'll finally stick it to Chevron."

[161] *See Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 81222 *7 (N.D. Cal. Oct. 16, 2007).

the court ordered the plaintiffs to produce the intake forms and the "51 percent" certifications from the doctor; however, Bonifaz admitted that he obtained no such certifications and the doctor never had been contacted.[162]

Defense counsel then traveled to Ecuador to depose the plaintiffs. During the depositions, defense counsel discovered that several of the plaintiffs' claims, as reflected in their complaint, were blatantly false. One plaintiff's son, alleged to have suffered from leukemia, did not have leukemia; indeed, the intake form for the son had left blank the date of the first diagnosis of cancer. In her deposition, the plaintiff stated that the paralegal never asked if her son had cancer, that she never told the paralegal that her son had cancer, that she never authorized her lawyer to sue Texaco based on these claims, and that she was never even told Texaco would be sued. [163]

Another plaintiff had told Mateus' paralegal that she had cancer; she admitted during her deposition that she did not have cancer, never did have cancer, and was never told by a doctor that she had cancer. Furthermore, nothing on her intake form indicated a medical diagnosis. [164] Her husband, also a plaintiff, never completed an intake form, and never met with attorneys in the case prior to the deposition.

When the court learned of these fabricated claims, it dismissed the three plaintiffs and issued sanctions *sua sponte* against Bonifaz and the other plaintiffs' counsel. It found that the plaintiffs did not understand or expect that a lawsuit would be brought in their names, concluding that counsel "relied on the unsophistication of plaintiffs." [165]

The court further found that "[t]his is not the first evidence of possible misconduct by plaintiffs' counsel in this case," [166] stating, "It is clear to the Court that this case was manufactured by plaintiffs' counsel for reasons other than to seek a recovery on these plaintiffs' behalf. This litigation is likely a smaller piece of some larger scheme against defendants."[167] The court later granted Chevron's motion for summary judgment dismissing the remaining two plaintiffs, thereby ending the litigation.

Lago Agrio litigation

The other lawsuit that followed the consolidated *Aguinda/Jota* dismissal in the United States is the Lago Agrio litigation. Bonifaz helped filed this action against Chevron[168] in Lago Agrio, Ecuador, in

[162] *See id.* at *26-27.

[163] *See Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, Order Granting Motions for Summary Judgment and Terminating Sanctions (Aug. 3, 2007).

[164] *See id.*

[165] *Id.*

[166] *Id.*

[167] *Gonzales v. Texaco Inc.,* No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 84523 (N.D. Cal. Nov. 15, 2007). The U.S. Court of Appeals for the Ninth Circuit subsequently found that the district court did not apply the correct standard in imposing sanctions on the plaintiffs' attorneys. In 2009, it reversed and vacated the sanctions ruling, and remanded the case so the district court could reconsider sanctions using the correct standard. *Gonzales v. Texaco, Inc.*, 2009 WL 2494324 (9th Cir. 2009).

[168] In 2006, the Amazon Defense Coalition terminated Cristobal Bonifaz. A resolution regarding his termination cited actions made by Bonifaz that were "unilaterally decided and personal" and that violated the Coalition's "internal decision-making processes with respect to the legal process, which has created a feeling of distrust in the directors and the legal team members alike." *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 81222 *6 (N.D. Cal. Oct. 16, 2007). Pablo Fajardo, the lead counsel in the Lago Agrio litigation, more recently stated that Bonifaz engaged in "ethically questionable" conduct that included failing to meet with clients and inadvertently waiving a defense that could have resulted in denying plaintiffs a recovery in the *Aguinda* case. *Chevron Criticized for Trying To Use Court Decision To Hide Environmental Liability In Rainforest*, Medio Ambiente Online, October 19, 2007, http://www.medioambienteonline.com/site/root/market/company_news/5257.html. As Fajardo's comments followed a stinging judicial rebuke of Bonifaz in the United States, they may reflect a desire to distance Bonifaz from the Lago Agrio litigation.

2003.[169] The Amazon Defense Coalition, represented by Bonifaz until 2006, is the named beneficiary of the lawsuit. As with the *Aguinda* case, Joe Kohn, of Kohn, Swift & Graf, a Philadelphia plaintiffs' firm, is financing the lawsuit.[170] As Mr. Kohn made clear in a documentary about Chevron-Ecuador, this matter "was not taken as a pro bono case, you know a lot of my motivation is, at the end of the day, is that it will be a lucrative case for the firm. And I think it put us in a position to do more of these kinds of cases."[171]

Bonifaz based the Lago Agrio Complaint in part on Article 43 of a newly created Ecuadorian law—the Environmental Management Act ("EMA")—for which he had lobbied while litigating *Aguinda* in the United Statess.[172] Enacted in 1999, the law gave individuals the ability, for the first time, to sue in Ecuador for "environmental remediation of public land."[173] The case was filed although Ecuador enacted the EMA long after TexPet completed its Ecuadorian operations and cleanup efforts, and the Ecuador Constitution prohibits the retroactive application of new laws.

PUBLIC RELATIONS AND LOBBYISTS

The plaintiffs also have assembled a powerful public relations and lobbying team to assist in their efforts. They have hired Karen Hinton Communications to provide advice, issue press releases for the Amazon Defense Coalition, post plaintiff-friendly comments on blogs, and engage in other public relations work. They also have hired Ben Barnes, a fundraiser and lobbyist, to lobby on behalf of the plaintiffs.[174] Another such lobbyist is former Congressman Tom Downey, well connected in the current policy community in Washington.[175]

THE AMAZON DEFENSE COALITION AND OTHER NGOS

The Amazon Defense Coalition is a powerful driving force in the plaintiffs' litigation. On its website, the Amazon Defense Coalition describes itself as "a group of Amazonian grass roots organizations and communities who have joined to defend and sustain our peoples and environment through unification of our forces and the integration of the entire Ecuadorian Amazon."[176] The Lago Agrio complaint requests that

[169] In September 2009, Chevron and TexPet also filed a claim before the Permanent Court of Arbitration asserting that Ecuador's conduct in connection with the Lago Agrio litigation breached settlement and release agreements that were protected under the U.S.-Ecuador Bilateral Investment Treaty, and also violated provisions of the Treaty itself. In late 2009, Ecuador filed an action in the U.S. District Court for the Southern District of New York to enjoin the arbitration from proceeding. *See Republic of Ecuador v. Chevron Corp.*, Petition to Stay Arbitration, No. 09 Civ. 09958 (S.D.N.Y. Dec. 3, 2009). The petition was rejected by the court on March 11, 2010, allowing the arbitration to proceed. *Republic of Ecuador v. Chevron Corp.*, No. 09 Civ. 09958, 2010 WL 1028349 (S.D.N.Y. March 11, 2010). That ruling is being appealed. In addition, in 2009, ChevronTexaco Corp. filed a claim against Ecuador before the Permanent Court of Arbitration, arising from seven lawsuits filed by Texaco against the government in the 1990s. The arbitrators found that the slow pace of the decisions in Ecuador entitles the company to $700 million in damages. *See* Ben Casselman, *Ecuador to Pay Chevron Damages*, Wall Street Journal Online (WSJ.com), March 30, 2010.

[170] The Amazon Post, *A Web of Influence: The Complex Case Against Chevron in Ecuador*, http://www.theamazonpost.com/web-of-influence ("Cristobal Bonifaz Architect of Lawsuit").

[171] Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf.

[172] *Id.* at 2.

[173] *Id.*

[174] The Amazon Post, *Trial Lawyers Bankroll Lawsuit, Bank on Payday*, Dec. 9, 2009, http://theamazonpost.com/news/trial-lawyers-bankroll-lawsuit-bank-on-payday.

[175] Vogel, Kenneth P., *Chevron's lobbying campaign backfires*, Politico.com, Nov. 16, 2009, http://www.politico.com/news/stories/1109/29560.html.

[176] Amazon Defense Coalition, TexacoToxico.com, "Who We Are" section, http://www.texacotoxico.org/eng/node/1.

the Amazon Defense Coalition, which is not a plaintiff but was formed to support the plaintiffs' lawsuit, be named trustee in charge of administering any money awarded for remediation. [177]

The Amazon Defense Coalition has a United States counterpart in Amazon Watch, a group based in San Francisco that claims to "protect the rainforest and advance the rights of indigenous peoples in the Amazon Basin," partnering with other "organizations in campaigns for human rights [and] corporate accountability." [178] Amazon Watch works closely with the plaintiffs' lawyers and is the Amazon Defense Coalition's United States partner in coordinating the campaign against Chevron. [179] A variety of other NGOs, including Amnesty International, Global Exchange, and EarthRights International, have lent assistance in various capacities in the United States and elsewhere. [180]

"So we're going down to have a little chat with the judge today. This is something you would never do in the United States. But Ecuador, this is how the game is played. It's dirty."

"Crude," U.S. plaintiffs' lawyer entering courthouse, Lago Agrio Case

PLAINTIFFS' TACTICS

As detailed in the below subsections, the campaign by NGOs, plaintiffs' lawyers, and other plaintiffs' advocates has included tactics inside and outside the legal system. There are allegations that inside the legal system, plaintiffs have taken advantage of weaknesses in the Ecuadorian courts, including susceptibility to political pressures, to push the court for a favorable verdict. Outside of the legal system, plaintiffs have pressured Chevron to settle the litigation by seeking to create leverage in Ecuador and the United States. They have used the media to generate negative publicity against the company, encouraged shareholders and institutional investment funds to divest Chevron stock, lobbied members of Congress to publicly denounce Chevron's attempts to hold the Government of Ecuador liable for failing to uphold its release of liability, and even sought criminal charges against Chevron attorneys representing the company in Ecuador.

[177] *See Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 4 (N.D. Cal. Nov. 15, 2007).

[178] *See* Amazon Watch, http://www.amazonwatch.org/about_us.

[179] *See* The Amazon Post, *A Web of Influence: The Complex Case Against Chevron in Ecuador*, at http://www.theamazonpost.com/web-of-influence ("Amazon Watch US Activist Group").

[180] *See, e.g.,* EarthRights International Campaign, *Mr. Watson: Do the Right Thing in Ecuador!*, January 13, 2010, http://www.earthrights.org/campaigns/mr-watson-do-right-thing-ecuador; *see also* Amnesty International, *Chevron (CVX) in the Amazon – Oil Rights or Human Rights? Texaco's legacy, Chevron's responsibility*, http://www.amnestyusa.org/business-and-human-rights/chevron-corp/chevron-in-ecuador/page.do?id=1101670; Global Exchange, *The Chevron Program*, http://www.globalexchange.org/campaigns/chevronprogram. Amnesty International, of course, is a well known NGO whose mission is to protect human rights on a global basis. *See* www.amnesty.org. Global Exchange claims to be "an international human rights organization dedicated to promoting social, economic and environmental justice around the world." *See* www.globalexchange.org. As discussed below, it is an institutional plaintiff in other transnational tort actions. EarthRights International is an NGO that claims it is dedicated to documenting and litigating human rights violations, advocating for those who have been harmed, and teaching people about rights and remedies. *See* www.earthrights.org/about.

LEGAL TACTICS

Corruption Concerns

The Lago Agrio litigation has been marked by credible evidence of political interference and troubling proceedings that create severe doubts about the reliability of the legal process.[181] One such disconcerting development involves judicial corruption.[182] In late 2009, three videos surfaced that appear to show the judge then-presiding over the Lago Agrio litigation confirming that he will rule against Chevron and hold the company liable for roughly $27 billion.[183] In one of the videos, an individual claiming to be associated with Alianza PAIS, Ecuador's ruling party, apparently tells two businessmen that he will direct remediation contracts to them after the verdict is rendered, if they pay him $3 million in bribes. He is recorded as saying that $1 million would go to the judge, $1 million would be for "the presidency," and the other $1 million would be directed to the plaintiffs.[184]

Whether the judge actually was soliciting a bribe is a matter of some dispute. Nonetheless, the judge describes the Lago Agrio litigation as "a fight between a Goliath and people who cannot even pay their bills." As the New York Times notes, corruption notwithstanding, "[t]he sympathies of the judge . . . are not hard to discern."[185]

After the videos appeared, the plaintiffs' representatives, rather than concede the troubling nature of the videos themselves, launched an aggressive public relations campaign against Chevron, claiming that Chevron orchestrated the potential bribery scheme. They hired investigators, issued press releases, and asked the Ecuadorian government to investigate Chevron.[186]

The judge has since been recused.

[181] After the plaintiffs filed the lawsuit, Chevron moved to dismiss the case, arguing, among other things, that retroactive application of the 1999 EMA was unconstitutional and that the Settlement and Release executed between TexPet and the Government of Ecuador barred plaintiffs' claims for public land remediation. Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf, at 4. The Ecuador Government did not take a position in the lawsuit at the time, and the court decided to wait on the pending motions until final resolution of the case on the merits. *Id.* at 5.

[182] The United States Department of State has observed the susceptibility of the Ecuadorian judiciary to external pressures, including political and media pressures, and corruption. U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, *2009 Human Rights Report: Ecuador*, http:// www.state.gov/g/drl/rls/hrrpt/2009/wha/136111.htm.

[183] Chevron Corp., *Chevron Provides Ecuador Authorities Evidence in Bribe Plot*, http://www.chevron.com/ecuador.

[184] Press Release, Chevron Corp., *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit Chevron Calls for Investigation, Disqualification of Judge in Ecuador Case* (August 31, 2009), http://www.chevron.com/news/press/release/?id=2009-08-31.

[185] Romero, Simon and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, The New York Times, May 14, 2009, http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1. One of the businessmen was an Ecuadorian who had been a logistics contractor for Chevron. The other businessman was an American who had no relationship to Chevron. Chevron stated that the two men recorded these meetings without Chevron's knowledge, and that the logistics contractor brought them to Chevron's attention. *Id.*

[186] The Amazon Defense Coalition and Amazon Watch hired an investigator to scrutinize the people who shot the videos, alleging that one has been convicted of drug charges years earlier. They also asked the U.S. Department of Justice to consider bringing criminal charges against the people who filmed the video, and Chevron, for alleged bribery violations; the study identified no evidence that the Department of Justice took such complaints seriously. *See* ChevronToxico, *Chevron's Bribery Scandal, Evidence Suggests a Chevron plan to disrupt Ecuador's judicial system* (October 29, 2009), http://chevrontoxico.com/assets/docs/20091029-chevrons-bribery-scandal.pdf; *see also* Press Release, ChevronToxico, *Report of Investigation of Wayne Hansen* (October 29, 2009), http://chevrontoxico.com/assets/docs/20091029-fine-report-without-annexes.pdf; ChevronToxico, *Chevron's Story on Ecuador Bribery Scandal Continues to Unravel* (October 13, 2009), http://chevrontoxico.com/news-and-multimedia/2009/1013-chevrons-story-on-ecuador-bribery-scandal-continues-to-unravel.html; Amazon Defense Coalition, *Chevron Admits Its Lawyers Present at Key Meeting with Ecuador Man Who Taped Video Scandal*, http://www.texacotoxico.org/eng/node/339.

Interference in Judicial Inspections

Evidence also has been identified that the plaintiffs have interfered in judicial inspections to pressure and politicize the judicial proceedings. In the evidentiary phase of the trial, the parties agreed that each side would provide an expert to inspect over one hundred former consortium sites and submit a report on each site.[187] If the experts made inconsistent findings, they would be resolved by a court-appointed expert. After these initial "judicial inspections," a "global assessment" was to be performed to determine whether any environmental remediation was necessary.[188] Chevron has stated that over some 30 months, it took more than one thousand water and soil samples that accredited U.S. laboratories analyzed.[189] They claim that the plaintiffs used an unaccredited laboratory and then blocked court-ordered inspections of those laboratories.[190]

In February 2006, a court-appointed panel of experts resolved an inspection dispute in Chevron's favor. According to Chevron, the plaintiffs responded by trying to pressure the judge into abandoning the inspection phase and moving straight to a global assessment.[191] Plaintiffs and their supporters protested outside the Lago Agrio courthouse, and the Amazon Defense Coalition published allegations that Chevron improperly was influencing two judges.[192] Shortly thereafter, a group of Ecuadorian officials, including Gustavo Larrea, the campaign manager for then-presidential candidate Rafael Correa, filed an amicus (friend of the court) brief in support of the plaintiffs, arguing that the court should end the judicial inspections it had ordered and move to a modified global assessment.[193]

Bowing to these pressures, the court reversed its prior course. It granted the plaintiffs' request to waive judicial inspections and appointed the plaintiffs' choice of Richard Cabrera, a mining engineer, as the sole expert responsible for the entire assessment.[194]

After conducting his assessment, Mr. Cabrera determined that Chevron alone is responsible for $27 billion in damages, with no responsibility placed on Petroecuador. How he arrived at that figure is the source of much controversy, and Chevron has filed petitions sharply objecting to Mr. Cabrera's methodology.[195]

[187] *See* Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf, at 5.

[188] *See id.*

[189] *See id.*

[190] *See id.* at 5-6.

[191] *See id.* at 6.

[192] *See id.*

[193] *See id.* Mr. Larrea was later named as Minister of Internal and External Security by President Correa, but was removed as part of an investigation into some of President Correa's government officials' alleged connections to the FARC, a terrorist group in Colombia. *Id.*

[194] *See id.*

[195] *See* Motion filed May 21, 2010, Suit No. 002-0003, http://www.chevron.com/documents/pdf/ecuador/cabrerafilingmay242010english.pdf. According to Chevron, Cabrera did not document causation and chronology as the court had ordered, ignored his own fieldwork results, environmental audits, and remediation costs, ignored his own work plan, lacked adequate time to complete his work, relied on secret teams for his work, and attributed all of the alleged harm, including harm linked to Petroecuador, to Chevron. *Id.* *See* Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf, at 9-10. Chevron alleges that 90 percent of the $27 billion figure was allocated to issues unrelated to remediation of the sites operated by the former consortium, and included such things as money for modernizing Petroecuador. *Id.* at 10.

Perhaps related to that, Chevron recently has identified evidence that at least raises serious questions about Mr. Cabrera's impartiality. Apparently, Mr. Cabrera previously served as a paid plaintiffs' expert, preparing two reports, in a different case that Bonifaz filed in the United States.[196] Chevron also cites evidence that Mr. Cabrera had improper contacts with consultants for the plaintiffs, that Mr. Cabrera prepared a report utilizing materials provided by those consultants, that a member of Mr. Cabrera's team began working on a survey used by Mr. Cabrera months before he was appointed, and that the team member made openly hostile remarks regarding TexPet's remediation efforts.[197] Indeed, in an outtake of the documentary *Crude*, a film about the Lago Agrio litigation (discussed below), the Cabrera team member appears with plaintiffs' counsel at a local community meeting, with one of the attorney's stating that the meeting was intended for the people to "talk to their lawyers" about "what they want as compensation."[198] According to Chevron, the community meeting was one of just six that the assistant attended as part of his survey.[199]

Mr. Cabrera also apparently was a co-founder, majority stockholder, legal representative, and general manager of an oilfield remediation company registered to perform oilfield remediation for Petroecuador, and could benefit from remediation contracts that would result from a verdict against Chevron.[200] The plaintiffs counter that Petroecuador would have no role in any clean-up, and thus Cabrera would not benefit financially.[201] The response, however, fails to address Cabrera's complete absolution of Petroecuador in his report to the court, or the other evidence of bias that Chevron cites.

EXTRA-LEGAL TACTICS

Political Tactics in Ecuador

To bolster their leverage against Chevron, the plaintiffs and their advocates also have employed an aggressive and varied array of extra-legal tactics. Among the most visible have been politically oriented efforts in Ecuador and the United States, designed to pressure a weak court susceptible to influence, legitimize the plaintiffs' case, win support abroad, and make Chevron pay the price for continued litigation.

In Ecuador, the executive branch has levied extensive pressure. In particular, the 2006 election of Socialist President Rafael Correa was a dramatic boon for the plaintiffs. The plaintiffs actively sought his support, and Correa wasted no time in providing it; in a telling scene in *Crude*, shortly after the election, a representative of the plaintiffs states that he had left the office of President Correa "after coordinating everything," and a plaintiffs' lawyer declares, "Congratulations. We've achieved something very important in this case.... Now we are friends with the President."[202] Consistent with that observation, Correa

[196] The case, *Arias v. DynCorp*, 517 F. Supp.2d 221 (D.D.C. 2007), involves the alleged use of a pesticide in Ecuador. It is pending in the United States District Court for the District of Columbia. Chevron contends that the conclusions in those reports directly contradict his conclusions in the Lago Agrio matter regarding the cause of certain harms alleged. *See* Chevron Motion, May 21, 2010, Suit No. 002-0003 (Lago Agrio), at 9.

[197] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *2 (S.D.N.Y. May 6, 2010); Chevron Motion, May 21, 2010, Suit No. 002-0003 (Lago Agrio), at 10-16, http://www.chevron.com/documents/pdf/ecuador/cabrerafilingmay242010english.pdf.

[198] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *4, 10 (S.D.N.Y. May 6, 2010).

[199] Chevron Motion, May 21, 2010, Suit No. 002-0003 (Lago Agrio), at 21, http://www.chevron.com/documents/pdf/ecuador/cabrerafilingmay242010english.pdf. The plaintiffs dispute these claims. *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *10 (S.D.N.Y. May 6, 2010).

[200] *See* Chevron Corp., *Ecuador Lawsuit - Cabrera Conflict of Interest*, at http://www.chevron.com/ecuador/background/cabrerareportflaws.

[201] *See* Press Release, ChevronToxico, *Chevron Caught Misrepresenting Facts about Expert Report in Ecuador Trial* (February 9, 2010), http://chevrontoxico.com/news-and-multimedia/2010/0209-chevron-caught-misrepresenting-facts-about-expert-report.html.

[202] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *4, 10 (S.D.N.Y. May 6, 2010).

has called the plaintiffs "comrades" and heroes, and has announced his solidarity with their cause.[203] He has publicly called Chevron's actions in Ecuador "a crime against humanity,"[204] stating, "We're not one of those right-wing sellout governments that supported this multinational company and betrayed our people."[205]

Ecuador President Rafael Correa at Lago Agrio (msnbc)

Correa also met with the plaintiffs to discuss their case, tour the affected area of the rainforest, and encourage their efforts,[206] and has publicly campaigned for them.[207]

Correa even called upon the State Prosecutor to investigate Chevron personnel for fraud in signing the remediation contracts with the State.[208] Although Chevron had received a release of liability from the government of Ecuador after finishing its $40 million environmental remediation program, the plaintiffs claimed that Chevron did not remediate the oil pits and fraudulently secured the release.[209]

In July 2008, plaintiffs' advocates held a news conference in Quito calling for charges to be brought against Chevron attorneys involved in the remediation. These allegations had been deemed baseless twice before: in 2006, the former Prosecutor General and Attorney General in Ecuador concluded there was no fraud in connection with TexPet's remediation program;[210] and in 2007, a district prosecutor, Washington Pesantez Munoz, affirmed the dismissal of charges against the Chevron personnel, also deeming them baseless.[211]

[203] Weekly Presidential Network, The Amazon Post (August 9, 2008), http://theamazonpost.com/web-of-influence/files/yanza/04_080908_CANAL_DEL_ESTADO.pdf; *see also* Press Conference for Prosecutor Washington Pesantez, The Amazon Post (September 4, 2009), http://theamazonpost.com/web-of-influence/files/rcorrea/08_20090904_Rueda_de_Prensa_del_Fiscal_Pesantez_eng.pdf.

[204] Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, The New York Times, May 14, 2009, http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1.

[205] Press Conference for Prosecutor Washington Pesantez, The Amazon Post (September 4, 2009), http://theamazonpost.com/web-of-influence/files/rcorrea/08_20090904_Rueda_de_Prensa_del_Fiscal_Pesantez_eng.pdf. *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *3 (S.D.N.Y. May 6, 2010).

[206] President Correa announced that he met with plaintiffs' advocates to discuss the case. *See* Excerpt from President Correa radio address, Radio Caravana (April 28, 2007), http://theamazonpost.com/web-of-influence/files/yanza/03_070428_Radio_Caravana_Correa_eng.pdf.

[207] Bret Stephens, *Amazonian Swindle, Daryl Hannah goes to Ecuador and gets in over her head*, Wall Street Journal Opinion Archives, October 30, 2007, http://www.opinionjournal.com/columnists/bstephens/?id=110010801.

[208] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *3 (S.D.N.Y. May 6, 2010).

[209] *See* ChevronToxico, *Chevron's $16 Billion Environmental Problem in Ecuador: Fact Sheet on Legal Case and Indictments of Two Chevron Lawyers* (September 2008), http://chevrontoxico.com/assets/docs/fact-sheet-2008-indictment-chevron-lawyers.pdf.

[210] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *2 (S.D.N.Y. May 6, 2010); *See* ChevronToxico, *Chevron's $16 Billion Environmental Problem in Ecuador: Fact Sheet on Legal Case and Indictments of Two Chevron Lawyers* (September 2008), http://chevrontoxico.com/assets/docs/fact-sheet-2008-indictment-chevron-lawyers.pdf.

[211] Request of Dr. Washington Pesantez Munoz, District Prosecutor of Pichincha, to The Hon. Judge of the Third Criminal Court of Napo (March 13, 2007), http://theamazonpost.com/web-of-influence/files/pesantez/04_prosecutor_pesantez_conf_vega.pdf.

Yet in 2008, after meeting with the Amazon Defense Coalition to discuss the case, President Correa exhorted the State Prosecutor to reopen an investigation.[212] In September 2008, Pesantez, by then Ecuador's Prosecutor General, charged the Chevron attorneys for fraud based on the remediation,[213] alleging that the attorneys falsified the results of the remediation to gain the release.[214] In a telling email, the Deputy Attorney General explained to plaintiffs' counsel in the Lago Agrio case that prosecutions could "nullify or undermine the value of the" settlements TexPet obtained.[215] In addition, the charges effectively preclude Chevron's lawyers, knowledgeable about the facts of the remediation, from entering Ecuador to assist Chevron's legal defense.[216] In a further act that raises questions about the integrity of the criminal matter, after issuing the charges, Pesantez then recused himself from the case.[217]

Political Tactics in the United States

The plaintiffs' political tactics have not been limited to Ecuador, however. Plaintiffs and their lawyers and lobbyists have used Congressional hearings, and the aid of sympathetic United States Congressional members and other politicians, to muster pressure on Chevron.[218] That has included letters to cabinet members,[219] from members of Congress, and statements on the floor of Congress.[220] In addition, on April 28, 2009, the Tom Lantos Human Rights Commission held hearings on the Chevron lawsuit in Ecuador, with Donziger testifying.[221]

Plaintiffs also have succeeded in pressing local governments to pass resolutions against Chevron. In June 2008, the San Francisco Board of Supervisors issued a declaration condemning Chevron's human rights record. Berkeley, California adopted a resolution to ban the sale of Chevron products.[222]

[212] Press Release, Chevron Corp., *Chevron Condemns Government of Ecuador's Attack on Chevron Attorneys* (September 12, 2008), http://www.chevron.com/news/press/release/?id=2008-09-12a.

[213] ChevronToxico, *Chevron's $16 Billion Environmental Problem in Ecuador: Fact Sheet on Legal Case and Indictments of Two Chevron Lawyers* (September 2008), http://chevrontoxico.com/assets/docs/fact-sheet-2008-indictment-chevron-lawyers.pdf.

[214] *Id.*

[215] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *2 (S.D.N.Y. May 6, 2010). In *Crude,* one of the plaintiffs' lawyers expressly notes that President Correa had called for criminal prosecutions against those who created the settlement between TexPet and the government. *Id.* at 4.

[216] Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf, at 8.

