

2011

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### Recommended Citation

Jonathan C. Drimmer and Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions*, 29 BERKELEY J. INT'L LAW. 456 (2011).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol29/iss2/2>

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# Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions\*

By  
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## INTRODUCTION

For nearly thirty years, thousands of claimants from Nicaragua have been filing lawsuits in both the United States and Nicaragua against multi-national companies relating to alleged injuries suffered through exposure to the pesticide Dibromochloropropane (“DBCP”).<sup>1</sup> Called among “the most wide-ranging efforts at forum shopping in our legal history,”<sup>2</sup> United States’ courts largely have dismissed DBCP cases from Nicaragua and elsewhere on *forum non conveniens* grounds.<sup>3</sup> In recent years, the litigation has been impacted by a Nicaraguan law designed to compel corporate defendants to accept jurisdiction in the United States, along with a wide range of out-of-court tactics employed by plaintiffs and their advocates to advance their cause. In addition, judicial findings of impropriety and corruption have marked this litigation. One judge detailed a “broad[] conspiracy of fraud” involving the falsification of plaintiff

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\* This article is premised on a study commissioned by the U.S. Chamber Institute for Legal Reform released publicly in June 2010.

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1. See, e.g., *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n. 5 (11th Cir. 1985); see also *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1362 (S.D. Tex. 1995).

2. *Rojas v. Dement*, 137 F.R.D. 30, 32 (S.D. Fla. 1991) (“In *Cabalчета*, Judge Atkins wrote that the actions were ‘one of the most wide-ranging efforts at forum shopping in legal history,’” and taking judicial notice of the decision.) (quoting *Barrantes Cabalчета 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)).

3. See Armin Rosencranz et al., *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161, 166-67 (2009). Under the *forum non conveniens* doctrine, a court may refuse to take jurisdiction if it determines that another forum is more appropriate to hear the dispute.

injuries,<sup>4</sup> while another found that the plaintiffs' lawyers proffered a "persistent use of known falsehoods,"<sup>5</sup> and a third concluded that Nicaraguan law does not "even come close" to "basic fairness."<sup>6</sup>

In a similar vein, beginning with a 1993 lawsuit under the Alien Tort Statute ("ATS"),<sup>7</sup> a law that enables foreign citizens to bring suits in the United States for violations of certain international laws, claimants have filed multiple cases in the United States and Ecuador seeking recovery from Texaco<sup>8</sup> for alleged environmental contamination and related personal injuries in Ecuador's Lago Agrio region.<sup>9</sup> In these actions, too, plaintiffs' attorneys have engaged in a broad set of out-of-court tactics.<sup>10</sup> As with the DBCP litigation, United States' courts have rebuked certain plaintiffs' attorneys, and there has been concerning evidence regarding the fairness of the local proceedings in Ecuador.<sup>11</sup>

In February 2010, Guatemalan labor activists filed lawsuit in New York state court against Coca-Cola on the basis of allegations of union-related violence against workers at a Guatemalan bottling facility.<sup>12</sup> The plaintiffs timed the filing to coincide with the release of a documentary, "The Coca-Cola Case," that featured the plaintiffs' lawyers who brought the Guatemalan action.<sup>13</sup> It was the sixth such case the plaintiffs' attorneys brought against Coca-Cola. Courts had dismissed the previous five ATS actions, arising from Turkey and Colombia.<sup>14</sup>

These transnational tort cases are part of a larger trend of litigation against multi-national defendants that has arisen over the past fifteen years involving

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4. *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 2.

5. *Franco v. Dow Chem. Co.*, No. 03-05094, Amended Report & Recommendation of the Special Master at 62-63 (Oct. 7, 2009) (hereinafter "Report & Recommendation").

6. *Sanchez Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1345 (S.D. Fla. 2009). To date, courts overseeing DBCP-related cases arising from other countries have not made findings regarding similar conspiracies.

7. 28 U.S.C. § 1350 (2010).

8. Now Chevron, after a merger between Texaco and a subsidiary of Chevron.

9. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (VLB), 1994 W.L. 142006 (S.D.N.Y. Apr. 11, 1994); *Ashanga Jota v. Texaco*, No. 94 Civ. 9266 (JSR) (S.D.N.Y.).

10. The corporate defendant in this case has pursued its own set of out-of-court tactics in defending itself.

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

12. *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.

13. See, e.g., *The Coca-Cola Case* (Trailer), NATIONAL FILM BOARD OF CANADA, [http://www.nfb.ca/film/coca\\_colo\\_case\\_trailer](http://www.nfb.ca/film/coca_colo_case_trailer) (last visited March 8, 2011).

14. *Sinaltrainal v. Coca-Cola Co.*, 572 F.3d 1252 (11th Cir. 2009) (four cases consolidated from Colombia); *Turedi v. Coca-Cola Co.*, 2009 WL 1956206 (2d Cir. July 7, 2009) (from Turkey).

allegations of corporate misconduct overseas.<sup>15</sup> In connection with those cases, plaintiffs, defendants, and their advocates are increasingly employing certain out-of-court tactics in part to advance or defend their legal positions and tout larger sets of causes. Although defendants and interested third parties may pursue such tactics, this Article focuses on those tactics pursued by plaintiffs, discussing their implications for corporate defendants, and identifying certain rule of law concerns given the cases to date and the nature of transnational tort litigation.

Part I provides a legal background, discussing the ATS and the growing frequency of transnational tort lawsuits filed in the United States and abroad. Part II discusses the results of a study the authors conducted of twenty-five of transnational tort matters, identifying the patterns of the plaintiffs' use of media, community-organizing, investment and political efforts. Part III discusses those tactics in three case studies, the Nicaraguan DBCP, Texaco-Ecuador, and Coca-Cola litigations. This part also notes, based on judicial findings in the Nicaraguan DBCP and Ecuador matters, transnational court cases' potential susceptibility to litigation improprieties and rule of law concerns generally, to which out-of-court tactics may contribute.<sup>16</sup> Part IV suggests some approaches that companies, courts, and legislators might consider given the implications and concerns that arise from the increasing number of transnational tort cases and their accompanying tactics. This Article does not argue in favor of specific normative changes, or that out-of-court tactics are *per se* improper. However, the Article concludes that given the rise of transnational tort cases and out-of-court tactics, it is important that all direct and indirect participants in the legal system, including courts, plaintiffs, defendants, interested third parties, and legislators, be cognizant of the nature of the tactics and the problems that have arisen as a result. In the long run, that cognizance will help ensure that litigation proceeds fairly and that legal judgments are rendered equitably.

## I.

### LEGAL BACKGROUND

Over the past fifteen years, with the growth of the global economy, the number of transnational tort cases has grown substantially.<sup>17</sup> Plaintiffs bring

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15. According to one commentator, the tactics and the rise in ATS litigation, discussed below, emerged co-extensively from *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), vacated, 403 F.3d 708 (9th Cir. 2005). The case, filed in 1996, in many respects gave rise to the modern corporate ATS trend, and "expanded the tactical repertoires of grass-roots activists as well as those of litigators," including investment and protest tactics. Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal*, 43 LAW & SOC'Y REV. 271, 291 (2009) (discussing NGOs who litigate ATS cases).

16. See Armin Rosencranz et al., *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161, 178-179 (2009).

17. See Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational*

these cases in the United States, under the ATS and common law tort theories, as well as in foreign courts. After discussing the ATS and the patterns of cases filed under the law, this section addresses lawsuits filed in the United States under other theories and lawsuits filed abroad.

### A. *The Alien Tort Statute*

The ATS, enacted as part of the first United States' Judiciary Act in 1789,<sup>18</sup> provides that 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."<sup>19</sup> Courts have construed the key relevant substantive term of the ATS – "violations of the law of nations" – to cover a limited class of alleged harms that are interpreted according to international law principles.<sup>20</sup> Those principles 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, and inhuman or degrading treatment.<sup>21</sup>

For nearly 200 years, the law remained essentially unused.<sup>22</sup> However, it was revived in 1980, in *Filartiga v. Pena-Irala*, a case in which Paraguayan citizens filed suit in New York against a Paraguayan police official for acts of torture and murder of a relative in Paraguay.<sup>23</sup> The lawsuit thus had no link to the United States. The plaintiffs filed the claim to vindicate foreign human rights abuses committed abroad by a non-United States citizen against a non-United

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*Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 388 (2010) ("There has been an explosion of ATS litigation centered almost exclusively on human rights violations").

18. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77. The ATS also has been referred to as the "Alien Tort Claims Act," or "ATCA."

19. 28 U.S.C. § 1350 (2006). For a discussion of the origins and intended meaning of the ATS, see M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT'L L. 316 (2009).

20. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

21. See, e.g., Beth Stephens, *Sosa v. Alvarez-Machain: 'The Door Is Still Ajar' for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 537 & n.18 (2004).

22. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115-16 (2d Cir. 2010); Jonathan Drimmer & Laura Ardito, "Emerging Issue Analysis," *Abdullahi v. Pfizer, Inc.* 2009 U.S. App. LEXIS 1768 (2d Cir. Jan. 30, 2009), Lexis/Nexis (April 2009).

23. 630 F.2d 876 (2d Cir. 1980). See also Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745, 748 (2010) (discussing the revival of the ATS); Jonathan Drimmer, *Corporate Exposure under the Alien Tort Claims Act*, 22 No. 1 Corp. Couns. 7 (2007); Paul L. Hoffman, Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 50 (2003); Sinan Kalayoglu, *Correcting Mujica: The Proper Application of the Foreign Affairs Doctrine in International Human Rights Law*, 24 WIS. INT'L L.J. 1045, 1045-1046 (2007).

States citizen. When the United States Court of Appeals for the Second Circuit allowed the lawsuit to proceed, dozens of others quickly followed.<sup>24</sup>

Initially, cases brought under the ATS followed the pattern of *Filartiga*, often seeking redress for unpunished international human rights abuses against government officials or oppressive regimes.<sup>25</sup> Plaintiffs brought these actions, often unopposed,<sup>26</sup> in large part to document and validate human rights abuses with the imprimatur of a judicial finding. Although the cases led to hefty damage awards regularly in excess of ten million, and sometimes even 100 million, dollars,<sup>27</sup> they presented little meaningful prospect of recovery.<sup>28</sup> Instead, these awards would represent a form of intangible justice.

The mid-1990s brought a new trend, however, as corporate defendants regularly began to be targeted in multi-million dollar actions.<sup>29</sup> To date, plaintiffs have filed more than 155 ATS cases against corporations, with 125, approximately 80 percent of all actions, arising in the past fifteen years.<sup>30</sup> Plaintiffs now file the majority of ATS cases against corporate defendants, and since 1994 they are filing on average six to ten corporate ATS cases annually.<sup>31</sup> One study, noting the dozens of corporate ATS cases against some of the most well known companies in the world, estimated the potential aggregate ATS

24. See Vega, *supra* note 17, at 394; Kalayoglu, *supra* note 23, at 1045-46; Ian Kierpaul, *The Mad Scramble of Congress, Lawyers, and Law Students after Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407, 433 n.292 (2008).

25. Kalayoglu, *supra* note 23, at 1045-46

26. See, e.g., *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. April 9, 1996); *Kadic v. Karadzic*, No. 93-cv-01163 (S.D.N.Y. Aug. 29, 2000) (Letter from defendant to court noting impossibility of litigating in the United States); *Paul v. Avril*, 901 F. Supp. 330, 331 (S.D. Fla. 1994); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

27. See, e.g., *Arce v. Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006) (\$54 million in damages); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (\$140 million); *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996) (\$103 million).

28. See Kalayoglu, *supra* note 23, at 1045-46; Charles Curlett, *International Law Weekend Proceedings, Introductory Remarks-Alien Tort Claims Act*, 6 ILSA J. INT'L & COMP. L.Q. 273, 274 (2000) ("Although [ATS litigation has] generated two billion dollars in damage awards, none has been collected."); see also Shirin Sinar, Book Note, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 38 STAN. J. INT'L L. 331, 332 (2002) (noting, on the subject of ATS law suits, that while "obtaining redress from perpetrators is often cited as an objective of transnational human rights cases, few claimants actually receive compensation even after a favorable judgment").

29. See Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 EUR. J. INT'L L. 1035, 1036 (2008); Jonathan Drimmer, *Corporate Exposure under the Alien Tort Claims Act*, 22 No. 1 Corp. Couns. 7 (2007); Kalayoglu, *supra* note 23, at 1045-46; 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).

30. See Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, AM. LAW., Oct. 12, 2010, and accompanying table. That calculation includes similar actions that courts later consolidated.

31. See *id.*

corporate liability to exceed 200 billion dollars if all the cases succeeded.<sup>32</sup>

## B. ATS Litigation Trends

### 1. Where They Are Filed, Against Whom and Why

The ATS cases involve several clearly definable groups.<sup>33</sup> Excluding class actions involving multiple companies, some two-dozen industries in total have been the subject of one or more ATS lawsuits.<sup>34</sup> Companies in the extractive sector, mining, oil, gas, and energy, such as Texaco, are the most frequent targets of ATS lawsuits, serving as defendants in approximately 22 percent of cases filed.<sup>35</sup> Approximately 15 percent have been filed against the financial services industry, most of which were directed against banks.<sup>36</sup> Companies in

32. See Arthur Fergensen & John Merrigan, "There They Go Again": *The Trial Bar's Quest for the Next Litigation Bonanza*, National Legal Center for the Public Interest, January 2007, at 17 n. 68; Gary Hufbauer & Nicholas Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. LAW 246 (2004). The reasons plaintiffs bring these cases in United States' courts are several. Among them are: (1) a broad ability to obtain personal jurisdiction over defendants; (2) the unique nature of the ATS as a law that permits the filing of tort actions premised on customary international law; (3) the availability of the class action, contingency fee and pre-trial discovery mechanisms in the United States; and (4) the widespread belief that damage awards are higher in United States' courts, which includes the potential for punitive damages. See, e.g., Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 577-78 (2007); E.E. Daschbach, *Where There's A Will, There's A Way: The Cause for A Cure and Remedial Prescriptions for Forum Non Conveniens As Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 L. & Bus. Rev. Am. 11, 28-39 (2007); Manuel A. Gomez, *Like Migratory Birds: Latin American Claimants in U.S. Courts and the Ford-Firestone Rollover Litigation*, 11 SW. J. L. & TRADE AM. 281, 295-96 (2005).

33. The demographics and calculations contained in this section derive from a collection of ATS cases collected by the authors. The cases are identified, along with some of the characteristics contained herein, in the table that accompanies Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, AM. LAW., Oct. 12, 2010. While some 155 corporate ATS cases have been lodged, a significant percentage do not facially involve cognizable harms under the ATS. That is particularly true for cases filed before the *Sosa* decision clarified the meaning of the "law of nations" for these purposes. Such cases include commercial or employment disputes, lawsuits premised on securities laws, actions involving negligence-based injuries aboard vessels or airlines and other similar suits, and most have been dismissed rapidly. To conduct a meaningful analysis of ATS trends, the authors made the subjective determination to exclude those cases, and the following statistical analyses focus on the roughly 120 "core" ATS cases that plausibly fall under the statute.

34. These include the following industries: agriculture/food, auction, banking, accounting, chemical, pharmaceutical, media and communications, extractive, hospitality, engineering, medical (hospital), housing, insurance, manufacturing, prison, school, suppliers, technology, transportation, construction and a talent agency. See Goldhaber, *supra* note 33, accompanying table at: <http://amlawdaily.typepad.com/ATS%20Cases.pdf>.

35. See, e.g., *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Bowoto v. Chevron*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

36. See, e.g., *Alperin v. Vatican Bank*, 2008 WL 509300 (N.D. Cal. Feb. 21, 2008); *Almog v.*

the food and beverage industries, such as Coca-Cola, also are frequent corporate defendants in ATS cases, appearing in roughly 15 percent of cases.<sup>37</sup> Cases against transportation<sup>38</sup> or manufacturing<sup>39</sup> companies also are relatively common, especially recently, and there have been several cases against communications and technology firms.<sup>40</sup> Defendants are not limited to companies based in the United States, as plaintiffs have sued foreign companies with a presence in the United States,<sup>41</sup> and courts have not deemed parent

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Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); United Bank for Africa, PLC v. Coker, 2003 WL 22741575 (S.D.N.Y. Nov. 18, 2003).

37. See, e.g., *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Doe v. Nestle S.A.*, No. 2:05-CV-5133 (C.D. Cal. July 14, 2005); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006).

38. See *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978); *Robert v. Bell Helicopter Textron, Inc.*, No. 3:01-CV-1576, 2002 WL 1268030 (N.D. Tex. May 31, 2002); *Mohammed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), *vacated*, 542 U.S. 901 (2004); *Aikpitanhi v. Iberia Airlines of Spain*, 553 F. Supp. 2d 872 (E.D. Mich. 2008); *Hereros ex rel. Riruako v. Deutsche Afrika-Linien GmbH & Co.*, 232 Fed. Appx. 90 (3d Cir. 2007).

39. See, e.g., *Doe v. Wal-Mart Stores, Inc.*, 2009 WL 1978730 (9th Cir. July 10, 2009); *Does I v. Gap, Inc.*, 2002 WL 1000068 (D.N. Mar. I. May 10, 2002); *Friedman v. Bayer Corp.*, 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

40. See, e.g., *Zheng v. Yahoo, Inc.*, 3: 08-01068-MMC (N.D. Cal. filed Feb. 22, 2008); *Xiaoning v. Yahoo! Inc.*, 07-CV-02151 (N.D. Cal. Apr. 18, 2007); *Chen v. China Ctr. Television*, 2007 WL 2298360 (S.D.N.Y. 2006). See also *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008); *Park v. Korean Broad. Sys.*, No. 07-2233, 2008 WL 4724374 (C.D. Ill. Oct. 24, 2008); *Akbar v. N.Y. Magazine Co.*, 490 F. Supp. 60 (D.D.C. 1980).

41. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (underlying acts allegedly committed by a foreign subsidiary imputed up to the foreign parent, and parents' ties to its United States subsidiary are permitted United States jurisdiction); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (jurisdiction found where a foreign defendant was listed on the New York Stock Exchange). Under United States law, litigation can proceed against a corporate defendant only where it maintains certain "minimum contacts with the forum such that the maintenance of the suit does not offend traditional conceptions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The logic is that where parties intentionally engage in activities within a state, availing themselves of the state's laws, it is deemed reasonable to require that the defendants "submit to the burdens of litigation in that forum as well." *Burger King v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). Applying this 'minimum contacts' test, a court may gain general or specific jurisdiction over a foreign defendant. If the foreign defendant's activities are substantial, continuous, and systematic, the defendant is subject to lawsuits on matters unrelated to the contacts with the forum. If the foreign defendant has less significant contacts with the forum, but those contacts give rise to the cause of action, jurisdiction also can be upheld. See *Hanson v. Denckla*, 357 U.S. 235, 250-53 (1958); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 (1952). In contrast, where a foreign defendant maintains no direct business tie to the United States, and does not maintain an agency relationship with a United States subsidiary or the subsidiary is the alter ego of the parent – such as where corporate formalities are maintained, there is no direct control by the parent over the subsidiary, and the parent would not necessarily maintain the same activity if the subsidiary did not exist – or where the subsidiary is not the alter ego of the parent company, courts have found jurisdiction against the parent company not to exist. See *Bauman v. DaimlerChrysler Corp.*, 2009 WL 2634795 (9th Cir. 2009) *vacated*, 603 F.3d 1141 (9th Cir. 2010); *Unocal*, 248 F.3d at 962-931; *In re S. African Apartheid Litig.*, 2009 WL 1841056 (S.D.N.Y. 2009).

companies immune simply because the underlying acts involve a subsidiary.<sup>42</sup>

The acts alleged under the ATS against these companies have been varied and diverse. They range from cases involving Chinese dissidents to those involving the use of forced labor to manufacture soccer balls to cases involving alleged terrorist financing.<sup>43</sup> Most commonly, however, these cases involve (1) alleged acts by a security force (25 percent), generally a foreign police, military, or paramilitary unit;<sup>44</sup> (2) labor-related issues (20 percent), such as those in the Coca-Cola actions;<sup>45</sup> (3) environmental claims akin to those in the Ecuador matters;<sup>46</sup> or (4) claims seeking redress for historical wrongs.<sup>47</sup> Plaintiffs also

42. See, e.g., *Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16 (D.D.C. 2008) (denying summary judgment because Indonesian subsidiary could have been acting as the parent's agent); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (denying summary judgment because Nigerian subsidiary could have been acting as the parent's agent or alternatively that the parent aided and abetted the subsidiary); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 274-76 (S.D.N.Y. 2009). Plaintiffs often pursue agency, alter ego, ratification, and other theories in seeking to attribute to a parent the acts of its affiliates. Under an alter ego theory, where the corporate relationship between a parent and subsidiary is sufficiently close, one corporation's liability can be attributed to the other. *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995). Under an agency theory, principals are liable for the acts of their agents in the scope of their authority. See *Meyer v. Holley*, 537 U.S. 280, 285 (2003). A party demonstrates ratification through knowing acceptance after the fact by the principal of an agent's actions, including covering up misdeeds, and through refusing to disavow the acts of an agent outside the scope of authority. See *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 273 (S.D.N.Y. 2009).

43. *Zheng v. Yahoo, Inc.*, 3:08-01068-MMC (N.D. Cal. filed Feb. 22, 2008); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000).

44. *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); *Bowoto v. Chevron Corp.*, 2007 WL 2349341 (N.D. Cal. 2007); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 301 (S.D.N.Y. 2003); *Doe.*, 573 F. Supp. 2d at 6; *Shiguago v. Occidental Petroleum Co.*, No. 06-4982 (C.D. Cal., filed Aug. 10, 2006).

45. See *Romero v. Drummond Company, Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Licea v. Curacao Drydock Company, Inc.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008); *Adhikari v. Daoud & Partners*, 2:08-cv-05626-RGK-AJW (C.D. Cal. filed Aug. 27, 2008); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007); *Sinaltrainal, Estate of Gil v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Sarei v. Rio Tinto*, 487 F.3d 1193, 1209-1210 (9th Cir. 2007), *remanded on other grounds* 550 F.3d 822 (9th Cir. 2008). See generally *Wesley V. Carrington, Corporate Liability for Violations of Labor Rights Under the Alien Tort Claims Act*, 94 IOWA L. REV. 1381 (2009).

46. See, e.g., *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Sarei*, 487 F.3d at 1193; see also Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275, 275-276 (2009) (discussing environmental and discrimination claims). In addition, cases premised on environmental harms have been pursued under traditional tort theories, without relying on the ATS as a component. See, e.g., *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823 (C.D. Cal. 2008); *Gonzales v. Texaco*, 2007 WL 3036093 (N.D. Cal. Oct. 16, 2007).

47. See, e.g., *Anderman v. Fed. Repub. of Austria*, 256 F. Supp. 2d 1098 (C.D. Cal. 2003); *Friedman v. Bayer Corp.*, 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Bauman v. DaimlerChrysler AG*, 2007 WL 486389 (N.D.

commonly file cases against companies that allegedly provide support, goods, or services to disfavored or repressive political regimes.<sup>48</sup>

These cases have arisen from roughly sixty different countries. Most common, however, are cases from the Middle East (23 percent), often involving events related to Iraq, and cases from South America (23 percent).<sup>49</sup> Cases from Asia (18 percent)<sup>50</sup> and Africa (13 percent)<sup>51</sup> are also present. Plaintiffs have filed ATS cases against corporations in numerous judicial districts, more than twenty-five in total. However, the cases have been clustered in a few locales. Plaintiffs have filed roughly twenty-five percent in federal district courts in New York, with most filed in the Southern District of New York.<sup>52</sup> Just under twenty percent of the ATS cases have been filed in California district courts, with more than one-half of such cases filed in the Central District of California.<sup>53</sup> The District of Columbia and the Southern District of Florida are also popular venues, with over ten percent of ATS cases filed in each.<sup>54</sup>

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Cal. Feb. 12, 2007); *Hereros ex rel. Riruako v. Deutsche Afrika-Linien GmbH & Co.*, 232 Fed Appx. 90 (3d Cir. 2007); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004).

48. *See In re S. African Apartheid Litig.*, 2009 WL 960078 (S.D.N.Y. Apr. 8, 2009); *Presbyterian Church of Sudan* at 321; *Stutts v. De Dietrich Group*, 2006 WL 1867060 (E.D.N.Y. June 30, 2006).

49. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

50. *See Zheng v. Yahoo, Inc.*, 3: 08-01068-MMC (N.D. Cal. filed Feb. 22, 2008); *Xiaoning v. Yahoo! Inc.*, 07-CV-02151 (N.D. Cal. filed Apr. 18, 2007); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009).

51. *See, e.g., Wiwa v. Shell Petroleum Dev. Co. of Nigeria, Ltd.*, 2009 WL 1560197 (2d Cir. Jun. 3, 2009). Other notable cases include two consolidated actions against Pfizer for alleged nonconsensual medical experimentation, as well as the Apartheid litigation. *See Pfizer v. Abdullahi*, 562 F.3d 163 (2d Cir. 2009); *In re S. African Apartheid Litig.*, 2009 WL 960078 (S.D.N.Y. Apr. 8, 2009).

52. In *Filartiga*, the ATS was essentially "rediscovered" in the Southern District of New York, and the United States Court of Appeals for the Second Circuit permitted the case to proceed. The Southern District of New York is also a popular forum because foreign companies' presence on a United States stock exchange and involvement in related investment activities can provide bases for jurisdiction. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

53. *Unocal*, the first major corporate ATS case to survive motions to dismiss, was filed in California, perhaps contributing to the number of actions filed in California.

