EARTHRIGHTS INTERNATIONAL

Missing the Point:
A response to the U.S. Chamber of Commerce report "Think Globally, Sue Locally"

EarthRights International (ERI) has reviewed the June 2010 report "Think Globally, Sue Locally," by Jonathan Drimmer for the U.S. Chamber of Commerce Institute for Legal Reform ("Chamber"). The report accurately states that corporations that face transnational tort lawsuits in the United States are also likely to face a variety of public education and outreach campaign strategies, and provides a reasonably accurate catalog of such strategies and how they have been employed. Fundamentally, however, the report misses the point on the *purpose* of such campaigns, and succumbs to serious errors of presentation and analysis. Its suggestion that education and outreach campaigns are designed to bolster lawsuits of dubious legal merit, and pressure defendants into settlements, is not supported by any of the analysis in the report, and its focus on admittedly unrepresentative cases means that its case studies have little to say about the field in general. Although Mr. Drimmer's work for neutral clients, such as his legal analysis for Lexis, is widely respected and generally fair, "Think Globally" is riddled with errors that betray the bias of the Chamber and undermine the report's conclusions.

The Chamber's bias is, of course, well-known. In 2004, the Chamber argued to the Supreme Court that the Alien Tort Statute (ATS), which allows transnational lawsuits over serious international human rights violations, could only be invoked if Congress passed a specific law allowing suits for a particular violation—meaning that no prior case should have proceeded under the ATS.[1] When this argument was rejected by the Supreme Court, which found that cases could be brought invoking international law norms,[2] the Chamber switched to arguing that international law simply does not recognize corporate liability.[3] The Chamber believes that none of the cases discussed in its report should be allowed to proceed in any fashion, because it believes that corporations should be immune from liability even for violations such as crimes against humanity. The Chamber's bias is further shown in Mr. Drimmer's suggestion (p. 12) that these cases arise from a "perceived failure to adhere to certain social expectations." "Social expectations" is quite a euphemism for the prohibitions on crimes against humanity, war crimes, extrajudicial killings and torture, to name the abuses that are most commonly alleged in the cases analyzed. These opinions, that corporations should be immune from liability and that the cases are about "social expectations," do not reflect mainstream legal views regarding transnational litigation and may well have colored the analysis of the facts and issues presented in the report.

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[1] Br. for the National Foreign Trade Council, USA*ENGAGE, the Chamber of Commerce of the United States of America, *et al.* as *Amici Curiae* in Supp. of Pet'r at 25-30, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 2003 U.S. Briefs 339.

[2] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

[3] Br. for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Supp. of Def.-Appellee at 5-13, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

U.S. Office
1612 K Street NW, Suite 401
Washington, DC 20006
Tel: (202) 466-5188
Fax: (202) 466-5189
email: infousa@earthrights.org

Southeast Asia Office
P.O. Box 123
Chiang Mai University
Chiang Mai 50202 Thailand
Tel/Fax: 66 1 531 1256
email: infoasia@earthrights.org

www.earthrights.org

I. Missing the Point: Errors in Comparative Analysis

The most obvious fundamental flaw in "Think Globally" is its suggestion that education and outreach campaigns have the primary purpose of pressuring defendants into settling transnational lawsuits, especially lawsuits with questionable legal merit. In order to test such a hypothesis, Mr. Drimmer could have engaged in several forms of comparative analysis.

Since the report focuses mainly on human rights cases, Mr. Drimmer could have examined similar high-profile situations where no lawsuit was filed to determine if these campaigns are associated with lawsuits or simply with corporate human rights issues in general. For example, there have been high-profile campaigns around issues such as conflict diamonds[4] and the Chad-Cameroon pipeline,[5] without any obvious lawsuit connection. It may simply be that these campaigns are characteristic of major human rights, environmental, and labor rights issues, and in some of these cases lawsuits are also filed, which naturally become a focus of the campaign. For example, the Bhopal gas disaster in India led to a worldwide campaign against Union Carbide, which is unsurprising given that it was the worst industrial disaster in history. Litigation against Union Carbide arising out of the gas disaster and subsequent pollution is manifestly a small part of this campaign, and the lawyers suing Union Carbide have no control over the global campaign.[6] Conversely, organizations such as ERI are also engaged in public campaigns with no tie to litigation, such as ERI's ongoing campaign against the Shwe gas project in Burma.[7] These examples suggest that education and outreach campaigns are characteristic of major human rights issues, and sometimes lawsuits are also filed in such cases. Without a real comparison, there is no basis to conclude that the campaigns detailed in the report are unique to lawsuits.