[217] Mercedes Alvaro, *Ecuador: Prosecutor Recuses Himself In Chevron Case, Dow Jones*, December 16, 2008, http://theamazonpost.com/web-of-influence/files/pesantez/03_pesantez_recusal.pdf.

[218] In April, 2007, plaintiffs' lawyer Pablo Fajardo invited California Governor Arnold Schwarzenegger to visit the affected areas in Ecuador, and asked for the governor's public support of the plaintiffs' fight against Chevron. ChevronToxico, Letter from Pablo Fajardo to Governor Arnold Schwarzenegger (April 17, 2007), http://chevrontoxico.com/assets/docs/carta-pablo.pdf. The study saw no evidence that Schwarzenegger responded.

[219] Michael Isikoff, *A $16 Billion Problem*, Newsweek, July 26, 2008.

[220] The Chevron Pit blog, *U.S. Congressman Jim McGovern: Chevron's Legacy in Ecuador Left Me 'Angry and Ashamed'* (December 11, 2008), http://thechevronpit.blogspot.com/2008/12/us-congressman-jim-mcgovern-chevrons.html; Letter from Linda T. Sanchez (D-CA) to Members of Congress, http://www.politico.com/static/PPM136_091112_sanchez_colleague.html.

[221] Statement by Steven R. Donziger to the Tom Lantos Human Rights Commission (April 28, 2009), http://chevrontoxico.com/assets/docs/20090428statement-by-steven-donziger.pdf.

[222] Recommendation to the Hon. Mayor and Members of the City Council of Berkeley, California, from the Peace and Justice Commission (January 29, 2008), http://chevrontoxico.com/assets/docs/berkeley-resolution.pdf.

Media Tactics

As a complement to the political tactics, the plaintiffs' primary means of garnering support and pressuring Chevron has been through the media. Their main media tactics have included internet campaigns, blogs, films, YouTube videos and documentaries, and television and radio interviews. As discussed below, the tactics, individually and in the aggregate, are designed to rouse support among those sympathetic to the plaintiffs and turn public opinion against Chevron, inflicting a cost on the company for continuing to litigate, and placing a tacit pressure on the local courts by reminding them of the stakes for the Ecuadorian plaintiffs.

Internet Campaigns

The Amazon Defense Coalition and Amazon Watch run a substantive joint internet campaign called *ChevronToxico, The Campaign for Justice in Ecuador* (http://chevrontoxico.com). It appears to be a key plaintiff media and advocacy tool and includes fact sheets, press kits, press releases, letter-writing and other social organization campaigns, news items, photos, videos, and plaintiffs' court documents. Press kits include plaintiffs' summary of the litigation, questions and answers, detailed background information, and advocacy pieces against Chevron.

Videos hosted on the website include mini-documentaries created by plaintiffs, such as a video message from affected Amazon communities to Chevron CEO John Watson and public service announcements, as well as television interviews with plaintiffs and their advocates. The website contains a link to the plaintiffs' blog, *Chevron in Ecuador* (http://www.chevroninecuador.com), which houses opinion pieces and commentary by plaintiffs and their advocates, news items, videos, and links back to ChevronToxico and other plaintiffs' websites. [223]

The internet campaign's "Take Action" section includes a letter to Watson, to which visitors can electronically add their signatures, and a tool kit on hosting a screening party for the documentary *Crude,* discussed below. The ChevronToxico campaign has also called for boycotts and has encouraged cities to pass resolutions banning Chevron products.

The campaign further includes mini-reports on different topics, such as health impacts, waste pits, and community mobilization in Ecuador. [224] It also includes more detailed investigative reports prepared by plaintiffs' organizations, which aim to discredit various aspects of Chevron's defense.

The ChevronToxico internet campaign site also encourages viewers to support and publicize the internet campaign on the social media network, Facebook. The website has archives of press releases, reports, videos, television ads and news items dating back to 2002.

The Amazon Defense Coalition maintains its own website, called TexacoToxico (http://www.texacotoxico.org/eng). Like the ChevronToxico website, TexacoToxico includes press releases, fact sheets, photos, and a "take action" link. Many of these are identical to the ones that appear on the ChevronToxico website. The site includes "scientific reports" aimed at discrediting Chevron's environmental assessments[225] and commentary that accuses Chevron of making misrepresentations in various forums. [226] The TexacoToxico website further includes reports on health hazards. [227] The Amazon Defense Coalition prepared

[223] Chevron has its own website with documents and information about the case. *See* http://www.chevron.com/ecuador. It also maintains the Amazon Post, a website with news and information. *See* http://theamazonpost.com.

[224] ChevronToxico, "About the Campaign" section, http://chevrontoxico.com/about.

[225] TexacoToxico, *Chevron's Dirty Business in Ecuador*, http://www.texacotoxico.org/eng/sites/default/files/Myths%20QA%20 20SEP06.pdf; *see also* Bill Powers and Mark Quarles, *Texaco's Waste Management Practices in Ecuador Were Illegal and Violated Industry Standards* (April 5, 2006), http://www.texacotoxico.org/eng/node/46.

[226] TexacoToxico, *Chevron's Misrepresentations to Shareholders over Ecuador Liability Have Been Obvious for Months*, http://www.texacotoxico.org/eng/node/232.

[227] For example, the website includes reports on subjects such as childhood leukemia, pregnancy in toxic areas, and the incidence of cancer near oil fields.

some of the reports; outside parties prepared others. [228]

Like the ChevronToxico website, TexacoToxico links to the plaintiffs' blogs, Chevron in Ecuador and The Chevron Pit (http://www.thechevronpit.blogspot.com). TexacoToxico, like the other sites, also encourages viewers to use social media such as Facebook and Twitter to support and publicize the Amazon Defense Coalition's work.

The Amazon Watch website focuses generally on the Amazon Rainforest but lists the Lago Agrio litigation as one of its "Campaign Highlights." It includes a link to the ChevronToxico website. It also includes the same action items, as well as press releases, news clips and videos that also appear on YouTube.

Amazon Watch also is a sponsor of the True Cost of Chevron campaign (http://truecostofchevron.com/ecuador.html). Like the website of Amazon Watch, the True Cost of Chevron focuses on the Lago Agrio litigation, as well as all other Chevron international activities. Its centerpiece is an alternative annual report, issued in 2009 and again in 2010, that bears the title of the website, "The True Cost of Chevron."[229] The report has a section written by Amazon Watch called "Chevron in Ecuador," which discusses the Lago Agrio case. The website also features alternative Chevron advertisements and contains a link to the ChevronToxico letter-writing campaign to Chevron CEO John Watson.

Numerous plaintiff-friendly internet sites exist; although they do not appear to be operated by the plaintiffs, they often link to and replicate items on the plaintiffs' internet sites. For example, the Chevron Program, [230] sponsored by the organization Global Exchange, contains a link to ChevronToxico's letter writing campaign, publishes the press releases of Amazon Watch and the Amazon Defense Coalition, and includes a link to The True Cost of Chevron Annual Report. In addition, the Chevron Program has gone so far as to advertise a "Reality Tour" called "Ecuador: Oil and the Environment." Participants travel to Ecuador and pay a program fee to engage in various activities: participants can "[e]xamine the historic ongoing court-battle against Chevron," "[v]isit the oil pits and affected communities within the Amazon," and "[v]isit the Frente de Defensa de la Amazonia [(Amazon Defense Coalition)] . . . ." [231]

Films and Documentaries

One of the methods that has gathered the most attention for the plaintiffs' case is the 2009 documentary *Crude*, [232] directed and produced by Joe Berlinger. In 2005, Lago Agrio plaintiffs' lawyer Donziger approached Berlinger to make a film to "'tell his clients' story,'" in effect to "create a documentary depicting the Lago Agrio Litigation from the perspective of his clients." [233]

[228] *Rainforest Catastrophe: Chevron's Fraud and Deceit in Ecuador: An Investigative Report by the Lago Agrio Team of the Amazon Defense Coalition* (November 2006), http://chevrontoxico.com/assets/docs/fraud-invest-report-nov.pdf.

[229] Antonia Juhasz, et al., *The True Cost of Chevron: An Alternative Annual Report* (May 2009), http://truecostofchevron.com/alternative-annual-report.pdf. For the 2010 Alternative Annual Report, *see* http://truecostofchevron.com/2010-alternative-annual-report.pdf.

[230] Global Exchange, "The Global Economy" section, "The Chevron Program" page, http://www.globalexchange.org/campaigns/chevronprogram/index.html.

[231] Global Exchange, "Reality Tours" section, "Ecuador: Oil and the Environment, November 21, 2009 - November 29, 2009" page, http://www.globalexchange.org/tours/1004.html.

[232] *Crude The Movie*, http://www.crudethemovie.com.

[233] *In re Application of Chevron Corp.*, 2010 WL 1801526, at *3 (S.D.N.Y. May 6, 2010) (quoting a declaration submitted by Berlinger).

The result was *Crude*. The film describes itself as focusing on "the human cost of our addiction to oil and the increasingly difficult task of holding a major corporation accountable for its past deeds."[234] Though it intersperses occasional responses from Chevron personnel, the film primarily follows plaintiffs' lawyers as they develop and execute litigation, media, tactical, and political strategies.[235] The movie begins, for instance, with Donziger taking Lago Agrio residents to a Chevron shareholders meeting, scripting the speech they will deliver and helping them prepare their comments; other scenes show Donziger meeting with public relations personnel, escorting President Correa to Lago Agrio, and taking Trudie Styler ("Styler"), wife of the musician Sting, to Lago Agrio. Berlinger even removed at least one scene at the request of the plaintiffs' lawyers, which they deemed unhelpful to the case.[236]

The ChevronToxico internet campaign features a press kit on *Crude* and instructions on how to host a "CRUDE screening party." It also notes that "Amazon Watch has worked to promote the theatrical run of CRUDE with grassroots outreach in cities around the country . . . ."[237] Other plaintiffs' and plaintiff-friendly websites also advertise *Crude*.

Plaintiffs and their advocates also have created plaintiff-friendly videos on YouTube about the Lago Agrio litigation specifically and Chevron's actions in Ecuador generally. Among other places, these videos are posted on the ChevronToxico and TexacoToxico websites, Amazon Watch's website, and the website of the True Cost of Chevron campaign. ChevronToxico also appears to have its own dedicated YouTube channel at http://www.youtube.com/user/chevrontoxico. According to the site, one of its videos has been viewed more than one-thousand times.

Use of Celebrities

To appear in those documentaries and videos, and otherwise champion their cause, the plaintiffs have recruited celebrities and other high profile personalities, including Styler, Daryl Hannah, Cary Elwes, and Bianca Jagger. As portrayed in *Crude*, in addition to touring the affected area of the Amazon and visiting with plaintiffs and their lawyers, Styler advocated for plaintiffs in the Ecuadorian and United States media; she also helped advertise *Crude* on her return. Indeed, as part of a publicity campaign, she invited 6,000 San Francisco Bay area Chevron employees to a free *Crude* screening.[238]

In June 2007, actress Daryl Hannah, leading a delegation to Ecuador with a Youth Ambassador from Amazon Watch, also visited the Amazon communities in Ecuador. She was photographed dramatically dipping her hand into an oil spill. This photograph has been posted on plaintiffs' and plaintiff-friendly websites, including Amazon Watch's website.[239] Hannah and the delegation also met with President Correa.[240]

As reported on the ChevronToxico campaign website, Bianca Jagger, the ex-wife of Mick Jagger of the

[234] *Crude*, *Production Notes*, http://www.crudethemovie.com/blog/wp-content/uploads/2009/08/CRUDE-Press-Kit-081909.pdf. Chevron has instituted an action to obtain unused footage from the filmmakers, for potential use in the case. *See NY Court to hear Filmmaker Protest in Chevron Case*, Associated Press, May 22, 2010.

[235] *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *11 (S.D.N.Y. May 6, 2010) ("Plaintiffs' counsel indeed are on the screen throughout most of *Crude*").

[236] The scene shows Cabrera's assistant appearing jointly with plaintiffs' attorneys. *See In re Application of Chevron Corp.*, 2010 WL 1801526, at *4 (S.D.N.Y. May 6, 2010).

[237] ChevronToxico, "Take Action" section, "Throw a CRUDE House Party!" page, http://chevrontoxico.com/take-action/crude-house-party.html.

[238] Derek Markham, *Activist Invites 6,000 Chevron Employees to Watch CRUDE Documentary*, post on Twilight Earth website, http://www.twilightearth.com/activism/activist-invites-6000-chevron-employees-to-watch-crude-documentary.

[239] Newsletter, Amazon Watch (June 2007), http://www.amazonwatch.org/newsletter/newsletterPHP/newsletter_09.php.

[240] *Id.*

Rolling Stones, also has been "part of the international campaign seeking compensation from ChevronTexaco in connection with their operations in Ecuador." [241] She has traveled to Ecuador and has spoken against Chevron in the press. [242] Jagger also addressed then-Chevron CEO David O'Reilly during Chevron's 2004 annual shareholders meeting. [243]

Similarly, Elwes narrated an advertisement that appears on the ChevronToxico website. [244] Clearly, the use of celebrities is part of the plaintiffs' effort to advance their cause and maintain pressure on Chevron.

Radio and Television Broadcasts

Plaintiffs and their advocates and supporters have appeared multiple times on television and radio news channels to provide interviews or commentary on the Lago Agrio litigation. Perhaps most well known was a piece that aired in 2009 on the news program *60 Minutes*, which featured the plaintiffs' attorneys, some responses from Chevron, and a purported study of the litigation. [245] Although the *60 Minutes* episode provided an air of legitimacy to the plaintiffs' story, the plaintiff-friendly nature of the show's depiction was noted by the Columbia Journalism Review; in a fact audit titled "How *60 Minutes* Missed on Chevron," the Review issued a report identifying various misimpressions left by the program regarding Texaco's conduct. That includes unfairly downplaying the role of Petroecuador, and all but omitting any mention of Petroecuador's poor environmental record. It also includes leading the segment with a depiction of a supposedly polluted site – while failing to note that Petroecuador, not Texaco, was obliged to remediate that particular pit. [246] The Review noted other examples of poor or unfair journalism directed toward the company, called the segment "an exercise in innuendo," and concluded, "Even in these days of cutbacks to news operations, *60 Minutes* could have—and should have—done better." [247]

The extent to which plaintiffs' representatives and attorneys secured those appearances or influenced their content – as opposed to their arising organically – is not known. Nonetheless, links to these video and audio broadcasts in the United States press can be found on the plaintiffs' internet campaign websites,

[241] Duncan Campbell, *Bianca Jagger Shares Honour*, The Guardian, October 8, 2004, http://chevrontoxico.com/news-and-multimedia/2004/1008-bianca-jagger-shares-honour.html.

[242] Associated Press, *Bianca Jagger Promotes Lawsuit Against ChevronTexaco in Ecuador*, October 10, 2003, http://chevrontoxico.com/news-and-multimedia/2003/1010-bianca-jagger-promotes-lawsuit-against-chevron.html.

[243] Michael Liedtke, *Bianca Jagger Speaks About Ecuadorean Health at Chevron Texaco Annual Meeting*, Associated Press, April 28, 2004, http://chevrontoxico.com/news-and-multimedia/2004/0428-bianca-jagger-speaks-about-Ecuadorian-health-at-chevron.html.

[244] ChevronToxico, "News and Multimedia" section, "ChevronTexaco: Clean Up Ecuador TV Ad" (December 2002), http://chevrontoxico.com/news-and-multimedia/video.html.

[245] *Amazon Crude*, *60 Minutes* (May 4, 2009), http://www.cbsnews.com/video/watch/?id=4988079n.

[246] Martha Hamilton, *How 60 Minutes Missed on Chevron: A piece on the oil giant and the rainforest last year relies too much on innuendo*, Columbia Journalism Review (April 14, 2010). The issue also has been picked up by other news ethics organizations, such as the group Stinkyjournalism.org, a group that advocates for journalistic integrity. *See* http://www.stinkyjournalism.org/editordetail.php?id=711.

[247] Martha Hamilton, *How 60 Minutes Missed on Chevron: A piece on the oil giant and the rainforest last year relies too much on innuendo*, Columbia Journalism Review (April 14, 2010). According to one website, after the *60 Minutes* piece, ChevronToxico.com had an increase in internet traffic of 350%. *See* http://www.ifc.com/makemediamatter/blog/2009/06/cevron-and-amazon.php.

ChevronToxico and Amazon Watch.[248]

In addition, multiple radio and television news channels have reported on the Lago Agrio litigation without featuring plaintiffs or their advocates. Much of this reporting, and the continuing coverage of the story, can be tied to the publicity efforts of the plaintiffs' organizations, and the advocacy of their communications firm.

Newsprint

Similar to radio and television publicity, plaintiffs and their advocates have been interviewed and profiled in numerous newspapers and magazines. They also have placed opinion editorials in print and online news media.[249] In addition, news agencies, newspapers, magazines and journals around the world have reported on various aspects of the Lago Agrio litigation and Chevron's activities in Ecuador, resulting in hundreds and maybe thousands of stories.[250] It is apparent that many of these articles resulted from the public relations efforts of Hinton, plaintiff press releases, and press conferences held by the plaintiffs and their advocates, though the extent to which any articles are organic is not known.

INVESTMENT RELATED TACTICS

The plaintiffs have engaged in a variety of tactics to pressure Chevron through investment-oriented tactics. Indeed, the plaintiffs often organize their investment efforts around shareholder meetings. The ChevronToxico internet campaign specifically states that it "engage[s] in a variety of tactics" to "pressure Chevron to do the right thing in Ecuador," including bringing Ecuador community activists to Chevron shareholder meetings, introducing shareholder resolutions, and targeting Chevron's executives and board of directors with letter writing campaigns.[251] These tactics seem designed to make shareholders question the direction of the case, and in turn further pressure Chevron.

For example, in May, 2009, Amazon Watch issued an open letter to Chevron's shareholders before the company's annual shareholders' meeting purporting to advise shareholders of Chevron's potential liability and criticizing company management.[252] Plaintiffs and

[248] Examples include: (1) Interview with Donziger on Morning Show, KPFA 94.1FM (April 21, 2006); (2) Amazon Watch officials' discussion of Lago Agrio litigation on KPFA (September 12, 2006); (3) Donziger discussing the Lago Agrio case on *Tell Me More*, National Public Radio (September 18 2008); (4) Interview with Amazon Watch's lead campaigner for the Ecuador project, on Free Speech Radio News (September 9, 2009); (5) Al Jazeera television interview with Ecuador plaintiffs' spokesperson Karen Hinton (October 29, 2009); (6) CNN interview with Kerry Kennedy (October 22, 2009); (7) Democracy Now! Interview with Antonia Juhasz, lead author of the alternative annual report, The True Cost of Chevron (May 26, 2009); (8) commentary by Luis Yanza, president of the Amazon Defense Coalition, on ABC 7 News (April 13, 2008).

[249] Examples include: (1) William Langeweische, *Jungle Law*, Vanity Fair, May 2007, http://www.vanityfair.com/politics/features/2007/05/texaco200705 (front cover feature article on Ecuadorian lawyer Pablo Fajardo); (2) Steven Donziger, *The Chevron Way*, Forbes.com, September 16, 2009, http://www.forbes.com/2009/09/16/chevron-texaco-crude-amazon-ecuador-opinions-contributors-steven-donziger.html; (3) Bret Stephens, *Amazonian Swindle, Daryl Hannah goes to Ecuador and gets in over her head*, Wall Street Journal Opinion Archives, October 30, 2007, http://www.opinionjournal.com/columnists/bstephens/?id=110010801 (quoting plaintiffs' expert Dave Russell); and (4) Elizabeth Day, *Trudie Styler: why I had to use my celebrity to try to save the rainforest*, The Observer, March 22, 2009, http://www.guardian.co.uk/environment/2009/mar/22/trudie-styler-environmentalist (interview with Styler on Chevron's actions in Ecuador).

[250] These include pieces by the Associated Press, Reuters, The Los Angeles Times, The New York Times, Newsday, The San Francisco Chronicle, El Comercio (in Ecuador), Miami Herald, The Christian Science Monitor, Oil Daily, The Financial Times, The Washington Post, The Economist, and BBC News, among others.

[251] ChevronToxico, "About the Campaign" section, "Amazon Watch Campaign," http://chevrontoxico.com/about/amazon-watch-campaign.

[252] Letter from Amazon Watch to Chevron Shareholders (May 25, 2009), http://chevrontoxico.com/assets/docs/aw-letter-to-shareholders-may-2009.pdf.

their advocates, including Amazon Watch, also have attended and protested at shareholder meetings as part of a "coordinated campaign to pressure the company into settling" the case.[253]

Pressure on Institutional Investors

The plaintiffs especially have targeted institutional investors for divestment, and to openly question the company's litigation approach. In fact, according to an internal email written by Amazon Watch, which was made public, one of its goals was to contact top shareholders such as Capital, Barclays, and Fidelity, to ask that they divest from Chevron.[254]

Likewise, in 2009, a number of public pension funds contacted Chevron with questions or concerns about the case.[255] In 2005, the Swedish National Pension fund sold its holdings in Chevron after a Swedish investment research firm recommended divestment based on the company's activities in Ecuador.[256]

Introducing Shareholder Resolutions

Since 2004, some of those same institutional investors, and others, have introduced resolutions at Chevron shareholder meetings. Each resolution has garnered only about 8 to 10 percent support, well short of the number needed for passage.[257] Plaintiffs' attorneys and advocates, including Donziger and Amazon Watch, have spearheaded at least some of those resolutions; an internal email from Amazon Watch from 2004, requesting assistance with filing the resolution, has been made public. The email notes that Trillium Asset Management, a social activist investment management firm, expressed interest in filing the resolution,[258] and states that Amnesty International USA participated in an earlier conference call regarding the resolution. Because Trillium and Amnesty filed or co-filed resolutions from 2004 to 2009,[259] plaintiffs' advocates, such as Amazon Watch, also may have been involved in encouraging those resolutions. Trillium also has led visits to Ecuador, along with public pension funds.[260]

[253] David Baker, *Chevron Braces for Protests at Annual Meeting*, The San Francisco Chronicle, May 27, 2009 (discussing "coordinated campaign to pressure the company into settling a landmark lawsuit in Ecuador"); *see* True Cost of Chevron, *Will You Join Us*, http://truecostofchevron.com/protest.html.

[254] *See* The Amazon Post, http://theamazonpost.com/web-of-influence/files/amazon_watch/03_amazon_watch_shareholder_campaign.pdf. (The email notes that seeking divestment as a strategic effort was discussed during a conference call with other plaintiffs' supporters.)

[255] Neil King, Jr., *Pension Funds Fret as Chevron Faces Ecuador Ruling*, Wall Street Journal, April 8, 2009, http://online.wsj.com/article/SB123914867284999153.html.

[256] Press Release, ChevronToxico, *A New Coalition of Chevron Texaco Shareholders Gather Support for Resolution Addressing Ecuadorian Contamination Controversy* (April 7, 2005), http://chevrontoxico.com/assets/docs/resolution-release-proxy-solicit.pdf.

[257] Braden Reddall, *Chevron: lawyers behind environment report proposal*, Reuters, May 20, 2009, http://www.reuters.com/article/idUSTRE54J6S920090520.

[258] *See* The Amazon Post, http://theamazonpost.com/web-of-influence/files/amazon_watch/03_amazon_watch_shareholder_campaign.pdf.

[259] *See* Press Release, ChevronToxico, *Pressure Mounts on ChevronTexaco to Confront its Responsibility for the 'Rainforest Chernobyl'* (April 26, 2004), http://chevrontoxico.com/news-and-multimedia/2004/0426-press-release-on-chevron-shareholder-meeting.html. Filers, co-filers and supporters of these resolutions have also included institutional investment funds such as the New York State Common Retirement System, Boston Common Asset Management, the Pennsylvania Treasury Department, and the New York City Pension Fund.

[260] Press Release, ChevronToxico, *Pressure Mounts on ChevronTexaco to Confront its Responsibility for the 'Rainforest Chernobyl'* (April 26, 2004), http://chevrontoxico.com/news-and-multimedia/2004/0426-press-release-on-chevron-shareholder-meeting.html; ChevronToxico, "Shareholder Resolutions" section, http://chevrontoxico.com/take-action/chevron-investor-campaign/shareholder-resolutions.html. In 2009, the pension funds of New York City and New York State co-sponsored a resolution again requesting Chevron's management to assess whether Chevron's worldwide operations comply with environmental regulations. Trillium supported the resolution.

Involving the SEC and Attorney General's Office

Plaintiffs' attorneys and/or their sympathizers also have sought to initiate SEC and state Attorney General investigations against Chevron. Amazon Watch, for instance, has been active in this area.[261] Similarly, in May 2009, seemingly at the behest of Amnesty International, New York Attorney General Andrew Cuomo issued a letter to Chevron's CEO asking that the company answer several questions regarding the Lago Agrio litigation.[262] Referencing an institutional investor, the Attorney General's office stated that it has an "interest in ensuring that public statements about the litigation are accurate and complete" because New York City and State public pension funds hold "substantial Chevron shares," and that New Yorkers are shareholders as well.[263] However, the study saw no evidence that the Attorney General insisted on a response or has initiated any sort of investigation, which may have been withdrawn.

Chevron-Ecuador Conclusion

This review, of course, neither considers nor opines on the merits of the Chevron in Ecuador matters, nor any other case. It is clear, however, that the plaintiffs and their attorneys have crafted an aggressive multi-national litigation strategy that includes a wide span of out-of-court tactics designed to pressure Chevron and the Ecuadorian courts, which in turn raise questions about the underlying action: if the contamination indeed creates high incidences of fatal illnesses – as the plaintiffs claim and Chevron disputes – then why could Bonifaz in the *Gonzales* action not locate the ill plaintiffs he sought? If Petroecuador bears no responsibility, then why should it not be made part of the litigation to receive judicial confirmation of that fact, something the plaintiffs oppose? If the proceedings are being conducted impartially, then why not appoint an independent inspector without ties to Petroecuador or plaintiffs' counsel? If Texaco did not act in good faith in conducting remediation efforts, for which it received a bill of clean health from the Government of Ecuador, then why did the Prosecutor General and Attorney General, in 2006, and the current Prosecutor General, in 2007, refuse to pursue cases against those involved? Such questions, well beyond the scope of this study, are nonetheless the natural consequence of the plaintiffs' tactics inside and outside the U.S. and Ecuadorian legal systems.

CASE STUDIES CONCLUSION

In the two transnational tort case studies, the underlying factual postures differed substantially. The DBCP cases involved alleged personal injuries from chemical exposure on produce plantations, while the cases against Chevron primarily involved alleged direct and derivative environmental harms related to oil production. They occurred in different countries, over different time periods, and involved different corporate defendants. Yet in both circumstances, plaintiffs and their representatives advocated for the passage of retroactive foreign laws that provided opportunities for litigation to proceed, there are judicial findings of outright fraud by certain plaintiffs and their lawyers, it appears that highly impoverished and susceptible plaintiffs may have been induced to participate in dubious litigation schemes, there is evidence of local corruption and pressures on judiciaries with reputations for malleability, there is evidence of impropriety by local laboratories and/or experts, and there are

[261] Memorandum of Law, Amazon Watch Request For Investigation of Chevron Corporation (January 30, 2006), http://theamazonpost.com/web-of-influence/files/amazon_watch/04-1_20060130_AW_Memo_for_SEC.pdf; *see also* Letter from Amazon Watch to Christopher Cox, Chairman, U.S. Securities and Exchange Commission (Jan. 30, 2006), http://theamazonpost.com/web-of-influence/files/amazon_watch/04-2_20060130_AW_Letter_to_SEC.pdf. These attempts by Amazon Watch were unsuccessful, as the SEC did not open an investigation of Chevron.