54. Many of the Florida actions arise from South America, perhaps explaining that choice of forum. The reason for the cluster of cases filed in the District of Columbia is less clear. Of the remaining jurisdictions, plaintiffs have filed approximately 8% of ATS in the United States Court of Appeals for the Fourth Circuit, with most being filed in the Eastern District of Virginia. They filed the remaining cases in the Fifth Circuit (4%), Third Circuit (4%), Seventh Circuit (2%), and Sixth Circuit (2%).

## 2. The Results in ATS Cases

For years, federal courts regularly dismissed corporate ATS cases.<sup>55</sup> Recently, however, plaintiffs have gained victories. Since 2007, four corporate ATS cases have proceeded to trial, resulting in one verdict for plaintiffs on ATS grounds.<sup>56</sup> In addition, several corporate ATS cases have settled for well over ten million dollars.<sup>57</sup> In 2008, two courts entered judgments against corporate ATS defendants, for 7.7 million dollars<sup>58</sup> and eighty million dollars respectively.<sup>59</sup> In short, over the past few years, ATS cases appear to be achieving greater successes than before.<sup>60</sup>

## 3. Continued Confusion about the Development of the Law

The legal landscape from which these ATS cases arise remains in substantial flux.<sup>61</sup> Since *Filartiga*, courts have struggled with the concept of the “law of nations,” grappling to decipher the scope of the ATS, and the types of cases that they should allow to proceed.<sup>62</sup>

55. See Goldhaber, *supra* note 33, and accompanying table.

56. See *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, Judgment in Favor of the Plaintiff, No. 1:08CV01659 (E.D.N.Y. 2009); *Jama v. Esmor Corr. Servs.*, 577 F.3d 169 (3d Cir. 2009) (holding for the plaintiff on non-ATS grounds); *Bowoto v. Chevron*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

57. See *A Milestone for Human Rights*, BUS. WK., Jan. 24, 2005 (reporting that Unocal was said to have settled its action for \$30 million); *Jad Mouawad, Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 9, 2009; *Jenny Strasburg, Saipan Lawsuit Terms OK'd: Garment Workers to Get \$20 million*, S.F. CHRON., Apr. 25, 2003, at B1. See also Sue Reisinger, “Pfizer Settles Lawsuits over Drug Trials on Children in Nigeria,” Law.com, Feb. 23, 2011 (stating that Pfizer agreed to pay up to \$175,000 per child able to prove death or permanent disability from the use of the drug Trovan).

58. See *Aguilar v. Imperial Nurseries*, 2008 WL 2572250 (D. Conn. 2008).

59. *Licea v. Curaçao 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).

60. Various factors may explain that result. Given the body of law that now exists to guide claimants, corporate ATS lawsuits tend to be sounder in nature. In addition, complaints now regularly rely on both ATS and non-ATS based claims; in some instances, courts may not dismiss ATS claims when discovery on the same basic facts will proceed nonetheless. Third, the judiciary seems increasingly comfortable with ATS cases, and in cases involving egregious allegations of human rights abuses, the judiciary has become less willing to issue dismissals on perceived technical grounds. See Jonathan Drimmer & Laura Ardito, “Emerging Issue Analysis,” *Abdullahi v. Pfizer, Inc.* 2009 U.S. App. LEXIS 1768 (2d Cir. 2009), LexisNexis (April 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (*en banc*) (plurality holding that whether an exhaustion doctrine analysis should be applied depends in part on the gravity of the underlying allegations).

61. See Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62 (2008) (“Judges and scholars have reached, and continue to reach, divergent conclusions about how to identify the applicable standards in ATS cases, leading to confusion in the lower courts and persistent uncertainty for litigants.”)

62. Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 457-458 (2007). That struggle can be attributed to several factors. They include a relative lack of familiarity with the intricacies of international law by many United States

In 2004, the Supreme Court stepped in to try to provide some of that missing guidance.<sup>63</sup> In *Sosa v. Alvarez-Machain*,<sup>64</sup> a Mexican doctor sued other Mexican nationals under the ATS, claiming that they had conspired with the United States Drug Enforcement Agency (DEA) to abduct him and bring him to the United States to stand trial for his alleged role in torturing and killing a DEA agent. After he was found not guilty of criminal charges, he filed a successful ATS lawsuit alleging arbitrary detention. In overturning that decision, the Supreme Court urged judges to exercise restraint in recognizing new ATS claims, admonishing them to engage in “vigilant doorkeeping” in these extraterritorial cases.<sup>65</sup> Though the Court did not limit the Act to violations accepted in 1789, it declared that the ATS would apply to “a narrow set” of international norms that are obligatory, universally accepted and defined with specificity.<sup>66</sup> The Court ruled that arbitrary detention for a short period of time was not such a norm.<sup>67</sup>

The Court’s attempt to clarify the law has been partially successful. Certainly, *Sosa* indicates, and lower courts have generally concluded, that the norms recognized under the ATS are the most serious crimes under international law. The framework the Supreme Court provided for analyzing ATS claims also has brought a greater degree of consistency than previously existed. The ATS’s precise scope, however, remains elusive. As one court noted, “[t]he *Sosa* opinion provides little guidance concerning which acts give rise to a claim.”<sup>68</sup> Another stated that *Sosa* has “invite[d] the kind of judicial creativity that has caused the disparity of results and differences of opinion that preceded the decision.”<sup>69</sup> As a result, while *Sosa* did provide needed clarity on important aspects of the ATS, and provided a framework of analysis, there remains a confused body of lower court decisions.

A particular area of confusion for the courts has been determining the scope of the “law of nations.”<sup>70</sup> Furthermore, courts have been unclear about the

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attorneys and courts. They also include a seeming unease among courts with identifying potential causes of action in the first instance – a task in the United States that is typically left to legislative bodies – particularly given the lack of a concrete framework for how claims under the “law of nations” should be determined.

63. Drimmer, *supra* note 23. For a discussion of *Sosa*, see Benjamin Berkowitz, *Sosa v. Alvarez-Machain: United States Courts As Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289 (2005).

64. 542 U.S. 692 (2004).

65. *Id.* at 729.

66. *Id.* at 729, 732.

67. *Id.* at 738.

68. *Kiobel*, 456 F. Supp. 2d at 462.

69. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004). For a discussion of the pros and cons of ATS litigation, see John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1, 7-11 (2009).

70. For instance, in cases involving multi-national corporations, lower courts have squabbled

required elements of actionable violations. For instance, diverging constructions of the state action element,<sup>71</sup> a required component of most ATS claims,<sup>72</sup> have led to much confusion.<sup>73</sup> The pertinent standards associated with accessory

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in deciding whether certain widely-recognized international claims, such as cruel, inhuman, or degrading treatment, fall under the ATS. *Compare, e.g.,* *Aldana v. Del Monte*, 416 F.3d 1242, 1247 (11<sup>th</sup> Cir. 2005), and *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 U.S. 375, 382 (E.D.N.Y. 2008), with *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093-95 (N.D. Cal. 2008), and *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995). Another confused issue is the deference that courts have provided to the executive branch when statements of interest are filed. *See, e.g.,* *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205-1207 (9<sup>th</sup> Cir. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354-55 (D.C. Cir. 2007); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005); *Presbyterian Church of Sudan v. Talisman, No. 01 Civ. 9882*, 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. Aug. 30, 2005). Exhaustion of local remedies is yet another area that has not yielded clear judicial guidance. *See generally* Steffanie Bevington, *Requiring Exhaustion: An International Law Perspective of the Alien Tort Claims Act in Sarei v. Rio Tinto*, 38 GOLDEN GATE L. REV. 461 (2008); Charles Donefer, *Sarei v. Rio Tinto and the Possibility of Reading an Exhaustion Requirement into the Alien Tort Claims Act*, 6 NW. U.J. INTL. HUMAN RIGHTS 155 (2007).

71. *See generally* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 475 (2007); Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*, 21 EMORY INT'L L. REV. 789, 804 (2007).

72. Because the reach of international criminal law has traditionally been restricted to misconduct by states or by state officials, all but a few cognizable causes of action contain a "color of law" requirement. 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. *See* Jonathan Drimmer, *Human Rights and the Extractive Industries: Litigation and Compliance Trends*, 3 J. WORLD ENERGY L. & BUS. 121, 130 (2010); *see also* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 475 (2007) (discussing the general requirement of state action in ATS cases). For example, in cases involving events in Colombia, alleged conduct by a state security force acting on behalf of a petroleum company was deemed to satisfy the "color of law" requirement, but attacks against labor leaders in connection with their activities at a coal mine without proof of participation by state actors did not. *Compare* *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005), with *Romero v. Drummond Company, Inc.*, 552 F.3d 1303 (11<sup>th</sup> Cir. 2008); *see also* *Aldana*, 416 F.3d at 1248 (attacks by licensed private security firm, without more, fails to satisfy state action).

73. Most federal courts, relying on pre-*Sosa* precedent, have looked to domestic definitions based on the civil rights jurisprudence of 42 U.S.C. § 1983. *See, e.g.,* *Aldana*, 416 F.3d at 1247-48 (citing *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995)). Following *Sosa*, several courts and commentators have argued that, in fact, the proper principles should derive from international law. *See* *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005); Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?* 21 EMORY INT'L L. REV. 789 (2007). That conclusion plainly seems to be the right one, since courts construe the causes of action that comprise the "law of nations" under international law, and state action is a mandatory element for those international claims. *See* Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*, 21 EMORY INT'L L. REV. 789 (2007). However, even among courts that look to international law on state action, some have determined that international law on state action is not defined with specificity, as *Sosa* requires, while others have clearly struggled with the appropriate doctrinal approach, particularly given the long history of judicial reliance on § 1983 in this context. *Compare* *Bowoto v. Chevron Corp.*, 2006 WL 2455752, \*5 (N.D. Cal. 2006), with *Bowoto v. Chevron Corp.*, 2007 WL 2349341, \*2-7 (N.D. Cal. 2007); *see generally* Jessica Priselac, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*,

liability are also unclear.<sup>74</sup> This is especially germane as most plaintiffs in corporate ATS cases seek to attribute liability to the company based on agency, joint venture, conspiracy, ratification, aiding and abetting, and other related theories.<sup>75</sup> Those theories have been met with mixed success in United States' courts, which have recognized, rejected, or offered competing and sometimes widely differing interpretations of theories of secondary liability.<sup>76</sup> Most

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21 EMORY INT'L L. REV. 789 (2007).

74. See generally Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008). For other discussions of theories of liability under the ATS, see Frank Olah, *MNC Liability for Human Rights Violations Under the Alien Tort Claims Act: A Review and Analysis of the Fundamental Jurisprudence and a Look at Aiding and Abetting Liability Under the Act*, 25 QLR 751 (2007); William Simmons, *Liability of Secondary Actors Under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Juárez*, 10 YALE HUM. RTS. & DEV. L.J. 88 (2007); Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005).

75. See Curtis A. Bradley, et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 925-26 (2007) ("most of the ATS claims brought against corporations have alleged that they were indirectly liable for human rights abuses committed by foreign government actors as a result of their acts of aiding and abetting, such as providing the perpetrators with financial support or materials").

76. Aiding and abetting liability is a prime example. See generally Jonathan Drimmer, *Is Second Circuit Ruling a "Talisman" Against Alien Tort Statute Suits?*, Legal Backgrounder, Washington Legal Foundation, Feb. 12, 2010; Michael Garvey, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative*, 29 B.C. THIRD WORLD L.J. 381, 383 (2009). Some courts, relying on *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82 (1994), which held that aiding and abetting liability should be permitted in civil cases only where Congress expressly authorizes it, have concluded that corporate defendants cannot be liable under an aiding and abetting theory. See, e.g., *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005); see also Lucien J. Dhooge, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247, 273-93 (2009) (arguing that *Central Bank* should be applied in the ATS context). Most courts, however, have permitted secondary theories of liability to be pursued. See, e.g., *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006), *aff'd*, 582 F.3d 244 (2d Cir. 2009); *Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. Aug. 22, 2006); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 52-54 (E.D.N.Y. 2005). Among those courts, however, some judges defined the applicable standard by looking to interpretations provided by international legal sources, such as the International Criminal Court, or decisions of the International Criminal Tribunals for the former Yugoslavia and Rwanda. These judges might define the theory broadly to include an *actus reus* of assistance or encouragement to a wrongdoer and a *mens rea* of knowledge or even recklessness, in which the aider and abettor need not even know the precise crime that the principal intends to commit. See, e.g., *Doe v. Unocal Corp.*, 395 F.3d 932, 950-51 (9th Cir. 2002), *vacated* 403 F.3d 708 (9th Cir. 2005) (quoting *Prosecutor v. Furundzija*, IT-95-17/1 T (Dec. 10, 1998), *reprinted* in 38 I.L.M. 317 (1999)); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 333 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007) ("practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," though assistance need not be indispensable) (internal quotations omitted); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d at 54;

significantly, there is a heated ongoing dispute over whether corporations can even be liable under the ATS.<sup>77</sup>

### C. Non-ATS Litigation

In addition to ATS cases, a much larger pool of non-ATS transnational tort cases have been brought in United States federal and state courts over the past decade.<sup>78</sup> Plaintiffs base some of those cases, like the most recent Coca-Cola case, on human and environmental rights claims against companies with some tie to the United States. They thus closely resemble ATS cases in their underlying factual allegations.<sup>79</sup> Many others, like the DBCP Nicaraguan matters, are based on traditional commercial and personal injury tort theories against companies over whom personal jurisdiction can be obtained. As with ATS cases, this larger pool of transnational tort cases continues to grow.

Like the ATS cases, these non-ATS suits span a wide range of industries and conduct. The spectrum of legal theories upon which these cases rely are similarly broad. Much like the ATS cases, frequent defendants include extractive companies, food and beverage companies, apparel companies, and financial companies. Several of these cases arose from circumstances of environmental degradation,<sup>80</sup> harsh labor conditions,<sup>81</sup> or claims for damages

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Cabello Barrueto v. Fernandez Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148 (11th Cir. 2005). Or they might define the theory narrowly, to include a *mens rea* of intent, in which the aider and abettor must purposefully facilitate the underlying crime. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009). Other jurists have looked to domestic definitions, which has an *actus reus* similar to international law -- assistance or encouragement of a wrongdoer -- and a *mens rea* that requires the alleged aider and abettor know that the assistance is facilitating an underlying harm. Doe v. Unocal, 395 F.3d at 965 (Reinhardt, J., concurring); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring). Still others have not indicated whether the international or domestic definition may be applicable. *See, e.g.*, Burnett v. Al Baraka Inv. & Dev. Co., 274 F. Supp. 2d 86, 100 (D.D.C. 2003); Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000).

77. *Compare* Kiobel v. Royal Dutch Petroleum Co., Nos. 621 F.3d 111 (2d Cir. 2010), *Flomo v. Firestone Natural Rubber Co.*, No. 1:06-cv-00627, 2010 WL 3938312, at \*7 (S.D. Ind. Oct. 5, 2010); *Viera v. Eli Lilly & Co.*, No. 1:09-CV-0495, 2010 WL 3893791, at \*2 (S.D. Ind. Sep 30, 2010); *Doe v. Nestle*, No. CV 05-5133, 2010 WL 3969615, at \*75 (C.D. Cal. Sept. 8, 2010), *with* *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008), *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 754 (D.Md. 2010), *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009), and *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 227 (D.D.C. 2007).

78. *See, e.g.*, *Lear*, *supra* note 32, at 590, 598 (discussing transportation disaster cases); *see also* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41 (2003) (discussing global plaintiff classes).

79. *See, e.g.*, *Perez v. Dole Food Co.*, Los Angeles Superior Court, April 28, 2009, <http://www.iradvocates.org/4.27.09%20Dole%20Complaint%20FINAL.pdf>. There may be differing reasons why plaintiffs in these cases choose not to invoke the ATS. Some plaintiffs may prefer to litigate in state court because of the jury pool, state procedural rules, or other reasons. Others who may wish to litigate in federal court may feel that the ATS is unnecessary to obtain federal jurisdiction.

80. *See, e.g.*, *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823 (D.C. Cal. 2008) (discussing alleged environmental contamination in Peru); *Gonzales v. Texaco, Inc.*, 2007 WL

based on activities performed decades before.<sup>82</sup> Many arose from transportation related injuries including airplane, helicopter, train, and automobile accidents that occurred in Latin America, Europe, Asia, and elsewhere.<sup>83</sup> Others have involved injuries allegedly caused by a range of pharmaceutical and other health-related products.<sup>84</sup>

Plaintiffs have filed these cases in numerous jurisdictions, and a few have resulted in plaintiffs' verdicts and settlements.<sup>85</sup> However, most have been dismissed on *forum non conveniens* grounds.<sup>86</sup> In light of that hurdle, plaintiffs

3036093 (N.D. Cal. Oct. 16, 2007) (discussing alleged cancer caused by Texaco's operations in Ecuador); *Native Federation of the Madre de Dios River & Tributaries v. Bozovich Timber Prod., Inc.*, 491 F. Supp. 2d 1174 (Ct. In'l Trade 2007) (discussing alleged violations of endangered species treaties in Peru); *Sahu v. Union Carbide*, 548 F.3d 59 (S.D.N.Y. 2008) (discussing alleged injuries from water pollution in India).

81. *David v. Signal Int'l, LLC*, 257 F.R.D. 114 (E.D. La. 2009) (discussing alleged trafficking to the United States to work in substandard conditions); *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996) (same); *Kasky v. Nike, Int'l*, 45 P.3d 243 (Cal. 2002) (discussing false advertising and unfair competition action premised on alleged misrepresentations to the public about factory working conditions).

82. The most common types of actions are individual lawsuits filed by injured workers aboard foreign vessels in and out of port, and by patrons at foreign hotels, in which the allegations have ranged from stolen valuables, to terrorist attacks, to injuries and deaths on site. *See, e.g.*, *Niv v. Hilton Hotels Corp.*, 2008 WL 4849334 (S.D.N.Y. No. 10, 2008); *Miriam Ramirez de Arellano v. Starwood Hotels & Resorts Worldwide, Inc.*, 448 F. Supp. 2d 520 (S.D.N.Y. 2006); *Tarasevich v. Eastwind Transp. Ltd.*, 2003 WL 21692759 (S.D.N.Y. July 21, 2003); *Gonzales v. P.T. Pelangi Niagra Mitra Int'l*, 196 F. Supp. 2d 482 (S.D. Tex. 2002).

83. *See, e.g.*, *Clerides v. Boeing Co.*, 534 F.3d 623 (7th Cir. 2008); *Reers v. Deutsche Bahn, AG*, 320 F. Supp. 2d 140 (S.D.N.Y. 2004); *Van Humbeck v. Robinson Helicopter Co.*, 2007 WL 4340996 (Cal. Ct. App. Dec. 13, 2007); *Herrera v. Michelin N. Am., Inc.*, 2009 WL 700645 (S.D. Tex. Mar. 16, 2007). *See also* *Gomez, supra* note 32, at 285. The lawsuits have included allegations against United States and foreign airlines, the manufacturers of airplanes, helicopters, trains, automobiles, and tires, and the makers of the constituent parts. *See, e.g.*, *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002); *Lueck v. Sundstardm Corp.*, 236 F.3d 1137 (9th Cir. 2001); *In re Air Crash Near Peixoto de Azeveda, Brazil*, 574 F. Supp. 2d 272 (E.D.N.Y. 2008); *Faat v. Honeywell Int'l*, 2005 WL 2475701 (D.N.J. Oct. 5, 2005); *Anandan v. Singapore Airlines Ltd.*, 2005 WL 758444 (Cal. Ct. App. Apr. 5, 2005); *Juanes v. Cont'l Tire North America, Inc.*, 2005 WL 2347218 (S.D. Ill. Sept. 26, 2005); *Rihbany v. Fleetwood Enters., Inc.*, 2003 WL 1901354 (Ca. Ct. App. Apr. 18, 2003).

84. *See, e.g., In re Factor VIII or IX Concentrate Blood Prods. Liab. Litig.*, 2008 WL 4866431 (N.D. Ill. June 4, 2008) (suits brought by hemophiliacs who claim to have been infected with HIV and/or the Hepatitis C Virus through the use of concentrate blood products manufactured by pharmaceutical companies); *In re Rezulin Prods. Liab. Litig.*, 214 F. Supp. 2d 396 (S.D.N.Y. 2002); *In re Vioxx Litig.*, No. 619, 2006 WL 2950622 (N.J. Super. Oct. 2, 2006).

85. *See, e.g., Kasky*, 45 P.3d 243, which was resolved for \$1.3 million. In 1992, a DBCP suit by Costa Rican plaintiffs reportedly settled for some \$20 million. In 1997, another action reportedly settled for \$41 million, and in 2007, an action involving 13 workers settled for \$300,000. *See Panama Banana Workers Bid on a Perilous Business*, NOTICEN: CENTRAL AMERICAN & CARIBBEAN AFFAIRS, Feb. 13, 2003, at 2003 WLNR 16919700; *Christian Miller, Pesticide Company Settles Sterility Suit for \$300,000*, L.A. TIMES, Apr. 16, 2007, at <http://articles.latimes.com/2007/apr/16/local/me-amvac16>.

86. That outcome is not surprising. Foreign plaintiffs electing to file actions outside of the jurisdiction where the alleged injury occurred receive substantially less deference in their choice of

have increasingly filed actions in specific state courts where they perhaps believe a *forum non conveniens* dismissal is less likely.<sup>87</sup>

### 1. The Frequency of Forum Non-Conveniens Dismissals

Perhaps because the ATS is contained in an express federal statute, it appears that courts dismiss non-ATS claims on *forum non conveniens* grounds more frequently than in ATS cases, although courts often still dismiss ATS cases on *forum non conveniens* grounds. Regardless of the ATS or non-ATS nature of the suit, it has become increasingly common for courts to place conditions on defendants, such as agreements to accept the jurisdiction of a foreign tribunal or to abide by the alternative forum's final judgment, before granting a motion to dismiss based on *forum non conveniens*.<sup>88</sup>

Even with such agreements, however, multiple surveys confirm that plaintiffs refile a very small percentage of cases abroad after dismissals from United States' courts.<sup>89</sup> However, in the relatively few cases that plaintiffs do refile in foreign jurisdictions, and as discussed in detail in the context of the Ecuadorian environmental litigation against Texaco, companies may end up facing litigation in unpredictable legal systems subject to political and other external influences.<sup>90</sup> Indeed, no doubt with such concerns in mind, Pfizer, after prevailing on a *forum non conveniens* argument in the District of Connecticut in an ATS case involving alleged involuntary medical experimentation in Nigeria,

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forum. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981); Lear, *supra* note 3, at 567-8 (discussing *Piper*). In addition, the factors courts consider in evaluating *forum non conveniens* motions tend to favor dismissal, including court congestion, local interest in resolving the controversy, the preference for applying familiar law, ease of access to evidence and the convenience of witnesses. See *Piper*, 454 U.S. at 251 n.6. Likewise, courts typically reject the arguments made by plaintiffs that alternative forums are inadequate, whether because of a lack of class action procedures, less developed law, less favorable remedies, fewer available causes of action, or other reasons. See, e.g., *Piper*, 454 U.S. at 256; *In re Vioxx Litig.*, 395 N.J. Super. 358, 366 (App. Div. 2007).

87. *Delgado v. Shell Oil Co.*, 231 F.3d 165, 169 (5th Cir. 2000). See also *Tonah v. Dow Chem. Co.*, 561 F.3d 945, 949 (9th Cir. 2009) (copycat cases based on plaintiffs' alleged exposure to DBCP, filed with just under one hundred class members, thereby avoiding the one hundred 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).

88. See *Daschbach*, *supra* note 32, at 25-26.

89. See, e.g., *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) ("Empirical data available demonstrate that less than four percent of cases dismissed under the doctrine of *forum non conveniens* ever reach trial in a foreign court."); Lear, *supra* note 32, at 577 (few cases dismissed on *forum non conveniens* are refiled); *Daschbach*, *supra* note 32, at 25-26; 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); Winston Anderson, *Forum Non Conveniens Checkmated? - the Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 193 (2001).

90. See Section IV, *infra*.

changed its mind and conceded the *forum non conveniens* point on appeal.<sup>91</sup> Corporate defendants thus must be careful what they ask for, as prevailing on a *forum non conveniens* argument can lead to litigation in far more difficult locations.

#### D. Foreign Litigation

Although the large majority of transnational tort cases involving companies with a presence in the United States have been brought in the United States, similar matters also are being raised abroad. Some, as in the DBCP context, discussed *infra*, involve efforts to obtain judgments from local courts to be exported to the United States for attempted enforcement. Others involve cases filed in foreign domestic courts where a judgment can be enforced locally.<sup>92</sup> Still others have sought favorable decisions from international or regional tribunals.<sup>93</sup> While such tribunal-related cases may not involve monetary damage awards, and usually involve the state as the putative real party in interest, they can provide plaintiffs with a finding that permits them to assert the merit of their cause and achieve some of their desired results.<sup>94</sup> Indeed, several such cases

91. See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009).

92. See, e.g., *Choc v. HudBay Minerals Inc.*, CV-10-411159 (Ont. Sup. Ct. filed Nov. 29, 2010) (Canada); *Ramirez v. Copper Mesa Mining Corp.*, CV09-37504 (Ont. Sup. Ct. filed March 3, 2009) (Canada); *Oguru v. Royal Dutch Shell PLC*, Court of the Hague, Docket Number HA ZA 09-579 (Netherlands); *Pedro Emiro Florez Arroyo v. BP Petroleum (Colombia) Ltd.*, Particulars of Claim, Claim No. HQ08X00328 (High Court of Justice Dec. 1, 2008); *Guerrero v. Montterrico Metals PLC*, [2009] EWHC 2475 (QB); *Canada Assoc. Against Impunity v. Anvil Mining Ltd.*, (Quebec Prov. Ct. filed Nov. 8, 2010), available at [http://www.haguejusticeportal.net/Docs/NLP/Canada/Kilwa\\_Complaint\\_8-11-2010.pdf](http://www.haguejusticeportal.net/Docs/NLP/Canada/Kilwa_Complaint_8-11-2010.pdf).