Another useful comparison would be to study whether cases with strong legal merit engender more or fewer campaign tactics than legally weaker cases. For example, Mr. Drimmer could have examined tactics used in cases that have survived summary judgment motions—the point at

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[4] *See, e.g.,* Amnesty Int'l USA, *Conflict Diamonds*, http://www.amnestyusa.org/business-and-human-rights/conflict-diamonds/page.do?id=1051176; Global Witness, *Combating Conflict Diamonds*, http://www.globalwitness.org/pages/en/conflict_diamonds.html.

[5] *See, e.g.*, Center for Int'l Environmental Law, *The Chad-Cameroon Pipeline Project: Summary of Concerns, at* http://www.ciel.org/Ifi/chadcamsummary.html; Amnesty Int'l, *Contracting Out of Human Rights: The Chad-Cameroon Pipeline Project* (2005), *available at* http://www.amnesty.org/en/library/asset/POL34/012/2005/en/76f5b921-d4bf-11dd-8a23-d58a49c0d652/pol340122005en.pdf.

[6] ERI is co-counsel on two cases captioned *Sahu v.Union Carbide Corp.* and was co-counsel on *Bano v. Union Carbide Corp.* The campaign is spearheaded by the the International Campaign for Justice in Bhopal, http://www.bhopal.net, and its affiliate in the United States, Students for Bhopal, http://www.studentsforbhopal.org. ERI is not a part of either organization.

[7] *See generally* ERI, *Shwe Gas Campaign*, http://www.earthrights.org/campaigns/shwe-gas-campaign. ERI has also published a number of reports on other issues that do not relate to ERI's current litigation. *See, e.g.*, ERI, *Capitalizing on Conflict: How Logging and Mining Contribute to Environmental Destruction in Burma* (2003), *available at* http://www.earthrights.org/publication/capitalizing-conflict-how-logging-and-mining-contribute-environmental-destruction-burma; ERI, *Oil Impacts in the Territory of the Native Communities Canaan de Cachiyacu, Peru* (2005), *available at* http://www.earthrights.org/publication/oil-impacts-territory-native-communities-canaan-de-cachiyacu-peru; ERI, *The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma* (2008), *available at* http://www.earthrights.org/publication/human-cost-energy-chevron-s-continuing-role-financing-oppression-and-profiting-human-rig.

which a judge decides that there is sufficient evidence for a jury to hold the defendant liable—compared to cases that have been dismissed at earlier stages. Many of the most high-profile cases discussed by Mr. Drimmer, such as *Doe v. Unocal Corp.*, *Bowoto v. Chevron Corp.*, *Wiwa v. Royal Dutch Petroleum Co.*, and *Rodriguez v. Drummond*, survived the summary judgment stage. If Mr. Drimmer's hypothesis were correct, one would expect to see fewer campaign tactics used in the legally strong cases than in cases dismissed at earlier stages. We are doubtful of this,[8] but the point is that the report does not engage in this analysis.

Alternatively, the report could have compared cases in which public campaigns were employed with those where they generally were not. Numerous significant transnational corporate tort cases are not covered by the report at all—cases such as *Saleh v. Titan Corp.*,[9] in which the plaintiffs are seeking Supreme Court review at the moment,[10] or any of the other cases arising out of the Iraq war,[11] or *Corrie v. Caterpillar, Inc.*,[12] or *In re Terrorist Attacks on September 11, 2001*,[13] or any of the numerous cases arising out of the Holocaust.[14] Perhaps this is because these cases engendered fewer public campaign activities, but if so, they would provide useful comparisons in deducing why campaigns are used in some cases but not others.