[262] Letter from Andrew M. Cuomo, New York State Attorney General, to David O'Reilly, Chairman and CEO, Chevron Corporation (May 4, 2009), http://www.politico.com/static/PPM136_091112_cuomo_letter.html. Because the letter references Amnesty International and copies Amnesty International's Policy Director for Economic Relations, it appears that Amnesty was at least involved in initiating the effort. It is unclear whether the Lago Agrio plaintiffs' advocates themselves also were involved, but because of Amazon Watch's coordination with Amnesty International with regard to other matters, it is a reasonable assumption that Amnesty International consulted or coordinated with plaintiffs' advocates on this front.

[263] *Id.; see* Isabel Ordonez, *Chevron Confirms NY AG Inquiry Into Ecuador Lawsuit Liability*, The Wall Street Journal, May 6, 2009.

manifest out-of-court tactics designed in different ways to pressure the corporate defendants. Those tactics include in particular a sophisticated use of the media, organizing techniques, and in the case of Chevron, political and investment-related pressures.

These tactics, the focus of this study, cannot be isolated from the aggressive, and in some cases questionable, underlying litigating positions in the actions. To the contrary, those litigating positions explain the rationales behind the tactics. The tactics by all appearances have become a part of the larger litigation effort itself. They seem designed to influence the corporate defendants in the litigation through pressures outside the courtroom – negative publicity, shareholder skepticism, regulatory and political inquiries, and other means. Through such external leverage, the plaintiffs' attorneys try to inflict a maximum penalty on the corporations defending themselves in court. In the DBCP and Chevron-Ecuador cases, the evidence also suggests the pressures have been designed to impact the decisions of local judges susceptible to manipulation and influence. In short, based on a review of the tactics in these two case studies, the plaintiffs' representatives appear to be pursuing a holistic litigation approach composed of aggressive efforts inside and outside the legal system. That conclusion is confirmed by the larger analysis of tactics in many additional cases, discussed in Part III.

Playbook

THE TRANSNATIONAL TORT LAWYERS' PLAYBOOK: Patterns of Tactics In The Larger Set of Cases Reviewed

INTRODUCTION

The extra-legal tactics in the two case studies do not stand in isolation. Instead, the remaining cases reviewed show that they are part of a much larger and emerging trend involving well-known corporate defendants. The study did not identify the same type of evidence or judicial findings of fraudulent activities in the other cases. However, many of the same aggressive strategies outside the courtroom by plaintiffs and their advocates, no doubt operating from a similar holistic litigation approach – to pressure corporate defendants – clearly were identified.

From the Killer Coke Campaign

GENERAL ISSUES AND PATTERNS

In the larger group of cases, at least one and usually many more of the 24 tactics, each of which appear in the DBCP and/or Chevron-Ecuador matters, appeared in every instance.[264] By and large, as suggested below, the strategic activities most frequently observed were those that involved the least expense. Also, because the review is premised on public searches, it should be noted that the study certainly has not uncovered all tactics being used in a case, nor the intensity nor breadth with which they are being deployed.

Patterns Observed

The tactics studied loosely fall into four general categories: media tactics, community organizing tactics, investment tactics, and political tactics.[265] The most common are those surrounding media efforts, which the study identified in every case. Within that category, the most frequent strategic tactics by plaintiffs or their advocates were authoring articles or appearing in print media (23 cases), broad internet campaigns (21), issuing press releases (20), creating and/or posting favorable video clips on You Tube and other websites

[264] Methodologically, the discussion below contains narrative examples of the results observed. It does not identify every instance of a tactic observed, and thus contains fewer examples than appear on the chart at Appendix A.

[265] Although this review focused on tactics by plaintiffs and their lawyers, in the course of conducting that analysis, it was observed that some of the same tactics were used by defendants in these lawsuits and others.

(17), and appearing on television or radio to discuss the case or cause (17). The study also observed favorable films, documentaries and mini-documentaries in 13 cases, a higher than expected result given the effort and expense involved in their creation. Less frequent media-related efforts include: issuing or promoting subject matter reports (4), conducting seminars (5), holding press conferences (7), and using celebrity activists (1).

The study observed community organizing tactics in every case but one. Within that category, protests and demonstrations (15), calls for boycotts (17), and forming coalitions and partnerships with like-minded groups to help further the litigation goals (15), were the most frequent. As noted below, in several instances plaintiffs filed cases as part of larger campaigns, and thus created a symbiotic effect; the external campaign fostered awareness of the issues and a pressure on the corporate defendant, while the lawsuit served as another arm of the larger campaign. Creating non-governmental organizations where none previously had existed (6), as occurred in the DBCP and Lago Agrio litigations, appeared less frequently in the community organizing category.

The study identified investment tactics, similar to those in the Chevron-Ecuador matter, in every case but 7. The most popular surrounded introducing resolutions at corporate shareholder or annual meetings (16), while another common approach for plaintiffs or their advocates was attending shareholder meetings to speak or protest (8). Also noteworthy, in light of their potential impact, are pressures on shareholders – either encouraging divestment (7) or through statements by institutional investment or mutual funds that invest only in companies deemed socially responsible (7). Contacting state or federal regulatory agencies was observed in one instance.

Finally, the study observed political tactics in roughly half of the cases. Most common was participating in Congressional hearings (10). Engaging politicians in public campaigns (10) and other types of political pressures (7) also were identified. In none of the cases, unlike the DBCP in Nicaragua and Chevron-Ecuador proceedings, were foreign laws favorable to the plaintiffs created; that is not a surprise, given that the plaintiffs filed and litigated the remaining cases studied in United States domestic courts.

In addition, while for purposes of this report the tactics are divided into four main categories, in reality they operate fluidly. For example, protesting outside shareholder meetings is simultaneously a community organizing, investment, and media ploy. Internet campaigns that post action items, such as letter writing campaigns to company CEOs, may involve both community organizing and media efforts.

Timing Considerations

In studying the tactics, two timing-related considerations are worthy of note. First, the number and variety of tactics continue to grow. The cases studied include those that plaintiffs filed from the mid-1990s until 2009. Although in the 1990s certain cases generated substantial publicity and other attention, that appears to have emanated organically from the underlying events rather than from conscious efforts of plaintiffs or their advocates to further litigation goals. For example, *Kasky v. Nike*, filed in April 1998 and settled in 2002, was a high profile matter involving corporate statements about alleged sweatshop working conditions in China, Vietnam, and elsewhere. Yet relatively little of the press focus appears to be attributable to any concerted effort by the plaintiff-activist who initiated the lawsuit. [266]

Similarly, the execution by the Nigerian government of environmental activist Ken Saro-Wiwa in the mid-1990s generated international attention before the filing of an ATS lawsuit against Royal Dutch Petroleum. As *Wiwa v. Royal Dutch Petroleum* moved closer to a scheduled 2009 trial, the plaintiffs began to increase the number of tactics. The same is true of other cases, such as *Bowoto v. Chevron Corp.*, related to alleged violence by Nigerian authorities after the plaintiffs overtook a Chevron oil platform, which was filed in the late 1990s and resulted in a jury verdict

[266] The case was premised on alleged false public statements by the company; Nike strenuously denied the allegations, legally and factually. *See Kasky v. Nike, Inc.*, Respondent's Brief on the Merits, No. 2087859 (Cal. Sept. 21, 2000).

for Chevron in late 2008.[267]

In short, the study observed a greater frequency of tactics in recent years. It appears that plaintiffs and their attorneys are learning new gambits from each other and recycling them in their cases. Several of the cases studied also had plaintiffs' attorneys in common, and many of the plaintiffs' lawyers seem to have worked together in other matters. Indeed, the growth of tactics also is perhaps attributable in part to the traditional lack of success plaintiffs have had in the transnational tort cases; the tactics thus may be perceived as a means of creating certain advantages, and thereby overcoming the historical legal and factual weaknesses in the cases.

Second, in several instances, plaintiffs coordinated the filing of lawsuits with various publicity events. For instance, in March 2010, plaintiffs filed a lawsuit against Coca-Cola and its bottling plants based on alleged union assaults in Guatemala.[268] That lawsuit coincided with the release of a new film called "The Coca-Cola Case." The film focuses on alleged attacks on union members in Colombia, the subject of four consolidated actions (*Sinaltrainal v. Coca-Cola Co.*) that have now been dismissed, and features the lawyers who filed both the Colombian and Guatemalan actions.[269] By filing the lawsuit at that time, plaintiffs capitalized on attention given to the film, and the film capitalized on attention associated with the new lawsuit.

Case Variances

In addition to timing considerations, while in every case there appeared one or more of the tactics studied, substantial variances in the number and types of tactics exist between cases. In some cases, such as *Doe v. Unocal Corp.* (17) (a settled case involving alleged misconduct by Burmese security forces in connection with the construction of a pipeline[270]) and *Sinaltrainal* (15), the study observed numerous tactics by plaintiffs or others. In different cases, such as *Bauman v. DaimlerChrysler*, involving alleged corporate misconduct during Argentina's "Dirty War," the study identified only 4 tactics.[271] In some instances, such as the Apartheid litigation, which had a gag order in place, or *Flores v. Southern Peru Copper,* which involved a less well-known corporate defendant and relatively rapid dismissal by the courts (involving alleged environmental and derivative harms in Peru in connection with a mining operation), the relative paucity of tactics is explicable.[272] For others, the reasons are not readily evident.

In addition, as illustrated in the chart at Appendix A, there are clear trends related to the tactics identified. In many instances, the documentation directly connects those efforts to plaintiffs and their attorneys. In other instances, public information does not include such a connection between the activities, being conducted by sympathizers, and the plaintiffs or their representatives. That does not mean, of course, that

[267] In *Wiwa*, Royal Dutch Shell asserted that any misconduct was committed by, and attributable to, the Nigerian government, not the company. *See generally Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002). The case settled in 2009. In *Bowoto*, Chevron argued that Nigerian authorities were called because the plaintiffs assumed control over a company oil platform, took employees hostage, and attacked the authorities themselves. *See, e.g.*, *Bowoto v. Chevron Corp.*, 2008 WL 4822251 (N.D. Cal. Nov. 5, 2008); Corrected Joint Pre-trial Conference Statement, *Bowoto v. Chevron Corp.*, No. C-99-2506-SI (N.D. Cal. Sept. 26, 2008). The jury found for Chevron.

[268] *See, e.g.,* Press Release, Campaign to Stop Killer Coke, *Coke Hit with New Charges of Murder, Rape, Torture* (Mar. 1, 2010), http://www.killercoke.org/nl100301.htm.

[269] *See, e.g., The Coca-Cola Case* (Trailer), National Film Board of Canada, http://www.nfb.ca/film/coca_cola_case_trailer.

[270] Unocal asserted that it did not contribute to any wrongful act, and certainly bore no responsibility for any harmful conduct allegedly committed by the military forces of a sovereign country. *See Doe v. Unocal Corp.*, Defendants/Appellees Consolidated Answering Brief, Nos. 00-56603 & 00-56628 (9th Cir. July 3, 2001).

[271] The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of the action, but has since agreed to rehear the case. *See Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009), *rehearing granted*, 2010 WL 1816711 (9th Cir. May 6, 2010).

[272] *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

the plaintiffs did not play some role in organizing or implementing the tactic. Instead, it merely means that the study identified no information that makes such a connection. In fact, plaintiff involvement certainly might be inferred from the clear patterns between cases in which connections can and cannot be made. The alternative possibility, that similar tactics coincidentally were performed on a repeated basis without some plaintiff role, seems less plausible.

Litigation as a Tactic and Larger Campaigns

As a final general observation, it is seminal to note the existence of larger corporate campaigns and the use of litigation itself as a tactic. For several of the cases studied, there were extant coordinated anti-corporate efforts that bear a direct relation to – and perhaps are the genesis for – the lawsuits themselves. For instance, for the past few years, a labor-related campaign against Wal-Mart has gained major press attention, involving protests, boycotts, and other measures. Incidental to that campaign, a lawsuit – since dismissed by the courts – was filed in California in 2005 against Wal-Mart based in part on labor practices at the company's suppliers.[273] Although the study observed a substantial number of the commonly identified tactics in the larger Wal-Mart campaign, few could be connected to the plaintiffs or their attorneys in the litigation.[274]

In several other cases, plaintiffs' attorneys, shortly after having had cases dismissed, filed lawsuits that largely repeated the underlying allegations in the cases just rejected. For example, the Eleventh Circuit Court of Appeals upheld a jury verdict in favor of Drummond in multiple consolidated cases brought by survivors of union representatives alleged to have been killed by paramilitary units Drummond allegedly retained at its Columbian coal mine.[275] Immediately after that affirmance, the plaintiffs' attorneys filed a substantially similar matter by the children of the deceased union representatives; not surprisingly, the district court readily dismissed this action.[276] Likewise, soon after the decision by the United States Court of Appeals to uphold the dismissal of consolidated actions against Coca-Cola in *Sinaltrainal v. Coca-Cola Co.*, regarding alleged attacks on union leaders in Coca-Cola bottling facilities in Colombia, plaintiffs' counsel launched the new Guatemalan lawsuit (*Palacios v. Coca-Cola Co.*) featuring highly similar allegations arising from

Bano v. Union Carbide Campaign from EarthRights International

[273] *See Doe v. Wal-Mart Stores, Inc.*, 573 F.3d 677 (9th Cir. 2009). Wal-Mart sharply disputes the allegations, arguing that the lawsuit well exceeds United States law, that it had no authority to police its suppliers, and that the complaint otherwise is unfounded. *See Doe v. Wal-Mart Stores, Inc.*, Wal-Mart Stores, Inc.'s, Notice of Motion and Motion to Dismiss Plaintiffs' First Amended Complaint, No. 05-7307 (C.D. Cal. Feb. 13, 2006).

[274] In other corporate campaigns, however, the results differed. For instance, in the labor-oriented campaigns Killer Coke (Campaign to Stop Killer Coke website, http://killercoke.org) and Stop Firestone (Stop Firestone Campaign website, http://www.stopfirestone.org), tactics could be connected to the attorneys involved in the related ATS cases *Sinaltrainal v. Coca-Cola Co.* and *Flomo v. Bridgestone Americas Holding, Inc.* (pending case involving labor conditions on a Liberian rubber plantation). As the *Wal-Mart*, *Sinaltrainal* and *Flomo* lawsuits were brought by the same principal plaintiffs' attorneys, the different approaches are difficult to immediately reconcile.

[275] Drummond argued that the alleged violence was caused by third-parties unaffiliated with the company. *See Romero v. Drummond*, Defendant's Trial Brief, CV-03-BE-0575-W (N.D. Ala. June 15, 2007).

[276] *Baloco et al. v. Drummond Co., Inc. et al.*, No. 09-CV-00557 (N.D. Ala.), filed March 20, 2009 and dismissed Nov. 9, 2009.

Guatemala.[277] Similarly, nearly identical lawsuits were filed by plaintiffs Bano and Sahu against Union Carbide alleging harms associated with the chemical plant in Bhopal; *Sahu* was filed less than 2 years after *Bano* was dismissed, and involved many of the same class members.[278] In these subsequently filed actions, success on the merits likely is not the primary consideration in their being initiated.[279]

Instead, in cases such as these, the out-of-court tactics may not be designed to further litigation goals; rather, the filing of the litigation serves as an outlet to generate further negative corporate publicity. In those cases, the litigation itself can be viewed as one tactic among several that the plaintiffs and their attorneys may utilize to pressure corporations to achieve certain larger social goals.

Media Tactics

The majority of the plaintiffs' tactics are media-related, and the study observed them in all of the cases reviewed. As noted above, it is common for plaintiffs and their attorneys to generate media attention by issuing press releases and holding press conferences that are timed to coincide with external events, such as announcements by the companies or developments in the legal cases. For example, plaintiffs have held protests and released new documentaries or reports during defendants' shareholder meetings, upon the filing of a new case, when filing motions to dismiss or summary judgment, or at the beginning of trial. By capitalizing on these already newsworthy events, plaintiffs broaden the exposure of their efforts. While occasionally plaintiffs are profiled or otherwise have an opportunity to plead their cause in mass media, the majority of their efforts do not appear to reach larger audiences.

Internet campaigns

Because of its unique features, the Internet is a major focus of plaintiffs' and their advocates' campaigns. The Internet is in many respects the perfect messaging medium. A website is inexpensive and easy to maintain. Information can be fully controlled, with no oversight, fact-checking, or censorship. A site can host stories that appear to be legitimate news, containing arguments or positions masquerading as facts; indeed, websites now often are treated as mainstream news sources. The Internet also has remarkably broad reach, operating on a worldwide basis, and can host multi-media sources. One individual or entity also can establish multiple interrelated sites, under assumed names if desired, to maximize readership.

For such reasons, the study found internet campaigns in virtually every case reviewed (21), in which the campaigns operated as public relations, advocacy, and community organizing vehicles. Websites of the plaintiffs' organizations and plaintiffs' advocates house most of the campaigns, although some are part of larger efforts against corporate defendants.

Case-related internet campaigns commonly consist of various elements. They include "fact" sheets setting out the core case details from the plaintiffs' perspectives;[280] summaries of the legal proceedings

[277] *Palacios v. Coca-Cola Co.*, 102514/2010 (N.Y. Sup. Ct. Feb. 25, 2010); *Palacios v. Coca-Cola Co.*, No. 10-CV-03120 (S.D.N.Y.), removed to federal court April 13, 2010. In the *Sinaltrainal* actions, Coca-Cola asserted that while violence may have occurred against union members, the company was being targeted for the activities of wholly unaffiliated third-parties. *See Sinaltrainal v. Coca-Cola Co.*, Brief for Defendants-Appellees, No. 06-15851 (11th Cir. June 30, 2008).

[278] *Bano v. Union Carbide Corp.*, No. 99-CV-11329 (S.D.N.Y.), Nov. 15, 1999, and dismissed Oct. 5, 2005; *Sahu v. Union Carbide Corp.*, No. 07-CV-02156 (S.D.N.Y.), filed Mar. 13, 2007 (pending).

[279] Indeed, of the cases studied, the majority to reach final resolution resulted in favorable defense outcomes.

[280] *See, e.g.,* Fact Sheet, EarthRights International and Center for Constitutional Rights, *Bowoto v. Chevron: International Human Rights Litigation, Chevron Pays, Houses, Transports, Schedules and Directs the Nigerian Police and Military*, http://ccrjustice.org/files/Chevron_Nigerian_Police.pdf; *see also* Fact Sheet, EarthRights International and Center for Constitutional Rights, *Bowoto v. Chevron: International Human Rights Litigation, Dead Fish, Dead Trees, No Water to Drink*, http://ccrjustice.org/files/Chevron_Environment.pdf; EarthRights International, *Myths and Facts about Bowoto v. Chevron*, http://www.earthrights.org/sites/default/files/documents/Bowoto-Myths-and-Facts.pdf.

and legal documents;[281] press kits, composed of media backgrounders, key documents, press releases, and other case details for members of the media interested in providing coverage;[282] a collection of the press releases that have been issued by the plaintiffs' attorneys or sympathetic third-parties;[283] reports of various types;[284] favorable news articles;[285] campaign posters and postcards to express support for the effort;[286] photographs of different varieties;[287] YouTube videos of plaintiffs, attorneys, and others;[288] trial coverage, where applicable;[289] and blogs in which participants, typically pro-plaintiff, can discuss their views of the case.[290]

Call to email the President of Firestone

From shellguilty.com

A particular focus of the internet campaigns are calls-to-action. Those frequently include: exhortations for letter writing campaigns to company executives, board

[281] *See, e.g.,* Center for Constitutional Rights, "*Bowoto v. Chevron*" section, http://ccrjustice.org/ourcases/current-cases/bowoto-v.-chevron; EarthRights International, *Bowoto v. Chevron Case Overview*, http://www.earthrights.org/legal/bowoto-v-chevron-case-overview; EarthRights International, *Wiwa v. Royal Dutch/Shell*, http://www.earthrights.org/legal/wiwa-v-royal-dutchshell; *Bigio* Plaintiffs', http://www.bigiofamily.com/11801.html; International Rights Advocates, http://www.iradvocates.org/coke1case.html.

[282] *See, e.g.,* Wiwavshell.org, *The Case Against Shell*, "For Journalists" section, http://wiwavshell.org/press/for-journalists.

[283] *See, e.g.*, EarthRights International, *Press Coverage of Wiwa v. Shell,* http://www.earthrights.org/about/news/press-coverage-wiwa-v-shell.

[284] *See, e.g.,* International Labor Rights Forum, *Ethical Standards and Working Conditions in Wal-Mart's Supply Chain* (October 24, 2007), http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10586; *see also* International Labor Rights Forum, *Wal-Mart in China: The High Cost of Low Prices*" (October 25, 2006), http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10662.

[285] *See, e.g.,* International Rights Advocates, "News and Press Release" section, http://www.iradvocates.org/drummond.html (Drummond); *id.*, http://www.iradvocates.org/oxy.html; (*Occidental v. Mujica)*; *see also* Justice in Nigeria Now, "Press Links" section, http://justiceinnigeria.wordpress.com/press-links (Bowoto).

[286] *See, e.g.*, Wiwavshell.org, *The Case Against Shell*, "Posters and Postcards" section, http://wiwavshell.org/resources/posters-and-postcards.

[287] *See, e.g.,* Campaign to Stop Killer Coke, "Shareholders Meeting - Protest Pics" section, http://www.killercoke.org/protest-share.htm.

[288] *See, e.g.,* Campaign to Stop Killer Coke, http://www.killercoke.org.

[289] Regarding *Bowoto v. Chevron Corp.*, *see Bowoto v. Chevron Trial Blog*, http://bowotovchevron.wordpress.com/about.

[290] *See, e.g.,* Labor is Not a Commodity blog, a collaboration of NGOs, covering labor rights issues, including information about Wal-Mart, http://laborrightsblog.typepad.com/international_labor_right/walmart.

members and defendant supporters, along with form letters;[291] student activism kits, which may describe how students can become educated about the issues and then educate others on campus through forums and rallies;[292] calls for protests;[293] demands for cities, universities, and the public to boycott the defendants' products, and explanations for how the public citizenry can seek the same;[294] and calls for sympathizers to write op-eds or letters to the editor, attend trial or hearings, host video screenings of sympathetic documentaries, and engage in other activism.[295] Many of the internet campaigns also include connections to the social media sites Facebook and Twitter, where part of the campaign is lodged for supporters.

In short, internet campaigns are designed as all-inclusive sites to organize supporters, and where the public and media can become educated about the plaintiffs' cause and legal theories. The campaigns also broaden their own exposure by posting links to media coverage about the cases, which they often generate.

Among the most comprehensive internet campaigns are the Killer Coke Campaign against Coca-Cola, run by the plaintiffs in the *Sinaltrainal* case and a labor activist; the Wiwavshell.org campaign associated with *Wiwa v. Royal Dutch Petroleum*, which has been maintained by the plaintiffs' attorneys in that case; and the Stop Firestone campaign, which is maintained by a coalition, including plaintiffs, of *Flomo v. Bridgestone Americas Holding* (involving allegations of forced and child labor) lawsuit supporters. They each feature most of the items listed above, including fact sheets, reports, videos, action tool kits, and news articles.

The Killer Coke Campaign, for example, was established in 2004, and states that more than 1.4 million viewers have visited the site. Its stated mission is focused on alleged attacks on union leaders at Coca-Cola bottling facilities in Colombia, though the campaign, which includes education, social and political activism, community organizing, and other matters, covers a much broader range of issues associated with Coca-Cola and its products. The internet campaign includes faux Coca-Cola ads, with such tag lines as "Murder: It's the Real Thing," depicting corpses, coffins, a hand gun pointed at the viewer, and a Coca-Cola can dripping in blood.[296] The internet campaign contains a section it calls "Coke's Crimes" that encourages people to demonstrate, leaflet, and write letters to the offices of Coke's Board of Directors, links to a petition to the Board, and includes downloadable flyers.[297] The website also has a section on the resolutions that have been passed by universities,

[291] *See, e.g.*, Press Release, International Labor Rights Forum, *Burmese Workers Suing Unocal in Los Angeles Will Have Their Day in Court* (August 30, 2001), http://www.icai-online.org/xp_resources/icai//burmese_workers_suing_unocal.pdf; Campaign to Stop Killer Coke, http://www.killercoke.org/crimes.htm.

[292] *See, e.g.,* Campaign to Stop Killer Coke's "Campaign for a Coca-Cola Free Campus" student activism toolkit, http://www.killercoke.org/pdf/campguide.pdf.

[293] *See, e.g.,* Hel-Mart's call regarding Wal-Mart, http://www.hel-mart.com/links.php; International Labor Rights Forum's call regarding Firestone, http://www.laborrights.org/stop-child-labor/stop-firestone/news/11687; Stop Firestone Coalition's protest, http://www.stopfirestone.org/2008/07/report-from-stop-firestone-protest-at-public-strategies.

[294] *See, e.g.,* The Bigio Family Court Case, "Bigio Family Lawsuit Against Coca-Cola" section, http://www.bigiofamily.com/24043.html; *see also* Amazon Watch, "Everyday actions" page, http://www.amazonwatch.org/take_action/everyday.

[295] For instance, the Stop Firestone campaign includes, among other things, letter writing, protests, urging city councils to adopt resolutions, student toolkits, and an online action campaign to tell the NFL to stop supporting Bridgestone/Firestone. *See, e.g.*, the International Labor Rights Forum, section on the NFL-related campaign, http://www.unionvoice.org/campaign/NFL09; the Stop Firestone Coalition, Student Action Kit, http://www.laborrights.org/files/StudentActionKit.pdf. The website for WiwavShell.org (a joint project of the Center for Constitutional Rights and EarthRights International, two organizations serving as co-counsel on two closely-related lawsuits – *Wiwa v. Royal Dutch Petroleum* and *Wiwa v. Anderson*) includes tips for getting involved, including planning events, writing op-eds or letters to the editor, attending trial, hosting video screenings, online activism tips, and how to connect via the social media Facebook, Twitter and Myspace.

[296] *See* Campaign to Stop Killer Coke, http://www.killercoke.org.

[297] *See* Campaign to Stop Killer Coke, "Coke's Crimes" section, http://www.killercoke.org/crimes.htm.

unions, and city councils in support of the Killer Coke Campaign's international boycott of Coca-Cola products.[298] It maintains a Student Activism section where students and others can download campus activism packets, read sample resolutions, view protest pictures, and gain tips on starting campus campaigns.[299] The website has a similar Union Activism section with downloadable flyers for unions, and news articles and press releases on union activism against Coca-Cola.[300] The campaign website also contains links to archived newsletters, a "reports" section, protest pictures, a section on the supposed health effects of drinking Coca-Cola, and a listing of alternative beverages.[301] In addition to the Killer Coke website, the plaintiffs' attorneys' organizations also host information about the case on their separate websites.[302]

Although *Wiwa v. Royal Dutch Petroleum* settled last year for $15.5 million, the Wiwavshell.org internet campaign remains alive. It includes updates on the status of related lawsuits, links to interviews with attorneys, a campaign video about *Wiwa*, and the history of Royal Dutch Shell's operations in the affected area. The campaign also hosts a section for the press with kits for journalists, including information on attending the trial (which has not been updated, though the *Wiwa* case settled). Press coverage and press releases also appear. The website has a detailed "Get Involved" section with information on how to hold a screening of a documentary about the case, a list of events such as panel discussions, and information about how volunteers can become involved. In addition, the plaintiffs' attorneys' organizations that support this combined website also host information about the case on their own separate websites.[303]

News articles

Similar to the DBCP and Chevron-Ecuador context, articles in newspapers, journals, and magazines – both in print and on-line – were identified in every case studied. The study tracked print media generally, and articles in which the plaintiffs or their attorneys appeared specifically (every case). News articles include traditional news pieces and opinion pieces, such as op-eds and blog posts.