93. There exists a patchwork of international bodies and quasi-adjudicative tribunals with varying degrees of powers of enforcement over companies. They include U.N. committees that investigate and seek remedies through the pertinent states parties in connection with certain U.N. Conventions, like the Torture Convention, the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination Against Women. They also include regional agreements and conventions, such as: The Convention for the Protection of Human Rights and Fundamental Freedoms, which is enforced by the European Court of Human Rights, see <http://www.echr.coe.int/echr>; the American Convention on Human Rights, implementation of which is maintained by the Inter-American Commission, see <http://www.cidh.org/DefaultE.htm>; and the African Charter on Human and Peoples' Rights, implementation of which is maintained by the African Commission, see <http://www.achpr.org>. Plaintiffs have pursued relatively few actions against companies in these venues, although several have been considered against states themselves in connection with private corporate interests.

94. See, e.g., *Guerra v. Italy*, 26 Eur. Ct. H.R. 357 (1998) (concerning environmental issues); *SERAC and CESR v. Nigeria*, African Commission on Human & Peoples' Rights, Comm. No. 155/96 (2001) (concerning alleged abusive activities in the Niger Delta by the Nigerian government and a consortium of oil companies); *Taskin v. Turkey*, 42 Eur. Ct. H.R. 50 (2006) (regarding a waste dump); Report No. 69/104, Petition 504/03, Admissibility Community of San Mateo De Huanchor and its Members, IACHR (Oct. 15, 2004); *Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala*, PM 260-07, IACHR (2010). See generally Nsongurua Udombana, *Between Promise and*

have resulted in multi-million dollar settlements.<sup>95</sup>

## II.

### PATTERNS OF OUT-OF-COURT TACTICS

In these transnational tort cases, parties frequently employ out-of-court tactics in part to publicly advance their cause, pressure their opponents, or initiate corporate change. While defendants, plaintiffs, and third parties may employ such tactics, this Article focuses on those pursued by plaintiffs.

#### A. Methodology

In analyzing those tactics, the authors reviewed public information, including court records, judicial decisions, publications and reports, transcripts, press releases, public emails and correspondence, news articles, documentaries, mini-documentaries, television programs, video clips, webpages, web-logs (“blogs”), and other internet media, associated with some twenty-five recent transnational tort matters.<sup>96</sup> The cases were not selected at random. The authors intentionally chose cases with diverse characteristics. The cases involve: individual and class actions; companies that operate in a variety of sectors, including chemicals, agriculture, oil and gas, mining, manufacturing, pharmaceuticals, finance, and the Internet; underlying conduct arising from countries in Latin America, Africa, Asia and Europe; companies that are well known to the public, and less well known; and 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, and involvement

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*Performance: Revisiting States’ Obligations Under the African Human Rights Charter*, 40 STAN. J. INT’L L. 105 (2004).

95. For instance, in July 2005, a group of Colombian farmers sought £15 million in damages from the English High Court against BP Exploration Company (Colombia), alleging environmental degradation and security force abuses from an oil pipeline constructed by a BP-led consortium. The parties reached an undisclosed settlement in July 2006, which likely included a payment of several million pounds. Another similar matter was instituted in 2008 and remains pending. See Pedro Emiro Florez Arroyo v. BP Petroleum (Colombia) Ltd., Particulars of Claim, Claim No. HQ08X00328 (High Court of Justice Dec. 1, 2008); Robert Verkaik, *BP pays out millions to Colombian Farmers*, INDEPENDENT, July 22, 2006; 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>. See also Clara Nwachukwu, *Shell Appeals N15.4bn Oil Spill Penalty*, VANGUARD, July 8, 2010 (Nigerian Federal High Court ordered Shell Petroleum Development Company to pay \$100 million related to an oil spill); Adam Nossiter, *Payments in Ivory Coast Dumping At Risk, Lawyer Says*, N.Y. TIMES, Nov. 4, 2009; *Waste Victims Waiting for Compensation*, AFP, Nov 21, 2009 (Settlement of \$49 million in London High Court Action against petroleum trader Trafigura arising from alleged dumping of toxic waste off Cote d’Ivoire in 2006).

96. Some of these cases are related, and courts consolidated some. This Article treats related and consolidated cases as one case; based on individual filings, the number of cases studied exceeds 40 in total.

with repressive governmental regimes. In addition, the authors selected cases in which plaintiffs prevailed, in which defendants prevailed, which settled, and which are ongoing. While nearly all involve grave claims of wrongdoing that, if true, are deeply disturbing, we did not assess the underlying legal or factual merits of any of the cases studied.

Instead, for each of these cases, we attempted to identify out-of-court tactics plaintiffs or their advocates employed. We did not attempt to identify every tactic plaintiffs used on those cases, but selected twenty-four tactics that we previously observed in individual transnational tort actions to determine whether they appeared in other cases.<sup>97</sup> To be clear, this Article does not suggest that any of these twenty-four tactics are *per se* proper or improper, though as indicated by some of the case studies there are instances in which the tactics may have influenced foreign legal determinations or been launched in conjunction with questionable claims. In addition, it is possible that a study focusing on defense tactics in these same cases may identify similar tactics, although we did not observe defendants using these tactics with the same degree of frequency.<sup>98</sup>

The twenty-four tactics we studied fall into four general categories: media tactics, community organizing tactics, investment tactics, and political tactics. The patterns we observed for each of these categories are set forth below, followed by three case studies.

### *B. Media Tactics*

In all twenty-five of the cases reviewed, plaintiffs used media-related approaches. These methods most commonly took the form of Internet campaigns, news articles, radio and television programs, films, and documentaries.

#### *1. Internet Campaigns*

Because of its unique features, the Internet is a very popular communications device in litigation. The Internet is in many respects the perfect messaging medium, as websites are inexpensive and easy to maintain, and information can be fully controlled with little oversight or censorship. A site can host stories that appear to be legitimate news, but contain arguments or party positions. Indeed, websites are now often treated as mainstream news sources. The Internet also has a remarkably broad reach because it operates on a worldwide basis and can host multi-media sources. An individual or entity can

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97. The tactics are below and appear in Table 1. Certain additional tactics were present in several cases reviewed during the study; while these additional tactics do not appear in the Table, some may be noted within the text.

98. That likely is due to the fact that, as a general proposition, the plaintiffs in these cases have a greater interest in increasing publicity surrounding the suit or in seeking change.

also establish multiple interrelated sites to maximize readership.

The study found the use of Internet campaigns in most cases, 21 out of 25. They generally operate as public relations, advocacy, and community organizing vehicles. Plaintiffs' organizations and plaintiffs' advocates house most of the web campaigns.<sup>99</sup>

Case related Internet campaigns commonly consist of various elements. They include 'fact' sheets, which outline the core case details from the plaintiffs' perspectives;<sup>100</sup> summaries of the legal proceedings and legal documents;<sup>101</sup> press kits, composed of media backgrounders, key documents, press releases, and other case details for members of the media interested in providing coverage;<sup>102</sup> a collection of the press releases that have been issued by the plaintiffs' attorneys or third parties;<sup>103</sup> reports of various types;<sup>104</sup> favorable articles;<sup>105</sup> campaign posters and postcards to express support for the effort;<sup>106</sup> photographs; YouTube 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.<sup>107</sup>

99. See, e.g., 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>. Several websites set up by defendants in the cases studied likewise appeared.

100. 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](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](http://ccrjustice.org/files/Chevron_Environment.pdf).

101. See, e.g., *Bowoto v. Chevron*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/bowoto-v.-chevron> (last visited April 5, 2011); *Bowoto v. Chevron Case Overview*, EARTHRIGHTS INTERNATIONAL, <http://www.earthrights.org/legal/bowoto-v-chevron-case-overview> (last visited April 5, 2011); BIGIO FAMILY LAWSUIT AGAINST COCA-COLA, <http://www.bigiofamily.com/11801.html> (last visited April 5, 2011).

102. See, e.g., *Wiwa v. Shell: For Journalists*, WIWA V. SHELL, <http://wiwavshell.org/press-for-journalists> (last visited April 5, 2011).

103. See, e.g., *Press Coverage of Wiwa v. Shell*, EARTHRIGHTS INTERNATIONAL, <http://www.earthrights.org/about/news/press-coverage-wiwa-v-shell> (last visited April 5, 2011).

104. See, e.g., *Ethical Standards and Working Conditions in Wal-Mart's Supply Chain*, INTERNATIONAL LABOR RIGHTS FORUM (October 24, 2007), <http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10586>; see also, *Wal-Mart in China: The High Cost of Low Prices*, INTERNATIONAL LABOR RIGHTS FORUM (October 25, 2006), <http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/10662>.

105. See, e.g., *News & Press*, INTERNATIONAL RIGHTS ADVOCATES, <http://www.iradvocates.org/drummond.html> (Drummond); <http://www.iradvocates.org/oxy.html> (*Occidental v. Mujica*); see also *Press Links*, JUSTICE IN NIGERIA NOW (February 9, 2009), <http://justiceinnigeria.wordpress.com/press-links> (Bowoto).

106. See, e.g., *Posters and Postcards*, WIWA V. SHELL, <http://wiwavshell.org/resources/posters-and-postcards> (last visited April 5, 2011).

107. 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\\_](http://laborrightsblog.typepad.com/international_)

These Internet campaigns frequently also involve calls-to-action. Those often include: appeals for letter-writing campaigns to company executives, board members and defendant supporters, along with form letters;<sup>108</sup> student activism kits, which may describe how students can become educated about the issues and then educate others on campus through forums and rallies;<sup>109</sup> calls for protests<sup>110</sup> as well as boycotts of the defendants' products, and explanations for how the public citizenry can seek the same;<sup>111</sup> and calls for others to write op-eds or letters to the editor, attend trials or hearings, host video screenings of documentaries, and engage in other forms of activism.<sup>112</sup> 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.<sup>113</sup>

## 2. News Articles

Websites also often feature news articles.<sup>114</sup> Though, focusing on print media, the study identified articles in newspapers, journals, and magazines, both in print and online, in all twenty-five cases.<sup>115</sup> The study tracked print media

labor\_right/walmart (last visited April 5, 2011).

108. 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.ical-online.org/xp\\_resources/ical/burmese\\_workers\\_suing\\_unocal.pdf](http://www.ical-online.org/xp_resources/ical/burmese_workers_suing_unocal.pdf).

109. See, e.g., *Hel-Mart's Call Regarding Wal-Mart*, HELL-MART, <http://www.hel-mart.com/links.php>; STOP FIRESTONE COALITION, <http://www.laborrights.org/files/StudentActionKit.pdf> (last visited April 5, 2011).

110. See, e.g., *Hel-Mart's call regarding Wal-Mart*; International Labor Rights Forum's Call Regarding Firestone (July 30, 2008), <http://www.laborrights.org/stop-child-labor/stop-firestone/news/11687>; *Stop Firestone Coalition's Protest*, STOPFIRESTONE.ORG (July 24, 2008) <http://www.stopfirestone.org/2008/07/report-from-stop-firestone-protest-at-public-strategies>; <http://www.laborrights.org/files/StudentActionKit.pdf>

111. 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](http://www.amazonwatch.org/take_action/everyday).

112. For instance, the Stop Firestone campaign, related to *Flomo v. Bridgestone*, a case alleging forced and child labor on a Liberia plantation, 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., NFL-related campaign, INTERNATIONAL LABOR RIGHTS FORUM, <http://www.unionvoice.org/campaign/NFL09> (last visited June 2010); *Student Action Kit*, INTERNATIONAL LABOR RIGHTS FORUM, <http://www.laborrights.org/files/StudentActionKit.pdf>. In response to the suit, 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).

113. See, e.g., [www.wiwavshell.org](http://www.wiwavshell.org); [www.stopfirestone.org](http://www.stopfirestone.org) (maintained by a coalition, including plaintiffs, of *Flomo v. Bridgestone Americas Holding* (involving allegations of forced and child labor) lawsuit supporters).

114. See, e.g., INTERNATIONAL RIGHTS ADVOCATES, *supra* note 105, JUSTICE IN NIGERIA NOW, *supra* note 105.

115. Given that the cases often involved high profile lawsuits, that result is not wholly surprising.

generally and articles in which the plaintiffs or their attorneys appeared specifically. News articles include traditional news pieces and opinion pieces, such as op-eds and blog posts.

Although some articles originated organically, many seem to result from press releases that plaintiffs' attorneys and organizations issued. The study identified such press releases in twenty of the cases.<sup>116</sup>

Print media and press releases are simple, effective, and inexpensive means to broadcast messages, and they tend to spike in frequency 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. The articles often include strong language by plaintiffs' attorneys about the underlying merits of the case,<sup>117</sup> and may include pieces plaintiffs or their advocates authored.<sup>118</sup> Following their publication, the press releases, like other articles, may be maintained on the Internet, which increases and prolongs their impact.

### 3. Television/Radio Broadcasts

In addition to print media, radio and television covered seventeen of the cases, a number that is likely underrepresented because of the lack of publicly available materials for review. Only a minority of the cases had national television or radio coverage, as most of the radio and television appearances were in local media.

As with other forms of media, some of the television and radio broadcasts may have developed organically; these programs, however, often contain what seem to be a pro-plaintiff slant, or at a minimum repeat the graphic allegations in the case. Like other materials, these television and radio broadcasts often appear on plaintiffs' attorneys' websites, thus expanding the broadcasts' circulation and duration.<sup>119</sup> As with all media coverage, television and radio

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116. The press releases were issued by various different firms and NGOs. Defendants in several cases issued press releases at key points, such as when they obtained dismissals.

117. See, e.g., *Chavez & Gertler Announces Lawsuit Filed Against DaimlerChrysler Over "Dirty War" Human...*, BUS. WIRE, January 14, 2004, at <http://www.allbusiness.com/government/government-bodies-offices/5212466-1.html> (DaimlerChrysler "wanted to get rid of the union leaders," and "[m]anagers of that Mercedes plant knew they could get away with this"); *Exxon 'helped torture in Indonesia'*, BBC NEWS, June 22, 2001, <http://news.bbc.co.uk/2/hi/business/1401733.stm> (related to alleged abuses by Indonesian security forces at an Exxon facility, "Exxon knew from the beginning about the security forces' reputation of brutality"); 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](http://www.nrc.nl/international/article2376593.ece/Apartheid_victims_want_Western_companies_to_cough_up) ("Our case is not only about the apartheid past, but also about how companies behave in general in countries where human rights are violated").

118. Larry Bowoto (assisted by Bert Voorhees, one of his lawyers), *Chevron Should Pay* (Op-Ed), L.A. TIMES, May 29, 2008, <http://articles.latimes.com/2008/may/29/opinion/oe-bowoto29>.

119. Of the media sources that retain publicly searchable materials, a review of archived public

appearances increase in number at the filing of a lawsuit or commencement of a trial, after any important court rulings, and around events planned by plaintiffs' organizations.<sup>120</sup>

#### 4. Films, Documentaries and Mini-Documentaries

Though less frequent than television or radio appearances, thirteen of the studied cases featured films, documentaries, and mini-documentaries, a substantial number given the effort and expense involved in creating these visual media.<sup>121</sup> In some instances, it is unclear whether plaintiffs directly funded or participated in directing these films and documentaries. In most instances, however, plaintiffs or their attorneys participated in the production of the film; sometimes they are even featured in the film itself.<sup>122</sup> Regardless of their participation, most of the films sympathize with the plaintiffs, who often place movie clips on their websites or plan activism events around them. For example, plaintiff websites create both Internet toolkits for students and others to watch the documentaries and press kits to help shape media coverage.

A fairly recent creation is the "mini-documentary," akin to a political campaign video, made by plaintiffs or their attorneys. These typically run for roughly ten minutes, emphasize key arguments and evidence, and can carry the visual message of the plaintiffs in a powerful manner. The documentaries'

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materials found that the Voice of America service, Democracy Now! (a daily television/radio news program) and public radio syndicates provided the most frequent coverage of the plaintiffs' cases. See, e.g., *NPR Marketplace* (American Public Media Broadcast), transcript available at [http://rights.igc.org/press/ChildLabor/cocoa/fairtradecocoa\\_marketplace\\_020606.htm](http://rights.igc.org/press/ChildLabor/cocoa/fairtradecocoa_marketplace_020606.htm); 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#](http://www.democracynow.org/2003/5/2/occidental_petroleum_sued_for_role_in#); *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>.

120. Although as a general matter we observed less use of the media by corporate defendants, we did observe several instances in which corporate defendants issued short statements at key points in the cases.

121. Though not a focus of the study, we observed few instances in which corporate defendants created films, documentaries, or mini-documentaries.

122. For instance, Plaintiffs' counsel played a pivotal role in the documentary *Litigating Disaster*, which was based on *Bano v. Union Caride Corp.*, the dismissed action arising from the Bhopal gas leak. See Icarus Films, *Litigating Disaster: A film by Ilan Ziv*, <http://icarusfilms.com/new2004/lit.html>. The makers constructed the film around a judicial theme; it shows the plaintiffs' attorney presenting his case to a fictitious jury, the documents secured in discovery, the evidence against the company, and includes interviews with former company employees. See also, *Nigerian Delta Force*, JOURNEYMAN PICTURES (April 18, 1995), <http://www.journeyman.tv/?lid=59032> (chronicling the life of Ken Saro-Wiwa, the deceased plaintiff from *Wiwa v. Royal Dutch Petroleum*, and Shell's activities in Nigeria); *Drilling and Killing*, Democracy Now! (July 11, 2003), transcript available at [http://www.democracynow.org/2003/7/11/transcript\\_of\\_drilling\\_and\\_killing\\_documentary](http://www.democracynow.org/2003/7/11/transcript_of_drilling_and_killing_documentary) (about *Bowoto v. Chevron Corp.*); *Total Denial*, <http://www.totaldenialfilm.com> (a documentary about *Doe v. Unocal Corp.*); *Poison Fire The Movie*, [www.poisonfire.org](http://www.poisonfire.org) (about the environmental practices that underlay the protests leading to *Wiwa v. Royal Dutch Petroleum*).

brevity and the fact that they are typically posted on YouTube or plaintiffs' websites render them readily accessible to the public. Tens of thousands of viewers often see these mini-documentaries, as anyone with an internet connection can access them.<sup>123</sup>

### 5. Other Media Publicity: Press Conferences, Reports and Seminars

The study identified a number of other media efforts by plaintiffs and their attorneys. For instance, they may hold press conferences to coincide with the filing of lawsuits and other events.<sup>124</sup> Another tactic is the publication of detailed subject matter reports, whether prepared by plaintiffs' organizations themselves or by outside consultants, on the issues surrounding the lawsuits.<sup>125</sup> Plaintiffs' attorneys also sometimes speak on university campuses and in other fora to publicize their cases and encourage activism.<sup>126</sup>

### C. Community Organizing Tactics

While media tactics were most commonly used by plaintiffs in the cases studied, community organizing tactics, including partnering with other organizations, boycotts, and protests, also appeared frequently.

123. See, e.g., *Campaign Video: The Case Against Shell: Landmark Human Rights Trial (Wiwa v. Shell)*, WIWA v. SHELL, <http://wiwavshell.org/resources/campaign-video> (last visited April 5, 2011); *The Case Against Shell: 'The Hanging of Ken Saro-Wiwa Showed the True Cost of Oil'*, YOUTUBE (May 18, 2009) <http://www.youtube.com/watch?v=htF5XEIMyGI>; Press Release, Amazon Watch, *Occidental Petroleum's Toxic Legacy in the Peruvian Amazon To Dominate Annual Meeting* (October 27, 2009), [http://www.amazonwatch.org/newsroom/view\\_news.php?id=1777](http://www.amazonwatch.org/newsroom/view_news.php?id=1777).

124. 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. 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*, Global Exchange, Apr. 24, 2003, <http://www.globalexchange.org/countries/americas/colombia/663.html>. Occidental Petroleum denies any responsibility for any injuries to the plaintiffs. See Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal of Defendant, *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009) (Nos. 05-56056, 05-56175, 05-56178).

125. See, e.g., *Firestone and Violations of Core Labor Rights in Liberia*, INTERNATIONAL LABOR RIGHTS FORUM, <http://www.laborrights.org/stop-child-labor/stop-firestone/resources/12060> (last visited April 5, 2011).

126. 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. *H. Rajan Sharma Biography*, SHARMA & DEYOUNG LLP, <http://sharmadeyoung.com/sharma.html>. See also Terry Collingsworth, *Beyond Reports and Promises: Enforcing Universally Accepted Human Rights Standards in the Global Economy* (Seminar #3), THE CARNEGIE COUNCIL, February 6, 2003, [http://www.cceia.org/resources/articles\\_papers\\_reports/874.html](http://www.cceia.org/resources/articles_papers_reports/874.html).

### 1. Partnering with Like-Minded Organizations

In most of the cases studied, one or more of the plaintiffs' attorneys were from nonprofit legal organizations or public interest firms. In fifteen of the cases, there were joint efforts between those attorneys and like-minded human and labor rights organizations.<sup>127</sup>

In several cases, plaintiffs' organizations formed new coalitions to support a legal action.<sup>128</sup> Of particular note, in the cases reviewed, labor unions were a frequent partner for the plaintiffs' organizations, appearing, quite logically, in nearly all cases involving allegations of labor violations and of the killing of labor unionists.<sup>129</sup>

In at least two cases, plaintiffs' attorneys filed the lawsuit in part on behalf of institutional plaintiffs.<sup>130</sup> In numerous other cases, plaintiffs' organizations

127. See generally Holzmeyer, *supra* note 15, at 287-88.

128. 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. See *Who We Are*, STOP FIRESTONE COALITION, <http://www.stopfirestone.org/about/coalition> (last visited Mar. 13, 2011); *Cases: Bridgestone-Firestone*, INTERNATIONAL RIGHTS ADVOCATES, <http://www.iradvocates.org/bfcase.html> (last visited Feb. 7, 2011); Press Release, Stop Firestone Coalition, *Super Bowl Halftime Sponsor, Bridgestone Firestone, Uses Child Labor, Abuses Workers and Environment in Liberia*, INTERNATIONAL LABOR RIGHTS FORUM, January 29, 2008, <http://www.laborrights.org/stop-child-labor/stop-firestone/news/11309>. The groups are based both in the United States and Liberia, the site of the underlying acts at issue in the case. EarthRights International was also formed for the *Unocal* case. See Holzmeyer, *supra* note 15, at 282.

129. For instance, a United Steelworkers Union ("USW") counsel is an attorney of record in *Bauman v. DaimlerChrysler*, see *Bauman v. DaimlerChrysler Corp.*, No. 04 Civ. 00194 (N.D. Cal. Jan. 14, 2004) and *Drummond*; in *Drummond*, the USW also provided Congressional testimony and wrote letters to the Secretary of State about the action. See, e.g., Complaint, *Estate of Rodriguez v. Drummond Co., Inc.*, 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); Letter from USW to Hillary R. Clinton (Sept. 17, 2009), <http://assets.usw.org/News/GeneralNews/09-17-09secyclintonltronddrummond.pdf>; see also 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/> (regarding the *Bridgestone* case, the AFL-CIO awarded the plaintiffs' workers' union, the Firestone Agricultural Workers Union of Liberia with an award).

130. In *Doe v. Nestle*, involving labor practices in Cote d'Ivoire, Global Exchange – a “membership-based international human rights organization” that focuses on fair trade, labor rights and environmental practices – is a plaintiff in the lawsuit. *Cases: Nestle, Archer Daniels Midland, and Cargill*, INTERNATIONAL RIGHTS ADVOCATES, <http://www.iradvocates.org/bfcase.html> (last visited on Feb. 7, 2011). Global Exchange helps coordinate activism surrounding the action through organizing protests, letter-writing campaigns, and other means. The defendants deny the allegations in the complaint, arguing that, if anything, the conduct at issue sought to prevent improper labor practices. See Notice of Motion and Motion to Dismiss Plaintiffs' Amended Complaint, *Doe v. Nestle*, CV-05-5133-SVW (C.D. Cal. July 20, 2009), see also Kelly Hearn, *For Peru's Indians, Lawsuit Against Big Oil Reflects a New Era: Outsiders and High-Tech Tools Help Document Firms'*

have worked or partnered with like-minded groups on certain activism events, internet campaigns, or media publicity.<sup>131</sup>

## 2. Protests & Boycotts

Eighteen of the cases studied involved organized protests. Plaintiffs and their advocates often organized protests near the defendants' corporate headquarters or to coincide with an event involving a corporate defendant. As with other tactics, protests can be an inexpensive and effective way to advance a message.<sup>132</sup> In the same vein, boycotts were quite common, appearing in seventeen of the cases reviewed.<sup>133</sup>

### D. Investment Related Tactics

Much like media and community-activism tactics, the study identified numerous instances of investment-related tactics by plaintiffs and their supporters; eighteen cases in all. While plaintiffs and their advocates use media

*Impact*, THE WASHINGTON POST (Jan. 31, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/01/31/ST2008013100037.html>. 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. See STOP THE TRAFFIK, <http://www.stophetraffik.org/about/who/coalition.aspx> (last visited Feb. 7, 2011) (related to *Doe v. Nestle*).

131. For example, in *Bowoto v. Chevron Corp.*, the organization Justice in Nigeria Now, noted above, posted fact sheets on its website, assisted with media publicity, and gave interviews at the start of the 2008 trial. See *Chevron*, JUSTICE IN NIGERIA NOW, <http://justiceinnigerianow.org/about-chevron> (last visited on Feb. 2, 2011), JUSTICE IN NIGERIA NOW BLOG, <http://justiceinnigeria.wordpress.com> (last visited Mar. 13, 2011); Robin Rose, *Bowoto v. Chevron*, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM BLOG, November 4, 2008, <http://wilpf.blogspot.com/2008/11/bowoto-v-chevron.html>.