The report also could have compared the activities of plaintiffs and advocates with the activities of the corporations themselves. Although Mr. Drimmer acknowledges (p. 16) that "corporate defendants in these same" cases may have utilized tactics "similar . . . to those used by plaintiffs," the report "does not analyze" those tactics. This omission is surprising, given that the report actually relies on the product of corporate tactics for much of its information; for example, Mr. Drimmer's discussion of the Lago Agrio litigation against Chevron cites to Chevron's own reports, press releases, and websites more than 40 times (and often as a source for facts rather than merely Chevron's opinion). The one-sided focus again misses an opportunity for a useful comparison; if both sides to litigation engage in similar activities, it stands to reason that engaging in those activities says little about the merits of a party's case.

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[8] Our experience suggests that high-profile campaigns are associated with high-interest and impactful issues, regardless of the legal merits of the case, but we have not done any systematic study.

[9] 580 F.3d 1 (D.C. Cir. 2009) (dismissing claims against Iraq war contractors).

[10] Pet'n for Certiorari, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. filed May 11, 2010).

[11] *See, e.g.*, *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009).

[12] 503 F.3d 974 (9th Cir. 2007) (dismissing claims against Israeli defense contractor).

[13] *See, e.g.*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

[14] Numerous cases relating to the Holocaust have been filed, resulting in several major settlements. *See, e.g.*, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2006); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2006); *Ungaro-Benares v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004); *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008); *Arndt v. UBS AG*, 372 F. Supp. 2d 623 (E.D.N.Y. 2005); *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d. 1098 (C.D. Cal. 2003); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (S.D.N.Y. 2000); *In re Holocaust Victim Assets*, No. CV-96-4849 (E.D.N.Y.); *Markovicova v. Swiss Bank Corp.*, No. CV-98-2934 (N.D. Cal.); *Rosenberg v. Swiss Nat'l Bank*, No. CV-98-1647 (D.D.C.). The latter three cases settled for $1.25 billion, *see* Class Action Settlement Agreement, *available at* http://www.swissbankclaims.com/Documents/Doc_9_Settlement.pdf; other cases also helped prompt the creation of the German Foundation "Remembrance, Responsibility and Future" and the Austrian Fund for Reconciliation, Peace and Cooperation. *See Ungaro-Benares*, 379 F.3d at 1231 (noting that the German Foundation was established in response to "class-action lawsuits against the German government and private German companies . . . in American courts"); *Whiteman*, 431 F.3d at 63 (noting that negotiations for the Austrian Fund commenced "partly in response to class action litigation in United States courts").

Finally, as another tool in determining the motivation behind such campaigns, Mr. Drimmer simply could have asked the people involved in the cases. While he consulted corporate counsel, however, Mr. Drimmer failed to consult anyone actually involved in advocacy for the victims in these cases. Such consultation is no substitute for rigorous analysis, since advocates certainly could conceal their true motives, but it likely would have helped correct some of the basic errors in the report. Indeed, in the one instance in which the report does quote from the views of an advocate (p. 69), attorney Terry Collingsworth, speaking at a seminar, stated that his purpose in engaging in "a public campaign" related to his cases was "to educate the public and raise people's awareness of human rights violations engendered by corporate policy." Mr. Drimmer concludes that "[s]uch statements . . . readily reveal the motives behind" the campaigns, even though Mr. Collingsworth's statements do not seem to support Mr. Drimmer's thesis or indicate any improper motive behind the public education activities.

II. Studying the Outliers: Errors in Inductive Reasoning

A second major flaw in "Think Globally" is its selection of case studies. Case studies are typically intended to be representative of a phenomenon, to allow more general conclusions to be drawn from specific cases by a process of inductive reasoning. But the cases highlighted in the report—"DBCP in Nicaragua" and "Chevron in Ecuador"—are admittedly unrepresentative and, in fact, unique, in at least two ways.