Although some of the articles are organic, they often seem to result from press releases issued by plaintiffs' attorneys and organizations. The study identified

[298] *See* Campaign to Stop Killer Coke, "Resolutions" section, http://www.killercoke.org/resolutions.htm.

[299] *See* Campaign to Stop Killer Coke, "Student Activism" section, http://www.killercoke.org/student.htm.

[300] *See* Campaign to Stop Killer Coke, "Union Activism" section, http://www.killercoke.org/unions.htm.

[301] *See* Campaign to Stop Killer Coke, section on health issues related to consuming Coke, http://www.killercoke.org/health-iss.htm.

[302] *See* International Labor Rights Forum, "Alien Tort Claims: Colombia" page, http://www.laborrights.org/end-violence-against-trade-unions/colombia/news/10896; International Rights Advocates, "Cases" section, http://www.iradvocates.org/coke1case.html#. As noted above, Coca-Cola sharply disputes that it bears any responsibility for violence at the hands of unaffiliated third-parties. *See Sinaltrainal v. Coca-Cola Co.*, Brief for Defendants-Appellees, No. 06-15851 (11th Cir. June 30, 2008).

[303] *See* EarthRights International, "Wiwa v. Royal Dutch/Shell" page, http://www.earthrights.org/legal/shell; Center for Constitutional Rights, "Wiwa et al. v. Royal Dutch Petroleum et al" page, http://www.ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum. *See also* Global Exchange, "Fair Trade Cocoa Campaign" page, http://www.globalexchange.org/campaigns/fairtrade/cocoa; The Bigio Family Court Case, www.bigiofamily.com; EarthRights International, "Doe v. Chiquita Brands International" page, http://www.earthrights.org/legal/chiquita; International Rights Advocates, overview of the *Chiquita* case, http://www.iradvocates.org/chiquitacase.html; Hausfeld LLP, "Khulumani (Apartheid)" section, http://www.hausfeldllp.com/pages/current_investigations/165/khulumani-(apartheid). *See also* Center for Constitutional Rights, "Bowoto" section, http://ccrjustice.org/bowoto; and EarthRights International, overview of the *Bowoto v. Chevron Corp.* case, http://www.earthrights.org/site_blurbs/bowoto_v_chevrontexaco_case_overview.html; News Release, International Labor Rights Forum, *Burmese Workers Suing Unocal in Los Angeles Will Have Their Day in Court* (August 30, 2001), http://www.icai-online.org/xp_resources/icai//burmese_workers_suing_unocal.pdf; International Labor Rights Forum, "Wal-Mart Campaign" section, http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign; EarthRights International, "Bano v. Union Carbide" section, http://www.earthrights.org/legal/unioncarbide.

such press releases in 20 of the cases, a figure that unquestionably demonstrates the desire of plaintiffs and their advocates to use the press to further their aims. [304]

As with the Internet, print media and press releases are simple, effective, and inexpensive means to broadcast messages. It also is no surprise that the frequency of articles and press releases spike around major events in the lawsuit, such as the filing of a complaint and important rulings. Articles based on press releases also increase around the time of plaintiff activism events, such as protests and shareholder actions. In addition, plaintiffs often post the articles and press releases on their websites through their internet campaigns, increasing the exposure.

In the cases reviewed, it was quite common (and not surprising) to find dramatic and inflammatory quotes by plaintiffs' attorneys in the printed press about the underlying merits of the case. Examples include:

- *Bauman v. DaimlerChrysler* (DaimlerChrysler "wanted to get rid of the union leaders," and "[m]anagers of that Mercedes plant knew they could get away with this"); [305]
- *Doe v. Exxon Mobil Corp.* (dismissed action, related to alleged abuses by Indonesian security forces at an Exxon facility, "Exxon knew from the beginning about the security forces' reputation of brutality");[306]
- *Bigio v. Coca-Cola Co.* ("Coca-Cola is … the occupier of stolen property… The time has come for Coca-Cola to meet a minimal standard of decency and justice."); [307]
- and the Apartheid litigation ("Our case is not only about the apartheid past, but also about how companies behave in general in countries where human rights are violated"). [308]

[304] The press releases were issued by numerous different firms and NGOs, including International Rights Advocates, Conrad & Scherer, Hausfeld LLP, EarthRights International, Center for Constitutional Rights, and others.

[305] *Chavez & Gertler Announces Lawsuit Filed Against DaimlerChrysler Over "Dirty War" Human…*, Business Wire, January 14, 2004, http://www.allbusiness.com/government/government-bodies-offices/5212466-1.html; Bob Egelko, *Carmaker sued by kin of Argentine workers: S.F. suit alleges ties to junta's killings*, The San Francisco Chronicle, January 15, 2004, http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/01/15/BAGR14A8QD1.DTL.

[306] *Exxon 'helped torture in Indonesia'*, BBC News, June 22, 2001, http://news.bbc.co.uk/2/hi/business/1401733.stm. The company consistently has denied any wrongdoing, and in September 2010, the court dismissed the action against it. *See Doe v. Exxon Mobil Corp.*, 658 F. Supp.2d at 131 (D.D.C. 2009).

[307] Edwin Black, *Coca-Cola Accused of Near-Criminal Collusion in Egypt's Anti-Jewish Ethnic Cleansing*, The Cutting Edge News, September 21, 2009, http://www.thecuttingedgenews.com/index.php?article=11608; *see also* Ben Harris, *ZOA calls for Coca-Cola boycott in support of Jewish family*, J. The Jewish News Weekly of Northern California, March 16, 2007, http://www.jweekly.com/article/full/31841/zoa-calls-for-coca-cola-boycott-in-support-of-jewish-family/#. Coca-Cola has disputed the assertions; it argues, and courts have found, that the company in no way was involved in expropriating the property at issue in the case and should not be liable for the conduct of the Egyptian government. *See Bigio v. Coca-Cola Co.*, Brief of the Appellees, No. 05-2426 (2nd Cir. Dec. 22, 2005).

[308] Peter Vermaas, *Apartheid Victims Want Western Companies To Cough Up*, NRC Handelsblad, October 2, 2009 (changed October 5, 2009), http://www.nrc.nl/international/article2376593.ece/Apartheid_victims_want_Western_companies_to_cough_up. *See also* Andrew Stelzer, *Workers, Activists Redouble Efforts to 'Beat' Wal-Mart*, The New Standard, September 16, 2005, http://newstandardnews.net/content/index.cfm/items/2363; Michael Barbaro, *Wal-Mart Accused of Denying Workers' Rights*, The Washington Post, September 14, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/

In several instances, the study identified longer pieces authored by plaintiffs or their advocates. For example, in connection with *Bowoto v. Chevron Corp.*, the Los Angeles Times ran an Op-Ed by the plaintiff, Larry Bowoto, assisted by one of his attorneys a few months before the jury found against him.[309] The piece begins, "Ten years ago this week, I was shot by Nigerian soldiers who, my federal lawsuit will show, were paid for by Chevron Nigeria Ltd., a subsidiary of Chevron Corp." It further asserts that Chevron has made false claims, argues that Chevron has engaged in personal attacks against him, mentions the poverty of the villagers who live nearby Chevron's Nigerian operations, and advocates for "environmental reparations and support."[310] Obviously, through such articles, the plaintiffs and their attorneys hope to raise the profile of their action, and advocate and draw sympathy to their cause, while inflicting sharp negative publicity on the corporate defendants on the other side of the case.

Drummond lawsuit protest

Television/radio broadcasts

Similar to print media, to maximize publicity, plaintiffs and their attorneys also provide television and radio interviews, and may alert television and radio stations to cover staged activism events. In all, fifteen of the cases contained such radio or television coverage, a number that is likely unduly low because of methodological limitations (e.g., the lack of publicly available materials). A minority involved national television or radio coverage; a far greater percentage did not.

As with other forms of media, certainly some of the television and radio broadcasts may have developed organically; programs, however, often provide a pro-plaintiff slant, or at a minimum repeat the allegations in the case, which furthers negative corporate publicity. The television and radio coverage is often, in turn, posted on plaintiffs' attorneys' websites, thus expanding its reach and continuing its shelf-life. As with all media coverage, television and radio appearances increase at the filing of a lawsuit or commencement of a trial, any important court rulings, and around events planned by plaintiffs' organizations, which are designed to garner attention and publicity.

Of the media sources that retain publicly searchable materials, the Voice of America service, Democracy Now! (a daily television/radio news program), and public radio syndicates appear to provide the most frequent coverage of the plaintiffs' cases. For example, in February 2006, the National Public Radio program *Marketplace* aired a story about *Doe*

AR2005091301157.html; David Glovin, *Shell Must Defend Nigerian Rights Suit, Judge Says*, Bloomberg, April 23, 2009, http://www.bloomberg.com/apps/news?pid=20601116&sid=aJ6AQ1T36zRs&refer=africa; *see also* Mike Pflanz, *Shell 'played role in activist executions'*, Telegraph, May 25, 2009, http://www.telegraph.co.uk/finance/newsbysector/energy/5383923/Shell-played-role-in-activist-executions.html; Ed Pilkington, *14 years after Ken Saro-Wiwa's death, family points finger at Shell in court*, The Guardian, May 27, 2009, http://www.guardian.co.uk/business/2009/may/27/ken-saro-wiwa-shell-oil; Erik Larson and Joshua Goodman, *Murders May Lead to Damages Tailspin for Chiquita*, Bloomberg, April 2, 2008, http://www.bloomberg.com/apps/news?pid=20601109&sid=aqsoW_J3nbOU&refer=home; Douglas S. Malan, *Attorney Continues Long Battle With Pfizer Over Nigerian Drug Experiments*, Law.com, February 12, 2009, http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202428184887; William Baue, *Alien Tort Claims Act Lawsuit Alleges Slavery and Child Labor on Liberian Firestone Plantation*, SocialFunds' Sustainability Investment News, December 30, 2005, http://www.socialfunds.com/news/article.cgi/article1897.html.

[309] Larry Bowoto (assisted by Bert Voorhees, one of his lawyers), *Chevron Should Pay* (Op-Ed), Los Angeles Times, May 29, 2008, http://articles.latimes.com/2008/may/29/opinion/oe-bowoto29.

[310] *Id.*

v. Nestle.[311] The story provided an interview with an unidentified man who reported threats and violence at the cocoa plantation run by the defendants, and with the plaintiffs' attorney who graphically accused the defendants of a variety of wrongful acts.[312]

Interviews also have been conducted with organizations that may be related (or at least are sympathetic) to plaintiffs' organizations. Examples include interviews on Democracy Now! with the founder of the organization Justice in Nigeria Now (a broad advocacy group that focuses on the extractive industry in Nigeria) and a Nigerian activist regarding *Bowoto v. Chevron Corp.,*[313] as well as an interview on Democracy Now! with the Center for Justice and Accountability (an NGO that focuses on bringing human rights lawsuits) regarding the settlement in the *Unocal* case.[314] The degree to which these can be connected to the plaintiffs themselves is not immediately known, although such connections would not be surprising.[315]

Films, documentaries & mini-documentaries

Of particular note, plaintiffs drum up substantial publicity with films, documentaries and mini-documentaries about their cases and causes. Like *Bananas!** in the DBCP context and *Crude* in connection with Lago Agrio, no fewer than 13 cases studied featured such programs, a substantial number given the effort and expense involved in creating these visual media.

In some instances, it is unclear whether plaintiffs are directly involved in the funding or artistic direction

[311] NPR Marketplace, News and Press page on "Ethically-produced Chocolate," http://lrights.igc.org/press/ChildLabor/cocoa/fairtradecocoa_marketplace_020606.htm.

[312] *Id.* The defendants vigorously deny the allegations in the complaint, arguing that, if anything, the conduct at issue sought to prevent improper labor practices. *See Doe v. Nestle*, Notice of Motion and Motion to Dismiss Plaintiffs' Amended Complaint, CV-05-5133-SVW (C.D. Cal. July 20, 2009). Other similar interviews include: an interview with a plaintiff and attorney in *Mujica v. Occidental Petroleum Corp.* on the Democracy Now! radio program, Democracy Now!, *see Occidental Petroleum Sued for Role in Civilian Massacre in Colombia* (May 2, 2003), http://www.democracynow.org/2003/5/2/occidental_petroleum_sued_for_role_in#; an interview on Voice of America with the wife of the plaintiff in *Xiaoning v. Yahoo! Inc.*, *see* Democracy Now!, *Occidental Petroleum Sued for Role in Civilian Massacre in Colombia* (May 2, 2003), http://www.democracynow.org/2003/5/2/occidental_petroleum_sued_for_role_in#; a CNN interview with the Ogoni community in connection with Wiwa, *see Saro-Wiwa's Memory Kept Alive: CNN's Christian Purefoy reports on what the Ogonis feel about the trial of Nigerian activist Ken Saro-Wiwa vs. Shell*, CNN.com (added on June 9, 2009), http://www.cnn.com/video/#/video/world/2009/06/09/purefoy.nigeria.shell.court.cnn; an interview with members of the Stop Firestone coalition on Chicago Public Radio, in connection with *Flomo v. Bridgestone Americas Holding*, Chicago Public Radio, Worldview program on *Firestone's Rubber Plantation in Liberia* (interview with a co-member of Stop Firestone Coalition) (February 15, 2008), http://www.chicagopublicradio.org/content.aspx?audioID=18579#; a "Powercast" webcast with the plaintiffs' attorney in *Estate of Rodriquez v. Drummond Co.*, http://uswpowercast.blogspot.com/2007/04/episode-10-special-powercast-devoted-to.html (blog post documenting the webcast); an interview on Voice of America with the Secretary General of the Firestone Agriculture Workers Union of Liberia, regarding *Flomo*, Jame Butte, *Firestone Dragging Feet on CBO Implementation, Says Union Secretary*, VOA News, May 22, 2009, http://www.stopfirestone.org/2009/05/firestone-dragging-feet-on-cba-implementation-says-union-secretary-voa-news.

[313] Democracy Now!, *Drilling and Killing: Landmark Trial Against Chevron Begins Over Its Role in the Niger Delta* (October 28, 2008), http://www.democracynow.org/2008/10/28/drilling_and_killing_landmark_trial_against.

[314] Democracy Now!, *Unocal Settles Landmark Human Rights Case with Burmese Villagers* (December 16, 2004), http://www.democracynow.org/2004/12/16/unocal_settles_landmark_human_rights_case#. Reclaim Democracy has some audio from the weekly radio show Counterspin discussing the media coverage of *Kasky v. Nike*, http://www.reclaimdemocracy.org/audio/index.html.

[315] In December 2004, the 20th anniversary of the Bhopal plant leakage, a member of the group Yes Men was interviewed by the BBC, pretending to be an executive at Dow (which now owns Union Carbide). The person "Jude Finnestra" stated that Dow took full responsibility for the incident and was going to give a multi-billion dollar payout to the victims. *See* YouTube video, *Bhopal Disaster - BBC - The Yes Men*, http://www.youtube.com/watch?v=LiWlvBro9eI. The group started the fake Dow Ethics, www.dowethics.com, and fake press releases were also disseminated. *See* Press Release, *A Legacy Acknowledged*, http://www.dowethics.com/r/about/corp/bhopal.htm. There is no known connection to the plaintiffs, but this is a case of the goals of two separate groups – plaintiffs and the Yes Men – aligning.

of the documentaries. In most, however, the films are made with the cooperation of the plaintiffs or their attorneys, as they play central roles in several of them and generally are featured to some extent. Regardless of their exact role in the films, plaintiffs and their advocates certainly seek to take full advantage of them, advertising the movies (and sometimes including clips from them on their websites and internet campaigns), and planning activism events around them. For example, plaintiff websites create internet toolkits for students and others to organize groups to watch the documentaries, and press kits to help shape media coverage. In this way, plaintiffs use the documentaries to generate more publicity for themselves, create more negative publicity for corporate defendants, and serve as a teaching tool about the underlying cause.

The most recent full length documentary is "The Coca-Cola Case," related to the Killer Coke Campaign.[316] Co-produced with the National Film Board of Canada, the film describes itself as following the plaintiffs' lawyers in the *Sinaltrainal* cases "as they attempt to hold the giant U.S. multinational beverage company accountable in this legal and human rights battle."[317] The film's official website also contains a link to the plaintiffs' Killer Coke website,[318] and the movie poster depicts the plaintiffs' lawyers from *Sinaltrainal.* The movie chronicles the creation of the campaign against Coke, noting that the two plaintiffs' attorneys sought out a partnership with a well-known union activist and publicist to help broadcast their legal case. Worthy of note for this study, in the film one of the lawyers explicitly states that a goal is to use successes in one ATS case to pressure defendants in other ATS cases. The documentary also captured a vow to file more lawsuits (including a mention of the *Turedi* matter, which also was resolved in Coca-Cola's favor) against Coca-Cola to further pursue the company after settlement negotiations turned sour. Ultimately, the film demonstrates the tangled motives – involving monetary compensation and social justice – of the plaintiffs and their lawyers.[319] Notably, the frank discussions of settlement conferences in the film by the plaintiffs' counsel violated a confidentiality order, and the plaintiffs were sanctioned by the mediator in the case, Judge Daniel Weinstein, who ordered the film not to be shown.[320] The sanctions, however, seem to have had no effect as the film continued to be shown as recently as April 26, 2010.[321]

In a similar vein, related to *Bano v. Union Carbide Corp.*, the dismissed action arising from the Bhopal plant leak, the plaintiffs' counsel was instrumental to the documentary "Litigating Disaster."[322] In fact, the film is constructed around a judicial theme; the plaintiffs' attorney presents his case to a fictitious jury, and the film includes evidence against the company, documents secured in discovery, and interviews with former company employees. A rather open effort to show how justice from the plaintiffs' view has not been, but should be, achieved, the film describes itself as exploring how the corporate defendant "successfully manipulated both the U.S. and the Indian legal systems against each other, to avoid having to defend its record

[316] http://www.cinemapolitica.org/the-coca-cola-case.

[317] http://films.nfb.ca/the-coca-cola-case.

[318] There also exists a 60 minute video called Coca-Cola Corruption which features a comedian commenting on the company's "lack of corporate responsibility and malicious behavior." http://www.documentary-film.net/search/video-listings.php?e=10. From its advertising, it is not clear whether this video has any connection to the plaintiffs.

[319] Notably, the lawsuit suggests the International Union of Food Workers as being complicit in the underlying attacks.

[320] Exhibit A to Final Order Of Settlement Master In Re Sinaltrainal v. TCCC, December 23, 2009. The Exhibit is directed to "Persons or Entities Planning to Screen 'El Caso Coca Cola'" and states in part, "Statements made in the Film by Counsel for SINALTRAINAL referring to the purported contents, purported terms of mediation, and/or purported potential settlements directly violate confidentiality requirements and the Final Order of the Settlement Master requiring that contents of the mediation and negotiations between the Parties remain confidential."

[321] *See An Anti-Coke Campaign Effervesces at NYU,* by Jason Farbman (April 22, 2010), https://nacla.org/node/6527.

[322] *See* Icarus Films, *Litigating Disaster: A film by Ilan Ziv*, http://icarusfilms.com/new2004/lit.html.

in the Bhopal plant in court." [323]

Concerning *Wiwa v. Royal Dutch Petroleum*, the documentary "Delta Force" chronicles the life of deceased plaintiff Ken Saro-Wiwa and the company's activities in Nigeria. [324] The movie focuses on the international campaign by the "people of the Niger Delta" against their government and oil companies operating in the region. It chronicles a claimed massive retaliation by the government, and includes a clip of Saro-Wiwa himself blaming Shell. The plaintiffs' advocates' secured permission from the filmmaker to make "Delta Force" publicly available for educational purposes. The plaintiffs' website, Wiwavshell.org, encourages people to organize such screenings by offering to provide the film, along with promotional materials and tips for holding a successful educational showing. [325] Other examples of full length documentaries are those by Democracy Now! about *Bowoto v. Chevron Corp.*, titled "Drilling and Killing," [326] a documentary about *Doe v. Unocal Corp.*, called "Total Denial," [327] and a documentary about the environmental practices that underlay the protests leading to *Wiwa v. Royal Dutch Petroleum*, called "Poison Fire." [328]

A more recent creation, however, is the "mini-documentary" – akin to a political campaign video – made by plaintiffs or their attorneys. These typically run for roughly 10 minutes, emphasize key arguments and evidence, and can carry the visual message of the plaintiffs in a powerful manner. Their brevity, and the fact that they typically are posted on YouTube or plaintiffs' websites, renders them readily accessible to viewing audiences. Some of these videos have been seen by tens of thousands of viewers, as anyone with an internet connection can access them.

For example, plaintiffs' lawyers in *Wiwa v. Royal Dutch Petroleum* produced a mini-documentary in anticipation of the 2009 trial in that matter. [329] With the feel of an opening argument, it provides a background to the case, including the history of Royal Dutch Shell in the affected area. It begins by referencing the then-upcoming trial, followed by a harsh comment by the lead plaintiffs' attorney on Shell's position. It intersperses comments from plaintiffs' lawyers throughout, shows community members speaking about their struggles with the oil company, argues that Shell was directly connected to an oppressive government, identifies specific evidence to be used in the case, and seeks to tie Shell directly to

[323] *Id.*

[324] *See* Journeyman Pictures, "Documentaries" section, "*Nigeria – Delta Force*" wepgage, http://www.journeyman.tv/?lid=59032.

[325] Wiwavshell.org, "Get Involved" section, webpage on how to host a screening of *Delta Force*," http://wiwavshell.org/get-involved/host-a-film-screening.

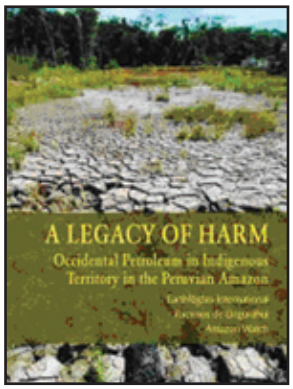
[326] Democracy Now!, *Transcript of Drilling and Killing Documentary* (July 11, 2003), http://www.democracynow.org/2003/7/11/transcript_of_drilling_and_killing_documentary.

[327] *See* EarthRights International, *Documentary about Doe v. Unocal Wins Vaclav Havel Award at One World Film Festival* (May 3, 2006), http://www.earthrights.org/legalfeature/documentary_about_doe_v._unocal_wins_vaclav_havel_award_at_one_world_film_festival.html. A film critical of Wal-Mart also exists, *The Hidden Costs of Walmart* (*see* http://www.walmartmovie.com), but it is unclear whether this film is connected to the *Doe v. Wal-Mart* litigation or the plaintiffs.

[328] *See Poison Fire The Movie*, www.poisonfire.org.

[329] See *Campaign Video: The Case Against Shell: Landmark Human Rights Trial (Wiwa v. Shell)*, http://wiwavshell.org/resources/campaign-video.

the government's attacks on the plaintiffs. According to YouTube, it has been viewed nearly 100,000 times on that website alone;[330] that does not appear to include direct clicks on the plaintiffs' website, other places where it may be posted, or even other versions of the video on YouTube. The fact that the video was released shortly before the trial certainly suggests an intent to increase pressure on Shell in the case, if not to influence the jury pool.



Report from EarthRights Int'l

In *Flomo v. Bridgestone Americas Holding,* the Stop Firestone Campaign includes numerous YouTube videos, including interviews with plaintiffs and their lawyers.[331] In connection with *Carijano v. Occidental Petroleum Corp.*, a case involving alleged environmental harms in Peru, plaintiffs' advocate Amazon Watch created a short video, narrated by Daryl Hannah, on the circumstances leading to the lawsuit.[332] The video is available on Amazon Watch's website, and was released in connection with an annual Occidental Petroleum shareholders' meeting. Likewise, Global Exchange, which is an institutional plaintiff[333] in *Doe v. Nestle,* has posted on its website videos in connection with its role in the case.[334] YouTube videos and documentary clips exist in the *Sinaltrainal* and *Turedi* cases on the Killer Coke website,[335] and multiple YouTube videos also exist on the *Drummond* case, though the connection to the plaintiffs is unclear.[336] Obviously, such YouTube clips may not reach the same mass audience as full length films.

Other media publicity: press conferences, reports and seminars

Plaintiffs and their attorneys may hold press conferences to coincide with the filing of lawsuits and other events, yet another cost-effective means of delivering a message. For example, the plaintiff, his attorney, and a former state senator participated in a press conference surrounding the filing of the *Mujica* lawsuit against Occidental Petroleum, involving alleged abuses in Colombia.[337] In *In re Chiquita Brands Int'l*, a consolidated series of cases arising from the company's payments to Colombian paramilitary units in connection with agricultural production, one of the plaintiffs' attorneys held a press conference in which he made "his case," according to CNN, one of the

[330] *The Case Against Shell: 'The Hanging of Ken Saro-Wiwa Showed the True Cost of Oil'*, http://www.youtube.com/watch?v=htF5XElMyGI.

[331] Stop Firestone Coalition, "About" section, http://www.stopfirestone.org/about. As noted above, the larger campaign features fact sheets about the case and Firestone's activities in Liberia, reports of various types, action tool kits, news articles, calls to action, and other items.

[332] Press Release, Amazon Watch, *Occidental Petroleum's Toxic Legacy in the Peruvian Amazon To Dominate Annual Meeting*, http://www.amazonwatch.org/newsroom/view_news.php?id=1777. As noted above, Daryl Hannah also lent her publicity to the Lago Agrio litigation against Chevron, in which Amazon Watch was also a plaintiffs' advocate. The *Carijano* case has been dismissed, and an appeal is pending.

[333] *See* International Rights Advocates' overview of the case, http://www.iradvocates.org/nestlecase.html.

[334] *See* Global Exchange, "Fair Trade Cocoa Campaign" page, http://www.globalexchange.org/campaigns/fairtrade/cocoa.

[335] Campaign to Stop Killer Coke, http://www.killercoke.org.

[336] Many different mini-documentaries exist on the Union Carbide cases, but their connection to the plaintiffs or their attorneys is not clear. *See, e.g.*, the Students for Bhopal, "News and Press" section, http://old.studentsforbhopal.org/MediaResources.htm#BhopalDocs; *see also* http://www.studentsforbhopal.org/video; Strategic Video, *Twenty Years Without Justice: The Bhopal Chemical Disaster* (March 6, 2007), http://bhopal.strategicvideo.net.

[337] *See* Joint Press Release, Global Exchange/Amazon Watch, *Occidental Petroleum Sued in U.S. Courts For Role in Civilian Massacre in Colombia Role in Civilian Massacre in Colombia* (April 24, 2003), http://www.globalexchange.org/countries/americas/colombia/663.html. Occidental Petroleum strongly denies any responsibility for any injuries to the plaintiffs, which were caused by actions undertaken the Colombian Air Force. *See Mujica v. Occidental Petroleum Corp.*, Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal of Defendant, Nos. 05-56056, 05-56175, 05-56178 (9th Cir. Feb. 15, 2005).

media outlets that covered the conference.[338] Press conferences also have been held by plaintiffs' attorneys in the Apartheid litigation.[339]

Another tactic, also seen in the Lago Agrio litigation, is the publication of detailed subject matter reports, whether prepared by plaintiffs' organizations themselves or by outside consultants, on the issues surrounding the lawsuits. Sometimes the reports are based on supposed evidence collected by the plaintiffs and their advocates through in-country "fact finding" missions.

These reports, which vary widely in length, serve several purposes. First, they can provide an aura of credibility to the plaintiffs' positions, especially those written by credentialed scientists, academicians and other third parties. Second, the reports generate publicity – they are posted as part of plaintiffs' internet campaigns, and provide an occasion for the plaintiffs to launch a media event, such as a press release or press conference.