132. See generally Holzmeyer, *supra* note 15, at 291 (discussing protests related to *Unocal*). For instance, in connection with the *Carijano* lawsuit, the plaintiff joined other supporters and activists in demonstrating outside Occidental Petroleum's headquarters. 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" against Occidental Petroleum and others accused of participating in attacks on union leaders. Media Advisory, *United Steelworkers, Occidental Petroleum on Trial in Colombia Tribunal: Steelworkers Demand Justice*, UNITED STEELWORKERS, July 18, 2008, [http://www.usw.org/media\\_center/releases\\_advisories?id=0047](http://www.usw.org/media_center/releases_advisories?id=0047).

133. For example, SAMFU, part of the Stop Firestone campaign, has called for a boycott of the company's products until it addresses the coalition's concerns about working conditions. *Poor Conditions in Liberia's Rubber Plantations*, TRÓCAIRE'S, May 23, 2006, <http://www.trocaire.org/news/2006/05/23/poor-conditions-liberias-rubber-plantations>. 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. *Boycott Shell*, ESSENTIAL ACTION, <http://www.essentialaction.org/shell/index.html> (last visited on Feb. 13, 2011); *Shell in Nigeria: What are the issues?*, ESSENTIAL ACTION, <http://www.essentialaction.org/shell/issues.html> (last visited on Feb. 13, 2011).

tactics and community organizing techniques to place public pressures on corporate defendants, the investment strategies directly target corporate stock prices, executives, and shareholders. The tactics include appearances at annual shareholder meetings, introducing resolutions, and divestment campaigns.

### 1. *Plaintiffs' Attendance at Annual and Shareholder Meetings*

When plaintiffs attend and speak at annual shareholder meetings, as they did in eight cases studied, they can communicate directly with stockholders, technically the owners of the company, and company executives. Plaintiffs often generate media attention in the process. Coupled with the relative ease and lack of expense, shareholder meeting participation is a popular tactic.<sup>134</sup> Of the tactics studied, it is perhaps among the most likely to be underrepresented, since participation at a shareholders meeting may not generate the type of publicly retrievable documentation primarily used in this review.

### 2. *Introducing Resolutions at Shareholder Meetings*

The study found that introducing resolutions is the most frequent investment tactic. This was present in seventeen cases.<sup>135</sup> Typically, the resolutions seek reviews of and reports on the companies' practices at issue in the lawsuit, and attempt to improve company compliance with human rights standards.<sup>136</sup> Plaintiffs and their advocates typically pursue such resolutions because even if the resolutions do not pass, which they rarely do, they still raise the plaintiffs' concerns in a visible manner to the company's board of directors, management, employees, and shareholders. Institutional funds in New York have been particularly active in these efforts.<sup>137</sup> In some of the cases reviewed,

134. See generally Holzmeyer, *supra* note 15 at 291 (discussing shareholder resolutions, including in relation to *Unocal*). For instance, 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. *Lawyers For Larry Bowoto Respond to Chevron Executive's Comments*, EARTHRIGHTS INTERNATIONAL, 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, Apr. 11, 2009, <http://www.sanfranciscosentinel.com/?p=22618>.

135. See generally Alex Markels, *Showdown for a Tool In Human Rights Lawsuits*, N.Y. 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.”).

136. *Id.*

137. For example, the New York City pension fund filed shareholder resolutions to challenge Yahoo! and Google's policies in China and other countries. See Jill Gardiner, *Thompson Targets Google, Yahoo Over China Policy*, N.Y. SUN, Dec. 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, Sept. 14, 2008, <http://www.asianews.it/index.php?l=en&art=4118>. Similarly, the New York City Comptroller and the New York City pension systems, which represented over 10,000,000

the plaintiffs' involvement in introducing resolutions was clear. In others, because of lack of involvement or methodological limitations, it was not. However, the pattern of resolutions introduced bearing a correlation with the facts at issue in the underlying litigation raise the possibility of plaintiff involvement.

### 3. Pressuring Shareholders to Divest Stock in Defendant Companies

In a related vein, the study identified several instances of pressures to divest stock holdings; seven cases in all. Divestiture can, if successful, drive down stock prices, bring along other investors, and create negative media attention.<sup>138</sup>

However, in the cases studied as part of the review, there was no evidence that divestiture efforts impacted corporate stock prices. Nor were there clear causal links between divestiture efforts and the plaintiffs in the cases studied, whether because the plaintiffs were not involved or because of methodological limits.

In seven instances that we observed, however, divestiture did cause investment firms who make decisions based on social criteria to give negative ratings to some defendant companies, citing the then-outstanding litigation as their reason for doing so.<sup>139</sup> Among those who divested in the cases studied were universities<sup>140</sup> and pension funds, particularly TIAA-CREF, a retirement fund, which provides retirement plans for educational, religious, and nonprofit organizations.<sup>141</sup>

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shares in Wal-Mart, also had a shareholder resolution introduced on their behalves at one of Wal-Mart's shareholder meeting. Rev. Rhett Baird, Minister at the Unitarian Universalist Fellowship of Fayetteville, Ark., Speech on behalf of the New York City Comptroller and the New York City pension systems at the annual shareholders meeting of Wal-Mart in Fayetteville, Ark. (June/Sept. 2002), <http://www.uujec.org/bbr/walmartshareholderaction.pdf>.

138. See, e.g., Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 438-41 (2004).

139. See, e.g., *Dexia Equities L Sustainable Emerging Markets: European SRI Transparency Guidelines*, DEXIA ASSET MANAGEMENT, at 10 (Sept. 2009), [https://www.dexia-am.com/NR/rdonlyres/47096CA9-4675-46E9-AF20-3C69E0F780B3/0/TG\\_Dexia\\_Equities\\_L\\_Sustainbale\\_Emerging\\_Markets\\_2009\\_EN\\_20090904.pdf](https://www.dexia-am.com/NR/rdonlyres/47096CA9-4675-46E9-AF20-3C69E0F780B3/0/TG_Dexia_Equities_L_Sustainbale_Emerging_Markets_2009_EN_20090904.pdf).

140. See Mark Thomsen, *Students Push University of Virginia Out of Unocal*, SOCIALFUND'S SUSTAINABILITY INVESTMENT NEWS, Oct. 23, 2001, <http://www.socialfunds.com/news/article.cgi/693.html> (University of Virginia divested 50,000 shares of Unocal in response to student protests that the company was complicit in human rights violations perpetuated by the Burmese military).

141. See TIAA-CREF, <http://www.tiaa-cref.org/public/about/index.html>. For instance, activists also urged NY TIAA-CREF to divest from Wal-Mart. 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](http://walmartwatch.com/blog/archives/al_norman_new_york_ny_tiaa_cref_urged_to_divest_wal_mart_stock). See also Bill Baue, *Norwegian Government Pension Fund Dumps Wal-Mart and Freepart on Ethical Exclusions*, SOCIALFUND'S SUSTAINABILITY INVESTMENT NEWS, June 16, 2006, <http://www.socialfunds.com/news/article.cgi/2034.html> (Norwegian Ministry of Finance's

### E. Political Tactics

Of the categories of tactics studied, plaintiffs employed political tactics the least frequently, only fourteen times in all. The primary tactics the study identified were testimony at congressional hearings by plaintiffs or their advocates, alignment with politicians and well-known leaders to garner support and publicity, and pressure for resolutions on local levels.<sup>142</sup>

#### 1. Congressional Hearings

In ten of the cases reviewed, the plaintiffs or their supporters testified at friendly congressional hearings.<sup>143</sup> Much like others studied, this tactic has appeal on multiple levels: it is essentially cost-free, generates publicity, and may influence lawmakers and others.<sup>144</sup> In addition, on two occasions in recent years

Government Pension Fund divested \$416 million worth of Wal-Mart stock upon recommendation from the Government's Council on Ethics).

142. In several of the cases reviewed, defendants likewise appeared to have used certain political efforts.

143. See, e.g., *Protection and Money: U.S. Companies, Their Employees, and Violence In Colombia, a joint hearing before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on the Western Hemisphere of the Committee 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. at 27 (2007) (testimony by counsel for plaintiffs in *Drummond*, *Sinaltrainal*, and *Occidental* cases); *Wal-Mart's 2008 Shareholder Resolutions: Human Rights Committee*, WAL-MART WATCH, May 13, 2008, [http://walmartwatch.com/blog/archives/wal\\_marts\\_2008\\_shareholder\\_resolutions\\_human\\_rights\\_committee](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, Oct. 25, 2007, <http://abcnews.go.com/Politics/story?id=3775750&page=1>.

144. 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. See *Yahoo! Inc.'s Provision of False Information to Congress, Hearing Before the Committee on Foreign Affairs*, 110th Cong. (Nov. 6, 2007). 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.* In the suit, Yahoo! argued that its subsidiary acted lawfully under Chinese laws, obeyed requests of the Chinese government and 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."). However, 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. See *The Internet in China: A Tool for Freedom or Suppression? J. Hearing Before the Subcomm. on Africa, Global Human Rights, and Int'l Operations and the Subcomm. on Asia and the Pacific of the H. Comm. on Int'l Relations*, 109th Cong. 55-57 (2006); *Yahoo! Inc.'s Provision of False Information to Congress, Hearing Before the Committee on Foreign Affairs*, 110th Cong. (Nov. 6, 2007). In a high profile and testy session, with family members of the plaintiff in the audience, House members grilled Yahoo! executives on the issue. The case settled immediately thereafter. *Families of Shi Tao and Wang Xiaoning (Yahoo! Inc.)*, WORLD ORGANIZATION FOR HUMAN RIGHTS USA, [http://www.humanrightssusa.org/index.php?option=com\\_content&task=](http://www.humanrightssusa.org/index.php?option=com_content&task=)

hearings were scheduled to coincide with upcoming high-profile trials.<sup>145</sup> Whether the timing of those hearings was coincidental, or whether the plaintiffs played a role in the timing, was not clearly discernable from the information reviewed.

## 2. Other Political Pressure

Other political tactics, including the participation of politicians in public campaigns, appeared in ten of the cases reviewed. Seeking supportive letters from political figures seems common.<sup>146</sup> Plaintiffs also sometimes contacted public officials to request investigations.<sup>147</sup> In a few instances, foreign

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view&id=15&Itemid=35 (last visited Mar. 6, 2011); Jacqui Cheng, *Congress Unimpressed by Yahoo Apology for China Dissident E-mail Testimony*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2007/11/yahoo-calls-withholding-of-info-on-chinese-arrests-a-misunderstanding.ars> (last updated Nov. 6, 2007). For a discussion of *Xiaoning* and its implications, see DeNae Thomas, *Xiaoning v. Yahoo! Inc.'s Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle*, 11 VAND. J. ENT. & TECH. L. 211 (2008); Khurram Nasir Gore, *Xiaoning v. Yahoo!: Piercing the Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 97, 98 (2008).

145. In April 2009, in a joint hearing, the United States House of Representatives' Committee on Foreign Affairs and Committee on Education and Labor heard testimony focusing on oil production in Nigeria. The hearing discussed the *Wiwa* case and included testimony regarding Ken Saro-Wiwa's environmental and human rights concerns. *Environmental and Human Rights Concerns Surrounding Oil Production in the Niger Delta Before the H. Tom Lantos Human Rights Commission*, 111th Cong. (2009) (testimony of Stephen M. Kretzmann, Executive Director, Oil Change International); *Congressional Commission Hears Testimony on Shell's Environmental Abuses in the Niger Delta*, EARTHRIGHTS INTERNATIONAL (Apr. 28, 2009), <http://www.earthrights.org/legal/congressional-commission-hears-testimony-shell-s-environmental-abuses-niger-delta>. The hearing occurred roughly one 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*, 110th Cong. (Sept. 24, 2008). The hearing, which featured testimony from plaintiff organizations involved in several of the studied cases, discussed the facts underlying *Bowoto* as well as *Unocal*, and *Exxon*. See *id.* at 18, 19, 23-24, 30, 32, 33.

146. 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. Notably, the letter was sent just days before a plaintiffs' attorney in Drummond testified to Rep. Delahunt's subcommittee. 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](http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x2928336).

147. 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 United States Members of Congress were copied on the letter. See Letter from Leo W. Gerard, Int'l President, United Steelworkers, to U.S. Sec'y of State, regarding "Continued Repression of Drummond Union and Workers in Colombia" (Sept. 17, 2009), <http://assets.usw.org/News/GeneralNews/09-17-09secyclintonltronddrummond.pdf>; see also Congressman Dennis J. Kucinich, *Foreign Affairs Policy*

governments submitted letters to courts.<sup>148</sup> On a local level, of the cases reviewed, there was at least one instance of a city passing a resolution supportive of the plaintiffs.<sup>149</sup> Other political efforts observed include politicians participating in press conferences,<sup>150</sup> submitting supporting briefs to courts in favor of plaintiffs,<sup>151</sup> and visiting affected plaintiffs on fact-finding missions and then releasing plaintiff-friendly reports.

## F. General Trends Associated with the Tactics

### 1. Timing Considerations

In addition to the specific tactics identified, several other general trends are noteworthy. From a timing standpoint, the number and variety of tactics continues to grow. The cases studied range from the mid-1990s until 2009. From those, it appears that plaintiffs use more tactics more frequently today than in prior years.<sup>152</sup> More recently, it appears that plaintiffs are learning new tactics

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on Colombia, <http://kucinich.house.gov/Issues/Issue/?IssueID=1563#Colombia> (last visited Mar. 2, 2011).

148. See, e.g., Letter from Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Dev., Republic of S. Afr., to Judge Shira A. Scheindlin, U.S. Dist. Court, S. Dist. of N.Y. (Sept. 1, 2009), available at [http://www.hausfeldllp.com/content\\_images/file/09\\_01\\_09%20SA%20Ministry%20of%20Justice%20Ltr%20to%20Judge%20Scheindlin.PDF](http://www.hausfeldllp.com/content_images/file/09_01_09%20SA%20Ministry%20of%20Justice%20Ltr%20to%20Judge%20Scheindlin.PDF).

149. 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 United States city to do so, passing a resolution expressing solidarity with the plaintiffs. The resolution stated that Berkeley residents “do not wish their city to be a profit center for Bridgestone/Firestone.” See *City Resolutions, Stop Firestone Coalition*, <http://www.stopfirestone.org/action/city-resolutions> (last visited Mar. 18, 2011).

150. See, e.g., *Joint Press Release, Occidental Petroleum Sued in U.S. Courts For Role in Civilian Massacre in Colombia*, GLOBAL EXCHANGE/AMAZON WATCH (Apr. 24, 2003), <http://www.globalexchange.org/countries/americas/colombia/663.html>; see also *Senator Says Wal-Mart Sells Products From Sweatshops*, N.Y. TIMES, Dec. 13, 2007, <http://www.nytimes.com/2007/12/13/business/13ornaments.html>.

151. See, e.g., Press Release, Eleven Members of Congress File Amicus Brief in Support of Bhopal Victims’ Lawsuit (Apr. 4, 2006), [http://www.house.gov/list/press/nj06\\_pallone/pr\\_apr4\\_india.html](http://www.house.gov/list/press/nj06_pallone/pr_apr4_india.html). In 2006, United States 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 United States 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.

152. For example, *Kasky v. Nike, Int’l*, 45 P.3d 243 (2002), 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. The case was premised on allegedly false public statements by the company; Nike strenuously denied the allegations, legally and factually. See Respondents’ Brief on the Merits, *Kasky v. Nike, Inc.*, No. S087859, 2000 WL 1508256 (Cal. Sept. 21, 2000). 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*

from each other.

## 2. Case Variances

In addition to timing considerations, while one or more of the tactics studied appeared in every case, substantial variances in the number and types of tactics exist between cases. In some cases, such as *Doe v. Unocal Corp.*,<sup>153</sup> a well-known matter involving allegations of misconduct by a foreign security force, the study observed numerous tactics by plaintiffs and others. In different cases, such as *Bauman v. DaimlerChrysler Corp.*,<sup>154</sup> involving alleged corporate misconduct during Argentina's "Dirty War," the study identified only four tactics. In some instances, such as the Apartheid litigation, in which the court ordered that the parties not make public statements about the case, or *Flores v. Southern Peru Copper Corp.*,<sup>155</sup> which involved a less well-known corporate defendant and relatively rapid dismissal by the courts related to environmental claims in Peru, the relative paucity of tactics is explicable.<sup>156</sup> For others, the reasons are not readily evident.<sup>157</sup>

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*Dutch Petroleum* moved closer to a scheduled 2009 trial, the plaintiffs began to increase the number of tactics, including the mini-documentary and Internet efforts discussed above. The same is true of other cases, such as *Bowoto v. Chevron Corp.*, also 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 for Chevron in late 2008. 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.*, No. 96 Civ. 8386, 2002 WL 31988 (S.D.N.Y. Feb. 28, 2002). 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.*, No. 99-02506, 2008 WL 4822251 at \*1 (N.D. Cal. Nov. 5, 2008); Corrected Joint Pretrial Conference Statement, *Bowoto v. Chevron Corp.*, No. 99-02506, 2008 WL 4524503 (N.D. Cal. Sept. 26, 2008). The jury found for Chevron. See *Bowoto v. Chevron Corp.*, 2009 WL 593872, at \*1 (Mar. 4, 2009).

153. 963 F. Supp. 880, 883-84 (C.D. Cal. 1997), vacated 403 F.3d 708 (9th Cir. 2005). *Unocal* is a settled case involving alleged misconduct by Burmese security forces in connection with the construction of a pipeline. Unocal asserted that it did not contribute to any wrongful act and bore no responsibility for any harmful conduct allegedly committed by the military forces of a sovereign country. See Defendants/Appellees Consolidated Answering Brief, *Doe v. Unocal Corp.*, Nos. 00-56603 & 00-56628, 2001 WL 34093599 (9th Cir. July 3, 2001).

154. 579 F.3d 1088, 1091 (9th Cir. 2009), vacated, 603 F.3d 1141 (9th Cir. 2010).

155. 414 F.3d 233, 256 (2d Cir. 2003).

156. See John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 6-7 (2009) (discussing the Apartheid litigation); Lucien J. Dhooge, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247 (2009). For a discussion of Flores, see Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 760-762 (2007).

157. In addition, of 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.

### 3. *Litigation as a Tactic and Larger Campaigns*

As a final general observation, it is worth noting the existence of larger campaigns for corporate change, and the use of litigation itself as a tactic. For several of the cases studied, there were extant coordinated efforts against corporations related to the lawsuits themselves.<sup>158</sup> 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 Court of Appeals for the Eleventh Circuit upheld a jury verdict in favor of Drummond in multiple consolidated cases involving murders of union representatives allegedly killed by paramilitary units retained by Drummond at its Columbian coal mine.<sup>159</sup> After the Circuit Court's ruling, the plaintiffs' attorneys filed a substantially similar matter on behalf of the children of the deceased union representatives. The district court dismissed this action,<sup>160</sup> though the Circuit Court has reversed that ruling.<sup>161</sup>

In these subsequently filed actions, it is possible that a likelihood of success on the merits is not the attorneys' primary consideration. Instead, the filing of the litigation may serve as a means of advancing a larger goal of drawing attention to the broader advocacy campaign. As one ATS plaintiff's lawyer stated, "[t]he weakness of most campaigns is that they lack teeth . . . . Using litigation in tandem with a campaign could provide this necessary element."<sup>162</sup> Indeed, there is some evidence that, in deciding whether to pursue transnational tort cases, the ability to launch an effective campaign now seems to be a consideration.<sup>163</sup>

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158. For instance, for the past few years, a labor-related campaign involving protests, boycotts, and other measures against Wal-Mart has gained major press attention. Incidental to that campaign, a lawsuit dismissed by the courts was filed in California in 2005 against Wal-Mart based in part on labor practices at the company's suppliers. *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 Notice of Motion and Motion to Dismiss Plaintiffs' First Amended Complaint, Doe I v. Wal-Mart Stores, Inc.*, No. 05-7307 (C.D. Cal. Feb. 13, 2006). In other corporate campaigns, however, the results differed. For instance, in the labor-oriented campaign Stop Firestone (<http://www.stopfirestone.org>), tactics could be connected to the attorneys involved in the related ATS case *Flomo v. Bridgestone Americas Holding, Inc.*, 492 F. Supp. 2d 988 (7th Cir. 2009) (pending case involving labor conditions on a Liberian rubber plantation). The evidence is unclear as to the reasons for the different approaches in *Wal-Mart* and *Flomo*, since the same plaintiffs' attorneys brought both lawsuits.

159. *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008). Drummond claimed that the alleged violence was caused by third-parties unaffiliated with the company. Defendant's Trial Brief, *Romero v. Drummond*, No. CV-03-BE-0575-W (N.D. Ala. June 15, 2007).

160. *Baloco v. Drummond Co., Inc.*, No. 09-CV-00557 (N.D. Ala.) (filed Mar. 20, 2009 and dismissed Nov. 9, 2009).

161. *Baloco v. Drummond Co., Inc.*, 2011 WL 321646 (11th Cir. Feb. 3, 2011).

162. Holzmeyer, *supra* note 15, at 291 (internal quotation omitted) (discussing NGOs who litigate ATS cases).

163. *Id.*

## III.

## DBCP, CHEVRON IN ECUADOR, AND COCA COLA

Three sets of cases exemplify the use of these tactics: the DBCP litigation arising from Nicaragua, ATS and environmental cases against Texaco-Chevron from Ecuador, and the ATS and non-ATS lawsuits against Coca-Cola from Colombia, Turkey, Guatemala and elsewhere. Each features a multinational litigation strategy by plaintiffs that includes a wide span of out-of-court efforts. In addition, as raised by the DBCP and Ecuador matters, the tactics may contribute to an extant concern about adherence to the rule of law in transnational tort cases given particular judicial susceptibilities to influence in such matters.

A. *DBCP in Nicaragua*<sup>164</sup>

This section first provides a background on the use of DBCP in Nicaragua and litigation in the United States. It then discusses the enactment of a Nicaraguan statute designed to deter dismissals from United States courts, and the range of media, political and other out-of-court tactics employed in Nicaragua and the United States. Finally, it addressed the ensuing findings of misconduct by courts in the United States in direct and judgment enforcement actions.

1. *Background on DBCP in Nicaragua*

For years, planters used DBCP to combat pests that damage the roots of various crops, including bananas, grapes, tomatoes and pineapples.<sup>165</sup> That use continued in the United States until 1977, when the Environmental Protection Agency deregistered DBCP for all crop uses except pineapples.<sup>166</sup>

In 1984, the first round of DBCP litigation premised on overseas use began.<sup>167</sup> Attorneys brought cases in Florida, California, Texas, and elsewhere on behalf of tens of thousands of foreign plaintiffs claiming sterility and other

164. While this section focuses on DBCP litigation from Nicaragua, there is also litigation in the United States over the use of DBCP in the Ivory Coast, Costa Rica, Honduras, Panama, and Guatemala. To date, the problems associated with the Nicaraguan DBCP litigation have not been found in DBCP litigation elsewhere, and this Article should not be construed to suggest otherwise.

165. *Basic information about 1,2-Dibromo-3-chloropropane (DBCP) in Drinking Water*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://water.epa.gov/drink/contaminants/basicinformation/1-2-dibromo-3-chloropropane.cfm> (last visited Mar. 4, 2011). See Rosencranz et al., *supra* note 3, at 164-65.

166. See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009); *An Evaluation of Dibromochloropropane (DBCP)*, CORNELL UNIVERSITY, PROGRAM ON BREAST CANCER AND ENVIRONMENTAL RISKS (July 2004), <http://envirocancer.cornell.edu/FactSheet/pesticide/fs50.dbcp.cfm>.

167. Winston Anderson, *Forum Non Conveniens Checkmated? - the Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 190 (2001).

injuries.<sup>168</sup> Though a few cases resulted in settlements,<sup>169</sup> in large part, courts ruled that the cases were inappropriate attempts to seek justice in the United States,<sup>170</sup> dismissing them on *forum non conveniens* grounds.<sup>171</sup>

## 2. *Nicaraguan Special Law 364*

In Nicaragua, in late 2000, in response to these results, plaintiffs' lawyers and the Asociación de Trabajadores y Ex Trabajadores Afectados por Nemagon-Fumazone (ASOTRAEXDAN, or the Association of Workers and Former Workers Affected by Nemagon) successfully lobbied the Nicaraguan legislature to pass Special Law 364.<sup>172</sup> The law is retroactive in nature.<sup>173</sup>

Special Law 364 specifically addresses the claims of individuals allegedly exposed to and injured by DBCP on banana plantations.<sup>174</sup> It is a "blocking statute"<sup>175</sup> designed to counter *forum non conveniens* dismissals by including numerous provisions that openly aid claimants, thus compelling defendants to

168. See *id.* at 184; see also Rosemary H. Do, *Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light*, 14 SW. J. L. & TRADE AM. 409, 410 (2008) (hundreds of DBCP lawsuits pending in Nicaragua with potential damages estimated at over \$11 billion).

169. See, e.g., *Costa Rica: The Price of Bananas*, ECONOMIST, Mar. 12, 1994.

170. See, e.g., *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985); *Rojas v. Dement*, 137 F.R.D. 30, 32 (S.D. Fla. 1991) ("In *Cabalceta*, Judge Atkins wrote that the actions were "one of the most wide-ranging efforts at forum shopping in legal history.") (quoting *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)). See also Do, *supra* note 168, at 412.

171. See, e.g., *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1362 (S.D. Tex. 1995). See generally Rosencranz et al., *supra* note 3, at 166-67.

172. *Mejia Op.*, *supra* note 4, at 23; M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. INT'L L. & MGMT. REV. 21, 34 (2007); *Victims of Nemagon Hit the Road*, ENVIO MAGAZINE, June 2005, <http://www.envio.org.ni/articulo/2972>.