Most glaring in a report about "transnational tort cases" is the fact that neither of these cases is a transnational case. *Every other case* listed in the report is a case litigated in U.S. courts arising out of conduct abroad, and nearly all of the others are cases primarily litigated as violations of international law under the Alien Tort Statute. The two "case studies," however, are of cases that plaintiffs tried to litigate in the United States but then were compelled to litigate abroad due to dismissals under the doctrine of *forum non conveniens*, in which the defendants argued that it would be inconvenient for them to litigate in the United States. Most of the case studies then focus on allegedly unfair treatment of the corporate defendants by the foreign legislatures and courts. Moreover, to our knowledge, none of the DBCP cases included claims under the ATS, and, while the Ecuador litigation did originally include some ATS claims, those claims never figured significantly in the case, are no longer part of the Lago Agrio litigation, and were not part of the 2006 *Gonzales v. Texaco* suit in the United States.

Furthermore, while the report focuses on the documented fraud by plaintiffs and lawyers in the Nicaragua DBCP cases and the false claims in *Gonzales v. Texaco*, it admits that these are the *only* known fraudulent cases.[15] (Indeed, even characterizing *Gonzales v. Texaco* as "fraudulent" goes farther than the judge presiding over that case ever did; as discussed more fully below, there is no evidence the lawyers involved in that case deliberately presented false claims.) These two cases are admittedly outliers, but they are nonetheless highlighted as "case studies" that supposedly tell something about dozens of other, admittedly non-fraudulent cases. A supposition of widespread fraud appears to be a major basis of the report's suggestion that public campaigns are mounted to force settlements in meritless cases, but that supposition is baseless.

[15] *See* p. 54 ("The study did not identify the same type of evidence or judicial findings of fraudulent activities in the other cases."); p. 81 (acknowledging that "the only clearly evident instances of fraud occurred in the Chevron-Ecuador and DBCP contexts" and referring to "the vast majority of cases where no evidence of fraud is present").

Using these case studies, the report could have drawn some highly pertinent and useful conclusions. Unfair treatment and fraud appear only to arise in cases litigated outside the United States; indeed, the fraud and false claims in these cases were exposed when proceedings were brought in the United States. Of course, in both cases the corporate defendants chose to litigate in the foreign country rather than in the United States and, as part of their *forum non conveniens* argument, they represented to the U.S. courts that the foreign courts were fair and adequate. But while the report acknowledges (pp. 19-20) that, "[w]hen actions are refiled in foreign jurisdiction, U.S. companies may face litigation in unpredictable legal systems subject to political and other external influences," it fails to draw the most obvious conclusion from this observation: in order to avoid fraud and unfair treatment, corporations should not attempt to use the doctrine of *forum non conveniens* to dismiss cases filed in the United States. It is typically not plaintiffs who choose to use these "unpredictable legal systems," but defendants themselves, in the hopes that the foreign legal system will be more favorable to them.

Instead of drawing such lessons, the report suggests (p. 81) that "[l]egislative amendments . . . also may be warranted to help ensure the integrity of the United States legal system." The report does not indicate what such amendments might be, nor does it say what exactly is the threat to the integrity of the U.S. courts. But it is clear that no support can be drawn for this suggestion from the examples given: outliers that are not representative of transnational tort litigation, and in which any fraud was readily exposed when the cases were brought to the United States.

III. Skewing the Facts: Errors in Objective Facts and Analysis

"Think Globally" also suffers from numerous factual errors, ranging from minor mistakes to major misconceptions. We have examined most closely the treatment of ERI's own cases, and less closely the cases in which we have filed amicus briefs; we may not have spotted all of the errors in the treatment of cases with which we are not intimately familiar. Many of these errors may have been innocent, but a number of them contribute to a portrayal of the cases as lacking in legal merit, which plays into the overall argument of the report.

Downplaying the merit of the cases

The following errors of fact and analysis either implicitly or expressly contribute to the argument that the lawsuits are legally weak:

- The report's discussion of the DBCP cases (p. 22) implies that these cases are all fraudulent and states that "most DBCP cases were dismissed," but fails to acknowledge that at least two such cases settled long before any of the fraudulent activity arose (and before the enactment of Nicaragua's Special Law 364).[16] We are unaware of any allegations of fraud in these cases, or in the ongoing suits involving DBCP injuries arising out of Costa Rica, Ecuador, and Panama,[17] which the report also overlooks.