For example, the plaintiffs' organizations in *Flomo v. Bridgestone Americas Holding* wrote and released a brief paper on claimed violations of International Labor Organization standards and labor rights in Liberia.[340] The report, which is 6 pages long, argues that Firestone has violated various rights at its Liberian plantation.[341] Save My Future Foundation (SAMFU), a group sympathetic to the *Flomo* plaintiffs and dedicated to sustainability issues in Liberia, authored another report, publishing it on the Stopfirestone.org website. The twenty-two page report claims to expose various faults associated with Firestone's rubber plantation in Liberia – the subject of *Flomo*.[342]

Similarly, on the Killer Coke Campaign website, the plaintiffs have included a 2005 report on the "corporate profile" of Coca-Cola[343] by the Polaris Institute, a Canadian organization that advocates for "social change in an age of corporate driven globalization."[344] The 60 page report claims to describe various aspects of alleged corporate harms to obtain profits.[345] The report includes an organizational profile, economic profile, political profile, social profile (including *Sinaltrainal*

[338] *Colombian families' suit says Chiquita liable for torture, murder*, CNN.com (November 14, 2007), http://www.cnn.com/2007/US/law/11/14/chiquita.lawsuit. The company argues that the allegations cannot, as a matter of law, tie it to any wrongful conduct by third-parties, which form the basis of the alleged injuries. *See In re Chiquita Brands Int'l Inc.*, Defendant's Memorandum in Support of Consolidated Motion to Dismiss Complaints, Case Nos. 10-cv-60573, 10-cv-00404-RJL (S.D. Fla. May 4, 2010).

[339] *See* Khulumani Support Group, "Statements" section, http://www.khulumani.net/khulumani/statements.html); *July 28 Press conference with U.S. attorneys on advances in the Apartheid case* (July 28, 2009), http://www.khulumani.net/khulumani/statements/342-july-28-press-conference-with-u-s-attorneys-on-advances-in-the-south-africa-apartheid-litigation.html.

[340] International Labor Rights Forum, *Firestone and Violations of Core Labor Rights in Liberia*, http://www.laborrights.org/stop-child-labor/stop-firestone/resources/12060. Another report claiming to expose various labor problems was written by a Liberian-based foundation and released at an event organized by the plaintiffs' organization. *See* Joint Press Release of the International Labor Rights Forum, Institute for Policy Studies, and Save My Future Foundation (Liberia), *New Report Details Widespread Abuses on Firestone's Rubber Plantation in Liberia* (July 18, 2008), http://www.laborrights.org/sites/default/files/news/Heavy%20Load%20Press%20Release.pdf.

[341] Firestone argues that its employees, including the plaintiffs, are free to leave their jobs at any time. *See* Defendant's Reply Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint, No. CV 05-8168 (C.D. Cal. Apr. 3, 2006).

[342] Save My Future Foundation, *The Heavy Load* (June 2008), http://www.laborrights.org/sites/default/files/publications-and-resources/The%20Heavy%20Load.pdf.

[343] Campaign to Stop Killer Coke, "Killer Coke Reports" section, http://www.killercoke.org/reports.htm; *see also* Polaris Institute, *Coca-Cola Company: Inside the Real Thing* (August 2005), http://www.polarisinstitute.org/files/Coke%20profile%20August%2018.pdf; Saint Joseph University Students for Workers' Rights, *Evidence of The Coca Cola Company's Human Rights Abuses and Environmental Violations* report, http://org.ntnu.no/attac/dokumentene/cocacola/cokeinfopacket.pdf.

[344] Polaris Institute, "About Us" section, http://www.polarisinstitute.org/aboutus.

[345] Polaris Institute, *Coca-Cola Company: Inside the Real Thing* (August 2005), at 1.

and other lawsuits against Coca-Cola), Stakeholder Profile, and specifically lists the company's top 10 institutional and mutual fund shareholders.[346] In *Doe v. Wal-Mart Stores,* the plaintiffs' attorneys authored a report of a similar type, timing its release to coincide with the anniversary of a popular speech made by the Wal-Mart CEO.[347] Other reports appear in connection with *Bowoto*, *Wiwa*, and other cases.[348] These include alternative annual reports, similar to the one issued by True Cost of Chevron, noted above.[349]

Plaintiffs' attorneys sometimes speak on university campuses and in other fora to publicize their cases and encourage activism. For example, an attorney from the *Bano* case claims to have spoken at a variety of universities, including Princeton, New York University, University of Chicago, and the New England School of Law.[350] The plaintiffs' attorney in the *Unocal* and *Wal-Mart* cases has conducted seminars[351] and campus speaking tours,[352] discussing the underlying facts of the cases, the legal theories under which the cases have been brought, and the supposed need for such litigation in light of alleged continuing corporate abuses and deficient human rights enforcement mechanisms. Tellingly for this study, at one such seminar, this attorney expressly noted that that it was his organization's "future objective[] … to couple each of its cases with a public campaign. The organization did this with its case against Coca-Cola, and intends to use this as a strategy to educate the public and raise people's awareness of human rights violations engendered by corporate policy." He further noted that "his organization has also undertaken initiatives to work with lawyers in other countries so that they can bring cases against the same companies by exploiting their own domestic laws." The attorney concluded by saying, "We're going to continue our efforts to bring these issues to the door of the corporations, and I certainly hope that the war on terror and these other rationales will not allow us to, in effect, sanction a different form of terrorism which is very real to the people who are working in the factories of the global economy."[353] Such statements, of course, readily reveal the motives behind the extra-legal tactics in the transnational tort cases, although these efforts are not intended to reach mass audiences.

Community Organizing Tactics

Partnering with like-minded organizations

In most of the cases studied, one or more of the

[346] Polaris Institute, *Coca-Cola Company: Inside the Real Thing* (August 2005), http://www.polarisinstitute.org/files/Coke%20profile%20August%2018.pdf.

[347] International Labor Rights Forum, *Ethical Standards and Working Conditions in Wal-Mart's Supply Chain* report (October 24, 2007), http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10586.

[348] *See, e.g., The Life & Death of Ken Saro-Wiwa: a history of the struggle for justice in the Niger Delta* (an account based on a previous document published by Project Underground), http://justiceinnigerianow.org/jinn/wp-content/uploads/2009/03/life_death_ksw.pdf.

[349] *See, e.g., Lessons Not Learned: The Other Shell Report 2004*, http://justiceinnigerianow.org/jinn/wp-content/uploads/2009/03/lessons_not_learned1.pdf.

[350] H. Rajan Sharma biography, http://sharmadeyoung.com/sharma.html.

[351] *See, e.g.*, "Beyond Reports and Promises: Enforcing Universally Accepted Human Rights Standards in the Global Economy (Seminar #3)" with Terry Collingsworth (February 6, 2003), http://www.cceia.org/resources/articles_papers_reports/874.html.

[352] *See, e.g.*, International Labor Rights Forum, "Wal-Mart Campaign" section, *ILRF-National Labor College Discussion on Wal-Mart Workers in China*, http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10586; Laraine Weschler, *Tour educates AU of Wal-Mart labor violations* (speaking tour on the campus of American University, organized by International Labor Rights Fund with Terry Collingsworth as speaker), The Eagle, February 2, 2006, http://www.theeagleonline.com/news/story/tour-educates-au-of-wal-mart-labor-violations.

[353] "Beyond Reports and Promises: Enforcing Universally Accepted Human Rights Standards in the Global Economy (Seminar #3)" with Terry Collingsworth (February 6, 2003), http://www.cceia.org/resources/articles_papers_reports/874.html.

plaintiffs' attorneys were from nonprofit legal organizations or public interest firms. They thus can be expected to maintain relationships with like-minded human and labor rights organizations, leading to partnerships in advancing their common causes (15 cases). The study observed such relationships, of course, in the DBCP and Lago Agrio case studies.

In several cases, plaintiffs' organizations formed new coalitions to support the legal action. For example, in *Flomo v. Bridgestone Americas Holding,* the Stop Firestone Coalition consists of the plaintiffs' attorneys who filed the lawsuit, along with a wide range of environmental groups, finance organizations, civil rights groups, human rights units, and labor unions.[354] The groups are based both in the United States and Liberia, the site of the underlying acts at issue in the case. Additionally, the plaintiffs' attorneys in the *Sinaltrainal* lawsuit, involving alleged attacks on union leaders, contacted a known labor union activist and publicist to start the Campaign to Stop Killer Coke.[355]

Of particular note, the study also observed that labor unions are a frequent partner for the plaintiffs' organizations, appearing, quite logically, in nearly all cases that allege mass labor violations and the killing of labor unionists. For instance, a United Steelworkers Union ("USW") counsel is an attorney of record in *Sinaltrainal*,[356] *Bauman v. DaimlerChrysler*,[357] and *Drummond*. In *Drummond*, the USW also provided Congressional testimony and wrote letters to the Secretary of State about the action.[358]

In at least 2 cases, similar to the role of the Amazon Defense Coalition in the Lago Agrio litigation, plaintiffs' attorneys filed the lawsuit in part on behalf

Activists in the Bridgestone/Firestone case have also hosted seminars, *see, e.g.*, *Liberian Activists Back in D.C.: Wed (5/20) at 12:30pm* (May 19, 2009), http://www.stopfirestone.org/2009/05/liberian-activists-back-in-dc-wed-520-at-1230pm.

[354] *See* Stop Firestone Coalition, "About Us" section, http://www.stopfirestone.org/about/coalition; International Rights Advocates, "Cases" section, overview of the Bridgestone-Firestone case, "Summary" paragraph at http://www.iradvocates.org/bfcase.html; Press Release, Stop Firestone Coalition, *Super Bowl Halftime Sponsor, Bridgestone Firestone, Uses Child Labor, Abuses Workers and Environment in Liberia* (January 29, 2008), International Labor Rights Forum, http://www.laborrights.org/stop-child-labor/stop-firestone/news/11309.

[355] http://www.killercoke.org/who.htm; *The Coca-Cola Case* (Argus Films, 2010). Indeed, in the recent *Palacios* case filed against Coca-Cola based on alleged violence against a union member and his family in Guatemala, the complaint expressly references the work of the NGO Students Against Sweatshops (http://usas.org), a student and youth organization dedicated to the rights of workers. *See Palacios v. Coca-Cola Co.*, Complaint, 102514/2010 (N.Y. Sup. Ct. Feb. 25, 2010).

[356] Press Release, International Labor Rights Fund, *ILRF & USW Bring New Complaint Against Coca-Cola* (June 2, 2006), http://lrights.igc.org/press/Coke/newcase_ilrf_060206.htm.

[357] *See Bauman v. DaimlerChrysler Corp.*, Complaint, No. 04 Civ. 00194 (N.D. Cal. Jan. 14, 2004). In the *Bridgestone* case, the AFL-CIO awarded the plaintiffs' workers' union, the Firestone Agricultural Workers Union of Liberia (FAWUL), with the 2007 George Meany–Lane Kirkland Human Rights Award for courage, innovation and leadership. *See* James Parks, *AFL-CIO Solidarity Center Honors Liberian Rubber Workers*, AFL-CIO NOW Blog (June 27, 2008), http://blog.aflcio.org/2008/06/27/afl-cio-solidarity-center-honors-liberian-rubber-workers/#. *See also* VOA News, *Bridgestone/Firestone Rubber Company in Liberia Accused of Rights Abuses* (July 23, 2008), International Labor Rights Forum, http://www.laborrights.org/stop-child-labor/stop-firestone/news/11680. In *Unocal*, the International Federation of Chemical, Energy, Mine and General Workers' Unions Asia-Pacific launched a media campaign to support the plaintiffs, and advocated that regional unions should press companies to leave Burma, but it is unclear whether the union is connected to the plaintiffs. *See* News Release No. 24/2001, International Federation of Chemical, Energy, Mine and General Workers' Unions, *Burma Disinvestment Campaign Stepped Up* (May 10, 2001), http://www.icem.org/en/3-Energy-Oil-and-Gas/821-Burma-Disinvestment-Campaign-Stepped-Up.

[358] *See, e.g.*, *Estate of Rodriguez v. Drummond Co., Inc.*, Complaint, No. 02-CV-0665 (N.D. Ala. Mar. 14, 2002); *Protection and Money: U.S. Companies, Their Employees, and Violence In Colombia*, a Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on the Western Hemisphere of the House Comm. on Foreign Affairs and the Subcomm. on Health, Employment, Labor, and Pensions and the Subcomm. on Workforce Protections of the Committee on Education and Labor, 110th Cong. (June 28, 2007), http://foreignaffairs.house.gov/110/36425.pdf; Letter from USW to Hillary R. Clinton (Sept. 17, 2009), http://assets.usw.org/News/GeneralNews/09-17-09secyclintonltrondrummond.pdf.

of institutional plaintiffs. In *Doe v. Nestle*, involving labor practices in Cote d'Ivoire, Global Exchange – the "membership-based international human rights organization" that focuses on fair trade, labor rights and environmental practices and assists the plaintiffs in the Lago Agrio litigation – is a plaintiff in the lawsuit. [359] Global Exchange helps coordinate activism surrounding the action through organizing protests, letter-writing campaigns, and other means. Similarly, in *Sinaltrainal v. Coca-Cola Co.*, involving alleged attacks on individual union leaders, Sinaltrainal, the Colombian Soft-Drink Workers Union, was the institutional plaintiff. [360] The NGO Amazon Watch, discussed extensively above in connection with Chevron in Ecuador, is a plaintiff (along with individuals) in *Carijano v. Occidental Petroleum*[361] and has helped organize demonstrations. [362]

In other cases, plaintiffs' organizations work or partner with like-minded groups on certain activism events, internet campaigns or media publicity. For example, in *Bowoto v. Chevron Corp.*, the organization Justice in Nigeria Now, noted above, posted fact sheets on its website, [363] assisted with media publicity, [364] and gave interviews at the start of the 2008 trial. Numerous similar examples of sympathetic organizations providing publicity, logistics, and support to individual lawsuits are abundant, and indeed appear in most of the cases reviewed.

Protests

In the DBCP and Chevron-Ecuador case studies, numerous protests were observed. The same is true for most of the remaining cases (15). Plaintiffs and their advocates often organize protests near the defendants' corporate headquarters or to coincide with an event that involves a corporate defendant. As with other tactics, protests can be an inexpensive and effective way to broadcast a message, and they commonly take place outside of shareholder meetings, to draw the attention of company executives, shareholders, employees, and the media.

Examples include:

- In connection with the *Carijano* lawsuit, the plaintiff joined other supporters and activists in demonstrating outside Occidental Petroleum's

[359] International Rights Advocates, "Institutional Plaintiff" paragraph in the overview of the "Nestle, Archer Daniels Midland, and Cargill" case, http://iradvocates.org/nestlecase.html.

[360] International Rights Advocates, "Institutional Plaintiff" paragraph in the overview of the "Coca-Cola I" case, http://www.iradvocates.org/coke1case.html.

[361] Kelly Hearn, *For Peru's Indians, Lawsuit Against Big Oil Reflects a New Era: Outsiders and High-Tech Tools Help Document Firms' Impact*, The Washington Post, January 31, 2008, http://www.washingtonpost.com/wp-dyn/content/story/2008/01/31/ST2008013100037.html.

[362] *See* Press Release, Amazon Watch, *'Clean Up Operation' Launched at Occidental Petroleum Headquarters, Amazon Watch Says* (April 30, 2008), http://www.amazonwatch.org/newsroom/view_news.php?id=1565. In other cases, organizations plan events to bring attention to the lawsuits, but it is unclear whether the interests of these organizations in the actions developed organically and separate from the plaintiffs and their advocates, or whether the organizations work in partnership with plaintiffs. For example, (1) related to *Doe v. Nestle*, there is Stop the Traffik's part Internet campaign/ part coalition, http://www.stopthetraffik.org/about/who/coalition.aspx; (2) related to *Unocal* (though not limited to *Unocal*), there is the Free Burma Coalition, http://www.freeburmacoalition.org, and Global Exchange's *Unocal* Corporate Accountability Campaign, covered by Mark Thomsen, *Social Investors Press Unocal to Cut Ties to Burma*, SocialFund's Sustainability Investment News (October 24, 2001), http://www.socialfunds.com/news/article.cgi/article694.html; (3) related to *Union Carbide*, Students for Bhopal, http://www.studentsforbhopal.org, is geared toward college students, with goals including divestment of school holdings in Dow, convincing schools to stop using Dow products, and urging students to pledge not to work for Dow (event and action ideas are enumerated on the website); and (4) related to *Apartheid,* there is the Khulumani Support Group, http://www.khulumani.net/home.html.

[363] Justice in Nigeria Now, "Chevron" section, http://justiceinnigerianow.org/about-chevron & Justice in Nigeria Now blog, http://justiceinnigeria.wordpress.com.

[364] Posting of Robin Rose to the Women's International League for Peace and Freedom, http://wilpf.blogspot.com/2008/11/bowoto-v-chevron.html (November 4, 2008).

headquarters.[365] In connection with the *Mujica* case, a protest organized by the USW was held outside Occidental Petroleum's headquarters to coincide with a public hearing against the company by the People's Permanent Tribunal in Colombia, a citizens group that considered alleged "crimes" of Occidental Petroleum and others accused of participating in attacks on union leaders;[366]

- In *Bowoto v. Chevron Corp.*, Justice in Nigeria Now helped mobilize a coalition to protest at Chevron's annual shareholder meeting.[367] During the *Bowoto* trial, Justice in Nigeria Now also helped to organize protesters in front of a Chevron gas station;[368]
- In *Bigio v. Coca-Cola Co.*, those who filed amicus curiae (friend of the court) briefs in the case appeared at protests at shareholder meetings;[369]
- Protests by plaintiffs' representatives and others also were held outside of Royal Dutch Shell's headquarters and at company annual meetings in connection with the proceedings in *Wiwa v. Royal Dutch Petroleum;*[370] and
- In connection with *Sarei v. Rio Tinto*, the Mineral Policy Institute (MPI) and Free West Papua[371] (whose connections to the plaintiffs are unclear), organized a demonstration that included

Daryl Hannah and others protesting Oxy in Peru

Women occupying Chevron terminal in Nigeria

[365] Press Release, Amazon Watch, *'Clean Up Operation' Launched at Occidental Petroleum Headquarters, Amazon Watch Says* (April 30, 2008), http://www.amazonwatch.org/newsroom/view_news.php?id=1565.

[366] Media Advisory, United Steelworkers, *Occidental Petroleum on Trial in Colombia Tribunal: Steelworkers Demand Justice* (July 18, 2008), http://www.usw.org/media_center/releases_advisories?id=0047.

[367] Justice in Nigeria Now, "About JINN" section, http://justiceinnigerianow.org/about-2.

[368] *See* Laura McClure, *On Bowoto v. Chevron*, MotherJones, October 28, 2008, http://www.motherjones.com/blue-marble/2008/10/bowoto-v-chevron. *See also* Justice in Nigeria Now's overview of media coverage, http://justiceinnigeria.wordpress.com/press-links/media-coverage-of-bowoto-v-chevron/tvradio-media. Global Exchange, Justice in Nigeria Now, and West County Toxics Coalition (a local environmentally oriented NGO in Northern California) organized protests in front of a Chevron gas station during trial. Justice in Nigeria Now is reported to have been a driving force in pushing the case to trial, and founder Laura Livoti gave numerous press interviews when the lawsuit began. In *Doe v. Nestle*, institutional plaintiff Global Exchange organized a protest outside a San Francisco movie theater showing the movie *Willie Wonka and the Chocolate Factory*. *See* Deborah Orr, *Slave Chocolate?*, Forbes Magazine, April 24, 2004, http://www.organicconsumers.org/fair_trade/slavechocolate060414.cfm. In addition, the DaimlerChrysler unionists also have protested to demand justice in *Bauman v. DaimlerChrysler*. *See* International Rights Advocates, "News and Press" section, http://www.iradvocates.org/dc.html. There have also been protests against Gap, arising from *Does v. Gap*. *See* Save the Redwoods/ Stop the Gap, www.gapsucks.org.

[369] Press Release, Zionist Organization of America, *ZOA Protests Outside Coca-Cola's Annual Shareholders' Meeting In Wilmington, Delaware* (April 22, 2008), http://www.zoa.org/sitedocuments/pressrelease_view.asp?pressreleaseID=391.

[370] *See* Shell Guilty, "Video" section, http://www.shellguilty.com/category/video/ (includes a video of the protest). It is unclear whether the plaintiffs or affiliated groups organized these protests.

[371] MPI is an Australian NGO that focuses on environmental and social issues in the mining sector. *See* http://www.mpi.org.au. Free West Papua is an NGO that advocates to free West Papua from Indonesia. *See* www.freewestpapua.org.

shareholders outside the company's annual meeting to protest the company's mining practices in Papua New Guinea. [372]

In short, such protests, often advocated by plaintiffs and their representatives as part of their media campaigns, are a staple in the cases studied involving well-known corporate defendants.

Boycotts

It is no surprise that boycotts are among the tactics employed against corporate defendants. Indeed, the study observed boycotts of different types in most of the cases reviewed.

For example, the USW and the Sinaltrainal union in Colombia called for the international boycott of Coca-Cola. [373] Those requests have been supported by other unions. [374] As a result, according to one account, there are at least 150 colleges and universities around the world that are active in the Killer Coke Campaign targeting alleged misconduct by Coca-Cola against union leaders through education, calls to action, and other means. [375] This includes Hofstra University in New York, which passed a resolution not to renew the university's exclusive contract with the company. [376]

Other examples include:

- Bridgestone/Firestone, in which SAMFU (discussed above), part of the Stop Firestone campaign, has called for a boycott of the company's products until the company addresses the coalition's concerns about working conditions; [377]
- Royal Dutch Shell, in which the NGO Essential Action (a group whose stated mission is to encourage citizens to become socially active) demanded the boycott – while it is unclear whether that organization was related to the plaintiffs, the boycott was in response to the events of the *Wiwa* lawsuit; [378] and

[372] *See Asylum seekers join Rio Tinto protest*, The Age, May 4, 2006, http://www.theage.com.au/news/national/asylum-seekers-join-rio-tinto-protest/2006/05/04/1146335853569.html (also posted at http://www.freelists.org/post/ppi/ppiindia-Asylum-seekers-join-Rio-Tinto-protest).

[373] *See* Frank Neisser, *City councilors demand 'Coca-Cola-free' Boston*, Workers World, August 11, 2004, http://www.workers.org/2008/us/boston_0814.

[374] *See* Campaign to Stop Killer Coke, "Resolutions" section, http://www.killercoke.org/resolutions.htm. The Ontario Public Service Employees Union (OPSEU) resolved that "until the situation involving SINALTRAINAL is resolved and the safety and rights of workers in the Coca-Cola Colombian bottling plants are protected, OPSEU will continue the boycott and information campaign against Coca-Cola" (*see* http://www.killercoke.org/opseuresolution.pdf). Local chapters of the Service Employees International Union (SEIU) have passed resolutions as well, for example, to "support the worldwide call to boycott Coca-Cola and work to win broad AFL-CIO support for the campaign against Killer Coke" by ceasing to sell Coca-Cola or provide it at meetings. *See* "12,000 Member SEIU Local 2028 Bans Coke Products," Campaign to Stop Killer Coke, "Resolutions" section, http://www.killercoke.org/resolutions.htm. The Executive Council of the Union of Clerical and Technical Workers of New York University, Oakville and District Labour Council, and Canadian Auto Workers Local 707 have also passed resolutions supporting the boycott. *See Two Resolutions to Boycott Coca-Cola Products Adopted by the Executive Council of the Union of Clerical and Technical Workers of NYU (UCATS)*, Local 3882, American Federation of Teachers, NYSUT, AFL-CIO (Passed: March 8, 2005), http://www.killercoke.org/aft3882res.htm. The amicus curiae, ZOA, in the *Bigio v. Coca-Cola* lawsuit has also called for a boycott against the company. *See* Press Release, Zionist Organization of America, *ZOA Protests Outside Coca-Cola's Annual Shareholders' Meeting In Wilmington, Delaware* (April 22, 2008), http://www.zoa.org/sitedocuments/pressrelease_view.asp?pressreleaseID=391.

[375] Saint Joseph's University Students for Workers' Rights, "Evidence of The Coca Cola Company's Human Rights Abuses and Environmental Violations" information packet, http://org.ntnu.no/attac/dokumentene/cocacola/cokeinfopacket.pdf, at 76.

[376] *Id.* at 60.

[377] "Poor conditions in Liberia's rubber plantations" news item (May 23, 2006) posted on Trócaire's website, http://www.trocaire.org/news/2006/05/23/poor-conditions-liberias-rubber-plantations.

[378] Essential Action's "Boycott Shell" project, http://www.essentialaction.org/shell/index.html; Essential Action, *Shell in Nigeria: What are the issues?*, http://www.essentialaction.org/shell/issues.html.

- Exxon Mobil, in which Global Exchange, the institutional plaintiff in *Doe v. Nestle*, requested the boycott citing the company's practices in Indonesia.[379]

Investment Related Tactics

The study identified numerous instances of investment-related tactics of the type seen in the Lagro Agrio matter (17 cases). While plaintiffs and their advocates use media tactics and community organizing techniques to try to place public pressures on corporate defendants, the investment strategies directly target corporate stock prices, executives, and shareholders. Although the study did not identify evidence that these strategies succeed in any measurable respect, they commonly include plaintiffs' attendance at annual and shareholder meetings, introducing shareholder resolutions that support the issues being litigated, and pressuring shareholders to divest in the defendant company. Similar to the Lagro Agrio case, plaintiffs also attempt, without measurable success, to place particular pressures on institutional investors to introduce shareholder resolutions and divest in the defendant companies. These tactics are designed to cause a drop in stock prices, create unease among stockholders about the direction of the lawsuits, and ultimately pressure defendant companies to change course and settle contentious litigation.

Plaintiffs' attendance at annual and shareholder meetings

When plaintiffs attend and speak at annual shareholder meetings (8 cases), they can communicate directly to stockholders – technically the company owners – and company executives. They also often generate media attention in the process. Coupled with the relative ease and lack of expense, shareholder meeting participation is a popular publicity tactic. Of the tactics studied, it also is perhaps among the most likely to be underrepresented in the number of times it has been used, since participation at a shareholder meeting may not generate the type of publicly retrievable documentation primarily used in this review.

Nonetheless, the study identified numerous examples. In connection with his lawsuit against Chevron, Larry Bowoto traveled to the Bay Area in May 2008, to speak at Chevron's annual shareholder meeting.[380] Similarly, in connection with *Mujica v. Occidental Petroleum Corp.*, the plaintiffs timed the filing of their lawsuit to coincide with Occidental Petroleum's annual shareholder meeting, where the named plaintiff questioned Occidental's CEO and board of directors and broadly called for justice.[381] Other examples were

[379] Global Exchange, *Take Action: Make An Exxample of Exxon!*, http://www.globalexchange.org/getInvolved/actnow/boycottexxon.html. To a lesser extent, boycotts have also been called against Nestle and Gap. A large boycott of Nestle's infant formula products, unrelated to the lawsuit against Nestle and other chocolate companies for child labor abuses, has been ongoing since 1977. *See* Baby Milk Action's Briefing Paper, http://www.babymilkaction.org/pages/history.html. However, Nestle's chocolate products have now also been added to the boycott. In addition, it is unclear whether the Gap protest was connected to the plaintiffs in *Does v. Gap*, but it was related to the factory in Saipan that formed the basis for part of the action. *See* Faran Haq, *GAP Boycott Over Sweatshops Using 'Made in USA' Guise*, The Albion Monitor (March 8, 1999), http://www.albionmonitor.com/9903a/copyright/gapsaipan.html. Amazon Watch includes boycotts as part of its "everyday action" items. *See* Amazon Watch, "Take Action" section, "Everyday actions" page, http://www.amazonwatch.org/take_action/everyday.