173. Do, *supra* note 168, at 415.

174. 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).

175. *Osorio*, 665 F. Supp. 2d at 1324 ("Special Law 364 may be properly viewed as a "blocking statute." In this context, a blocking statute is a law that closes the doors of a foreign country's courts to prevent a United States court from finding that an alternative forum exists under the *forum non conveniens* doctrine."). Nicaragua is not alone in passing a blocking statute. See, e.g., Dahl, *supra* note 174, at 22-23; Casey & Ristroph, *supra* note 172. For example, in Guatemala, the government passed a law that withdrew jurisdiction from local courts if a lawsuit had first 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.*

choose between litigating in a forum where the law is stacked against them, or agreeing to litigate in the United States.<sup>176</sup> Such provisions include: an irrefutable presumption of causation where the plaintiffs present medical test results as proof of injuries;<sup>177</sup> the elimination of the statute of limitations for claims by plaintiffs;<sup>178</sup> a requirement that defendants must post a bond of 300,000,000 NCD (approximately 14.6 million dollars) to appear in the case to ensure adequate means of satisfying a judgment;<sup>179</sup> the adoption of the so-called “3-8-3” schedule in which the defendant has three days to answer the complaint, the parties have eight days for discovery, and the judge has three further days to issue a judgment;<sup>180</sup> upon proof of liability, individual plaintiffs are entitled to at least \$100,000 in damages;<sup>181</sup> and highly curtailed appellate procedures, including no ability to appeal a decision to the Nicaraguan Supreme Court.<sup>182</sup>

In addition, telling as to 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.<sup>183</sup> Accordingly, Special Law 364 effectively creates a litigation system that pressures defendants to affirmatively agree to litigate in the United States, or face the prospect of likely judgments in Nicaragua that plaintiffs’ attorneys could then bring to the United States for attempted enforcement.<sup>184</sup> To date, over 10,000 plaintiffs have brought claims under the law, and Nicaraguan judges have awarded over two billion dollars in damages for alleged harms related to sterility and other physical maladies.<sup>185</sup>

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176. See *Osorio*, 665 F. Supp. 2d at 1324 (calling Special Law 364’s terms “onerous”); Rosencranz et al., *supra* note 3, at 167; Casey & Ristroph, *supra* note 172, at 29; Do, *supra* note 168, at 410. As the court in *Osorio* found, however, even where defendants choose to opt-out by refusing to make a required deposit, plaintiffs nonetheless have brought actions in Nicaragua, 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. 665 F. Supp. 2d at 1339.

177. Special Law 364 art. 9

178. *Id.* arts. 6, 14, 15.

179. *Id.* art. 8.

180. *Id.* arts. 6, 14, 15. See Do, *supra* note 168, at 415.

181. Special Law 364 art. 12.

182. *Id.* art. 14.

183. *Id.* art. 7.

184. See generally Paul Santoyo, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine As an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT’L L. 703, 704 (2005). 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. *Osorio*, 665 F. Supp. 2d at 1316. The Nicaraguan Supreme Court originally declared the law unconstitutional. After large-scale marches and protests, the Nicaraguan Supreme Court issued an advisory opinion stating that the law is in fact constitutional, reasoning that Law 364 did not offend due process because the defendants may opt-out of the litigation if they submit to jurisdiction in the United States. *Id.* at 1317-18; see Casey & Ristroph, *supra* note 172, at 35.

185. *Osorio*, 665 F. Supp. 2d at 1312.

### 3. *Influx of Lawyers to Nicaragua and Out-Of-Court Tactics*

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.”<sup>186</sup>

These offices and others have represented thousands of plaintiffs primarily alleging sterility from DBCP.<sup>187</sup> Dominguez and others have staged rallies and demonstrations against the use DBCP and the corporations that allegedly used it. Dominguez rented a football stadium in Nicaragua to hold one such rally.<sup>188</sup> Dominguez also advertised on the radio and broadcast information about DBCP exposure<sup>189</sup> and the potential for a substantial legal recovery.

There have been numerous similar efforts by plaintiffs’ lawyers and other sympathetic groups. ASOTRAEXDAN has organized yearly marches on the capital, and overseen other protests and community organizing events.<sup>190</sup> Other groups have published articles and publicized legal updates related to DBCP in Nicaragua.<sup>191</sup>

Another out-of-court effort was the professional documentary, *BANANAS!\**. The film is a chronicle of Dominguez’s efforts in the DBCP cases:

Juan “Accidentés” Dominguez is on his biggest case ever. On behalf of twelve 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

186. *Mejia Op.*, *supra* note 4, at 24.

187. According to a 2006 public filing by Dole, there were 537 lawsuits against the company at various stages of litigation alleging injury from exposure to DBCP or seeking enforcement of judgments already rendered by Nicaraguan courts. *See* Dole Food Co. Inc., Quarterly Report (Form 10-Q), at 16 (Oct. 7, 2006).

188. Alan Zarembo & Victoria Kim, *L.A. Lawyer Accused of Fraud in Pesticide Litigation*, L.A. TIMES, Aug. 5, 2009, <http://articles.latimes.com/2009/aug/05/local/me-dominguez5>.

189. *Id.*

190. *Victims of Nemagon Hit the Road*, ENVIO MAGAZINE, June 2005, <http://www.envio.org.ni/articulo/2972>.

191. The NGO Alliance for Global Justice, which seeks to create social justice through grassroots organizing, 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.” *See* ALLIANCE FOR GLOBAL JUSTICE <http://www.clrlabor.org/afgj/index.html> (last visited Mar. 4, 2011); *About the Nicaragua Network: Over 30 Years of Solidarity with the People of Nicaragua*, THE NICARAGUA NETWORK, Mar. 27, 2009, <http://www.nicanet.org/?cat=24>. 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 and regularly included updates on the legal proceedings in its weekly “Nicaragua Network Hotline” news bulletin. *See, e.g.*, Press Release, *Nemagon Case Goes to Jury in California!*, THE NICARAGUA NETWORK, Oct. 15, 2007, <http://www.nicanet.org/?p=368>; *Dole Tries to Squash ‘Bananas’; Activists fight back via Internet; Dole drops suit!*, THE NICARAGUA NETWORK, October 13, 2009, <http://www.nicanet.org/?p=839>.

suspenseful documentary *BANANAS!\**, filmmaker Fredrik Gertten sheds new light on the global politics of food.<sup>192</sup>

In June 2009, *BANANAS!\** premiered at the Los Angeles Film Festival and has been screened in Europe, North America, South America and Asia.<sup>193</sup> The makers of the documentary have also used other forms of social media, including a website and Twitter, to gain publicity for the film.<sup>194</sup>

Students at Bucknell University made another documentary, *Missing Seeds*, which focuses on the plight of those in a shantytown that has grown outside of the national legislature in Managua.<sup>195</sup> 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.<sup>196</sup> The documentary features Antonio Hernandez Ordenana, the Nicaraguan law partner of Juan Dominguez,<sup>197</sup> and attributes at least 2500 deaths to DBCP in Nicaragua.<sup>198</sup>

Despite such publicity efforts and other tactics, the plaintiffs' law firms identified relatively few ex-banana plantation workers in Nicaragua, and even fewer who are sterile.<sup>199</sup> According to detailed judicial findings, to circumvent that hurdle, the American and Nicaraguan attorneys involved in the litigation

192. *About the Film, BANANAS!\**, <http://www.bananasthemovie.com/about-the-film> (last visited March 18, 2011).

193. *See Screenings, BANANAS!\**, <http://www.bananasthemovie.com/screenings> (last visited March 18, 2011). 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*, No. BC 417435 (L.A. Sup. Ct. 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." Dole Food Company, Inc., News Release, Dole to Withdraw Defamation Suit, Oct. 14, 2009, <http://www.dole.com/PDFs/dbcp/BananaMoviePressReleaseWithdrawFINAL101409.pdf>. Dole was thereafter fined \$200,000 for legal costs incurred by the filmmakers in defending the lawsuit. Matthew Belloni, *Dole Hit With \$200,000 Penalty Over Movie Lawsuit*, REUTERS, Nov. 28, 2010, available at <http://www.reuters.com/article/2010/11/29/us-dole-idUSTR6AS0S020101129>.

194. Profile of "Bananasmovie," TWITTER, <http://twitter.com/bananasmovie> (last visited Mar. 4, 2011); Bananas!\* Facebook page, FACEBOOK, <http://www.facebook.com/pages/BANANAS/121163091704> (last visited Mar. 4, 2011).

195. *HearOutYellow, Missing Seeds: Part 1*, YOUTUBE (Jan 15, 2009), <http://www.youtube.com/watch?v=5wD7WRLD5ok>.

196. The video, originally published at [www.hearyellow.org](http://www.hearyellow.org), is now available at <http://www.youtube.com/watch?v=5wD7WRLD5ok> and <http://www.youtube.com/watch?v=P-WTda9-faU&feature=channel>.

197. *See* Rosencranz et al., *supra* note 3, at 163 (discussing Dominguez and Ordenana).

198. The documentary also notes that, in addition to sterility, the shantytown residents complain of skin rashes, headaches, blindness, and birth defects; none of those physical conditions are suspected effects of DBCP exposure. *Id.*

199. *Mejia Op.*, *supra* note 4, at 26-27.

engaged in a wide-scale conspiracy to knowingly present overtly false claims, which included teaching impoverished plaintiffs the facts of their “story,” and colluding with Nicaraguan laboratories and at least one Nicaraguan judge to “fix” judgments.<sup>200</sup> In the end, 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.

#### 4. *The Tellez/Mejia Litigation in the United States and the Findings of Fraud*

In 2004, plaintiffs’ attorney Juan Dominguez filed three separate cases on behalf of multiple injured banana workers in Los Angeles County Superior Court: *Mejia v. Dole Food Co.*,<sup>201</sup> *Rivera v. Dole Food Co.*,<sup>202</sup> and *Tellez v. Dole Food Co.*<sup>203</sup> Each sought damages as a result of alleged exposure to DBCP by Nicaraguan banana workers. In May 2007, the court designated the cases “complex cases” and assigned them to Judge Victoria Chaney.<sup>204</sup> To identify and determine the relevant issues, she designated *Tellez* a test case and it proceeded to trial before the others.<sup>205</sup>

At trial, the twelve plaintiffs alleged various injuries as a result of DBCP exposure, including sterility. In November 2007, the jury returned favorable verdicts for six of the twelve plaintiffs.<sup>206</sup> For the six plaintiffs who prevailed, the jury awarded five million dollars in damages, including \$2.5 million in punitive damages against Dole.<sup>207</sup> Judge Chaney subsequently reduced the compensatory award to \$1.58 million and eliminated the punitive damages

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200. As relevant legal findings detail, to identify Nicaraguans who could serve as plaintiffs and train them in the details of their stories, the law firms used local “captains” to find potential plaintiffs, brought them to the law offices, provided them with false documents, took them to banana farms, and provided them with sufficient details about banana farm life to enable them to testify. *Id.* at 24-25, 27-33, 37-38. To help these plaintiffs, the captains created a 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. *Id.* 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*, WALL ST. J., August 19, 2009, <http://online.wsj.com/article/SB125061508138340501.html>. To solidify the claims and satisfy the irrefutable presumption of the causation provision of Special Law 364, the plaintiffs’ lawyers enlisted the aid of local Nicaraguan laboratories to generate false medical reports. *Mejia Op.*, *supra* note 4, at 30, 37-38.

201. *Mejia v. Dole Food Co.*, No. BC 340049 (L.A. Sup. Ct. June 17, 2009).

202. *Rivera v. Dole Food Co.*, No. BC 379820 (L.A. Sup. Ct. June 17, 2009).

203. *Tellez v. Dole Food Co.*, No. BC 312 852 (L.A. Sup. Ct. Mar. 7, 2008).

204. *Mejia Op.*, *supra* note 4, at 5.

205. *Id.* at 5-6.

206. *Id.*

207. Dole Food Company, Inc., News Release, Dole Food Company, Inc. Wins Court Rulings, Mar. 10, 2008, <http://www.dole.com/servedocument.aspx?fp=documents/dole/punitive-damages-verdict.pdf>; Rosencranz et al., *supra* note 3, at 161.

against Dole.<sup>208</sup> While the plaintiffs' judgment was on appeal, and *Mejia* and *Rivera* were proceeding toward trial, Dole discovered and notified the court of the misconduct in Nicaragua, and Judge Chaney stayed the litigation and ordered that fraud discovery proceed.<sup>209</sup>

In April 2009, after a three-day hearing, Judge Chaney dismissed the plaintiffs' claims.<sup>210</sup> 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 had never been employed at the plantations, and explained the recruitment scheme involving the local captains working in concert with Dominguez and others.<sup>211</sup> 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.<sup>212</sup> She found that Dominguez and his Nicaraguan law partner obstructed justice and abused the judicial process, including: suborning perjury, bribing and intimidating witnesses, intimidating defense investigators, and making false allegations of bribery against the defendants.<sup>213</sup> Judge Chaney also found that there was a "broader conspiracy that permeates all DBCP litigation arising from Nicaragua,"<sup>214</sup> naming other lawyers and firms not involved in *Mejia*, *Rivera* or *Tellez* as playing roles,<sup>215</sup> and ruled 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."<sup>216</sup> Judge Chaney finally noted, "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

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208. See *id.*; Rosencranz et al., *supra* note 3, at 162. Judge Chaney 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 (L.A. Super. Ct. Mar. 7, 2008) (trial order).

209. *Mejia Op.*, *supra* note 4, at 10.

210. See generally *id.* 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." *2009's 100 Most Influential People in Business Ethics*, ETHISPHERE, Dec. 16, 2009, available at <http://ethisphere.com/2009s-100-most-influential-people-in-business-ethics/>. Part of the article featured a segment called *Learning from Others' Mistakes: 2009's Top 10 People We Won't Miss*, ETHISPHERE lists Dominguez ahead of the former anti-corruption chief of Indonesia, 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. *Id.*

211. *Mejia Op.*, *supra* note 4, at 1, 24-26.

212. *Id.* at 24-28, 38-39.

213. *Id.* at 41-50. Dole investigators reported receiving threats against their lives, "wanted" posters featuring a drawing of one investigator, and radio broadcasts warning citizens not to cooperate with the Dole investigators and threatening harm if they did. False criminal charges were also pressed against the Dole investigators. *Id.* at 46-50.

214. *Id.* at 1.

215. *Id.* at 2, 3, 24, 27-29.

216. *Id.* at 58.

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.”<sup>217</sup>

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 should not also be dismissed.<sup>218</sup> After several hearings, Judge Chaney dismissed the *Tellez* case in July 2010, noting that the case was rife with “blatant fraud, witness tampering, and active manipulation.”<sup>219</sup> Significantly for this Article, Judge Chaney also found that the Nicaraguan court system “is, at best, fragile in its ability to present consistent rule of law and outcomes” and that “while many Nicaraguans live in relative poverty and with limited economic opportunity, “[t]his lawsuit is not the appropriate vehicle to rectify this situation.”<sup>220</sup>

### 5. *Rulings by United States Courts in Judgment Enforcement Actions*

The efforts to enforce judgments issued in Nicaragua under Special Law 364 have had similar problems. In August 2007, a group of 150 alleged former Nicaraguan banana workers claiming DBCP exposure filed suit in Florida state court to enforce a ninety-seven million dollar Nicaraguan judgment. They obtained the judgment under Special Law 364.<sup>221</sup> The same judge that Judge Chaney found participated in the conspiracy to “fix” Nicaraguan cases under Special Law 364 issued the judgment.<sup>222</sup>

217. *Mejia v. Dole Food Co. & Rivera v. Dole Food Co.*, Nos. BC340049, BC379820 (L.A. Sup. Ct. Apr. 23, 2009) (Oral Ruling at 15).

218. *Dole Food Co. v. Tellez*, No. B216182, B216264 (L.A. Sup. Ct. July 7, 2009) (order to show cause). Recently, plaintiffs have launched allegations that Dole investigators bribed witnesses as part of the fraud investigation, which Dole denies. See Marcos Aleman, *Nicaraguan Workers Deny Conspiracy Against Dole*, ASSOCIATED PRESS, May 14, 2010.

219. Dole Food Company, Inc., Press Release, *Dole Food Company, Inc. Announces Los Angeles Superior Court Vacates Judgment and Dismisses Fraudulent Lawsuit Brought by Nicaraguans Claiming to Have Been Banana Workers*, July 15, 2010, <http://www.dole.com/CompanyInformation/PressReleases/PressReleaseDetails/tabid/1268/Default.aspx?contentid=11722>.

220. *Id.* Additionally, alluding to certain types of lawsuits considered “impact litigation,” the Judge further observed that “[c]ivil actions are sometimes brought to induce social change. This is neither the platform nor the time to discuss using the court system to bring about different policies that affect society in general.” *Id.*

221. *Osorio*, 665 F. Supp. 2d at 1320. See generally John R. Crook, *U.S. District Court Refuses Enforcement of Nicaraguan Judgment, Finding Absence of International Due Process*, 104 AM. J. INT’L L. 105, 105 (2010).

222. See Rosencranz et al., *supra* note 3, at 176. During the proceedings, the trial court barred introduction of 151 birth certificates showing that the allegedly infertile plaintiffs had fathered children after their alleged exposure to DBCP. Crook, *supra* note 221, at 106; see also Do, *supra* note 168, at 416 (indicating that many United States-based corporate defendants “sued under Nicaraguan Special Law No. 364 did not participate in the litigation process,” most likely because “the Nicaraguan court refused to hear legal arguments or accept contrary proof,” with “none of the

After the defendants removed the case to the United States District Court for the Southern District of Florida in October 2009, in *Sanchez Osorio v. Dole Food Co.*,<sup>223</sup> Judge Paul Huck issued an opinion refusing to enforce the Nicaraguan court judgment.<sup>224</sup> In addition to finding that Nicaraguan courts lacked jurisdiction over the defendants, Judge Huck ruled that Special Law 364 denied defendants basic due process,<sup>225</sup> citing among other things Special Law 364's "irrefutable presumption" that DBCP exposure caused plaintiffs' sterility, a presumption Judge Huck found was "the antithesis of basic fairness."<sup>226</sup> 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."<sup>227</sup> Judge Huck also noted the "unanimous view among United States government organizations and officials (including United States ambassadors to Nicaragua), foreign governments, international organizations, and credible Nicaraguan authorities . . . is that the judicial branch in Nicaragua is dominated by political forces and, in general, does not dispense impartial justice."<sup>228</sup> Indeed, he wrote that the underlying trial in Nicaragua was conducted in an "ad hoc, unpredictable, discriminatory, and confusing manner."<sup>229</sup>

Another DBCP enforcement action, *Franco v. Dow Chemical Co.*,<sup>230</sup> also revealed troubling findings of ethical breaches. *Franco* was an action filed in Los Angeles by United States lawyers to enforce a \$489 million DBCP judgment obtained in Nicaragua.<sup>231</sup> In October 2009, Senior Judge A. Wallace Tashima, appointed as Special Master by the United States Court of Appeals for the Ninth Circuit, issued an amended Report and Recommendation suggesting fines against the United States lawyers in amounts totaling nearly \$400,000.<sup>232</sup> He found that the "sanctions are justified in this case because Respondents' filings," claiming that the Nicaraguan court issued the judgment against an

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multinational defendants participated in this proof process.").

223. 665 F. Supp. 2d 1307 (S.D. Fla. 2009). For a discussion of *Osorio*, see Crook, *supra* note 221.

224. *Osorio*, 665 F. Supp. 2d at 1351-52. 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. *Id.* at 1311 n.1.

225. *Id.* at 1327-45.

226. *Id.* at 1335.

227. *Id.* at 1345 (internal cites omitted).

228. *Id.* at 1349.

229. *Id.* at 1343. Judge Huck's opinion did not consider the fraud issues raised in the proceedings before Judge Chaney. *Id.* at 1312, 1321 n.7. He instead 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.

230. 2003 WL 24288299 (C.D. Cal. 2003).

231. *Report & Recommendation*, *supra* note 5, at 10.

232. *Id.* at 64-65.

entity not in the case,<sup>233</sup> were “made in bad faith” and “recklessly and intentionally misled this Court.”<sup>234</sup> Judge Tashima deemed the lawyers’ factual contentions so baseless as to “provide objective evidence of improper purpose.”<sup>235</sup> The Report and Recommendation concluded that the lawyers’ “efforts went beyond the use of ‘questionable tactics’ – they crossed the line to include the persistent use of known falsehoods . . . .”<sup>236</sup> The United States Court of Appeals for the Ninth Circuit formally reprimanded the lead attorneys, and suspected two lawyers for six months.<sup>237</sup>

At this juncture, as Judge Chaney implied and others have stated,<sup>238</sup> the tactics of the plaintiffs and their lawyers have now rendered all of the Nicaraguan DBCP cases suspect. It is possible, if not likely, that the substantial publicity efforts and other tactics instilled a hope for a monetary recovery in the plaintiffs’ that led them to participate in the scheme, and may have impacted a judiciary “that is, at best, fragile in its ability to present consistent rule of law and outcomes.” Certainly, the legislative and political efforts helped enact a law that is not likely to lead to enforceable judgments in the United States, as *Osorio* indicates. The actions in *Franco* only contributed to the suspicion of DBCP decisions from Nicaragua. In all, the tactics employed by plaintiffs’ attorneys in the Nicaraguan DBCP cases, coupled with other factors, appears to have caused the plaintiffs far more harm than good.

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233. *Id.* at 5.

234. *Id.* at 49 (citations omitted).

235. *Id.* at 53.

236. *Id.* at 62-63.

237. *In re Girardi*, Nos. 08-80090, 03-57038, slip op. at 10011 (9th Cir. July 13, 2010). Although the judicial findings of misconduct, to date, have been limited to Nicaragua, there are hints of similar problems in cases arising from at least one other locale. 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. *Abagninin v. Amvac Chem. Corp. Inc.*, No. BC 359259 (L.A. Sup. Ct. May 18, 2009) (Dole Defendants Proposed Agenda of Issues for May 19, 2009 Status Conference and attached affidavit), available at <http://amlawdaily.typepad.com/Agenda.pdf>. 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.” David Bario, *Gibson Dunn Knocks Out African Pesticide Case For Dole*, AMLAW LITIGATION DAILY, November 19, 2009, [www.law.com/jsp/tal/digestTAL.jsp?id=1202435667127](http://www.law.com/jsp/tal/digestTAL.jsp?id=1202435667127). The judge then dismissed the case when the plaintiffs, hundreds of peasants, failed to find new counsel or appear themselves. *Id.* In addition, in DBCP cases arising from non-Nicaraguan locations, the plaintiffs’ attorneys have filed a series of copycat cases, each with just under one hundred class members to avoid the one hundred 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. Mar. 9, 2009); *Tanoh v. AMVAC Chemical Corp.*, 2008 WL 4691004, at \*5 (C.D. Cal. Oct. 21, 2008). See also *Tonah v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009). Defendants have settled, and offered to settle, other DBCP claims without admitting liability. See, e.g., Richard Clough, *Doe Proposes New Settlements*, L.A. DAILY BUS. J., May 31, 2010, <http://labusinessjournal.com/news/2010/may/31/dole-proposes-new-settlements>.

238. See Rosencranz et al., *supra* note 3, at 166-67.

### B. Chevron in Ecuador

Although the underlying facts and case postures in the Nicaraguan DBCP cases differ widely from the series of matters surrounding the claims against Texaco in Ecuador, some of the same legal and non-legal patterns are present.<sup>239</sup> These include some of the same out-of-court tactics, as well as troubling evidence and court findings of impropriety. This section first discusses the factual and legal background, then the litigation and out-of-court tactics in Ecuador, and a related case, *Gonzales v. Texaco*,<sup>240</sup> filed in the United States.

#### 1. Background

In 1964, TexPet, a Texaco subsidiary, acquired the right to explore and drill for oil in Ecuador's Oriente region.<sup>241</sup> Throughout the 1970s and 1980s, operating under an oil concession granted by the government of Ecuador, TexPet drilled in Ecuador as part of a consortium consisting of Texaco and Gulf Oil subsidiaries.<sup>242</sup> Ecuador subsequently joined the consortium and granted its state oil company, CEPE (which later became Petroecuador), a 25 percent ownership interest.<sup>243</sup> In 1976, Ecuador purchased Gulf's interest in the consortium, thereby becoming the majority owner with 62.5 percent.<sup>244</sup> At the time, TexPet held a 37.5 percent interest in the consortium.<sup>245</sup> 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, then Petroecuador, became the operator.<sup>246</sup> In 1992, TexPet relinquished its interests in the consortium and Petroecuador assumed sole ownership.<sup>247</sup>

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239. The Plaintiffs' advocates accuse Chevron of using some of the same tactics discussed below. See *Chevron's Ten Biggest Lies About Ecuador*, AMAZON WATCH (Spring 2009), <http://amazonwatch.org/documents/ecuador-press-kit/chevrons-top-ten-lies-long.pdf>. Indeed, while this Article focuses on plaintiffs' tactics and their implications for companies doing business overseas, Chevron has pursued sustained and visible efforts on the Internet, in the media, politically in the United States, and elsewhere in response to the plaintiffs' tactics and to substantiate their position that the legal system in Ecuador is strongly and unfairly tilted against them.

240. *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA (N.D. Cal. Aug. 2 2007).

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

242. *In re Application of Chevron Corp.*, 2010 WL 1801526, at \*1; Chevron Corp., *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, <http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf>, at 2 ("Chevron Corp."); *Texaco in Ecuador Timeline*, <http://www.texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx> (last visited Mar 22, 2011).