[380] EarthRights International, *Lawyers For Larry Bowoto Respond to Chevron Executive's Comments* (May 29, 2008), http://www.earthrights.org/content/view/539/62; *see also* Pat Murphy, *Nigerian Plaintiffs' Attorneys In Bowoto Case Should Pay Chevron Court Costs - Attorneys Talked Bowoto, Nigerians Into Losing Suit – Why Shouldn't They Bear Costs?*, The San Francisco Sentinel, April 11, 2009, http://www.sanfranciscosentinel.com/?p=22618; DASW, *Clean Up Chevron! Coalition Confronts Company Executives at Annual Shareholders Meeting*, IndyMedia, May 29, 2008, http://www.indybay.org/newsitems/2008/05/29/18502949.php.

[381] Democracy Now!, *Occidental Petroleum Sued for Role in Civilian Massacre in Colombia* (May 2, 2003), http://www.democracynow.org/2003/5/2/occidental_petroleum_sued_for_role_in#; Joint Press Release, Global Exchange/Amazon Watch, *Occidental Petroleum Sued in U.S. Courts For Role in Civilian Massacre in Colombia Role in Civilian Massacre in Colombia* (April 24, 2003), http://www.globalexchange.org/countries/americas/colombia/663.html; Joint Press Release, Amazon Watch/Global Exchange, *Occidental Petroleum Faces Lawsuit for Its Role in Massacre in Colombia* (April 25, 2003), http://www.amazonwatch.org/newsroom/view_news.php?id=593.

observed,[382] though the study saw no evidence that the tactics had any demonstrable effect on stock prices.

Introducing resolutions at shareholder meetings

Just as numerous shareholder resolutions were introduced in connection with the Chevron-Ecuador matters, introducing resolutions was the most frequently identified investment tactic in the other cases (16).[383] Typically, the resolutions seek reviews of and reports on the companies' practices at issue in the lawsuit, and to improve company compliance with human rights standards. Plaintiffs and their advocates typically pursue such resolutions because even if the resolutions do not pass – they very rarely do – they raise the plaintiffs' concerns to the company's board of directors, management, employees, and shareholders. In particular, plaintiffs may encourage institutional investors to file the resolutions, no doubt to send a message of discontent from a substantial shareholder. In addition, because resolutions frequently advocate transparency, company opposition invariably is painted as secretive and evasive.

Of the cases reviewed, while in some instances the involvement of the plaintiffs was clear, in others, it was not; that of course does not signify that the plaintiffs were uninvolved, but simply that publicly available evidence of plaintiff involvement was not reviewed. The pattern of resolutions being introduced that bear a correlation to the facts at issue in the underlying cases, however, certainly raises a question – if not an inference – of plaintiff involvement.

Institutional funds in New York have been particularly active. For example, in 2005, New York City's then-comptroller William Thompson used the city pension fund to pressure Coca-Cola to allow an independent investigation into alleged violence against unionists at its plants in Colombia in connection with the *Sinaltrainal* case.[384] The resolution was designed to express support for organized labor. In connection with its introduction, Thompson stated, "The New York City Pension Funds are concerned about the allegations of alleged human rights abuses at Coca-Cola's Colombian affiliate," and that "[b]y failing to address this issue, Coca-Cola has fostered a negative image of itself and is now the subject of a boycott campaign, which poses a financial risk for its investors."[385] The New York City Employees' Retirement System, Teachers' Retirement System for the City of New York, New York City Police Pension Fund, New York City Fire Department Pension Fund, and the New York City

[382] They include: *Doe v. Exxon Mobil Corp.*, in which a member of the affected plaintiffs' community attacked the conduct of the Indonesian military at a shareholder meeting, *see* Jane Perlez, *Exxon Under Fire in Indonesia*, Moscow Times, July 16, 2002, http://www.globalpolicy.org/component/content/article/221/46831.html; *Doe v. Wal-Mart Stores,* in which plaintiffs' attorneys spoke at Wal-Mart's annual shareholder meeting in defense of a resolution, *see* Trina Tocco, *Wal-Mart Shareholder Meeting 2008 Speech* (June 6, 2008), International Labor Rights Forum, http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10714. They also include *Sinaltrainal* and *Turedi*, in which plaintiffs, their attorneys and union members have attended Coca-Cola shareholder meetings on multiple occasions and documented their attendance in *The Coca-Cola Case* film. Indeed, in the film, activists tout the use of protests at shareholders meetings as a tactic, and in one scene form the film, an activist read graphic allegations from a plaintiff's complaint. *See* International Labor Rights Fund, *Coca-Cola: Abuses in Colombia*, *Shareholder Meeting Report-Back* (April 19, 2006), http://lrights.igc.org/projects/corporate/coke. *See also GAP Boycott in New Mexico State*, New Mexico State University, http://business.nmsu.edu/~dboje/GAP/gap_boycott_in_new_mexico_state.htm; *Wiwa versus Shell: Oil company to stand trial for complicity in repression of the Ogoni people*, LINKS, International Journal of Socialist Renewal (May 27, 2009), http://links.org.au/node/1008; International Labor Rights Forum, *Wal-Mart Shareholder Meeting 2008 Speech* (June 6, 2008), http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10714.

[383] *See generally* Alex Markels, *Showdown for a Tool In Human Rights Lawsuits*, The New York Times, June 15, 2003 ("In resolutions being put before corporate directors, shareholders are calling for companies to pull out of projects implicated in human-rights lawsuits.").

[384] *See* Jill Gardiner, *Thompson Targets Google, Yahoo Over China Policy*, The New York Sun, December 14, 2006, http://www.nysun.com/new-york/thompson-targets-google-yahoo-over-china-policy/45150; Press Release, Campaign to Stop Killer Coke, *NYC Pension Funds Call For Investigation Into Alleged Human Rights Abuses At Coca-Cola* (January 26, 2006), http://www.killercoke.org/pr060126.htm.

[385] Press Release Campaign to Stop Killer Coke, *NYC Pension Funds Call For Investigation Into Alleged Human Rights Abuses At Coca-Cola* (January 26, 2006), http://www.killercoke.org/pr060126.htm.

Board of Education Retirement System also sponsored the resolution.[386] Together, the funds held 6,475,918 shares of Coca-Cola, worth more than $267 million.[387]

In 2006, Mr. Thompson also filed shareholder resolutions on behalf of the city's pension fund to challenge Yahoo! and Google's policies in China and other countries.[388] Similarly, the New York City Comptroller and the New York City pension systems, which represented over 10,000,000 shares in Wal-Mart, also had a shareholder resolution introduced on their behalves at one of Wal-Mart's shareholder meeting.[389] Other examples also were noted, though again the resolutions rarely succeed.[390]

Pressuring shareholders to divest stock in defendant companies

In a related vein, pressure to divest stock holdings was fairly commonly observed (7 cases). Divestiture obviously can, if successful, place some stress on the defendant companies, particularly when the divestiture is by an institutional shareholder, as it can threaten to drive down stock prices, bring along other investors, and create negative media attention. Notably, however, the study observed no evidence that such stress on defendant companies was achieved in any of the cases studied. In most of the cases in which the study identified divestiture, public information did not contain a direct causal link to the plaintiffs; again, that cannot be construed to signify a lack of plaintiff involvement, as the overall trend may permit a reasonable inference to the contrary.

On an overall basis, in several instances modest divestiture followed negative ratings on defendant companies by investment firms who make decisions based on social criteria, which cited then-outstanding litigation. In addition, among those most likely to divest are universities and pension funds, particularly TIAA-CREF, a retirement fund, which provides retirement plans mainly for educational, religious, and

[386] *Id.*; *see also* Bureau of Asset Management, Office of the Comptroller, City of New York, *2005 Proxy Initiatives of the New York City Pension Funds* (December 2005), http://www.comptroller.nyc.gov/bureaus/bam/corp_gover_pdf/2005-shareholder-report.pdf.

[387] In connection with *Bigio v. Coca-Cola*, the amicus curiae, ZOA, also introduced shareholders' resolutions. *See* Press Release, Zionist Organization of America, *ZOA Protests Outside Coca-Cola's Annual Shareholders' Meeting In Wilmington, Delaware* (April 22, 2008), http://www.zoa.org/sitedocuments/pressrelease_view.asp?pressreleaseID=391.

[388] *See* Jill Gardiner, *Thompson Targets Google, Yahoo Over China Policy*, The New York Sun, December 14, 2006, http://www.nysun.com/new-york/thompson-targets-google-yahoo-over-china-policy/45150. Reporters Without Borders, which later assisted the plaintiffs in the lawsuit against Yahoo!, also noted that it would ask institutional shareholders to press Yahoo!'s management on their policies. *See Anti-Yahoo! campaign begins*, Asia News, September 14, 2008, http://www.asianews.it/index.php?l=en&art=4118.

[389] *Walmart Shareholder Action* (June/September 2002), Unitarian Universalists for a Just Economic Community, http://www.uujec.org/bbr/walmartshareholderaction.pdf. Likewise, the plaintiffs' attorneys in *Wal-Mart Stores,* spoke at Wal-Mart's annual shareholder meeting in defense of a resolution requesting that Wal-Mart's Board of Directors establish a board-level human rights committee.

[390] *See, e.g.,* Youssef M. Ibrahim, *Shell Shareholders Reject A Human Rights Initiative*, The New York Times, May 15, 1997, http://www.nytimes.com/1997/05/15/business/shell-shareholders-reject-a-human-rights-initiative.html; Mike Kennedy, *A new approach: Exxon Mobil targeted by amnesty group on human rights*, Encyclopedia.com (May 13, 2002), http://www.encyclopedia.com/doc/1G1-85984936.html; Backgrounder, Amnesty International USA, "Business and Human Rights" section, *Why is Amnesty International concerned about ExxonMobil?*, http://www.amnestyusa.org/business/xom_background.html; *Chevron's Resolution on Nigeria* (Shareholder Resolution filed by Franklin Research & Development, Boston, and other shareholders), Association of Nigerian Scholars for Dialogue, http://www.waado.org/nigerian_scholars/archive/opinion/oilchev.html; EarthRights International, *Unocal Shareholders' Resolution on Forced Labor Gains Unprecedented Support* (May 22, 2002), http://www.earthrights.org/legalfeature/unocal_shareholders_resolution_on_forced_labor_gains_unprecedented_support.html; Press Release, Amazon Watch, *Occidental Petroleum's Toxic Legacy in the Peruvian Amazon To Dominate Annual Meeting* (May 1, 2001), http://www.amazonwatch.org/newsroom/view_news.php?id=1777; Resolution "aim[ed] to determine whether Hershey is purchasing cocoa from Cargill, Archer Daniels Midland, and Nestle, all of which are being sued for purchasing cocoa from farms that use forced labor" (April 17, 2006), http://www.globalexchange.org/update/press/3914.html, and http://www.laborrights.org/files/COCOAVDayList.pdf.

nonprofit organizations. [391]

For example, in 2006, TIAA-CREF sold 1.2 million shares of Coca-Cola stock, worth $52.4 million, after KLD Research and Analytics, another firm that seeks to make investments premised in part on social concerns, [392] dropped Coca-Cola from its list of socially responsible companies. That occurred in part because of allegations regarding Coca-Cola's actions in Colombia and elsewhere (the bases of the *Sinaltrainal* and *Turedi* lawsuits). [393] The shares sold were in a "social choice" account, in which roughly 430,000 pension clients invested at the time. Activists also urged NY TIAA-CREF to divest from Wal-Mart. [394]

Similarly, in 2006, the Norwegian Ministry of Finance's Government Pension Fund divested from Wal-Mart upon the recommendation by the Government's Council on Ethics. The fund sold some $416 million worth of Wal-Mart stock in total for a variety of alleged activities. [395]

On campus, in 2001, students at the University of Virginia succeeded in causing the UVA administration to divest the University's 50,000 shares of stock in Unocal because of allegations that the company was complicit in human rights violations perpetuated by the Burmese military. [396] By and large, however, while the study certainly noted efforts to generate such divestments, those divestments that did occur seemed to have little overall impact.

Political Tactics

Of the categories of tactics studied, political tactics (14 cases) – featured prominently in the Chevron-Ecuador matter – were the least frequently employed. Among the primary tactics observed was testimony at Congressional hearings by plaintiffs or their advocates, aligning with politicians and well-known leaders to garner support and publicity, and pressing for resolutions on local levels.

Congressional hearings

In 10 of the cases reviewed, the plaintiffs or their supporters testified at Congressional hearings. Much like other favored techniques, the tactic has appeal on multiple levels; it is essentially cost-free, generates negative publicity for corporate defendants, adds pressure on corporate defendants who may become concerned about alienating political support on Capitol

[391] *See* "TIAA-CREF" Wikipedia entry, http://en.wikipedia.org/wiki/TIAA-CREF.

[392] Dexia Asset Management, which promotes sustainable and responsible investing, has listed Bridgestone, Yahoo!, Dole, and Dow Chemicals as examples of companies that could be filtered out because of the ATS cases against them. Dexia Asset Management, *Dexia Equities L Sustainable Emerging Markets: European SRI Transparency Guidelines* (September 2009), https://www.dexia-am.com/NR/rdonlyres/47096CA9-4675-46E9-AF20-3C69E0F780B3/0/TG_Dexia_Equities_L_Sustainable_Emerging_Markets_2009_EN_20090904.pdf, at 10. In the *Unocal* case, the AFL-CIO sent a report on *Unocal* to company investors and analysts detailing "how the political and legal risks of Unocal's Burma investments pose a danger to shareowners," and Global Exchange's Unocal Corporate Accountability Campaign worked with shareowners to pressure Unocal to withdraw from Burma. *See* Mark Thomsen, *Social Investors Press Unocal to Cut Ties to Burma*, SocialFund's Sustainability Investment News (October 24, 2001), http://www.socialfunds.com/news/article.cgi/article694.html.

[393] Carolyn Wilbert, *Social responsibility of Coca-Cola questioned; Giant retirement fund decides to sell shares*, Atlanta Journal-Constitution, July 19, 2006, Campaign for a Commercial-Free Childhood, http://www.commercialexploitation.org/news/cokesocialresponsibilityquestioned.htm.

[394] Al Norman, *New York, NY TIAA-CREF Urged To Divest Wal-Mart Stock*, Wal-Mart Watch Blog (July 17, 2009), http://walmartwatch.com/blog/archives/al_norman_new_york_ny_tiaa_cref_urged_to_divest_wal_mart_stock.

[395] Bill Baue, *Norwegian Government Pension Fund Dumps Wal-Mart and Freeport on Ethical Exclusions*, SocialFunds' Sustainability Investment News (June 16, 2006), http://www.socialfunds.com/news/article.cgi/2034.html

[396] Mark Thomsen, *Students Push University of Virginia Out of Unocal*, SocialFund's Sustainability Investment News (October 23, 2001), http://www.socialfunds.com/news/article.cgi/693.html.

Hill, and may provide some influence to juries and judges. [397]

In 2006 and 2007, in perhaps the most well-known Congressional hearings among the cases reviewed, the House Committee on Foreign Affairs called upon Yahoo! executives to testify. In 2006, company officials told the Committee that they had been unaware of the nature of an investigation by the Chinese government against a dissident at the same time the Chinese government sought (and received) from Yahoo! online information about the dissident – the facts underlying *Xiaoning v. Yahoo! Inc.* [398] When evidence in the *Xiaoning* case suggested that perhaps Yahoo! knew more than it had told Congress, the committee called the company to testify again. In a high profile and testy session, with family members of the plaintiff in the audience, House members grilled Yahoo! executives on the issue. [399] The case settled immediately thereafter.

Post-card as part of the Stop Firestone Campaign

In April 2009, in a joint hearing, the U.S. House of Representatives' Committee on Foreign Affairs and Committee on Education and Labor heard testimony focusing on oil production in Nigeria. The hearing, titled "Environmental and Human Rights Concerns Surrounding Oil Production in the Niger Delta," discussed the *Wiwa* case, and included testimony regarding Ken Saro-Wiwa's environmental and human rights concerns. [400] Of note, the hearing occurred roughly 1 month before the trial in *Wiwa* was set to begin. In a similar vein, in September 2008, one month before the *Bowoto* trial was to start, the United States Senate's Subcommittee on Human Rights and the Law held a hearing titled, "Extracting Natural Resources: Corporate Responsibility and the Rule of Law." The hearing, which featured testimony from plaintiff organizations involved in several of the studied cases, discussed *Bowoto*, as well as *Unocal* and *Exxon*. These two examples strongly suggest that Congressional hearings now are being timed to coincide with planned corporate trials, likely a tactical maneuver to increase publicity and further pressure corporate defendants and perhaps influence judges and juries.

Other examples include two hearings from 2007. A June 2007 joint committee hearing in the House of Representatives, titled "Protection and Money: U.S. Companies, Their Employees, and Violence in Colombia," focused on alleged payments by United States companies to military and paramilitary units in Colombia. The hearing included testimony from plaintiffs' counsel discussing the lawsuits against

[397] Indeed, for plaintiffs, supportive members of Congress also can contact foreign politicians, and otherwise enlist aid in various ways.

[398] Yahoo! argued that its subsidiary acted lawfully under Chinese laws, obeyed requests of the Chinese government, and that the lawsuit sought to hold the company liable for the acts of the Chinese government. *See* Defendant Yahoo! Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint, No. 4:07-cv-02151-CW (N.D. Cal. Aug. 27, 2007) ("Yahoo! has no control over the sovereign government of the People's Republic of China ("PRC"), the laws it passes, and the manner in which it enforces its laws.").

[399] World Organization for Human Rights USA, "Who We've Helped" section, *Families of Shi Tao and Wang Xiaoning (Yahoo! Inc.)*, http://www.humanrightsusa.org/index.php?option=com_content&task=view&id=15&Itemid=35; Jacqui Cheng, *Congress unimpressed by Yahoo apology for China dissident e-mail testimony*, Ars Technica (November 6, 2007), http://arstechnica.com/tech-policy/news/2007/11/yahoo-calls-withholding-of-info-on-chinese-arrests-a-misunderstanding.ars.

[400] Testimony of Stephen M. Kretzmann, Executive Director, Oil Change International, before the United States House of Representatives, Tom Lantos Human Rights Commission (April 28, 2009), http://priceofoil.org/wp-content/uploads/2009/05/ushrtestimony042809.pdf; EarthRights International, *Congressional Commission Hears Testimony on Shell's Environmental Abuses in the Niger Delta* (April 28, 2009), http://www.earthrights.org/legal/congressional-commission-hears-testimony-shell-s-environmental-abuses-niger-delta.

Drummond, Chiquita, Coca-Cola, and Occidental Petroleum. The hearing also mentioned alleged payments by Del Monte – a defendant in another similar action.[401] In October 2007, plaintiffs' representatives in *Doe v. Wal-Mart Stores* strongly denounced the company to a Senate panel investigating overseas labor conditions and practices in the toy industry, claiming that it is responsible for poor health and safety standards in China.[402] The connection between these hearings and plaintiffs' representatives and advocates demonstrates that Congressional hearings are yet another tactic being employed by plaintiffs in their efforts to create leverage against corporate defendants.

Other political pressure

Plaintiffs and their advocates also have sought to heap other forms of political pressures on corporate defendants. Seeking supportive letters from political figures is a particularly common tactic. For instance, in connection with the lawsuit against *Drummond*, Representative Bill Delahunt from Massachusetts, the Chairman of the Committee on Foreign Affairs' Subcommittee on International Organizations, Human Rights, and Oversight, drafted a letter to the President of Colombia urging protection for two jailed witnesses.[403] Notably, the letter was sent just days before a plaintiffs' attorney in *Drummond* testified to Rep. Delahunt's subcommittee.[404]

Letters have also been submitted in court by foreign governments that support holding the defendants liable. For example, the Government of South Africa submitted a letter to the court in the Apartheid litigation expressing support for the lawsuit. It is unclear whether this letter was solicited by the plaintiffs' firms. In it, the Minister of Justice and Constitutional Development expressed the South African Government's opinion that a federal court in the Southern District of New York is an appropriate forum to hear the aiding and abetting claims alleged by the plaintiffs in the complaint.[405] In *Bano v. Union Carbide,* involving environmental remediation, the Indian Government submitted a letter noting that it would cooperate with any remediation if Union Carbide was ordered to conduct it by United States courts (but firmly disputed that United States courts had jurisdiction over the government and reaffirmed its entitlement to sovereign immunity).[406]

[401] *Protection and Money: U.S. Companies, Their Employees, and Violence In Colombia*, a joint hearing before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on the Western Hemisphere of the Committee on Foreign Affairs and the Subcommittee on Health, Employment, Labor, and Pensions and the Subcommittee on Workforce Protections of the Committee on Education and Labor, House of Representatives (June 28, 2007), http://foreignaffairs.house.gov/110/36425.pdf, at 74.

[402] Research Team, *Wal-Mart's 2008 Shareholder Resolutions: Human Rights Committee*, Wal-Mart Watch blog (May 13, 2008), http://walmartwatch.com/blog/archives/wal_marts_2008_shareholder_resolutions_human_rights_committee; Z. Byron Wolf, *Sweatshop Toys? China's Goods Find U.S. Homes: Free Versus Fair Trade Fails to Inspire Most in Congress*, ABC News (October 25, 2007), http://abcnews.go.com/Politics/story?id=3775750&page=1.

[403] *See* Frank Bajak, *Drummond Union: Govt Muffles Key Witness*, Forbes/Associated Press, July 24, 2007, http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x2928336.

[404] In a similar vein, in some cases reviewed, plaintiffs contacted public officials to request investigations. For example, one of the plaintiffs' attorneys in the *Drummond* litigation wrote a public letter to United States Secretary of State Hillary Clinton, requesting that the United States State Department pressure the Government of Colombia to investigate and prosecute the killings of trade union leaders, order Drummond to increase safety conditions, and to not permit Drummond to engage in retaliatory firings. The President of Colombia, as well as several U.S. Members of Congress, were copied on the letter. *See* Leo W. Gerard, International President, United Steelworkers, Letter to U.S. Secretary of State regarding "Continued Repression of Drummond Union & Workers in Colombia" (September 17, 2009), http://assets.usw.org/News/GeneralNews/09-17-09secyclintonltrondrummond.pdf; *see also* http://kucinich.house.gov/Issues/Issue/?IssueID=1563#Colombia.

[405] *See* http://www.hausfeldllp.com/content_images/file/09_01_09%20SA%20Ministry%20of%20Justice%20Ltr%20to%20Judge%20Scheindlin.PDF.

[406] *Bano v. Union Carbide Corp.*, No. 99-CV-11329, Opinion and Order (S.D.N.Y. Oct. 5, 2005).

On a local level, of the cases reviewed, there was at least one instance of a city passing a resolution supportive of the plaintiffs. The Stop Firestone Coalition ran a campaign encouraging people to press their city governments to pass resolutions supporting the plaintiffs in *Flomo*. In December 2007, Berkeley, California became the first U.S. city to do so, passing a resolution expressing solidarity with the plaintiffs.[407] The resolution stated that Berkeley residents "do not wish their city to be a profit center for Bridgestone/Firestone."

Poster from Permanent People's Tribunal

Similarly, as part of Killer Coke's boycott efforts against Coca-Cola, in 2008, a Boston City Councilman introduced a resolution to make Boston a Coke-free zone.[408] He introduced the resolution to coincide with the People's Permanent Tribunal in Colombia, which was considering alleged "crimes" of Coca-Cola.[409] The resolution recognized the boycott sought by the Sinaltrainal union in Colombia and the USW, and pressed the city administration "to not serve Coca-Cola products or stock them in any vending machines that are located on city property." It also "encourage[d] all businesses to immediately cease and desist from the stocking and selling of all Coca-Cola products until the international boycott has been resolved."[410] The resolution did not pass, however.

Other political pressures observed include politicians participating in press conferences,[411] submitting supporting briefs to courts in favor of plaintiffs,[412] and visiting affected plaintiffs on fact-finding missions and then releasing plaintiff-friendly reports.[413] Obtaining political support, whether through letters, hearings, resolutions, or other means, clearly represents a planned approach for plaintiffs seeking to place pressure on corporate defendants and the courts hearing these cases.

[407] *See* Stop Firestone Coalition, "Take Action" section, "City Resolutions" page, http://www.stopfirestone.org/action/city-resolutions.

[408] *See* Frank Neisser, *City councilors demand 'Coca-Cola-free' Boston*, Workers World (August 11, 2004), http://www.workers.org/2008/us/boston_0814.

[409] The tribunal was organized in Colombia and considered the effects of multinational corporations in the country. Although many corporations were involved, including Coca-Cola, the tribunal specifically denounced Occidental Petroleum. *See* http://www.usw.org/media_center/releases_advisories?id=0047; Dawn Paley, *Permanent Peoples' Tribunal in Colombia: Corporations with a License to Kill*, Upside Down World (August 7, 2008), http://upsidedownworld.org/main/content/view/1411/1.

[410] *See* Frank Neisser, *City councilors demand 'Coca-Cola-free' Boston*, Workers World (August 11, 2004), http://www.workers.org/2008/us/boston_0814.

[411] *See, e.g.,* Joint Press Release, Global Exchange/Amazon Watch, *Occidental Petroleum Sued in U.S. Courts For Role in Civilian Massacre in Colombia* (April 24, 2003), http://www.globalexchange.org/countries/americas/colombia/663.html; *see also* Reuters, *Senator Says Wal-Mart Sells Products From Sweatshops*, New York Times, December 13, 2007, http://www.nytimes.com/2007/12/13/business/13ornaments.html?ex=1283922000&en=c703cbfcdc994c57&ei=5035&partner=MARKETWATCH<br%20.

[412] *See, e.g.,* Press Release, *Eleven Members of Congress File Amicus Brief in Support of Bhopal Victims' Lawsuit* (April 4, 2006), http://www.house.gov/list/press/nj06_pallone/pr_apr4_india.html. In 2006, U.S. Representative Frank Pallone, Jr. (D-NJ), founder of the Congressional Caucus on India and Indian Americans, filed, along with 11 Members of Congress, an amicus brief in the U.S. Court of Appeals for the Second Circuit for the plaintiffs in the Union Carbide case. Representative Pallone had also filed an amicus brief on behalf of the plaintiffs in 2003. Dismissal of the case was ultimately upheld by the Second Circuit.

[413] *See, e.g.,* Information Packet, Saint Joseph's University Students for Workers' Rights, *Evidence of The Coca Cola Company's Human Rights Abuses and Environmental Violations*, http://org.ntnu.no/attac/dokumentene/cocacola/cokeinfopacket.pdf.

Conclusions

The conclusions of this study can be stated rather simply. Plaintiffs are employing a variety of aggressive out-of-court tactics in transnational tort cases that are designed to pressure well-known corporate defendants involved in litigation. Those tactics commonly involve media, community organizing, and investment-related efforts, and to a lesser but still notable extent, political activities.

Indeed, the cases reviewed differed widely in numerous key respects, including their facts, their posture, their timing, and the nature and operations of the companies involved. The two most visible links between the cases were: (1) they involved transnational tort cases against substantial companies, and (2) they involved extra-legal tactics employed by plaintiffs, their representatives, and their sympathizers.

The rationale behind these efforts also is readily visible, if not overt. Although the only clearly evident instances of fraud occurred in the Chevron-Ecuador and DBCP contexts, many of the same extra-legal tactics in those cases appear in the other cases reviewed. In the DBCP and Chevron-Ecuador matters, it is no secret that the plaintiffs are employing those tactics as part of a wider campaign that has approached, and on occasion crossed, ethical lines. In the other cases, an identical desire – to maximize leverage against corporate defendants in connection with filed litigation – was observed. In a smaller set of cases, it appears that the filing of a case is a part of a larger campaign against the targeted company, making the lawsuit a tactic unto itself. It is this holistic plaintiffs' approach to aggressive litigation, where activities against defendants outside the courtroom are used as part of an overarching strategy within the case or otherwise to stimulate corporate change, which most clearly emerges from this study. In all likelihood, that holistic approach has been furthered, at least in part, by a perceived need to overcome a historical lack of success on the merits in the cases.

Looking forward, the overall trends identified can be expected to continue and even grow. With the successes in some of the cases studied and, more generally, with the continuing prospect of massive recoveries for plaintiffs and the attorneys bringing these actions, transnational tort cases will remain on the rise. That includes cases like the Lago Agrio litigation, *Osorio* and *Franco*, that are filed abroad to obtain an award in a litigating regime hostile to the corporate defendants, which then can be brought to the United States for potential enforcement. It also includes cases filed in the United States in the first instance, like *Gonzales*, *Tellez*, and the other cases studied. In all such actions, while the plaintiffs themselves may as a class receive substantial financial recompense, the attorneys also may enrich themselves – the very reason Joe Kohn, of Kohn, Swift & Graf, is financing the Lago Agrio lawsuit. They may also use positive results to finance more actions, as at least one plaintiffs' attorney, featured in *The Coca-Cola Case,* expressly noted on screen.

The synergy of issues in these cases – involving facts that can be difficult to verify, zealous advocates, frequently indigent plaintiffs susceptible to undue influence, the potential for substantial damages, and foreign systems susceptible to corruption – creates particular vulnerabilities to fraudulent lawsuits. Without doubt, such vulnerabilities make it paramount for corporate defendants, and the judiciary, to particularly scrutinize transnational tort cases. As the opinion of Judge Chaney in *Mejia* makes plain, suspect circumstances cannot be ignored. Although overseas discovery might be challenging for defendants, it should be pursued vigorously. Legislative amendments on state or federal levels also may be warranted to help ensure the integrity of the United States legal system.

In addition, even in the vast majority of cases where no evidence of fraud is present, extra-legal plaintiff tactics – emanating from the same aggressive motives – assuredly will increase. That is true for at least three reasons. First, plaintiffs are using more and varied tactics. Just as the cases from the 2000s bore greater numbers of strategic efforts than cases from 1990s, the cases in the 2010s undoubtedly will see even further growth. Plaintiffs' attorneys are learning from each other and from their successive cases, and pursuing those extra-legal efforts they believe worthwhile. Second, transnational tort cases are remaining in litigation for longer periods of time. In addition to *Tellez*, trials in *Bowoto* and *Drummond* took place in the past 2 years, and *Wiwa* settled on the eve of trial. The longer cases remain in litigation, the more tactics plaintiffs use. That is especially so in the months leading up to a planned trial, as observed in *Wiwa*, *Bowoto*, and *Drummond*. While many transnational tort cases have been dismissed early in litigation, plaintiffs' attorneys are gaining skill and confidence in avoiding such early exits. Finally, the increasing use of the tactics certainly suggests that plaintiffs' advocates

believe they work (or at least have little downside). While the ultimate success of some or all of the efforts may be debatable, they now are ingrained as part of an overall litigation strategy in these matters. In short, the tactics are growing in size and frequency, and with the escalation of transnational tort cases, certainly look like they are here to stay.

Although beyond the scope of this study, the economic threats posed by these lawsuits and corporate campaigns are difficult to wholly ignore. Certainly, multinational companies seeking to invest in or enter emerging markets must be conscious that a perceived failure to adhere to certain social expectations – sometimes regardless of local legal requirements – can lead to a high-profile lawsuit seeking a large damage award, and with it an accompanying set of aggressive tactics aimed at hurting the company's image. At a minimum, companies that pursue such investments must consider taking affirmative, preventative measures to minimize the threat of such lawsuits. While this study does not consider or reach conclusions on the potential deterrent effects to companies pondering such overseas investments, it seems logical that such effects do, or given the trends soon will, exist.

APPENDIX A

	DBCP in Nicaragua	Chevron in Ecuador	Chevron v. Chevron	Bowoto v. Bridgestone	Flomo v. Daimler	Bauman v. Daimler	Doe v. Nestle	Doe v. Exxon	Occidental Cases	Sarei v. Rio Tinto	Doe v. Unocal	Yahoo! Cases	Doe v. Walmart	Wiwa v. Royal Dutch	Bigio v. Coca-Cola	Flores v. South. Peru	Sinaltrainal v. Coca-Cola	Aldana v. Del Monte	Does v. Gap	Pfizer Cases	Drummond Cases	Turedi v. Coca-Cola	Union Carbide Cases	In Re Chiquita	Apartheid	Kasky v. Nike
MEDIA TACTICS																										
Internet campaigns	X	P	P	P		P	P	P	P	P	X	P	P	P		P	P	X	X	X	X	P	P	P	P	P
Films/documentaries/mini-documentaries	P	P	X	P		P		P		X		X	P			P		X	P		P	P	X		X	
You tube and other video clips	P	X	P	P		P	X	X		P	X	X	P			X		X		X	X	X	X	X	P	
Celebrity Activism		P						P																		
Print articles/editorials/op-eds	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
Reports	P	P		P				X		X		P										X	X			
Radio and Television broadcasts	P	P	X	P		P	X	P		P	P	X	P			X	P		X	P		P	P	X	P	
Speaking Engagements/ Other Publicity	P	P		P						P		P								P		P				
Press Conferences	P	P	P					P				X				P					P		P	P		
Press Releases	P	P	P	P	P	P	P	P	P	P	X	P	P	P		P	P	P		P	P	X	P	P		
COMMUNITY ORGANIZING TACTICS																										
Partnering/working with sympathetic organizations/coalitions	X	P	X	P		P		X		X	P		P	P		P	X	X		P	X	P	X			
Creating new NGOs /coalitions	P	P		P								X	X			P						X		P		
Organize Protests	X	P	X		X	P		P	X	X		X	P	X		P		X		X	X	X	X			
Boycotts	X	P	P	P		P	P			X	X	X	P	P		P		X	X	X	P	P	X		X	
POLITICAL TACTICS																										
Political pressure		P		P				X			X					P				P			X	X	
Creating foreign laws	P	P																								
Participation of politicians in efforts	X	P		X				P		X	P					X	X	X	X	P				X		
Congressional Hearings		P	P					P		P	P	P	P			X	P			P			P			
INVESTMENT RELATED TACTICS																										
Produce alternative annual reports		P	X							X			X													
Plaintiffs' attendance at annual and shareholder meetings		P	P				P	P				P	X			P		X			P					
Introduce resolutions at annual and shareholder meetings		P	X		X	P	P	P		X	X	P	X	X		X		X			X	X		X	X	
Pressure shareholders to divest stock in defendant company	X	X								X	X	X	X			P					X	X				
Pressure institutional investment funds and social responsibility funds		X		X				P		X		X				X					X			X		
Contacting state Attorneys General /SEC		P																				X				

P = Plaintiffs' tactic | X = Parallel tactic that could not be connected to plaintiffs | Yellow = more than 10 cases | Light Blue = more than 10 different tactics

APPENDIX B*

1) *Adamu v. Pfizer, Inc.*, No. 04-CV-01351 (S.D.N.Y.), filed Feb. 18, 2004; *Abdullahi v. Pfizer, Inc.*, No. 01-CV-08118 (S.D.N.Y.), filed Aug. 29, 2001.

This lawsuit involves the deaths of Nigerians following the outbreak of an epidemic and the medical relief aid provided by Pfizer through their 1996 Trovan study. Plaintiffs filed suit in the District of Connecticut. The case was transferred to the Southern District of New York on February 18, 2004, and accepted by the court as related to *Abdullahi v. Pfizer, Inc.,* No. 01-CV-08118 (S.D.N.Y. Aug. 29, 2001) on March 11, 2004. The district court dismissed the case, and the plaintiffs appealed. On January 30, 2009, the Second Circuit reversed the district court's decision. The Second Circuit concluded that nonconsensual human medical experimentation, as alleged by the plaintiffs, violated customary international law as defined in *Sosa*. Holding that the court had subject matter jurisdiction under the ATS, it remanded the case to the district court for further proceedings. A petition for certiorari has been filed.

2) *Bano v. Union Carbide Corp.*, No. 99-CV-11329 (S.D.N.Y.), filed Nov. 15, 1999.

Plaintiffs, victims of a 1984 toxic gas leak at a chemical plant in Bhopal, India, alleged that Union Carbide and its majority-owned Indian subsidiary, which owned and operated the Bhopal plant, violated various norms of international law under the ATS by their conduct leading up to the disaster. Earlier complaints filed in the Southern District of New York were dismissed in deference to the Indian government's efforts on behalf of the disaster victims to pursue a global resolution in India of claims related to the disaster. The litigation in India eventually resulted in a settlement agreement, which was approved by the Indian Supreme Court in 1991. Plaintiffs filed this action in 1999 to obtain further redress in U.S. courts. The new complaint included allegations of violations of New York state law regarding environmental pollution at the Bhopal plant site and sought remediation of the site as well as compensation for residents claiming property damage. Plaintiffs' ATS claims were dismissed on the grounds that they had been fully litigated and settled in India. *See Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y. 2000). The court did not address defendants' arguments that Indian law deprived the plaintiffs of standing to seek remedies for the disaster or that the complaint had failed to allege a violation of well-established norms of international law, as required under the ATS.

The district court granted defendants' motion to dismiss and denied plaintiffs' cross-motions on August 28, 2000. *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y. 2000). Plaintiffs appealed to the Second Circuit. On November 15, 2001, the Second Circuit vacated the district court's dismissal of the environmental claims, but upheld the district court's dismissal of the plaintiffs' ATS claims. *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001). On March 18, 2003, the district court again dismissed the environmental claims. *Bano v. Union Carbide Corp.*, 2003 WL 1344884 (S.D.N.Y. 2003). On March 17, 2004, the Second Circuit affirmed in part and vacated and remanded in part the district court's decision on the environmental claims, instructing the district court to consider whether the plaintiff could proceed with a class action suit, and giving leave for the district court to consider reopening the remediation claims should the Indian Government intervene. The district court gave the Indian Government until June 30, 2004 to express its support for the suit; although a preliminary letter was sent on behalf of the Indian Government, it declined to intervene. On August 12, 2005, the magistrate judge denied the plaintiffs' motions for class certification and intervention. On October 5, 2005, the district court affirmed the magistrate's order, dismissed the action, and ordered it removed from the Court's docket. On November 1, 2005, the court entered judgment in favor of defendants. The Second Circuit affirmed the district court's judgment without opinion on August 10, 2006.

3) *Bauman v. DaimlerChrysler AG*, No. 04-CV-00194 (N.D. Cal.), filed Jan. 1, 2004.

Seventeen plaintiffs, including victims and victims' heirs, allege that officials of Mercedes Benz, a subsidiary of what is now known as DaimlerChrysler AG, conspired with security forces of the Argentinean junta to kidnap, and in some cases torture and kill, labor protesters and union leaders during a period of political and labor unrest from 1976 to 1983.

Plaintiffs filed a first amended complaint on February 11, 2004. On April 18, 2005, defendant filed a motion to dismiss for lack of personal jurisdiction. On November 22, 2005, Judge Whyte tentatively granted defendant's motion to quash and dismiss for lack of

**This list excludes the DBCP and Chevron/Ecuador cases, discussed at length in Part II.*

personal jurisdiction, but allowed limited jurisdictional discovery. On February 12, 2007, the court reaffirmed its tentative ruling that it lacked jurisdiction over DaimlerChrysler AG for actions taken in Argentina and dismissed the claims. The court noted that plaintiffs failed to prove that DaimlerChrysler had sufficient contacts with the California forum to confer general jurisdiction. Furthermore, the plaintiffs had not shown that more appropriate fora, such as Germany where defendant's headquarters were located, or Argentina, where the alleged torts took place, were inadequate.

The Ninth Circuit affirmed the dismissal in 2009, but since has granted a rehearing. *See* 2010 WL 1816711 (9th Cir. May 6, 2010).

4) *Bigio v. Coca-Cola Co.,* No. 97-CV-02858 (S.D.N.Y.), filed Apr. 21, 1997.

In this case, plaintiffs claim that in 1962 their property in Egypt was unlawfully seized and nationalized in violation of international law by the Egyptian government because the plaintiffs were Jewish. Plaintiffs allege that in 1993 Coca-Cola purchased or leased the plaintiffs' property with the knowledge that the property had been nationalized by the Egyptian government. The plaintiffs argue, that because the Egyptian government seized their property as part of a national program of religious persecution, the seizure violated international law. Plaintiffs' sole allegation against Coca-Cola was that it acquired or leased the property with knowledge that it had been expropriated in violation of international law.

The district court held that the complaint failed to plead a violation of international law by Coca-Cola, and, therefore, the court did not have jurisdiction over plaintiffs' ATS claims. On December 7, 2000, the Second Circuit upheld the dismissal of plaintiffs' ATS claims, but determined that the lower court had other bases for jurisdiction and remanded the case to the district court for further proceedings. *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

In December 2002, defendants filed a motion to dismiss the complaint. On February 3, 2005, the district court granted the motion to dismiss. The court held that the doctrine of international comity warranted dismissal, based largely on the fact that litigation of the issue would bring the court into conflict with Egyptian law and policy. The court also held that plaintiffs had not provided sufficient proof that continuing anti-Semitism in Egypt made it too dangerous for them to pursue their action there and that defendants had stipulated to jurisdiction in Egypt. The court further held that, under a *forum non conveniens* analysis, Egypt was an adequate alternative forum and the private and public interests tipped in favor of litigating the action in Egypt. *Bigio v. Coca-Cola Co.*, 2005 U.S. Dist. LEXIS 1587 (S.D.N.Y. 2005).

On May 9, 2006, the Second Circuit reversed the district court on the grounds that the court had misapplied the legal standards governing international comity and *forum non conveniens*, and remanded the case. Coca-Cola's petition for a rehearing *en banc* was denied, and the mandate returned the case to the district court on December 15, 2006. The case is pending.

5) *Bowoto v. Chevron Corp.*, No. 99-CV-02506-SI (N.D. Cal.), filed May 27, 1999.

In this case, plaintiffs allege that Chevron provided assistance to and participated in two Nigerian military raids in which alleged human rights abuses occurred—one on demonstrators on Chevron's oil rig and another against a village supporting the demonstrators.

On March 22, 2004, the district court granted defendant's motion for summary judgment as to claims of direct liability, and as to claims of alter-ego liability, but otherwise denied defendants' motion for summary judgment. *Bowoto v. Chevron Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004). In its decision, the court declined to decide whether in this case there was a state actor for ATS purposes.

Plaintiffs filed their sixth amended complaint on July 23, 2004. Briefing on assorted dispositive motions and discovery matters continued throughout 2006.

On August 22, 2006, the court dismissed plaintiffs' Torture Victim Protection Act ("TVPA") claims on the ground that the TVPA does not permit claims against corporations, and dismissed plaintiffs' ATS claims (except for the claim that Chevron had aided and abetted the commission of crimes against humanity) on the grounds that U.S. §1983 "under color of law" jurisprudence could not be invoked to hold a private party directly liable, and aiding and abetting could not be invoked to hold it indirectly liable, with respect to international law norms that are not applicable to

private parties. In contrast, the ATS claim for crimes against humanity was permitted to proceed, on the ground that that norm does bind private entities. On March 14, 2007, the court dismissed the RICO claim, finding insufficient evidence of either U.S.-based conduct or effects on the U.S. economy to permit the extraterritorial application of the statute.

On January 11, 2008, the defendant filed a motion for summary judgment on the remaining federal law claims, which was granted in part and denied in part on May 30, 2008; the district court allowed ATS claims for torture and for "cruel, inhumane and degrading treatment" to proceed. Trial began on October 27, 2008. On December 1, 2008, the jury returned a verdict for defendants on all counts, agreeing with defendant's position that the Nigerian government was responsible for the violence.

On April 2, 2009, plaintiffs filed for appeal in the Ninth Circuit challenging, *inter alia*, the district court's denial of a motion for a new trial and judgment as a matter of law as well as several adverse evidentiary and procedural rulings (No. 09-15641).

6) *In re Chiquita Brands Int'l Inc.*, 08-MD-01916 (S.D. Fla.), Filed February 20, 2008.

On February 20, 2008, six separate actions against Chiquita (two shareholder derivative actions and four actions involving alleged violations of the Alien Tort Statute) were consolidated into one proceeding in the Southern District of Florida.

This multi-district litigation arises out of allegations that Chiquita provided financial support to Aoutodefensas Unidas de Colombia (AUC), a Colombian right-wing paramilitary organization. The AUC is allegedly responsible for the death or disappearance of over six hundred individuals with ties to the banana industry and the Chiquita operations (the majority of plaintiffs in the various lawsuits represent the estates of these individuals). The complaint alleges that Chiquita aided and abetted the AUC's illegal activity by channeling payments from the Colombian government to the AUC and/or providing direct payment or other support to the AUC in order to gain economic and political control over the banana growing regions of Colombia. Plaintiffs brought this action under the ATS and TVPA alleging, *inter alia*, that the defendants are liable for war crimes, crimes against humanity, extrajudicial killing, torture and wrongful death.

The six separate but factually related lawsuits in this multi-district litigation were consolidated in the Southern District of Florida from various federal district courts on February 20, 2008. On July 11, 2008, Chiquita filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Defendants argued that plaintiffs' claims of material support to a terrorist organization and indirect liability for extrajudicial killings do not meet the stringent *Sosa* requirements. Defendants also argued that plaintiffs' claims of liability under the TVPA and state tort law were not adequately pled. No opinion has been issued. On May 1, 2009, another two related actions were added to this consolidated litigation. In January 2010, the shareholder cases were settled. Rulings have yet to be issued on the motion to dismiss regarding the remaining cases.

7) *Doe I v. Exxon Mobil Corp.*, No. 01-CV-01357 (D.D.C.), filed June 19, 2001.

Plaintiffs, 11 John and Jane Does, allege that ExxonMobil was jointly and severally liable and/or vicariously liable for human rights abuses allegedly committed by the Indonesian military in Aceh, in northern Sumatra. Plaintiffs allege that an Indonesian military unit was assigned to protect gas production facilities and in doing so committed human rights abuses all in the course of fighting a civil war in Aceh province. Plaintiffs advance ATS claims for murder, genocide, torture, kidnapping, and crimes against humanity, TVPA claims for torture and extrajudicial killing, and various municipal torts.

Defendants' motion to dismiss was filed on October 1, 2001. The State Department on August 1, 2002, opined that adjudication of these claims in the United States could have a substantial adverse impact on U.S.-Indonesian relations.

On October 14, 2005, Judge Oberdorfer granted defendants' motion to dismiss for failure to state a claim and lack of subject matter jurisdiction as to Claims I (ATS), II (TVPA), and III (Violence Against Women), relying heavily on the State Department's filing, but denied the motion to dismiss on remaining common law tort claims. The plaintiffs appealed.

On January 12, 2007, the D.C. Circuit, in a divided opinion, dismissed the appeal for lack of appellate jurisdiction, holding that the denial of the motion to dismiss was not an appealable "collateral order," and

denied defendants' alternative request for a writ of mandamus, holding that the district court had not indisputably erred in refusing to dismiss the tort claims on political question grounds.

In the district court action, defendants filed a motion for summary judgment and dismissal for lack of jurisdiction on January 29, 2008. On July 18, 2008, the court denied the motion to dismiss without prejudice. On August 27, 2008, the motion for summary judgment was denied as to defendant Exxon Mobil Corporation and ExxonMobil India and granted as to defendant Mobil Corporation and ExxonMobil Oil Corporation. On September 26, 2008, the case was reassigned from Judge Oberdorfer to Chief Judge Lamberth.

In September 2009, he dismissed the complaint on prudential standing grounds. He concluded that, although the ATS permits aliens to file tort actions in U.S. courts for violations of the "laws of nations," the case should nonetheless not be heard in this country.

8) *John Doe I v. Nestle, S.A.,* No. 05-05133 (C.D. Cal.), filed July 14, 2005.

Plaintiffs have filed suit against Nestle, S.A., its subsidiaries, and a number of other U.S. companies (ADM, Cargill, etc). Plaintiffs are all former child slaves of Malian origin who claim that they were trafficked and forced to work harvesting and/or cultivating cocoa beans on farms that supply cocoa beans to the defendant companies named in the lawsuit. In addition to stating claims under the ATS and TVPA, plaintiffs have also stated claims for forced labor and involuntary servitude under the U.S. and California Constitutions, as well as for breach of contract and negligence. Plaintiffs seek class action status.

The defendants filed a motion to dismiss in January 2006. A hearing took place on the motion in February 2006, and further briefing on the issues was requested. As that further briefing was being completed, the court, on November 2, 2006, ordered the litigation temporarily stayed, and imposed a further stay on August 28, 2007, pending Ninth Circuit action in *Sarei v. Rio Tinto*.

On January 5, 2009, the parties filed a joint stipulation to lift the stay and re-brief the motion to dismiss in light of the Ninth Circuit's December 16, 2008, ruling in *Sarei*. Motions to dismiss are pending.

9) *Doe v. Target Corp*., No. 02-CV-80049 (9th Cir.); *Does v. Levi Strauss & Co*., No. 03-CV-15252 (9th Cir.); *Does v. Advanced Textile*, No. 99-CV-16713 (9th Cir.); *Doe v. Gap Inc*., No. 99-CV-00329 (C.D. Cal.), filed Jan. 13, 1999; *Doe v. Brylane, L.P.*, No. 00-CV-00229 (D. Haw.), filed Mar. 28, 2000; *Doe v. Gap, Inc.*, No. 99-CV-00717 (D. Haw.), filed Oct. 15, 1999.

In January 1999, plaintiffs, immigrant workers, filed suit against defendants, various garment manufacturers and retailers, for alleged sweatshop abuses on the western Pacific Island of Saipan under the ATS.

In 2000, plaintiffs concluded settlements totaling approximately $8.75 million with some of the defendants. In September 2002, plaintiffs concluded settlements totaling approximately $11.25 million with the remaining defendants; only defendant Levi Strauss refused to settle. In April 2003, the $20 million settlement involving 27 garment manufacturers and 27 retailers was approved by the district court. In January 2004, plaintiffs voluntarily dismissed their case against Levi Strauss.

10) Doe v. Unocal Corp., No. 96-CV-06959 (C.D. Cal.), filed Oct. 3, 1996.

Plaintiffs (Burmese citizens) alleged that Unocal was jointly and severally liable and/or vicariously liable for alleged human rights abuses by the Burmese military allegedly committed in conjunction with the construction of a gas pipeline. Plaintiffs alleged that defendants were involved in constructing offshore drilling stations to extract natural gas from the Andaman Sea and a port and a pipeline to transport the gas through Burma into Thailand. Plaintiffs claimed that defendants, through the Burmese military, intelligence and/or police forces, engaged in forced relocation of villages and knowingly used forced labor in furtherance of the pipeline project. Plaintiffs argued that knowing participation in a commercial venture with an agency of a government with a record of human rights abuses is sufficient to establish liability for the alleged human rights abuses by the military under either joint venture or vicarious liability theories.

On August 31, 2000, the district court granted summary judgment in favor of Unocal and ruled that the company could not be held liable under the ATS for the Burmese government's use of forced labor. See

110 F. Supp. 2d 1294 (C.D. Cal. 2000). Plaintiffs appealed the district court's ruling to the Ninth Circuit, which affirmed in part and reversed in part the district court's decision. See 2002 WL 31063976 (9th Cir. 2002). That panel opinion, however, was itself vacated on February 14, 2003, when the Ninth Circuit ordered the matter to be heard *en banc*. See 2003 WL 359787 (9th Cir. 2003). The rehearing was argued before the *en banc* panel on June 17, 2003. On December 9, 2003, an order was filed withdrawing the case pending issuance of the Supreme Court's decision in *Sosa v. Alvarez-Machain*. On July 8, 2004, an order was filed requiring the parties to submit supplemental briefs on the effect, if any, of the Supreme Court's decision in *Sosa*. The *en banc* hearing was set for December 13, 2004, but on December 12, 2004, the parties took the argument off the calendar and announced a settlement in principle. The case settled on March 21, 2005, for a reported $30 million.

Plaintiffs had also re-filed their state law claims in state court in California in October 2000. The state court denied defendants' motion for summary judgment based on absence of vicarious liability. The trial proceeded in two phases. With respect to phase I, the judge ruled that the plaintiffs had failed to show that the relevant Unocal subsidiaries were alter egos of the Unocal Corporation. In response to this ruling, Unocal filed a motion to dismiss the state case on May 7, 2004, mainly arguing that the remainder of plaintiffs' arguments (vicarious liability claims) must necessarily fail because they are dependent on a showing of alter ego (parent company liability). These claims were included in the settlement reached in December 2004, and finalized in March 2005.

11) *Doe v. Wal-Mart Stores, Inc.*, No. 05-CV-07307 (C.D. Cal.), filed Oct. 11, 2005 (formerly No. BC339737 in L.A. County court).

On September 13, 2005, factory workers in China, Bangladesh, Indonesia, Swaziland and Nicaragua filed suit in California Superior Court, Los Angeles County, Central District, against Wal-Mart Stores, Inc. The complaint includes a variety of causes of action, including breach of contract of Wal-Mart's supply contracts, violations of local laws and violations of international law standards, including International Labor Organization conventions. Plaintiffs also allege that Wal-Mart aided, abetted, encouraged, condoned, and otherwise ratified its foreign suppliers' conduct. According to the complaint, Wal-Mart's supply contracts require foreign producers of Wal-Mart goods (including toy factories and garment factories) to adhere to Wal-Mart's Standards for Suppliers Agreement (which the complaint labels a "Code of Conduct"). Plaintiffs charge that Wal-Mart failed to ensure compliance with the Suppliers Agreement. As a result, working conditions for plaintiffs were abhorrent and involved serious worker rights violations such as forced overtime, compensation below minimum wage and overtime wages, and overall sub-standard conditions detrimental to plaintiffs' health and safety and in violation of their basic human rights.

Plaintiffs state that they brought the action in U.S. court because the Suppliers Agreement is premised on and controlled by U.S. law, Wal-Mart claims that it monitors and enforces its Suppliers Agreement from its headquarters in the United States, and Wal-Mart advertises in the United States that its Suppliers Agreement is its Code of Conduct for foreign suppliers. Plaintiffs also claim that they would be subjected to job loss and physical danger if they pursued their claims in their home countries.

The case was filed on September 13, 2005, and is a proposed class action. On October 11, 2005, defendant removed the case to federal court. Defendant then moved to dismiss.

On March 30, 2007, the court granted defendant's motion to dismiss the first amended complaint. The court held that plaintiffs were not third party beneficiaries of the Suppliers Agreement, because they had failed to show that it was the intention of the promisee (the foreign suppliers) to enter into these contracts for their benefit. In July 2009, the Ninth Circuit affirmed the dismissal.

12) *Estate of Rodriguez v. Drummond Co., Inc.*, No. 02-CV-0665 (N.D. Ala.), filed Mar. 14, 2002; *Romero v. Drummond Co., Inc.*, No. 03-CV-00575 (N.D. Ala.); No.07-14090 (11th Cir.); *Suarez v. Drummond Co., Inc.*, No. 03-CV-1788 (N.D. Ala.), filed July 11, 2003; *Baloco et al. v. Drummond Co., Inc. et al.*, No. 09-CV-00557 (N.D. Ala.), filed March 20, 2009.