243. Chevron Corp., *supra* note 242, at 2.

244. *See id.*

245. *Id.*

246. *Id.*; see also *In re Application of Chevron Corp.*, 2010 WL 1801526, at \*1

247. *In re Application of Chevron Corp.*, 2010 WL 1801526, at \*1.

As the oil concession was ending, TexPet, Petroecuador, and the government of Ecuador agreed to divide the responsibility for environmental remediation. Petroecuador allegedly declined to remediate its share of the operations' environmental impact while the government of Ecuador directed TexPet to remediate its portion and leave Petroecuador's portion for Petroecuador to complete at a later date.<sup>248</sup> In 1998, TexPet completed a forty million dollar environmental remediation program conducted through independent contractors; representatives of Petroecuador and the Ecuadorian government certified the work.<sup>249</sup> Also in 1998, TexPet and the government, and TexPet and Petroecuador, entered into separate releases with the government, and Petroecuador discharged TexPet from liability for environmental damage.<sup>250</sup>

## 2. *Series of Lawsuits*

Plaintiffs in Ecuador have filed three primary lawsuits against Chevron/Texaco involving many of the same lawyers and issues. In short, the plaintiffs claim that TexPet engaged in improper byproduct disposal techniques,<sup>251</sup> which contaminated nearby water sources and diffused the Oriente region with carcinogenic toxins.<sup>252</sup> That set of allegations is at the core of each of the major legal actions.<sup>253</sup>

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248. Chevron Corp., *supra* note 242, at 3.

249. See *id.*; see also Chevron Corp. v. Donziger, 2011 WL 778052, \*5 (Mar. 7, 2011) (discussing the final release). 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.

250. *In re* Application of Chevron Corp., 2010 WL 1801526, at \*1-2; Chevron Corp., *supra* note 242, at 3.

251. See Second Amended Complaint at 1, *Gonzales*, No. C 06-02820 WHA.

252. 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. 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,'* AMAZON POST, Apr. 29, 2010, <http://theamazonpost.com/tag/petroecuador>; *Ecuador Lawsuit Myths*, AMAZON POST, Oct. 23, 2009, <http://theamazonpost.com/category/ecuador-lawsuit-myths>.

253. The plaintiffs have not filed actions against Petroecuador, though Petroecuador was the majority partner in the consortium, has been solely responsible for oil production in the area since 1992, and has a dubious environmental record. The plaintiffs 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 & Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, N.Y. TIMES, May 14, 2009, [http://www.nytimes.com/2009/05/15/business/global/15chevron.html?\\_r=1](http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1). Apparently, the plaintiffs promised the Government of Ecuador that they would not sue Petroecuador to win the Government's support in the lawsuits. See Paul M. Barrett, *Amazon Crusader. Chevron Pest. Fraud?*, BLOOMBERG BUS. WEEK, Mar. 9, 2011.

*a. Aguinda v. Texaco*

In 1993, public interest attorneys Cristobal Bonifaz and Steven Donziger, along with others, filed an ATS action, *Aguinda v. Texaco*, in the United States federal district court in Manhattan premised on Texaco's activities in Ecuador.<sup>254</sup> The Philadelphia-based plaintiffs' firm Kohn, Swift & Graf PC financed the suit.<sup>255</sup> In 1994, Bonifaz filed a similar action, *Ashanga Jota v. Texaco*,<sup>256</sup> on behalf of indigenous peoples in Peru, alleging that Texaco's practices in Ecuador polluted a river and thereby impacted the plaintiffs' livelihood.

When Bonifaz filed *Aguinda*, the Frente de Defensa de la Amazonia ("Amazon Defense Front") was formed to support the action.<sup>257</sup> The group purports to be "part of a regional, national and global struggle for environmental and collective rights in the Ecuadorian Amazon."<sup>258</sup> Bonifaz represented the Amazon Defense Coalition until 2006.<sup>259</sup>

In 1996, the court dismissed the *Aguinda* and *Jota* lawsuits on *forum non conveniens* grounds.<sup>260</sup> In 2002, after trial and appellate court proceedings that required Texaco to stipulate to jurisdiction in Ecuador as part of a *forum non*

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

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

256. No. 94 Civ. 9266 (JSR) (S.D.N.Y. 1998). *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, 65 (S.D. Tex 1994).

257. See *Communities Mobilize Against Chevron*, CHEVRONTOXICO, <http://chevrontoxico.com/about/affected-communities/communities-mobilize-against-chevron.html> (last visited Mar. 22, 2011) (Frente formed in 1993); see also Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 2-3, *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA (N.D. Cal. Nov. 15, 2007) (Frente formed in 1994); *Amazon Defense Coalition, Who We Are*, TEXACOTOXICO, <http://www.texacotoxico.org/eng/node/1> (last visited Mar. 22, 2011).

258. See *Amazon Defense Coalition, Who We Are*, *supra* note 257.

259. There are some claims that a plaintiff's attorney formed the group. See The Blog Report With Zennie62, *Amazon Defense Coalition is Foreign Nonprofit Corporation*, SAN FRANCISCO CHRONICLE, Nov. 12 2009, [http://www.sfgate.com/cgi-bin/blogs/abraham/detail?blogid=95&entry\\_id=51564](http://www.sfgate.com/cgi-bin/blogs/abraham/detail?blogid=95&entry_id=51564). Bonifaz and others dispute that claim. See *Communities Mobilize Against Chevron*, *supra* note 257; Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 2-3, *Gonzales*, No. C 06-02820 WHA.

260. 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. Declaration of Cristobal Bonifaz in Support of Plaintiffs' Renewed Motion To Proceed With Action Using Pseudonyms, at 3, *Gonzales*, No. C 06-02820 WHA. 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*, 945 F. Supp. at 625. 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).

*conveniens* ruling, the United States Court of Appeals for the Second Circuit finally dismissed the case.<sup>261</sup> 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.

*b. Lago Agrio Litigation*

In 2003, with Bonifaz's assistance, Plaintiffs filed the Ecuador matter against Chevron<sup>262</sup> in Lago Agrio.<sup>263</sup> The Amazon Defense Coalition, represented by Bonifaz when the case was filed, is the named beneficiary of the lawsuit.<sup>264</sup> As with the *Aguinda* case, Kohn, Swift & Graf PC financed the lawsuit.<sup>265</sup>

Akin to the litigation under Special Law 364, the Lago Agrio Complaint is premised in part on Article 43 of an Ecuadorian law, the Environmental Management Act ("EMA"), that Bonifaz and other lawyers in the matter

261. 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 was 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).

262. In 2006, the Amazon Defense Coalition terminated Cristobal Bonifaz. A resolution regarding his termination cited that Bonifaz's actions were "unilaterally decided and personal" and 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 WL 3036093 \*2 (N.D. Cal. Oct. 16, 2007).

263. 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 United States-Ecuador Bilateral Investment Treaty, and also violated provisions of the Treaty itself. In late 2009, Ecuador filed an action in the United States District Court for the Southern District of New York to enjoin the arbitration from proceeding. See *Petition to Stay Arbitration, Republic of Ecuador v. Chevron Corp.*, No. 09 Civ. 09958 (S.D.N.Y. Dec. 3, 2009). The court rejected the petition 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*, WSJ ONLINE, Mar. 30, 2010.

264. 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." See *Amazon Defense Coalition, Who We Are*, *supra* note 257.

265. See *Chevron Corp.*, 2011 WL 778052 at \*17. 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." *Chevron Corp.*, *supra* note 242, at 1. According to reports, Kohn Swift has ceased financing the action, noting their concern regarding recent actions by the plaintiffs' attorneys and findings by courts, discussed below. See Barrett, *supra* note 253.

“substantially drafted and . . . procured.”<sup>266</sup> Enacted in 1999, after TexPet completed its Ecuadorian operations and cleanup efforts, the law gave individuals the ability to sue in Ecuador for “environmental remediation of public land.”<sup>267</sup> As a United States federal court recently found, the lawyers worked to enact the law because, in having to litigate in Ecuador, “which had no class actions and thus no vehicle for the sort of giant” litigation found in the United States, they “intended the EMA to provide a basis for suing in Ecuador to recover billions in damages in the absence of any other vehicle for doing so.”<sup>268</sup>

That vehicle led the plaintiffs to their desired result. Recently, a local Lago Agrio court awarded nearly \$9 billion in damages against Chevron.<sup>269</sup> The ruling included a punitive damages provision that, unless Chevron apologized publicly within fifteen days, the award would double.<sup>270</sup> Chevron did not issue an apology,<sup>271</sup> and the award now exceeds \$18 billion. Chevron states that it will appeal the judgment, while the plaintiffs state that they will appeal to seek a higher award.<sup>272</sup>

Accompanying the Lago Agrio litigation, and perhaps contributing to the judgment, have been a variety of out-of-court tactics by the parties, including the plaintiffs in particular,<sup>273</sup> “to pressure the company into settling.”<sup>274</sup> In the United States, with the help of public relations personnel and lobbyists,<sup>275</sup> the plaintiffs’ attorneys have testified at largely sympathetic congressional hearings,<sup>276</sup> and obtained letters and other supportive statements from United

266. *Chevron Corp.*, 2011 WL 778052 at \*5-6.

267. *Chevron Corp.*, *supra* note 242; *see Chevron Corp.*, 2011 Westlaw 778052, at \*5-6. 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.*, *supra* note 242, 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.

268. *Chevron Corp.*, 2011 Westlaw 778052, at \*6, \*22.

269. *Id.* at \*22.

270. *Id.*

271. *Id.*

272. Barrett, *supra* note 253.

273. *Chevron Corp.*, 2011 Westlaw 778052 at \*7; *see In re Application of Chevron Corp.*, 2010 Westlaw 4910248, \*12 (Nov. 10, 2010).

274. David Baker, *Chevron Braces for Protests at Annual Meeting*, S.F. CHRON., May 27, 2009 (discussing “coordinated campaign to pressure the company into settling a landmark lawsuit in Ecuador”).

275. *Trial Lawyers Bankroll Lawsuit, Bank on Payday*, THE AMAZON POST, Dec. 9, 2009, <http://theamazonpost.com/news/trial-lawyers-bankroll-lawsuit-bank-on-payday>. The plaintiffs also assembled a powerful public relations and lobbying team to assist in their efforts. Kenneth P. Vogel, *Chevron’s Lobbying Campaign Backfires*, POLITICO.COM, Nov. 16, 2009, <http://www.politico.com/news/stories/1109/29560.html>.

276. Statement by Steven R. Donziger to the Tom Lantos Human Rights Commission (Apr. 28,

States politicians.<sup>277</sup>

In addition, the Amazon Defense Coalition and its counterpart in the United States, Amazon Watch, run a substantive joint Internet campaign called *ChevronToxico, The Campaign for Justice in Ecuador*.<sup>278</sup> It includes fact sheets, press kits, press releases, letter writing and other social organizing campaigns, news items, photos, videos, and plaintiffs' court documents. 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*, which houses opinion pieces and commentaries, news items, videos, and links back to ChevronToxico and other plaintiffs' websites.<sup>279</sup> It also includes mini-reports on different topics, such as health impacts, waste pits, and community mobilization in Ecuador.<sup>280</sup> It also has called for boycotts and other organizing efforts, and encourages viewers to support and publicize the Internet campaign on social media.<sup>281</sup>

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2009), <http://chevrontoxico.com/assets/docs/20090428statement-by-stein-donziger.pdf>.

277. Michael Isikoff, *A \$16 Billion Problem*, NEWSWEEK, July 26, 2008; *U.S. Congressman Jim McGovern: Chevron's Legacy in Ecuador Left Me 'Angry and Ashamed'*, THE CHEVRON PIT BLOG, Dec. 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](http://www.politico.com/static/PPM136_091112_sanchez_colleague.html). On a local level in the United States, plaintiffs have also succeeded in pressing a local government to pass a resolution against Chevron. See Recommendation to the Hon. Mayor and Members of the City Council of Berkeley, California, from the Peace and Justice Commission (Jan. 29, 2008), <http://chevrontoxico.com/assets/docs/berkeley-resolution.pdf>.

278. CHEVRONTOXICO, <http://www.chevrontoxico.com> (last visited April 6, 2011). Amazon Watch is a San Francisco-based group whose mission is 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." See *About Us*, AMAZON WATCH, <http://amazonwatch.org/about> (last visited Mar. 9, 2011). Amazon Watch also is a sponsor of the True Cost of Chevron campaign, which focuses on the Lago Agrio litigation and 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." Antonia Juhasz, *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 Antonia Juhasz, *The True Cost of Chevron: An Alternative Annual Report* (May 2010), <http://truecostofchevron.com/2010-alternative-annual-report.pdf>. Amazon Defense Coalition maintains its own website, called TexacoToxico (<http://www.texacotoxico.org/eng>), which maintains similar types of information. See, e.g., Lago Agrio Team, Amazon Def. Coal., *Rainforest Catastrophe: Chevron's Fraud and Deceit in Ecuador*, (Nov. 2006), <http://chevrontoxico.com/assets/docs/fraud-invest-report-nov.pdf>.

279. CHEVRON IN ECUADOR, <http://www.chevrontoxico.com> (last visited April 6, 2011). Chevron has its own website with documents and information about the case. See *Ecuador Lawsuit*, CHEVRON CORPORATION, <http://www.chevron.com/ecuador> (last visited Mar. 9, 2011). It also maintains the Amazon Post, a website with news and information. See AMAZON POST, <http://theamazonpost.com> (last visited Mar. 9, 2011).

280. *About the Campaign*, CHEVRONTOXICO, <http://chevrontoxico.com/about> (last visited Mar. 9, 2011).

281. A variety of other NGOs have expressed support or lent assistance in various capacities in

More recently, the 2009 documentary *Crude*,<sup>282</sup> directed and produced by Joe Berlinger, has increased publicity for the case. In 2005, a Lago Agrio plaintiffs' lawyer 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."<sup>283</sup> The result was *Crude*, a film describing 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."<sup>284</sup> Though it intersperses occasional responses from Chevron personnel, the film primarily follows the plaintiffs' lawyers as they develop and implement litigation, media, tactical, and political strategies.<sup>285</sup> The movie begins, for instance, with a plaintiffs' lawyer taking Lago Agrio residents to a Chevron shareholders meeting, scripting the speech they will deliver and helping them prepare their comments. Other scenes show the lawyer meeting with public relations personnel, and escorting Ecuador President Rafael Correa and Trudie Styler, wife of the musician Sting, to Lago Agrio. Berlinger also apparently removed at least one scene at the request of the plaintiffs' lawyers, which they deemed unhelpful to the case.<sup>286</sup>

Other visual media include videos on YouTube about the Lago Agrio

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the United States and elsewhere. See, e.g., *Mr. Watson: Do the Right Thing in Ecuador!*, EARTHRIGHTS INT'L (Jan. 13, 2010), <http://www.earthrights.org/campaigns/mr-watson-do-right-thing-ecuador>; *Chevron (CVX) in the Amazon – Oil Rights or Human Rights? Texaco's legacy, Chevron's responsibility*, AMNESTY INT'L, <http://www.amnestyusa.org/business-and-human-rights/chevron-corp/chevron-in-ecuador/page.do?id=1101670> (last visited Mar. 9, 2011); *The Chevron Program*, GLOBAL EXCHANGE, <http://www.globalexchange.org/campaigns/chevronprogram> (last visited Mar. 9, 2011).

282. CRUDE: THE REAL PRICE OF OIL, <http://www.crudethemovie.com> (last visited Mar. 9, 2011). Chevron has, apparently, commissioned a documentary that describes the litigation from its standpoint. See *Chevron Corp. v. Berlinger*, 629 F.3d 297, 309 n.6 (2d Cir. 2011). That movie does not appear to have received the same level of publicity as *Crude*.

283. *In re Application of Chevron Corp.*, 2010 WL 1801526, at \*3 (S.D.N.Y. May 6, 2010) (quoting a declaration submitted by Berlinger). See also *Chevron Corp.*, 629 F.3d at 300 (noting that changes were made to the film at the plaintiff's request).

284. *Production Notes*, CRUDE: THE REAL PRICE OF OIL, <http://www.crudethemovie.com/blog/wp-content/uploads/2009/08/CRUDE-Press-Kit-081909.pdf> (last visited Mar. 9, 2011). 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.

285. See *Chevron Corp.*, 2010 WL 1801526, at \*11 (stating that "[p]laintiffs' counsel indeed are on the screen throughout most of *Crude*"); see also *Chevron Corp.*, 629 F.3d at 309 n.5 (upholding district court's rejection of "self-serving testimony" of Berlinger that the movie would be a "human rights advocacy film") (internal quotations omitted).

286. The scene shows the assistant of the supposed independent expert appearing jointly with plaintiffs' attorneys. See *Chevron Corp.*, 2010 WL 1801526, at \*4; see also *Chevron Corp.*, 629 F.3d at 309. 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 . . ." *Throw a CRUDE House Party!*, CHEVRONTOXICO, <http://chevrontoxico.com/take-action/crude-house-party.html> (last visited Feb. 6, 2011). Other plaintiffs' and plaintiff-friendly websites also advertise *Crude*.

litigation specifically, and Chevron's actions in Ecuador generally, that the plaintiffs and their advocates created. To appear in those documentaries and videos, and otherwise lend support, the plaintiffs have recruited celebrities and other high profile personalities, including Styler, Daryl Hannah, Cary Elwes, and Bianca Jagger.<sup>287</sup>

Plaintiffs and their advocates and supporters likewise have appeared multiple times on television and radio news channels to provide interviews or commentary on the Lago Agrio litigation.<sup>288</sup> Perhaps most well-known was a 2009 episode on the news program *60 Minutes*, which featured the plaintiffs' attorneys, some responses from Chevron, and a purported study of the litigation.<sup>289</sup> The Columbia Journalism Review sharply criticized the program; 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. The Review accused the segment of unfairly downplaying the role of Petroecuador, and all but omitting any mention of Petroecuador's poor environmental record. It called the segment "an exercise in innuendo," concluding that, "even in these days of cutbacks to news operations, *60 Minutes* could have—and should have—done better."<sup>290</sup> Frequent interviews, profiles, and opinion editorials also have appeared in print and online news media.<sup>291</sup>

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287. Derek Markham, *Activist Invites 6,000 Chevron Employees to Watch CRUDE Documentary*, TWILIGHT EARTH, <http://www.twilightheart.com/activism/activist-invites-6000-chevron-employees-to-watch-crude-documentary> (last visited Feb. 6, 2011); *Eye on the Amazon: The Monthly Newsletter of Amazon Watch*, AMAZON WATCH (June 2007), [http://www.amazonwatch.org/newsletter/newsletterPHP/newsletter\\_09.php](http://www.amazonwatch.org/newsletter/newsletterPHP/newsletter_09.php); Duncan Campbell, *Bianca Jagger Shares Honour*, GUARDIAN, Oct. 8, 2004, available at <http://chevrontoxico.com/news-and-multimedia/2004/1008-bianca-jagger-shares-honour.html>; *Bianca Jagger Promotes Lawsuit Against ChevronTexaco in Ecuador*, ASSOCIATED PRESS, Oct. 10, 2003, available at <http://chevrontoxico.com/news-and-multimedia/2003/1010-bianca-jagger-promotes-lawsuit-against-chevron.html>; Michael Liedtke, *Bianca Jagger Speaks About Ecuadorean Health at Chevron Texaco Annual Meeting*, ASSOCIATED PRESS, April 28, 2004, available at <http://chevrontoxico.com/news-and-multimedia/2004/0428-bianca-jagger-speaks-about-Ecuadorian-health-at-chevron.html>; *ChevronTexaco: Clean Up Ecuador TV Ad*, CHEVRONTOXICO (Dec. 2002), <http://chevrontoxico.com/news-and-multimedia/video.html>.

288. Chevron representatives do not appear to have sought the same type of visual media exposure as have the plaintiffs, though they have issued press releases and statements that have been picked up by print media.

289. *Amazon Crude*, CBS NEWS.COM (May 4, 2009), <http://www.cbsnews.com/video/watch/?id=4988079n>.

290. Martha Hamilton, *How 60 Minutes Missed on Chevron*, COLUM. JOURNALISM REV., Apr. 14, 2010. According to one website, after the *60 Minutes* piece, ChevronToxico.com had an increase in internet traffic of 350%. See Phil Robibero, *Chevron and the Amazon*, MAKE MEDIA MATTER BLOG (June 5, 2009), <http://www.ifc.com/makemediamatter/blog/2009/06/cevron-and-amazon.php>. The extent to which plaintiffs' representatives and attorneys secured those appearances or influenced their content – as opposed to their arising organically – is not known.

291. See, e.g., 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); Steven Donziger, *The Chevron Way*, FORBES.COM (Sept. 16, 2009), <http://www.forbes.com/2009/09/16/chevron-texaco-crude-amazon-ecuador-opinions->

The plaintiffs further have engaged in a variety of investment-related tactics. They seem to organize such efforts around shareholder meetings, 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.<sup>292</sup> Other efforts appear to include targeting institutional investors for divestment in order to question Chevron's litigation approach,<sup>293</sup> and introducing resolutions at Chevron shareholder meetings.<sup>294</sup>

A number of tactics also have been visible in Ecuador that, like the DBCP-Nicaragua matters, are particularly troubling from a rule of law standpoint.<sup>295</sup> The plaintiffs' attorneys, according to judicial findings, "have orchestrated a campaign to intimidate the Ecuadorian judiciary."<sup>296</sup> On a political level, the plaintiffs solicited and obtained the support of the Correa Socialist

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contributors-steven-donziger.html (commentary by Steven Donziger); Bret Stephens, *Amazonian Swindle, Daryl Hannah goes to Ecuador and Gets in Over Her Head*, WALL ST. J. (Oct. 30, 2007), <http://www.opinionjournal.com/columnists/bstephens/?id=110010801> (quoting plaintiffs' expert Dave Russell as saying the ecological fallout was "larger than the Chernobyl disaster"); Elizabeth Day, *Trudie Styler: Why I had to Use my Celebrity to Try to Save the Rainforest*, THE OBSERVER (Mar. 22, 2009), <http://www.guardian.co.uk/environment/2009/mar/22/trudie-styler-environmentalist> (interview with Styler on Chevron's actions in Ecuador).

292. See *About the Campaign*, *supra* note 280; Letter from Amazon Watch to Chevron Shareholders (May 25, 2009), <http://chevrontoxico.com/assets/docs/aw-letter-to-shareholders-may-2009.pdf>; see *Will You Join Us?*, TRUE COST OF CHEVRON, <http://truecostofchevron.com/protest.html> (last visited April 5, 2011).

293. See Email from Stu Dalheim to Indigenous Peoples Committee, CSIF (Nov. 26, 2003, 11:24 AM), [http://theamazonpost.com/web-of-influence/files/amazon\\_watch/03\\_amazon\\_watch\\_shareholder\\_campaign.pdf](http://theamazonpost.com/web-of-influence/files/amazon_watch/03_amazon_watch_shareholder_campaign.pdf) (email noting that seeking divestment as a strategic effort was discussed during a conference call with other plaintiffs' supporters). In 2009, a number of public pension funds contacted Chevron with questions or concerns about the case, and 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. Neil King, Jr., *Pension Funds Fret as Chevron Faces Ecuador Ruling*, WALL ST. J., Apr. 8, 2009, <http://online.wsj.com/article/SB123914867284999153.html>; Press Release, ChevronToxico, A New Coalition of Chevron Texaco Shareholders Gather Support for Resolution Addressing Ecuadorian Contamination Controversy (Apr. 7, 2005), <http://chevrontoxico.com/assets/docs/resolution-release-proxy-solicit.pdf>.

294. Braden Reddall, *Chevron: Lawyers Behind Environment Report Proposal*, REUTERS, May 20, 2009, <http://www.reuters.com/article/idUSTRE54J6S920090520>; see also Email from Stu Dalheim, *supra* note 293; Press Release, ChevronToxico, Pressure Mounts on ChevronTexaco to Confront its Responsibility for the 'Rainforest Chernobyl' (Apr. 26, 2004), <http://chevrontoxico.com/news-and-multimedia/2004/0426-press-release-on-chevron-shareholder-meeting.html>.

295. See *Chevron Corp.*, 2010 WL 4910248, at \*4 ("There is evidence . . . that [a plaintiffs' lawyer] and others associated with him have presented false evidence and engaged in other misconduct in Ecuador."); *Chevron Corp. v. Camp*, 2010 WL 3418394, at \*6 (W.D.N.C. Aug. 30, 2010) ("what has occurred in this matter would in fact be considered fraud by any court . . . If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."). *Chevron Corp.*, 2011 WL 778052, at \*15-16.

296. *Chevron Corp.*, 2011 Westlaw 778052, at \*15-16.

government.<sup>297</sup> Correa has called the plaintiffs “comrades” and heroes, and has announced his solidarity with their cause.<sup>298</sup> He has publicly called Chevron’s actions in Ecuador “a crime against humanity,”<sup>299</sup> met with the plaintiffs to discuss their case, toured the affected area of the rainforest, encouraged their efforts,<sup>300</sup> and publicly campaigned for them.<sup>301</sup> In a country whose judiciary is susceptible to political pressures and other influences,<sup>302</sup> and is even perhaps in “severe institutional crisis” in which independence is lacking,<sup>303</sup> such overt declarations raise obvious concerns about the ability of the courts to render a fair judgment. Indeed, plaintiffs’ counsel themselves have opined that any judge who ruled against the plaintiffs would be “killed,” and have acknowledged that the Ecuadorian judiciary is susceptible to influence.<sup>304</sup> Equally concerning, at the plaintiffs’ apparent encouragement, Correa persuaded the State Prosecutor to investigate, and ultimately file fraud charges against, Chevron personnel involved in obtaining the earlier releases of liability following the remediation programs.<sup>305</sup> These allegations had been deemed meritless twice before in Ecuador.<sup>306</sup>

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297. *Id.* at \*18.

298. Weekly Presidential Network, AMAZON POST, August 9, 2008, [http://theamazonpost.com/web-of-influence/files/yanza/04\\_080908\\_CANAL\\_DEL\\_ESTADO.pdf](http://theamazonpost.com/web-of-influence/files/yanza/04_080908_CANAL_DEL_ESTADO.pdf); see also Press Conference for Prosecutor Washington Pesantez, AMAZON POST, September 4, 2009, [http://theamazonpost.com/web-of-influence/files/rcorrea/08\\_20090904\\_Rueda\\_de\\_Prensa\\_del\\_Fiscal\\_Pesantez\\_eng.pdf](http://theamazonpost.com/web-of-influence/files/rcorrea/08_20090904_Rueda_de_Prensa_del_Fiscal_Pesantez_eng.pdf).

299. Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, N.Y. TIMES, May 14, 2009, [http://www.nytimes.com/2009/05/15/business/global/15chevron.html?\\_r=1](http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1).

300. 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](http://theamazonpost.com/web-of-influence/files/yanza/03_070428_Radio_Caravana_Correa_eng.pdf).

301. Bret Stephens, *Amazonian Swindle, Daryl Hannah goes to Ecuador and gets in over her head*, WALL ST. J. OPINION ARCHIVES, October 30, 2007, <http://www.opinionjournal.com/columnists/bstephens/?id=110010801>.

302. The United States Department of State has observed the susceptibility of the Ecuadorian judiciary to external pressures, including political and media pressures, and corruption. United States 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>.

303. Chevron Corp., 2011 WL 778052, at \*19-21.

304. *Id.* at \*14-15, \*17.

305. See *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 287 (S.D.N.Y. May 6, 2010); Chevron Corp., 2011 WL 778052, at \*17-19.

306. See Chevron Corp., 2011 WL 778052, at \*7-8; Chevron Corp., 709 F. Supp. 2d 283, at \*2; see also 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>; 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](http://theamazonpost.com/web-of-influence/files/pesantez/04_prosecutor_pesantez_conf_vega.pdf). 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. Chevron Corp., *Texaco*

Other evidence also raises rule of law concerns about the political and judicial branches. For instance, in late 2009, three videos surfaced that appear to show the judge then presiding over the Lago Agrio litigation stating that he will rule against Chevron and hold the company liable for roughly twenty-seven billion dollars.<sup>307</sup> In one of the videos, an individual claiming to be associated with Alianza PAIS, Ecuador's ruling party, apparently tells two businessmen, with the judge in the room, that he will direct remediation contracts to them after the verdict is rendered, if they pay him three million dollars in bribes. He is recorded as saying that one million dollars would go to the judge, one million dollars would be for "the presidency," and the other one million dollars would be directed to the plaintiffs.<sup>308</sup> When the videos became public, the judge recused himself.<sup>309</sup>

Troubling evidence also exists regarding judicial inspections, a process that led to the scope of the environmental harms and the allocation of responsibility.<sup>310</sup> Originally, the court ordered a process in which each party would submit expert reports for the court to consider. The plaintiffs apparently filed reports under the expert's name that, according to a United States federal court, the expert did not author. They instead were "entirely false and

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*Petroleum, Ecuador and the Lawsuit against Chevron*, <http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf> (last visited April 6, 2011), at 8. After issuing the indictments, the Attorney General then recused himself. 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](http://theamazonpost.com/web-of-influence/files/pesantez/03_pesantez_recusal.pdf).

307. Press Release, Chevron Corp., Chevron Provides Ecuador Authorities Evidence in Bribe Plot (Sept. 7, 2009), <http://www.chevron.com/news/press/release/?id=2009-09-07>.

308. 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>. Although it is not clear whether the judge himself was soliciting a bribe, he describes the Lago Agrio litigation as "a fight between a Goliath and people who cannot even pay their bills." Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, N.Y. TIMES, May 14, 2009, [http://www.nytimes.com/2009/05/15/business/global/15chevron.html?\\_r=1](http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=1). As the New York Times notes, "[t]he sympathies of the judge . . . are not hard to discern."

309. After the videos appeared, the plaintiffs' representatives claimed that Chevron had orchestrated the potential bribery scheme. They hired investigators, issued press releases, and asked that government authorities investigate Chevron (there is no evidence that the Department of Justice pursued such an investigation). See *Chevron's Bribery Scandal, Evidence Suggests a Chevron Plan to Disrupt Ecuador's Judicial System*, CHEVRONTOXICO (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>; *Chevron's Story on Ecuador Bribery Scandal Continues to Unravel*, CHEVRONTOXICO (Oct. 13, 2009), <http://chevrontoxico.com/news-and-multimedia/2009/1013-chevrons-story-on-ecuador-bribery-scandal-continues-to-unravel.html>; *Chevron Admits Its Lawyers Present at Key Meeting with Ecuador Man Who Taped Video Scandal*, AMAZON DEFENSE COALITION (October 28, 2009), <http://www.texacotoxico.org/eng/node/339>.

310. See *Texaco Petroleum, Ecuador and the Lawsuit against Chevron*, *supra* note 306, at 7.

fraudulent.”<sup>311</sup>

Then, at the behest of the plaintiffs, and with the support of an amicus curiae brief filed by the campaign manager for President Correa, the court deviated from the original plan and appointed the plaintiffs’ choice of Richard Cabrera, a mining engineer, as the sole expert responsible for the assessment.<sup>312</sup> According to a United States federal court, statements by the plaintiffs raise “at least serious questions” and even a “likelihood” that they pressured the Ecuadorian judge to deviate from the original expert process by withholding a complaint against him related to a “sex for jobs” scandal, selected Cabrera to serve as the expert, and paid him money “before he was appointed.”<sup>313</sup> Indeed, though he was purportedly independent, it has become known that Cabrera previously served as a paid expert and prepared two reports in a different case that Bonifaz filed in the United States.<sup>314</sup>

In the Lago Agrio matter, the United States federal court also found that the plaintiffs and their consultants secretly wrote much or all of Cabrera’s report.<sup>315</sup> Those consultants made statements to the plaintiffs’ lawyers, captured on film, that seem to cast doubt on the merits of at least part of the plaintiffs’ case. Nonetheless, a plaintiffs’ lawyer discounted those statements because, in his view, the pressure on the court, not the legal and factual merits, would lead to victory.<sup>316</sup> Cabrera’s report, whoever authored it, determined that Chevron has sole responsibility for damages, in the amount of twenty-seven billion dollars.<sup>317</sup>

While the plaintiffs contend that Chevron has also engaged in improper

311. *Chevron Corp.*, 2011 WL 778052, at \*8; *see id.* at \*10-11.

312. *Chevron Corp.*, 2011 WL 778052, at \*2.

313. *Id.* at \*11-12, \*15.

314. 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 its conclusions in the Lago Agrio matter regarding the cause of certain harms alleged. *See Motion To the President of the Provincial Court of Justice of Sucumbios* at 9, No. 002-0003 (May 24, 2010) (Lago Argio), available at <http://www.chevron.com/documents/pdf/ecuador/cabrerafilingmay242010english.pdf> (hereinafter “Chevron Motion”).

315. *Chevron Corp.*, 2011 WL 778052, at \*12-14; *see also Chevron Corp.*, 2010 WL 3584520, at \*6 (“ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own”).

316. *See Chevron Corp.*, 2010 WL 4910248, at \*7.

317. *See id.* at \*6; *see also In re Application of Chevron Corp.*, 735 F. Supp. 2d 773, 776-77 (S.D.N.Y. 2010) (discussing similar findings of another court). The Ecuadorian court stated that it did not rely on Cabrera’s report. *See Barrett, supra* note 253. A U.S. federal court concluded that subsequent reports upon which the court did claim to rely simply recycled Cabrera’s findings. *Chevron Corp.*, 2011 WL 778052, at \*14-15, \*34. That court issued an order temporarily enjoining enforcement of the award. *Id.* In addition, Chevron alleges that 90 percent of the twenty-seven billion dollar 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. Chevron Motion, *supra* note 314, at 10-16 (Lago Argio).

tactics,<sup>318</sup> multiple United States federal courts have issued criticisms of the efforts of the plaintiffs' counsel that are reminiscent of those issued by Judge Chaney. One court noted that one lawyer "and others associated with him have presented false evidence and engaged in other misconduct in Ecuador."<sup>319</sup> Another stated, "what has occurred in this matter would in fact be considered fraud by any court . . . If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."<sup>320</sup> Nor does a claim that a corporate defendant has engaged in improper tactics assuage the larger concern that the plaintiffs' out-of-court actions, coupled with the fragility of the Ecuadorian legal system, influenced the local court in issuing its massive nine billion dollar judgment – now doubled.<sup>321</sup> Indeed, the circumstances surrounding the Lago Agrio litigation raise the very concrete question about the capacity of local courts in Ecuador to provide reliable decisions in corporate transnational tort matters, which may involve highly charged, high stakes lawsuits involving foreign companies.<sup>322</sup> In a country where "the rule of law is not respected . . . in cases that have become politicized,"<sup>323</sup> the use of out-of-court tactics by plaintiffs, defendants, or their supporters very well may end up impacting legal outcomes themselves.

*c. Gonzales v. Texaco*

The concerns of misconduct have not been limited to litigation in Ecuador, however. They likewise appeared in *Gonzales v. Texaco*,<sup>324</sup> a personal injury action filed in 2006 by Bonifaz in San Francisco. The plaintiffs alleged that Texaco's byproduct disposal practices contaminated available water sources in Lago Agrio, leading to various physical maladies among local residents.<sup>325</sup>

Defense counsel, when deposing plaintiffs in Ecuador, discovered that several of the claims made in the complaint were false. One plaintiff's son, alleged to have suffered from leukemia, did not have the disease. In her deposition, the plaintiff stated that the paralegal who interviewed her before the

318. Barrett, *supra* note 253.

319. *Chevron Corp.*, 2010 WL 4910248, at \*4.

320. *Chevron Corp. v. Camp*, 2010 WL 3418394, at \*6 (W.D.N.C. Aug. 30, 2010).

321. See *Chevron Corp.*, 2011 WL 778052, at \*33-34 ("Chevron has raised substantial questions that present a fair ground for litigation as to whether the Ecuadorian judgment is a result of fraud practiced on the Ecuadorian tribunal").

322. *Id.* at \*19-22, \*32-33 ("Chevron thus is likely to prevail on its contention that the Ecuadorian judgment in this case was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law, at least in cases of this sort.") (internal quotation omitted).

323. *Chevron Corp.*, 2011 WL 778052, at \*21.

324. *Gonzales v. Texaco Inc.*, No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 84523 (N.D. Cal. Nov. 15, 2007).

325. Second Amended Complaint at 12, 19, *Gonzales v. Texaco*, No. C 06-02820 WHA (N.D. Cal.).

lawsuit never asked if her son had cancer, and never told her that the firm would sue Texaco based on these claims.<sup>326</sup> Another plaintiff told the paralegal that she had cancer but admitted during her deposition that this was false.<sup>327</sup> Her husband, also a plaintiff, never completed a legal intake form, and never met with attorneys in the case prior to the deposition.

When the court learned of these problems, it dismissed the three plaintiffs, with statements that echoed the concerns raised by Judge Chaney. The court 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.”<sup>328</sup> The court found that “[t]his is not the first evidence of possible misconduct by plaintiffs’ counsel in this case.”<sup>329</sup> Alluding to *Aguinda* and the Lago Agrio litigation, the court further found that the litigation was a tactic itself, unrelated to a potential recovery: “[i]t 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.”<sup>330</sup> The court later granted Chevron’s motion for summary judgment dismissing the remaining two plaintiffs, thereby ending the litigation.

### C. The Coca-Cola Cases

The use of litigation as part of a larger campaign, noted in *Gonzales*, is perhaps even more visible in the series of cases that have been filed against Coca-Cola arising out of alleged violence by third parties toward union workers. The cases, premised on the ATS and common law theories, have garnered little legal success, but have been accompanied by a similar array of tactics to those seen in the DBCP and Ecuador matters, and other transnational tort cases. This section first discusses the cases that have been filed, and then addresses the tactics that have accompanied them and statements by plaintiffs’ attorneys discussing the use of litigation as part of a larger campaign.

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326. See Order Granting Motions for Summary Judgment and Terminating Sanctions, *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA (N.D. Cal. Aug. 3, 2007). According to the court, in seeking to obtain the plaintiffs’ depositions, Bonifaz noted in a letter to a lawyer with whom he was working in Ecuador, “[i]t 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.” See *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 56622, \*10 (N.D. Cal. Aug. 3, 2007).

327. See *Gonzales*, 2007 U.S. Dist. LEXIS 56622, at \*5, \*10.

328. *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 WL 3036093, at \*3 (N.D. Cal. Oct. 16, 2007).

329. *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 56622, at \*10 (N.D. Cal. Aug. 3, 2007).

330. *Id.* at \*9. Although the district court issued sanctions against the lawyers, the court of appeals ruled that the district court did not apply the correct legal standard 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).

### 1. The Cases Filed

#### a. The Sinaltrainal Lawsuits

For decades, Colombia has been embroiled in a bloody civil war involving drug cartels, guerillas, and paramilitary forces.<sup>331</sup> Throughout that conflict, Colombian unions have been targets of violence: over the past twenty-five years, thousands of union members have been killed.<sup>332</sup>

One such victim was Isidro Segundo Gil, a local union leader allegedly murdered by paramilitary forces inside a Coca-Cola bottling facility, Bebidas y Alimentos de Urabá, S.A. (“Bebidas”).<sup>333</sup> Gil’s estate and his former union, Sindicato Nacional de Trabajadores de la Industria de Alimentos (“Sinaltrainal”), akin to the institutional plaintiff in the Lago Agrio case, sued Bebidas, The Coca-Cola Company (“Coca-Cola USA”), and Coca-Cola de Colombia, S.A. (“Coca-Cola Colombia”).<sup>334</sup> In three other complaints, Sinaltrainal sued the same defendants, as well as Panamco Colombia, S.A. (“Panamco”), claiming that paramilitaries and local police had also intimidated, kidnapped and tortured union leaders at Panamco Coca-Cola bottling facilities.<sup>335</sup> All four complaints alleged that bottling facility managers conspired with the armed groups, and sought a recovery on the various defendants through secondary theories of liability.<sup>336</sup>

In 2003, the district court dismissed the claims against Coca-Cola USA and Coca-Cola Colombia for lack of subject matter jurisdiction.<sup>337</sup> The court found that the bottler’s agreements did not give these defendants control over the bottling facilities’ operations and labor policies.<sup>338</sup> Without that control, the plaintiffs could not show that the Coca-Cola defendants had acted in concert with the paramilitaries and local police.<sup>339</sup> The court later dismissed the

331. See Background Note: Colombia, U.S. DEP’T OF STATE (Oct. 2010), <http://www.state.gov/r/pa/ei/bgn/35754.htm>. See also *Eleventh Circuit Dismisses Alien Tort Statute Claims Against Coca-Cola Under Iqbal’s Plausibility Pleading Standard*, 123 HARV. L. REV. 580, 581 (2009).

332. *Sinaltrainal*, 2009 WL 2431463, at \*8.

333. *Id.* at \*2.

334. See *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003). See also *Eleventh Circuit Dismisses*, *supra* note 331. Richard Kirby, the owner of Bebidas, also was named as a defendant. Coca-Cola asserted that while violence may have occurred against union members, the company was being targeted for the activities of unaffiliated third-parties. See Brief for Defendants-Appellees, *Sinaltrainal v. Coca-Cola Co.*, No. 06-15851 (11th Cir. Jun. 30, 2008).

335. *Sinaltrainal*, 2009 WL 2431463, at \*2. Panamerican Beverages Company, LLC and Panamco, LLC, the owners of Panamco Colombia, also were named as defendants. *Id.* See *Eleventh Circuit Dismisses*, *supra* note 331.

336. See *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1274 (S.D. Fla. 2006).

337. *Sinaltrainal*, 256 F. Supp. 2d at 1352-57.

338. *Id.* at 1354.

339. *Id.* at 1355.

plaintiffs' remaining claims without prejudice.<sup>340</sup> The United States Court of Appeals for the Eleventh Circuit affirmed that decision.<sup>341</sup>

*b. The Turedi and Palacios Lawsuits*

Within weeks of that affirmation, the United States Court of Appeals for the Second Circuit affirmed a dismissal in *Turedi*, a similar ATS action involving Coca-Cola and its Turkish subsidiary.<sup>342</sup> A few months later, the plaintiffs filed a new complaint, *Palacios*, which was similar to *Turedi* and *Sinaltrainal*, in connection with Coca-Cola bottling operations in Guatemala.<sup>343</sup>

Given the prior results in *Turedi* and *Sinaltrainal*, however, the likelihood of the case succeeding does not seem especially high. The plaintiffs' lawyers may know that fact. As one of the attorneys has stated,

[Litigation] . . . served to focus a broader campaign seeking to persuade [Coca-Cola] to accept responsibility for violence in its bottling plants, wholly apart from any potential legal liability . . . The campaign is using factual information developed from the investigations connected to the litigation, as well as traditional human rights reports, to support specific demands that Coca-Cola respond to the violence . . . The campaign provides a promising model of cooperation to change corporate behavior that supports or tolerates human rights

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340. *Sinaltrainal Litig.*, 474 F. Supp. 2d at 1273.

341. See *Sinaltrainal v. Coca Cola Company*, 2009 U.S. App. LEXIS 17764 (11th Cir. 2009); Jonathan Drimmer & Laura Ardito, *Emerging Issue Analysis*, *Abdullahi v. Pfizer, Inc.*, 2009 U.S. App. LEXIS 1768 (2d Cir. Jan. 30, 2009), Lexis/Nexis (April 2009). In one of the four cases, the court of appeals affirmed the dismissal without prejudice for the plaintiffs to refile their claim. *Sinaltrainal*, 2009 U.S. App. LEXIS 17764, at \*32-37.

342. *Turedi v. Coca Cola Co.*, 2009 WL 1956206 (2d Cir. July 7, 2009). For a discussion of *Turedi*, see Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749, 760-62 (2007). In *Turedi*, truck drivers and transport workers employed by Coca-Cola's facilities in Istanbul, Turkey, and family members, filed an action in New York under the ATS. The plaintiffs alleged that the Turkish "special branch" police (Cevik Kuvvet) used violence in response to a protest by workers who were fired for joining a labor union, and that the plaintiffs suffered additional injuries after they were arrested. The district court granted Coca-Cola's motion to dismiss the case on the grounds of *forum non conveniens*, noting that the "facts give rise to a strong inference that forum-shopping considerations served as a substantial motivation in Plaintiffs' venue choice." *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 522, 527 (S.D.N.Y. 2006).

343. *Palacios v. Coca-Cola Co.*, 102514/2010 (N.Y. Sup. Ct. Feb. 25, 2010) (removed to federal court on April 13, 2010); see 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>. The complaint alleges that Palacios was subjected to death threats, an armed home invasion and was ultimately fired from his job because of his union membership. Palacios was forced to flee his home and ultimately to flee to the United States. *Palacios v. Coca-Cola Co.*, 2010 WL 4720409, at \*2 (S.D.N.Y. Nov. 19, 2010). Another plaintiff alleges that after he made complaints to the managers of the bottling operations, assailants with ties to the management shot and killed his son and nephew, and raped his daughter. *Id. Palacios*, though substantially similar to *Turedi* and *Sinaltrainal*, was filed in a state court in New York, and relied on common law tort theories. Coca-Cola removed the case to federal court, where it is pending. *Id.*

abuses.<sup>344</sup>

Accordingly, like *Gonzales* and the follow-on cases against Drummond and others noted above, the litigation itself may have a relatively low chance of success, but the filings against Coca-Cola may be tactical efforts in a broader campaign seeking to create corporate change.<sup>345</sup>

## 2. *The Tactics in the Coca-Cola Cases*

Part of the campaign to create corporate change was the release of the full-length documentary, “The Coca-Cola Case,” which coincided with the filing of *Palacios*.<sup>346</sup> Co-produced with the National Film Board of Canada, the film follows the plaintiffs’ lawyers in the cases against Coca-Cola “as they attempt to hold the giant United States multinational beverage company accountable in [a] legal and human rights battle.”<sup>347</sup> The movie documents the creation of the campaign against Coke, noting that the two plaintiffs’ attorneys sought a partnership with a well-known union activist and publicist to help publicize their cases. In the film, one of the lawyers explicitly states his goal to use successes in one ATS case to pressure defendants in other ATS cases. The documentary also shows the attorneys vowing, after settlement negotiations turned sour, to file more lawsuits against Coca-Cola to further pursue the company. The film has since been aired in theaters around the world,<sup>348</sup> although during the film itself plaintiffs’ attorneys are seen relating the content of settlement discussions,<sup>349</sup> and the judge overseeing those negotiations stated as part of his Final Settlement Order that the statements “directly violate . . . confidentiality requirements” that were “established by state and federal laws of the United States.”<sup>350</sup>

The film has been highlighted in the Killer Coke Campaign, a website run by the plaintiffs in *Sinaltrainal* and the labor activist who appears in the film. Established in 2004, the site states that more than 1.7 million viewers have visited it.<sup>351</sup> The Campaign’s stated mission is focused on raising awareness of alleged attacks on union leaders at Coca-Cola bottling facilities in Colombia.

344. Holzmeyer, *supra* note 15, at 291.

345. *See id.* (describing the indirect effects and purposes of litigation concerning social issues).

346. *See, e.g., The Coca-Cola Case* (Trailer), NATIONAL FILM BOARD OF CANADA, [http://www.nfb.ca/film/coca\\_colo\\_case\\_trailer](http://www.nfb.ca/film/coca_colo_case_trailer) (last visited March 8, 2011). The film was released in January 2010, a few weeks before the February *Palacios* filing date.

347. *The Coca-Cola Case – A Documentary Film About Coke and Labour Rights in Latin America*, <http://films.nfb.ca/the-coca-cola-case> (last visited Feb. 28, 2011) [hereinafter *The Coca-Cola Case*].

348. *See* Jason Farbman, *An Anti-Coke Campaign Effervesces at NYU*, NORTH AMERICAN CONGRESS ON LATIN AMERICA (Apr. 22, 2010), <https://nacla.org/node/6527>.

349. *See The Coca-Cola Case, supra* note 347.

350. Exhibit A to Final Order of Settlement Master, *In re Sinaltrainal v. TCCC*, December 23, 2009, available at <http://www.killercoke.org/lettertocinemapolitica.pdf>.

351. *See Resolutions*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/resolutions.htm> (last visited Feb. 28, 2011).

This is done through the campaign website, which includes education, social and political activism, community organizing, and other matters. The campaign website includes a faux Coca-Cola ad with the tag line “Murder: It’s the Real Thing,” and a Coca-Cola can standing on a pool of blood.<sup>352</sup> The website also has a section on the resolutions that have been passed by universities, unions, and city councils in support of the Killer Coke Campaign’s international boycott of Coca-Cola products.<sup>353</sup> It maintains a “Campus Activism” section where people can read sample resolutions and tips on starting campus campaigns.<sup>354</sup> The website has a similar “Labor Union Solidarity” section with news articles and press releases on union activism against Coca-Cola.<sup>355</sup> The website also contains links to archived newsletters,<sup>356</sup> a section on the alleged health effects of drinking Coca-Cola,<sup>357</sup> YouTube videos and documentary clips,<sup>358</sup> and downloadable protest flyers.<sup>359</sup> Finally, it also has links to “The Coca Cola Case” official website, features news articles about the film, highlights the film’s opening, and permits the purchase of the film through the website.<sup>360</sup>

The site, like the tactics in the DBCP and Lago Agrio matters, also contains various reports related to Coca-Cola, including a “corporate profile” of Coca-Cola<sup>361</sup> by the Polaris Institute, a Canadian organization that advocates for

352. See CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org> (last visited Feb. 28, 2011).

353. See *Resolutions*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/resolutions.htm> (last visited Feb. 28, 2011).

354. See *Campus Activism*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/student.htm> (last visited Feb. 28, 2011).

355. See *Labor Union Solidarity*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/unions.htm> (last visited Feb. 28, 2011).

356. See *Newsletters*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/newsletters.php> (last visited Feb. 28, 2011).

357. See *Health Issues*, CAMPAIGN TO STOP KILLER COKE, [http://www.killercoke.org/health\\_issues.php](http://www.killercoke.org/health_issues.php) (last visited Feb. 28, 2011).

358. See *Videos and Interviews*, CAMPAIGN TO STOP KILLER COKE, [http://www.killercoke.org/videos\\_and\\_interviews.php](http://www.killercoke.org/videos_and_interviews.php) (last visited Feb. 28, 2011).

359. See *Flyers, Mini-Posters & Stickers*, CAMPAIGN TO STOP KILLER COKE, [http://www.killercoke.org/literature\\_flyers.php](http://www.killercoke.org/literature_flyers.php) (last visited Feb. 28, 2011).

360. See *Stop Killer Coke Newsletter*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/n1100115b.htm> (last visited Feb. 28, 2011). Organizations associated with the plaintiffs’ attorneys also host information on their own separate websites. See *Alien Tort Claims: Colombia*, INTERNATIONAL LABOR RIGHTS FORUM, <http://www.laborrights.org/end-violence-against-trade-unions/colombia/news/10896> (last visited Feb. 28, 2011); and *Cases*, INTERNATIONAL RIGHTS ADVOCATES, <http://www.iradvocates.org/coke1case.html> (last visited Feb. 28, 2011). 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).