Plaintiffs, legal representatives for the estates of three murdered Colombian trade union leaders and the trade union Sintramienergetica, alleged that the trade union leaders were killed by agents or employees of defendants, who operate a coal mine and a supporting

rail line and port in Colombia. Plaintiffs alleged that defendant companies hired paramilitary security forces to silence the leaders of unions representing workers at defendants' facilities, by means of violence, murder, torture and unlawful detention, and to prevent, by intimidation, other workers from joining the union or assuming union leadership positions. Plaintiffs claimed that the deaths of the trade union leaders amounted to extrajudicial killings in violation of the ATS, the TVPA and international law.

Romero v. Drummond was the lead case in this litigation. On May 30, 2002, defendants filed a motion to dismiss, which was granted in part and denied in part. *See Estate of Rodriguez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003). After the ruling on the motion to dismiss in *Rodriguez*, plaintiffs filed a second action (*Suarez*) on July 11, 2003. In the second action, the court denied defendants' motion to dismiss on November 7, 2003. The parties proceeded to discovery. The court indicated its interest in the views of the U.S. State Department on the case's consequences for U.S. foreign relations; the State Department filed a declaration under seal in district court on June 13, 2006.

On March 5, 2007, the district court granted in part and denied in part defendants' motion for summary judgment. The court found that there was insufficient evidence to support the custody requirement for torture and dismissed all TVPA claims. It refused to pierce the corporate veil to reach the U.S.-based Drummond Company, Inc. for the actions of its subsidiary, Drummond Ltd., and dismissed all claims against the parent company. The Alabama common law tort claims were dismissed as against the public policy of Alabama not to extend the application of its tort law extraterritorially. However, the claims alleging extrajudicial killings were permitted to go forward against the subsidiary under the ATS and possibly, pending a determination of supplemental jurisdiction, under Colombian law.

Trial began on July 9, 2007, ending in a jury verdict with judgment entered in favor of Drummond on July 30, 2007. Following cross-appeals, the Eleventh Circuit rejected plaintiff's argument that the district court erred in holding the plaintiffs failed to prove state action. The court also rejected plaintiffs' argument that the district court incorrectly prohibited them from calling certain witnesses. As to the jurisdictional issues, the court first noted that while ATS is a jurisdictional statute it does not create an independent cause of action, and that while TVPA provides a cause of action for torture and extrajudicial killing, it does not, itself, grant jurisdiction. It went on to note that courts are empowered to adjudicate claims under TVPA when either ATS or federal question creates jurisdiction. The court then rejected defendant's argument that neither ATS nor TVPA provides a cause of action against corporate defendants, noting that under its precedent both statutes provide such cause of action. The court also held that "aiding and abetting" liability is cognizable under both ATS and TVPA. Finally, the court rejected defendant's argument that TVPA provides the exclusive cause of action for extrajudicial killing, noting that claims may also be brought under the ATS if the killing is "committed in violation of the law of nations." The jury verdict was upheld.

Following the appeals, on March 20, 2009, eight children of the three murdered Colombian trade union leaders in *Estate of Rodriguez v. Drummond Co., Inc. (Drummond I)* brought a new suit against Drummond Co., under ATS and TVPA seeking equitable relief and damages based largely on the same facts and allegations as in *Drummond I*. While *Drummond I* ended in a trial verdict for the defendants which was later upheld on appeal, plaintiffs in this new suit claim to have access to a key witness that was unavailable to testify in *Drummond I*. This lawsuit was dismissed.

13) *Flomo et. al v. Bridgestone Americas Holding, Inc.*, No. 05-CV-08168 (C.D. Cal.), filed Nov. 17, 2005; transferred to No. 06-CV-00627 (S.D. Ind.) on Mar. 28, 2006.

Plaintiffs, 12 adult workers and 23 children who work and live on a Firestone rubber plantation in Liberia, filed a class action suit against Bridgestone Firestone, alleging that the company employs children and slave labor on the plantation. Plaintiffs sued under the ATS, claiming that Firestone encourages and oversees these illegal practices.

On March 28, 2006, the court granted defendant's motion to transfer to the Southern District of Indiana. On June 26, 2007, the court issued a 75-page opinion in which it dismissed all of plaintiffs' claims with the exception of the child labor ATS claim. The court found that plaintiffs' claims that they were subject to indentured servitude conflicted with their concerns over "losing" the same jobs they supposedly were forced to perform. The court found that involuntary servitude

cannot be equated with low wages and poor working conditions. Neither are such conditions violations of international law in their own right, as poor labor conditions are common throughout the world. However, the court found that there was a specific, universal, and obligatory norm at international law to refrain from exploiting child labor, and that allegations of recruitment of child labor stated a viable claim under the ATS. Scheduled briefing and discovery with the remaining defendants is ongoing.

On April 30, 2009, defendants filed a motion for summary judgment or motion for judgment on the pleadings. The motion is pending.

14) *Flores v. S. Peru Copper Corp.*, No. 00-CV-9812 (S.D.N.Y.), filed Dec. 28, 2000.

Plaintiffs, residents of Peru and representatives of deceased residents of Peru, alleged that pollution from the mining, refining and smelting operations of defendant, a Delaware corporation, in Peru caused plaintiffs or their decedents to suffer respiratory diseases. Plaintiffs sued defendant company in the Southern District of New York under the ATS for violations of international law.

In July 2002, the district court granted defendant's motion to dismiss for lack of federal subject matter jurisdiction and failure to state a claim. The court found that the residents had not demonstrated that high levels of environmental pollution within a nation's borders violated well-established, universally recognized norms of international law. The plaintiffs appealed to the Second Circuit, which affirmed the district court's ruling on August 29, 2003.

15) *Kasky v. Nike, Inc., et al*, S087859, 27 Cal. 4th 939 (Calif. Supreme Court), Filed April 20, 1998.

Plaintiff Marc Kasky, suing on behalf of the California public under a provision authorizing private citizens to enforce certain California statutes, brought suit against Nike, Inc. alleging various violations of laws against false advertising and unfair competition laws.

Plaintiff Kasky claimed that Nike made deceptive claims regarding the treatment of its employees in foreign facilities owned and operated by various subcontractors "with knowledge or reckless disregard of the laws of California prohibiting false and misleading statements."

Specifically, Nike said that workers in licensed factories in China, Vietnam and Indonesia making its products were protected against physical and sexual abuse, that they were paid in compliance with local laws governing wages and hours, and that they received a "living wage," free meals and health care. Nike made these statements in various public fora, including in press releases and advertisements. These statements were made in response to media coverage of substantial mistreatment of workers in factories Nike contracted with to manufacture its products, including reports of physical, verbal and sexual maltreatment, toxic exposure, safety risks, labor abuse and other violations.

The California Supreme Court found that Nike's speech was "commercial speech" subject to limited First Amendment protection. The Supreme Court of the United States initially granted certiorari, but later dismissed the case. Nike, Inc. v. Kasky, 539 U.S. 654, No. 02-575, Jun. 26, 2003. The case settled out of court in September 2003 for a reported $1.5 million.

16) *Mujica v. Occidental Petroleum Corp.*, No. 03-CV-02860 (C.D. Cal.), filed Apr. 24, 2003; *Shiguago v. Occidental Petroleum Corp.*, No. 06-04982 (C.D. Cal.), filed Aug. 10, 2006; *Carijano v. Occidental Corp.*, No. BC370828 (Los Angeles Sup. Ct.), filed May 10, 2007.

In *Mujica*, Plaintiff Luis Alberto Galvis Mujica filed this complaint on behalf of himself and his mother, sister, and cousin, who were killed in 1998 when a cluster bomb was dropped upon their town of Santo Domingo, Colombia, by a helicopter operated by the Colombian Air Force ("CAF"). Plaintiff claims that the CAF receives direct funding from Occidental, a U.S. company, in return for protecting Occidental's pipeline in Colombia and that the CAF was acting in the private interests of Occidental in carrying out the bombing. Plaintiff further claims that the CAF received the coordinates for this bombing and aerial surveillance assistance from defendant Airscan, a U.S. company, in its capacity as a security contractor for Occidental, and that the bombing was jointly planned by the CAF and defendants. Finally, the complaint alleges that a Colombian military officer, who was serving as a CAF liaison to Occidental, accompanied the Airscan pilots during the bombing raid. Plaintiff argues that defendants' actions constitute extra-judicial killings in violation of the law of nations or, alternatively, military actions which failed to avoid reasonably foreseeable civilian casualties, and war crimes. In addition, plaintiff claims that Occidental and Airscan had knowledge

of widespread human rights violations committed in Colombia by the Colombian military.

On August 20, 2004, defendants moved to dismiss the action under the doctrines of *forum non conveniens* and international comity, and for failure to state a claim upon which relief can be granted. On June 28, 2005, the court denied defendants' motion to dismiss under the doctrines of *forum non conveniens* and international comity. On that same day, the court denied in part and granted in part defendants' motion to dismiss for failure to state a claim. *See Mujica v. Occidental Petroleum*, 2005 WL 1962635 (C.D. Cal. 2005). On the ATS claims, the court dismissed claims for cruel, inhumane and degrading treatment, but denied the motion to dismiss for all other ATS claims. However, the court simultaneously dismissed the case in its entirety pursuant to the political question doctrine.

Plaintiffs appealed to the Ninth Circuit on July 11, 2005, and defendants cross-appealed. On May 11, 2009, the Ninth Circuit remanded the case to the district court to consider whether a prudential requirement (a requirement to exhaust remedies) applies to this case.

Shiguago, filed in 2006, involves analogous allegations in Ecuador. Specifically, the plaintiffs have filed an ATS action alleging that Occidental used military and paramilitary units to guard a pipeline in Ecuador, which led to torture and murder of members of the local population. In August 2009, the court granted in part and denied in part Occidental's motion to dismiss. The court allowed the plaintiffs ATS action to proceed, rejecting the argument that corporations cannot be liable under the ATS, rejecting the argument that aiding and abetting is not a viable theory of liability, and ruling that cruel, inhuman and degrading treatment is a viable cause of action. The court dismissed the TVPA claim on the ground that the statute does not apply to corporations, and dismissed the plaintiffs' state and Ecuadorean law claims. On August 25, 2009, the plaintiffs filed an amended complaint. The defendants have sought an interlocutory appeal.

Carijano is in many ways an analogue to the case against Chevron-Ecuador. Filed in 2007 on behalf of 25 indigenous Achuar plaintiffs from the Peruvian Amazon, the lawsuit alleges environmental harms caused by Occidental over a 30 year period in the Corrientes River Basin, causing a contamination of the river and the lands of the indigenous Achuar communities, death to indigenous residents, and destruction of their way of life. It was removed to federal court, and dismissed in 2008, on *forum non conveniens* grounds. An appeal is pending.

17) *Sarei v. Rio Tinto, PLC*, No. 00-11695 (C.D. Cal. 2002), filed Nov. 2, 2000.

Plaintiffs allege that Rio Tinto and a subsidiary, acting in concert with the governments of Australia and Papua New Guinea ("PNG"), forcibly evicted plaintiffs from their land and destroyed the surrounding rain forest through their copper mining activities in Bougainville, an island off the shore of Papua New Guinea. Plaintiffs further allege that defendants provided support to PNG government troops to suppress a civilian uprising and caused the PNG government to use force to reopen the copper mine, knowing that government troops were killing and abusing civilians. Plaintiffs further allege that Rio Tinto officials encouraged a blockade of food and essential medical supplies, allegedly resulting in deaths and injuries to the plaintiffs. Plaintiffs claimed that Rio Tinto is liable under the ATS and TVPA for violations of international norms pertaining to crimes against humanity, war crimes, racial discrimination, torture, cruel, inhuman and degrading treatment, and violations of environmental rights.

On July 9, 2002, the court granted most aspects of defendants' motion to dismiss on political question doctrine grounds, and denied plaintiffs' motion to amend their complaint. *See Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). Plaintiffs appealed from that ruling in 2002, and on August 7, 2006, the Ninth Circuit reversed the district court's dismissal.

A divided panel of the Ninth Circuit endorsed the district court's determinations that claims for war crimes, racial discrimination, and violations of the UN Convention on the Law of the Sea were all actionable under the ATS after *Sosa*, and that Rio Tinto could be held vicariously liable for such international law violations committed by the PNG Army. However, the Ninth Circuit panel proceeded to reverse the district court's dismissal of those claims, holding that they do not present non-justiciable political questions, and that neither comity nor the act of state doctrine require dismissal. In so doing, the Ninth Circuit panel decided not to give weight to a US Department of State statement of interest advising the court that the case could have adverse effects on U.S. international relations with PNG.

Rio Tinto's petition for rehearing and rehearing *en banc* was granted in part (as to the rehearing only – not *en banc*) and the Ninth Circuit panel withdrew its earlier opinion and issued a superseding opinion on April 12, 2007. The second opinion reaffirmed the previous one in all important respects (*i.e.*, political question doctrine, act of state doctrine, comity). *See Sarei v. Rio Tinto*, 2007 WL 1079901 (9th Cir. Apr. 12, 2007). Rio Tinto filed a renewed petition for rehearing and rehearing *en banc* on May 10, 2007.

Rehearing *en banc* was granted on August 20, 2007 (499 F.3d 923). On December 16, 2008, the Ninth Circuit remanded the case to the district court for the limited purpose of determining whether the plaintiffs must exhaust local remedies before invoking jurisdiction under the ATS in federal court. Noting that the ATS itself does not require exhaustion, the court pointed to language in *Sosa v. Alvarez-Machain* – that a prudential or judicially-imposed exhaustion requirement for ATS claims "would certainly [be considered] in an appropriate case." 542 U.S. 692, 733 n.21 (2004). Finding this case to be "an appropriate" one in which to examine exhaustion, the court remanded to the district court for further proceedings (Case No. 00-CV-11695).

On July 31, 2009, the district court ruled that the prudential exhaustion requirement involves a two-step process. If the alleged claims are particularly serious and there is a strong nexus between the plaintiffs' case and the U.S., it is then appropriate to engage in an exhaustion analysis. The court ruled that certain of the plaintiffs' most serious charges, related to genocide, crimes against humanity, and war crimes, did not require exhaustion, while others, related to environmental and other claims, did. An appeal has been filed.

18) *Sinaltrainal v. Coca-Cola Co.,* No. 01-CV-3208 (S.D. Fla.), filed July 20, 2001.

Plaintiff Sinaltrainal, a Colombian trade union, and individual plaintiffs allege that Coca-Cola, either through its agents or its alleged alter-egos, hired paramilitary units to terrorize and murder union organizers at bottling plants in Colombia. Plaintiffs allege that Coca-Cola and its affiliates are liable under the ATS and the TVPA for human rights abuses, including murder, extrajudicial killing, kidnapping, unlawful detention and torture. Plaintiffs further allege that Coca-Cola and its affiliates are liable for the denial of plaintiffs' right to associate and organize, and, under RICO, for an alleged pattern of threats and extortion and various domestic torts. Plaintiffs allege that Coca-Cola is jointly and severally liable for all the acts of its subsidiaries and/or vicariously liable for the acts of its alleged agents, the paramilitary units.

No. 01-CV-3208 is the lead docket with three other cases that the court consolidated (Nos. 01-CV-3208, 02-CV-20258, 02-CV-20259, 02-CV-20260). The original action was filed on July 20, 2001 in the Southern District of Florida. On March 28, 2003, the court denied defendants' motions to dismiss for lack of personal jurisdiction and to quash service of process but granted in part defendants' motion to dismiss for lack of subject matter jurisdiction. *See Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

On September 29, 2006, the court entered a consolidated order granting the defendant's motion to dismiss the cases for lack of subject matter jurisdiction. The Eleventh Circuit affirmed the dismissal in August 2009.

19) *In re South African Apartheid Litig.*, No. 02-MD-1499 (S.D.N.Y.), filed Dec. 20, 2002.

This multi-district litigation in the Southern District of New York involves allegations that the named companies are liable under the ATS for human rights violations committed by the former South African apartheid regime. The litigation includes complaints filed throughout the United States. The lead complaints are *Ntzebesa v. Citigroup, Inc.,* No. 02-CV-4712 (S.D.N.Y. June 19, 2002); *Digwamaje v. Bank of America,* No. 02-CV-6218 (S.D.N.Y. Aug. 2, 2002); *Brown. v. Amdahl Corp.* No. 02-CV-10062 (S.D.N.Y. Dec. 20, 2002); *Khulumani Group v. Barclay Nat'l Bank*, No. 03-CV-04524 (E.D.N.Y. Nov. 8, 2002). Plaintiffs are alleged victims of apartheid-related discrimination and other human rights abuses that occurred in South Africa between 1948 and 1993. Plaintiffs claim jurisdiction under the ATS and the TVPA and allege conspiracy, aiding and abetting, unfair and discriminatory labor practices, and human rights violations, including systematic murders, massacres, imprisonment, torture, forced removals, banishment and theft of assets. Defendants have included businesses in the computer, automotive, oil, construction, weapons, mining, manufacturing, pharmaceutical, transportation, and finance and insurance industries, such as Citigroup, UBS, and

Credit Suisse, and numerous Corporate Does. A RICO cause of action and a preliminary RICO statement were also filed.

Plaintiffs filed second amended complaints against various defendants on March 12, 2003, March 19, 2003, and March 23, 2003. On May 21, 2003, all claims against defendant Daimler Chrysler AG were voluntarily dismissed without prejudice and the Court ordered dismissal without prejudice of the action against defendant Rio Tinto. The court granted defense motions to dismiss on November 29, 2004. *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

On October 12, 2007, the Second Circuit reversed the district court's dismissal. (*Khulumani Group v. Barclay Nat'l Bank,* 2007 WL 2985101 (C.A.2 (N.Y.)). In a split decision, the court affirmed the district court's dismissal of the Torture Victim Protection Act claims, and vacated the portion of the ruling dismissing the ATS claims. The majority held that claims for aiding and abetting international law violations are actionable under the ATS, but was divided as to the source of the legal standard for establishing aiding and abetting (*i.e.* international law or federal common law). The case was remanded back to the district court to determine whether the plaintiffs could plead such claims.

On April 8, 2009, the court granted in part and denied in part a renewed motion to dismiss for failure to state a claim, and dismissed three of the related lawsuits for failure to prosecute. Pursuant to the court's April 8 order, the only remaining claims after this date are Ntsebeza plaintiffs against Daimler, GM and Ford for aiding and abetting torture, cruel, inhumane and degrading treatment, extrajudicial killing and apartheid, and Ntsebeza plaintiffs against IBM for aiding and abetting arbitrary denationalization and apartheid; Khulumani plaintiffs against IBM and Fujitsu for aiding and abetting apartheid; and Khulumani plaintiffs against Daimler, GM, and Ford for aiding an abetting extrajudicial killing and apartheid. The defendants sought interlocutory appeal seeking dismissal of the action. The right to file an interlocutory appeal was granted, and argument was heard in January 2010.

20) *Turedi v. The Coca-Cola Company*, No. 05-CV-09635 (S.D.N.Y.), filed Nov. 15, 2005.

Plaintiffs are truck drivers and transport workers employed by Coca-Cola's facilities in Istanbul, Turkey and some of the workers' family members. Plaintiffs allege that Coca-Cola called in the notoriously brutal Turkish "special branch" police (Cevik Kuvvet) to break up a peaceful protest by the families of workers who were summarily fired by the company for joining a labor union. The riot police allegedly seriously injured young children, their mothers and some of the workers with tear gas and beatings. In addition to seeking damages under the ATS, plaintiffs are asking the court to enjoin Coca-Cola from continuing to claim to its European and U.S. customers that it respects the rights of workers in the conduct of its business.

The complaint was filed in the Southern District of New York on November 15, 2005. The court granted the motion to dismiss on the grounds of *forum non conveniens* on November 3, 2006. The Second Circuit affirmed the dismissal in July 2009.

21) *Villeda Aldana v. Fresh Del Monte Produce, Inc.,* No. 01-CV-3399 (S.D. Fla.), filed Aug. 2, 2001.

Plaintiffs allege that Del Monte and its subsidiary, Bandegua, hired security forces in Guatemala to intimidate local union leadership in order to influence the outcome of an on-going collective bargaining agreement between management and employees Specifically, plaintiffs allege that Del Monte met with security forces to coordinate acts of violence, including the forced resignations of union leaders. Plaintiffs claim that defendants were liable under the ATS for torture, kidnapping, unlawful detention, crimes against humanity, and denial of the right to associate and organize, under the TVPA for torture and extrajudicial killing, and for various domestic torts. Plaintiffs assert that Del Monte was jointly and severally liable for the acts of its wholly-owned subsidiaries and the acts of the subsidiaries in concert with third parties. Further, plaintiffs allege that Del Monte, acting through its subsidiaries, hired armed individuals to commit acts of violence against the plaintiffs and, therefore, is vicariously liable for the acts of these alleged agents.

Plaintiffs filed their complaint in the Southern District of Florida and filed an amended complaint on August 30, 2001. On December 12, 2003, the court granted defendant's motion to dismiss. *See* 305 F. Supp. 2d 1285 (S.D. Fla. 2003).

On July 8, 2005, the Eleventh Circuit affirmed in part, vacated in part and remanded, holding that non-torture claims were not actionable under the ATS, but that the complaint did adequately allege torture claims under both the ATS and the TVPA. *See Villeda Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

The case returned to district court, where plaintiffs filed a fourth amended complaint on Sept. 8, 2006. The case was dismissed on October 16, 2007, on grounds of *forum non conveniens.* The court held that Guatemala is an adequate alternative forum and that the private and public interests weighed heavily in favor of Guatemala. The Eleventh Circuit affirmed in August 2009.

22) *Wiwa v. Royal Dutch Petroleum Co.,* ("Wiwa I"), No. 96-CV-08386 (S.D.N.Y.), filed Nov. 8, 1996.

Wiwa is the first of four related cases all seeking similar damages and relief, including *Wiwa, et al. v. Royal Dutch Petroleum Co., et al* ("Wiwa II") (No. 01-cv-01909), *Wiwa, et al. v. Shell Petroleum Development Company of Nigeria Limited* ("Wiwa III") (No. 04-CV-02665), and *Kiobel v. Royal Dutch Petroleum*, No. 02-CV-07618. Plaintiffs are three former citizens and residents of Nigeria and a Nigerian citizen identified as Jane Doe. Plaintiffs allege violations of international, federal, and state law in connection with the Nigerian government's activities in the Ogoni region of Nigeria during the 1990s. Plaintiffs specifically allege that Royal Dutch Shell, its London subsidiary, and the former head of its Nigerian subsidiary conspired with the Nigerian military government to arrest and convict nine members of a Nigerian opposition movement, and to suppress that movement in violation of international human rights law.

In 1998, the district court found personal jurisdiction over the corporate defendants in New York, but dismissed the case on grounds of *forum non conveniens*. *See Wiwa v. Royal Dutch Petroleum Co.*, 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Mar. 31, 1998). On appeal, the Second Circuit affirmed the trial court's ruling on personal jurisdiction, but reversed the trial court's ruling on *forum non conveniens* grounds. *See* 226 F.3d 88 (2d Cir. 2000). The case was remanded to the district court on defendants' motion to dismiss.

On February 28, 2002, the trial judge granted defendants' motion to dismiss with respect to two ATS claims by plaintiff Owens Wiwa for alleged violation of his right to life, liberty and security of person, and for arbitrary arrest and detention, but denied defendants' motion to dismiss on all of the remaining claims. The court ruled that the civil lawsuit for alleged violations of international law and claims under RICO could proceed against Shell and Royal Dutch Petroleum and that the former head of Shell's Nigerian subsidiary could be sued under the TVPA. The case proceeded into the discovery stage.

Defendants filed a motion to dismiss related to several claims made by plaintiffs recently joined to the complaint. The court ordered that the motion to dismiss should be granted with respect to various claims alleged by the late coming plaintiffs. In December 2006, plaintiffs filed a motion to again amend their complaint.

In the *Wiwa III* action (No. 04-cv-2665), the court issued an opinion and order on March 4, 2008, granting Shell Petroleum Development Co. (*Wiwa III*) and Royal Dutch Petroleum Co.'s (*Kiobel*) motions to dismiss actions for lack of personal jurisdiction and precluding plaintiffs from taking additional jurisdictional discovery. On April 15, 2008, the *Wiwa III* plaintiffs filed an appeal.

On December 19, 2008, defendants in *Wiwa I* filed a motion to dismiss the RICO claims for lack of subject matter jurisdiction. Defendants argued that the plaintiffs had failed to demonstrate U.S.-based effects on the U.S. economy which is necessary to permit the extraterritorial application of the statute. The court granted the motion and the RICO claims were dismissed.

On January 16, 2009, defendants in *Wiwa I* filed another motion to dismiss. Defendants argued that plaintiff's ATS claims were based on customary international law norms that that did not meet the *Sosa* standard required to confer jurisdiction (claims must be based on sufficiently universal norms, defined with specificity, and based on a sense of legal obligation and mutual concern) and therefore should be dismissed. On April 23, 2009, the court granted in part and denied in part plaintiff's motion to dismiss. The court granted the motion to dismiss all ATS claims based on rights related to peaceful assembly, holding that these purported norms did not meet the *Sosa* standard. However, the court denied the motion to dismiss the claims based on crimes against humanity, holding that these claims met the *Sosa* test. The court also rejected

defendants' argument that subject matter jurisdiction conferred only if the plaintiffs could hold the defendant vicariously liable for the tortious conduct of the Nigerian government. The court held that vicarious liability is ancillary to jurisdiction—it is an element to be proved at trial but not an element required to confer jurisdiction.

On June 8, 2009, the parties filed a stipulation of voluntary dismissal pursuant to a settlement in both *Wiwa I* and *Wiwa III*. According to press reports, Shell settled the suit for $15.5 million in damages.

23) *Zheng et al v. Yahoo! Inc. et al*, 08-CV-01068 (N.D.C.A.), filed February 22, 2008; *Xiaoning v. Yahoo! Inc.*, No. 07-CV-02151-CW (N.D. Cal. 2007), filed Apr. 18, 2007.

In *Xiaoning*, Plaintiffs were Chinese dissidents in support of democratic reform who used Yahoo!'s internet resources to send messages and post articles critical of the Chinese government. They alleged in a May 2007 Complaint that Yahoo!'s subsidiaries in China turned over identifying information and electronic communications to the People's Republic of China (PRC) that formed the basis for the PRC's detention and torture of plaintiffs or plaintiffs' relatives. Plaintiffs alleged that this conduct constitutes aiding and abetting the violation of established international human rights and is actionable in U.S. courts under the ATS and the TVPA, as well as various California common law torts. The parties settled the action in late 2007.

In November 2007, the House Foreign Affairs Committee rebuked Yahoo's executive vice president and general counsel, Michael Callahan, for testimony he gave to Congress in its 2006 investigation into how the plaintiff's information was turned over to the PRC. Although he and other Yahoo executives claimed they did not know why the PRC requested information on the plaintiff, it later emerged that Yahoo was in possession of a document stating that the information was needed because the plaintiff was involved in "suspected illegal provision of state secrets."

In *Zheng*, Cunzh Zheng and Guo Quan, Chinese dissidents acting *pro se*, brought this action in the Northern District of California on behalf of themselves and other (as of yet unnamed) plaintiffs against Yahoo Inc, Yahoo! Hong Kong, and the People's Republic of China. Plaintiffs claim that Yahoo voluntarily provided the People's Republic of China (PRC) with access to private email messages, email addresses, user ID numbers and other identifying information exposing the nature and content to their electronic information. Defendants brought this action under the ATS and TVPA, claiming that they were subjected to various human rights violations including torture, cruel, inhuman and degrading treatment and prolonged detention by the PRC in retaliation for the communications that it had accessed through and with the assistance of Yahoo.

The claim was initially filed on February 22, 2008, in the Southern District of California. On February 26, 2009, plaintiffs filed a second amended complaint. On December 2, 2009, the court dismissed the case.

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