361. “*Killer Coke Reports*” Section, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/reports.htm> (last visited Feb. 28, 2011); see also *Coca-Cola Company: Inside the Real Thing*, POLARIS INSTITUTE (August 2005), <http://www.polarisinstitute.org/files/>

“social change in an age of corporate driven globalization.”<sup>362</sup> The sixty-page report claims to describe various aspects of Coca-Cola’s alleged corporate harms to obtain profits.<sup>363</sup> The report includes organizational, economic, political, and social sections, including *Sinaltrainal* and other human rights lawsuits against Coca-Cola. It also contains Stakeholder Profiles of Coca-Cola and specifically lists the company’s top ten institutional and mutual fund shareholders.<sup>364</sup>

The out-of-court tactics against Coca-Cola have included other investment efforts. Plaintiffs, their attorneys, and union members have attended Coca-Cola shareholder meetings on multiple occasions, some of which were documented in “The Coca-Cola Case” film.<sup>365</sup> Indeed, in the movie, activists tout the use of protests at shareholders meetings as an activism tactic and, in one scene from the film, an activist reads graphic allegations from a plaintiff’s complaint at a shareholders’ meeting.<sup>366</sup> The investment related efforts include attempts to convince institutional investors to divest, as witnessed in other cases, as well.<sup>367</sup>

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Coke%20profile%20August%2018.pdf; *Evidence of The Coca Cola Company’s Human Rights Abuses and Environmental Violations* report, ST. JOSEPH UNIV. STUDENTS FOR WORKERS’ RIGHTS, <http://org.ntnu.no/attac/dokumentene/cocacola/keinfopacket.pdf> (last visited Feb. 28, 2011).

362. *About Us*, POLARIS INSTITUTE, <http://www.polarisinstitute.org/aboutus> (last visited Feb. 28, 2011).

363. *Coca-Cola Company: Inside the Real Thing*, POLARIS INSTITUTE (August 2005), at 1, [www.polarisinstitute.org/files/Coke%20profile%20August%2018.pdf](http://www.polarisinstitute.org/files/Coke%20profile%20August%2018.pdf).

364. *Id.*

365. *See The Coca-Cola Case*, *supra* note 347.

366. *See id.*; *Coca-Cola: Abuses in Colombia, Shareholder Meeting Report-Back*, INTERNATIONAL LABOR RIGHTS FUND (April 19, 2006), <http://lrights.igc.org/projects/corporate/coke>.

367. In 2005, New York City’s then-comptroller William Thompson issued a resolution on behalf of the city pension fund asking Coca-Cola to allow an independent investigation into alleged violence against unionists at its plants in Colombia in connection with the *Sinaltrainal* case. *See* Jill Gardiner, *Thompson Targets Google, Yahoo Over China Policy*, N.Y. SUN (Dec. 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 (Jan. 26, 2006), <http://www.killercoke.org/pr060126.htm>. 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.” *Id.* 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 Board of Education Retirement System also sponsored the resolution. *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), *available at* [http://www.comptroller.nyc.gov/bureaus/bam/corp\\_gover\\_pdf/2005-shareholder-report.pdf](http://www.comptroller.nyc.gov/bureaus/bam/corp_gover_pdf/2005-shareholder-report.pdf). Together, the funds held 6,475,918 shares of Coca-Cola, worth more than \$267 million. Similarly, in 2006, TIAA-CREF sold 1.2 million shares of Coca-Cola stock, worth \$52.4 million, after KLD Research and Analytics, a firm that seeks to make investments premised in part on social concerns, 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). Caroline Wilbert, *Social responsibility of Coca-Cola questioned; Giant retirement fund decides to sell shares*, ATLANTA-JOURNAL CONST. (Jul. 19, 2006), <http://www.commercialexploitation.org/>

Also as seen in many other cases, the efforts against Coca-Cola have included political tactics.<sup>368</sup> They also have included boycotts, and have extended to school campuses and other academic settings.<sup>369</sup> Indeed, according to one plaintiff's 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.<sup>370</sup> In addition, one of the attorneys featured in "The

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news/cokesocialresponsibilityquestioned.htm.

368. In June 2007, a 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 *Sinaltrainal*, and other legal actions. *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). Likewise, in 2008, a Boston City Councilman introduced a resolution to make Boston a Coke-free zone. 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." The resolution did not pass. See Frank Neisser, *City Councilors Demand 'Coca-Cola-free' Boston*, WORKERS WORLD (Aug. 11, 2004), [http://www.workers.org/2008/us/boston\\_0814](http://www.workers.org/2008/us/boston_0814).

369. The United Steel Workers and the Sinaltrainal union in Colombia also called for an international boycott of Coca-Cola. See Neisser, *supra* note 368. Those requests have been supported by other unions. See *Resolutions*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/resolutions.htm> (last visited Feb. 28, 2011). 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." *OPSEU Resolution*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/opseuresolution.pdf> (last visited Feb. 28, 2011). 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 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, Resolutions*, CAMPAIGN TO STOP KILLER COKE, <http://www.killercoke.org/resolutions.htm> (last visited Feb. 28, 2011). 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* (Mar. 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](http://www.zoa.org/sitedocuments/pressrelease_view.asp?pressreleaseID=391).

370. *Evidence of The Coca Cola Company's Human Rights Abuses and Environmental Violations* report, ST. JOSEPH UNIV. STUDENTS FOR WORKERS' RIGHTS at 76, <http://org.ntnu.no/attach/dokumentene/cocacola/cokeinfopacket.pdf> (last visited Feb. 28, 2011). This includes Hofstra University in New York, which passed a resolution not to renew the university's exclusive contract with the company. *Id.* at 60.

Coca-Cola Case” has lectured at the Carnegie Institute. He 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.”<sup>371</sup> He further noted, “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.”<sup>372</sup> He 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.”<sup>373</sup> Such statements, of course, identify the larger community-activism oriented motives behind some of the extra-legal tactics employed in the cases.

### 3. Final Thoughts on the DBCP, Ecuador, and Coca-Cola Cases

The underlying factual postures of the DBCP, Texaco-Ecuador and Coca-Cola cases differ substantially. The DBCP cases involved alleged personal injuries from chemical exposure on produce plantations, the cases against Texaco-Chevron primarily involved alleged direct and derivative environmental harms related to oil production, while the cases against Coca-Cola involved alleged third party attacks on workers and union leaders. They occurred in different countries, over different time periods, and involved different corporate defendants in different sectors. Yet all three sets of cases feature similar out-of-court tactics, including media, investment, political, and community organizing efforts, consistent with the larger trends identified in the study. In addition, in the DBCP and Ecuador matters, plaintiffs and their representatives advocated for the passage of retroactive foreign laws that provided opportunities for litigation to proceed. It appears that certain highly impoverished and “unsophisticated” plaintiffs may have been encouraged – perhaps in part by media tactics – to make dubious claims, there is concerning evidence related to local judiciaries with reputations for malleability, and there is evidence of impropriety by local laboratories and/or experts. While defendants of course

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371. Terry Collingsworth, *Beyond Reports and Promises: Enforcing Universally Accepted Human Rights Standards in the Global Economy (Seminar #3)*, CARNEGIE COUNCIL (Feb. 6, 2003), [http://www.cceia.org/resources/articles\\_papers\\_reports/874.html](http://www.cceia.org/resources/articles_papers_reports/874.html). 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>.

372. Collingsworth, *supra* note 371.

373. *Id.* 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>.

also engaged in their own set of tactics in those and other transnational tort cases, and certainly not all or even most transnational tort cases may have such problems, the DBCP, Ecuador and other matters do give rise to a concern that the unique mix of factors in transnational tort cases may make them susceptible to manipulation, false claims, and other litigation improprieties by the parties and other interested participants.

#### IV. LOOKING FORWARD

Despite those concerns, this Article does not argue that out-of-court tactics are improper, or in favor of legislative or legal solutions to deter or halt out-of-court tactics in transnational tort litigation. Instead, the purpose of this Article is far more modest. It seeks to identify the patterns in which the tactics, as used by plaintiffs, have appeared, and certain implications arising from them. This section discusses the likely future use of the tactics discussed above, and potential steps that, in light of the presence of the tactics and their implications, companies, courts, and legislators may wish to consider in helping to ensure fairness and consistency in future legal determinations.<sup>374</sup>

##### *A. The Future of Transnational Tort Cases and Their Related Tactics*

Looking forward, it seems logical that the out-of-court tactics in transnational tort cases would continue and even grow. With the successes in some of the cases, and the continuing prospect of recoveries and/or corporate change, transnational tort cases will likely remain on the rise.<sup>375</sup> That includes cases like the Lago Agrio litigation, *Osorio* and *Franco*, which plaintiffs filed abroad for potential enforcement in the United States and elsewhere. It also includes cases filed in the United States in the first instance, like *Gonzales*, *Tellez*, and *Sinaltrainal*.

From the plaintiffs' standpoint,<sup>376</sup> it also appears that they believe the tactics can help achieve their ultimate goals. This is seen in the increase in the number and variety of 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.<sup>377</sup> Plaintiffs' attorneys are learning from the successive cases that they and others bring, and pursuing those extra-legal efforts they believe worthwhile. Those trends certainly suggest that plaintiffs' advocates believe that they work, or at least have little downside.

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374. A study of defense tactics may yield additional considerations for plaintiffs and other participants in the legal process.

375. See generally *Vega*, *supra* note 17, at 402 (discussing ATS cases). That growth likely will cause defendants to increase their own tactics.

376. Perhaps from the defense standpoint, as well.

377. See generally *Holzmeyer*, *supra* note 15.

Indeed, in at least one case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,<sup>378</sup> they may be right. Talisman, a Canadian energy company listed on the New York Stock Exchange, became invested in Sudan in 1998 when its subsidiary purchased a company that was part of a consortium with three state-owned oil companies. The consortium, which focused on petroleum development in Southern Sudan, operated through an entity called the Greater Nile Petroleum Operating Company Limited (“GNPOC”). GNPOC’s exploration and production activities occurred during a fierce civil war that had long engulfed Southern Sudan, with rebel groups fighting each other and the Sudanese Government.<sup>379</sup> To protect its operation, GNPOC received security support from the government. GNPOC also provided logistical assistance to government units pursuant to a set of guidelines that limited the assistance to the government’s defense of the petroleum facilities, as opposed to government military operations against rebel groups. GNPOC also built certain infrastructure for itself, such as roads and airstrips, which the government also used. As part of its social activities, GNPOC and Talisman spent millions of dollars in local development programs.<sup>380</sup> They also apparently aided efforts to bring peace to the civil war ravaged nation, acting as “a significant source of information on conditions in southern Sudan,” and playing a role “in assisting U.S. peace envoy John Danforth during the process that lead to the signing of the 2002 Machakos Peace Protocol ending the civil war in southern Sudan.”<sup>381</sup> However, during the conflict, the Sudanese military committed widespread human rights violations, allegedly funded in part by royalties the consortium was obligated to pay to the government.<sup>382</sup>

Based on that funding, in 2001, plaintiffs filed an ATS case against Talisman in federal court in New York, relying on secondary theories of liability. The plaintiffs alleged that Talisman assisted the government in its human rights violations. For a decade, the company prevailed in court, and the case has now been dismissed. Nonetheless, the litigation was accompanied by an array of tactics, including protests, a stock divestment campaign targeting institutional investors, and political pressures in the United States and Canada, headed by multiple NGOs working together.<sup>383</sup> The plaintiffs likewise

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378. 582 F.3d 244 (2d Cir. 2009).

379. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 647-51 (S.D.N.Y. 2006), *aff’d*, 582 F.3d 244 (2d Cir. 2009).

380. See, e.g. Alistair Lyon, *Talisman Hopes Work In Sudan will Silence Critics*, REUTERS, Jan. 22, 2001; *Fact Sheet Two: A History of Oil in the Sudan* at 4, Understanding Sudan: A Teaching and Learning Resource, <http://understandingsudan.org/Oil/OilResources/L2FS2-HistoryofOilinSudan.pdf> (last visited Feb. 28, 2011); TALISMAN ENERGY CORPORATE SOCIAL RESPONSIBILITY REPORT 2001, at 21.

381. Vivek Krishnamurthy, Matthew Smith & Naing Htoo, *Energy Security: Security for Whom?*, 11 YALE HUM. RTS. & DEV. L.J. 259, 262 & n.17 (2008).

382. *Id.* See also Edwin L. Gorham, *The Alien Torts Statute and the Search for Energy in Difficult Political Environments*, 29 HOUS. J. INT’L L. 289, 298-301 (2007).

383. Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT’L L. &

employed media tactics effectively.<sup>384</sup> In the end, these combined efforts clearly had an impact. As one commentator noted, “[I]t is clear that Talisman’s stock price fell despite the success of its oil operations in Sudan. It is reasonable to assume that the decline in valuation of the company reflected the negative publicity and pressure on investors to sell resulting from the efforts of the advocacy groups.”<sup>385</sup>

In 2003, Talisman succumbed to the multi-faceted pressures. It sold its interest to an Indian state-controlled oil and gas company, lacking the same commitment to local development and peace efforts, rather than continuing to operate.<sup>386</sup> This was a result, as commentators have noted, that “can hardly be described as a positive development.”<sup>387</sup> The lawsuit against Talisman, however, continued.

As *Talisman* demonstrates, while the ultimate success of some or all of the efforts by plaintiffs and defendants may be debatable in any given case, they now are ingrained in many such matters. The tactics are growing in size and frequency, and with the escalation of transnational tort cases, certainly look like they are here to stay.

## B. Impact of the Tactics

### 1. Corporate Considerations

For corporations, that fact has several tangible results. It should help to inform a company about whether and how to engage potential claimants threatening a transnational tort action. It should likewise inform companies that, if there are inquiries and efforts being made by multiple NGOs, it may not be a coincidence, but could be related to a larger campaign with an uncertain planned outcome. It should also help provide awareness of the tactics and concerns that are likely to accompany a lawsuit in the United States or abroad, which should provide companies with some advance warning about how to prepare for and position themselves for the multiple fronts that transnational tort litigation now brings.

From an economic standpoint, the threats posed by these lawsuits and corporate campaigns are difficult to wholly ignore. Certainly, well known multinational companies seeking to invest in or enter emerging markets must be conscious that a perceived failure to adhere to international norms, sometimes

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POL. 425, 438-41 (2004).

384. *Id.*

385. *Id.* at 444.

386. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 648 (S.D.N.Y. 2006), *aff'd*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

387. Krishnamurthy, et. al, *supra* note 381.

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 that can hurt the company's image and reputation.<sup>388</sup> At a minimum, due diligence and impact assessments in the relatively early phases of investment may make sense in some situations.<sup>389</sup> In extreme cases, some companies likely will be deterred from pursuing certain overseas investments, or, like Talisman, in continuing certain overseas operations.

## 2. Compliance Solutions

For those companies that elect to pursue overseas investments, or to continue operations abroad, these threats also demand focused efforts designed to minimize potential problems through earnest compliance solutions. That entails more than corporate responsibility measures. It includes meaningful stakeholder engagement, training requirements for relevant personnel, relevant corporate policies and guidelines, means of reporting problems and immediate investigations, disciplinary actions against personnel who fail to adhere to policies, attention to third parties providing services for the company—including in due diligence, in contracts, and through audits—and an overall attention to human rights concerns. In short, management must make a dedicated effort to prevent problems from arising, and quickly address those problems that do arise.<sup>390</sup>

### C. The Vulnerabilities of Transnational Tort Litigation

As seems clear, and as Judge Chaney stated in *Tellez* and other commentators have noted, 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 particularly prone to manipulation, creates certain vulnerabilities to

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388. See Holzmeyer, *supra* note 15, at 292.

389. Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights, is in the process of issuing guiding principles that will emphasize these steps and others for companies in seeking to protect and respect human rights. See DRAFT REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (November 22, 2010), available at <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>.

390. See Lucinda A. Low & Jonathan Drimmer, *Specific Corporate Compliance Challenges: Extractive Industry*, in LEXISNEXIS CORPORATE COMPLIANCE PRACTICE GUIDE: THE NEXT GENERATION OF COMPLIANCE (Carol Basri ed., 2009); Jonathan Drimmer, *How to Steer Clear of the U.S. Human Rights Litigation Trend*, ENGIN. & MIN. J. (May 2009); Jonathan Drimmer, *At Home And Abroad*, CORPORATE COUNSEL, Apr. 2009; Jonathan Drimmer, *Don't Be Dubbed A Human Rights Abuser*, LEGAL TIMES, Oct. 30, 2007; Jonathan Drimmer, *Corporate Exposure Under The Alien Tort Claims Act*, CORPORATE COUNSELOR, June 5, 2007. See also Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building A Better Business Reputation*, 40 CAL. W. INT'L L.J. 55 (2009).

fraudulent lawsuits and rule of law concerns. Such inherent problems with transnational tort cases, some have observed, “raise[] serious concerns about whether truth can be ascertained when foreigners bring cases to United States courts. Some countries . . . lack the institutional capacity to prevent conspiracy among lawyers, judges, and citizens, and to protect the integrity of the evidence.”<sup>391</sup> Without doubt, these vulnerabilities make it paramount for parties and the judiciary to closely scrutinize their own conduct in transnational tort cases and to pay particular attention to suspect circumstances.

### 1. Potential Legal Solutions in Direct Litigation

In practical terms, in direct litigation, although overseas discovery might be challenging for parties, they should pursue it vigorously. Foreign depositions should be sought and taken. The existence of documents located abroad should not deter parties from seeking their production. These efforts may require the cumbersome use of formal international evidence gathering methods, such as letters rogatory<sup>392</sup> or reliance on the Hague Convention on Taking Evidence Abroad in Civil and Criminal Matters,<sup>393</sup> but they nonetheless can be critical to uncovering the truth. Indeed, it is through exactly such processes that some of the problems in the transnational cases discussed above have been revealed. In addition, given the clear potential hazards faced by Western companies forced to litigate in some foreign courts, requests by defendants for dismissals on *forum non conveniens*, once a staple of transnational tort cases, should be fully thought through.

For the judiciary, the trends in transnational tort cases likewise may suggest actions. The bench perhaps may make certain accommodations, such as permitting a greater number of depositions than it might otherwise, assisting with granting orders for letters rogatory, or increasing the time for discovery to account for overseas fact gathering, in light of some of the unique concerns in transnational tort cases. Courts also might closely assess the propriety of proceeding when important overseas discovery, such as depositions of alleged tortfeasors or the joinder of indispensable parties, cannot be obtained.<sup>394</sup> Given the proliferation of media tactics in the transnational tort cases, judges may also want to incorporate additional questions into *voir dire* for jury pools preceding transnational tort trials. And as did Judge Chaney, where questions of fraud

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391. See Armin Rosencranz et al., *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161, 166-67 (2009). The article rhetorically asks, “Why should U.S. courts be open to cases brought by foreigners from countries where truth is difficult to come by?” *Id.* at 179.

392. Letters rogatory is a process where a court makes a formal request for judicial assistance to a foreign court.

393. 23 U.S.T. 2555 (2010), 28 U.S.C. § 1781 (2006).

394. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 350 (S.D.N.Y. 2003).

arise, courts ought to carefully consider holding separate evidentiary hearings.

On a legislative basis, it may be appropriate, as some courts have done, to impose a heightened pleading standard in ATS cases, if not other types of transnational tort cases. One such court to follow that approach was the district court in *Sinaltrainal*. The court noted that, because the ATS requires that plaintiffs establish that a tort was committed in violation of international law, “the complaint must identify the specific international law that the defendant allegedly violated.” That, the court noted, was a higher standard of pleading than is traditionally required under the Federal Rules of Civil Procedure.<sup>395</sup> The court also noted the appropriateness of requiring “some heightened pleading standard when determining whether the complaints . . . sufficiently [pled] facts showing that Defendants violated the law of nations.”<sup>396</sup> The court explained that a higher standard may be warranted given the “risk that vague, conclusory, and attenuated allegations will allow individuals . . . to engage in unwarranted international ‘fishing expeditions’ against corporate entities and to abuse the judicial process in order to pursue political agendas.”<sup>397</sup> A higher pleading standard, as that court and others have noted, also helps to ensure courts proceed cautiously in recognizing new theories under the ATS, as *Sosa* mandates.<sup>398</sup>

At present, under the Federal Rules of Evidence, only claims of fraud must be pled under a heightened standard.<sup>399</sup> That higher burden exists because fraud claims may have a stigmatizing effect upon a defendant, and the elevated standard may “protect defendants from harm to their reputation and goodwill . . . prevent plaintiffs from filing baseless claims in an attempt to discover unknown wrongs.”<sup>400</sup> Given the similar concerns in transnational tort cases as expressed by the court in *Sinaltrainal*, and the inherent difficulties and expense associated with litigating such cases, formally importing a heightened pleading standard may be worth considering.

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395. *In re Sinaltrainal*, 474 F. Supp. 2d 1273, 1275 (S.D. Fla. 2006), *aff’d in part vacated in part*, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11<sup>th</sup> Cir. 2009). *See also* *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1292 (S.D. Fla. 2003) *aff’d in part and rev’d in part* 416 F.3d 1242 (11<sup>th</sup> Cir. 2006); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004).

396. *In re Sinaltrainal*, 474 F. Supp. 2d at 1287.

397. *Id.* at 1275.

398. *Id.* at 1282. *See also* *Arndt*, 342 F. Supp. 2d at 138. *See generally* Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 *FORDHAM L. REV.* 2177 (2009).

399. The Federal Rules of Evidence state that fraud claims must be pled “with particularity.” *FED. R. EVID.* 9(b).

400. *Thompson Advisory Group, Inc. v. First Horizon Nat. Corp.*, 2007 WL 2284352, \*2 n.1 (N.D. Tex. 2007); *see* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1296 31 (3d ed. 2004); Jason N. Haycock, *Pleading a Loss Cause: Resolving the Pleading Standard for the Element of Loss Causation in a Private Securities Fraud Claim and a Plaintiff’s Heavy Burden Pleading it Under Iqbal*, 60 *AM. U. L. REV.* 173, 187-88 (2010).

## 2. *Potential Legal Solutions in Enforcement Actions*

Litigants, courts and the legislature should also scrutinize foreign judgment enforcement actions. Corporate defendants should vigorously contest, as they no doubt will, attempts to enforce foreign judgments obtained under questionable circumstances.

As *Osorio* and *Franco* demonstrate, judges asked to enforce the increasing number of overseas transnational tort judgments being brought to the United States, whether they originated as ATS cases or otherwise,<sup>401</sup> should pay close attention to rule of law concerns. This is true both in terms of the statutory framework under which the foreign action was litigated, as in the Special Law 364 context, and regarding the specific evidence and procedures in individual matters.<sup>402</sup>

On a legislative level, federal amendments to permit a right of removal in transnational tort cases may be appropriate. At present, plaintiffs in any state court where jurisdiction may reside may bring foreign enforcement actions cases. Because of that, there is an inherent risk of forum shopping, either regarding particularly favorable state laws, or even to obtain a perceived sympathetic state court judge. Although many states have adopted a model law, the Uniform Foreign Money-Judgments Recognition Act,<sup>403</sup> the terms of those state laws can vary, as can their interpretation by state courts.<sup>404</sup> Providing a defendant with a right of removal in a foreign judgment enforcement action may help limit the risks of forum shopping and inconsistent interpretation and enforcement, and thus create greater consistency among decisions related to foreign judgments.<sup>405</sup> Indeed, given the international component of a foreign judgment enforcement action, resolution by federal courts may be more appropriate doctrinally.

## CONCLUSION

As the global economy expands, it certainly appears that the prospect of litigation in United States and foreign courts has expanded with it.<sup>406</sup>

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401. See Asa W. Markel, *International Litigation in Arizona: Litigating Foreign Country Judgments in Arizona*, 1 PHOENIX L. REV. 117, 118 (2008).

402. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Cf. Robert Sedler, *Law Beyond Borders: Jurisdiction in an Era of Globalization*, 51 WAYNE L. REV. 1065, 1094-95 (2005).

403. 13 U.L.A. 263 (1986).

404. Although many states have adopted The Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263 (1986), the terms of those state laws can vary. See Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 288 (1991); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 3, 5, 58-59 (2004).

405. Brand, *supra* note 404, at 298-300.

406. See Teitz, *supra* note 404 at 3, 9.

Transnational tort cases are on the rise, and now commonly feature tactics from plaintiffs, defendants, and interested third parties. For plaintiffs, the tactics frequently appear to include media, investment, political, and community organizing tactics. For corporate defendants operating overseas, those tactics underscore the importance of conducting due diligence, and seeking to institute meaningful compliance programs to identify and reduce potential negative human rights impacts.

In addition, given certain unique factors associated with transnational tort cases, including impoverished plaintiffs, foreign courts susceptible to influence, and the potential for substantial judgments, the prospect of false claims and tainted judgments—to the benefit of plaintiffs or defendants—is a substantial concern. Responsible parties obviously must seek to avoid unduly pressuring fragile foreign courts, or taking advantage of impoverished and “unsophisticated” plaintiffs.<sup>407</sup> United States courts must be sure to avoid enforcing tainted judgments, ensuring that parties in direct litigation are able to conduct necessary discovery, and verifying that out-of-court tactics that parties may employ does not taint jurors. Legislators also may wish to consider measures, such as federal court jurisdiction in foreign enforcement actions or heightened pleading standards, to ensure that transnational tort cases proceed equitably and reliably. In short, as the world’s economy becomes increasingly intertwined, and the actions of foreign litigants and courts further impact legal determinations for United States companies at home and abroad, all participants in the process must work vigilantly to ensure that zealous advocacy outside the courtroom does not create unjust outcomes within it.

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407. *Gonzales v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 U.S. Dist. LEXIS 56622, \*9 (N.D. Cal. Aug. 3, 2007); Press Release, Dole Food Co., Dole Food Company, Inc. Announces Los Angeles Superior Court Vacates Judgment and Dismisses Fraudulent Lawsuit Brought by Nicaraguans Claiming to Have Been Banana Workers (July 15, 2010), <http://www.dole.com/CompanyInformation/PressReleases/PressReleaseDetails/tabid/1268/Default.aspx?contentid=11722>.