[16] One suit arising out of Costa Rica was settled in 1992 for about $20 million. *See The price of bananas*, The Economist, Mar. 12, 1994. Another suit arising out of several countries was settled in 1998 for about $45 million. Mike Lanchin, *Poisoned Plantations: Ex-workers in Nicaraguan banana fields sue U.S. firms over illnesses linked to toxic fumigant*, San Francisco Chronicle, Mar. 15, 2001.

[17] *See, e.g.*, Gene Park, *Workers Claim Pesticide Injury*, Honolulu Star Advertiser, June 9, 2010.

- The report (p. 19 & n.14) states that, of the four corporate ATS cases to proceed to trial, only one resulted in a verdict for the plaintiff. This is highly misleading at best. In *Jama v. Esmor Correctional Services*, most of the plaintiffs settled their claims before trial; and the jury ruled in favor of two of the remaining plaintiff's claims at trial, rejecting two others; the plaintiff was awarded $100,000 plus over $600,000 in attorneys' fees.[18] While the jury did rule against the plaintiff on her single ATS claim, it is obviously incorrect to characterize the result of the trial as a win for the defendants.
- In its only concrete example of transnational cases that supposedly lack legal merit, the report suggests (p. 58) that three cases were not motivated by a likelihood of "success on the merits" because they were filed shortly after similar cases were dismissed. This is a serious allegation that impugns the ethics of the lawyers involved, and for at least two of the cases the facts plainly do not support the allegation. In cases against Coca-Cola, the dismissal of one case arising out of Colombia obviously has no bearing on the merits of an entirely different case arising out of Guatemala.[19] In the *Union Carbide* cases, in which ERI is counsel, the cases do arise out of the same circumstances, but a brief review of the case histories and the opinions demonstrates why the dismissal of the *Bano* case likewise has no bearing on the merits of the *Sahu* cases. The answer is simple: *Bano*, although filed as a putative class action, was dismissed due to weaknesses of the named plaintiff's own claims, and the *Sahu* cases were filed by other members of the same putative class who did not suffer from the same problems. In fact, the report fails even to understand that there are *two Sahu* cases; *Sahu I* was, in fact, filed in 2004, not 2007, well before the ultimate dismissal of *Bano*.[20] This happened because the *Bano* plaintiff's personal injury claims were first dismissed on statute of limitations grounds,[21] and *Sahu I* was then filed by victims whose injuries were more recent[22]; subsequently, the remaining property damage claims in *Bano* were dismissed because the court found that the plaintiff did not own her property,[23] and *Sahu II* was then filed by property owners.[24] Additionally, neither of the *Sahu* cases includes any ATS claims.
- The report's case history of *Doe v. Unocal* (pp. 87-88), which settled in 2005, misses an important detail that skews the presentation of the settlement. Although the report correctly states that Unocal moved to dismiss the state court lawsuit after winning a partial trial on corporate alter ego issues, the report fails to note that Unocal's motion was *denied* on September 14, 2004,[25] and on November 2, 2004, the court set a trial date for a

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[18] *See Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169, 171-73 (3d Cir. 2009). The attorneys' fees award was subsequently vacated and remanded by the Third Circuit. *Id.* at 181. Later filings in the case suggest that the parties later settled the fee award dispute for $525,000. *See* Memo. of Law in Supp. of Pls.' Mot. to Enforce the Settlement Agreement with Defs. Esmor & Lima for Attorneys' Fees & Expenses, Docket No. 584-1, *Jama v. Esmor Corr. Servs., Inc.*, No. 97-3093 (D.N.J. filed Mar. 19, 2010).

[19] *Compare Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (allegations of union activists killed by paramilitaries in Colombia) *with* Complaint, *Palacios v. Coca-Cola Co.*, No. 10-CV-03120 (S.D.N.Y.), *available at* http://www.killercoke.org/cokeguatcomplaint.doc (complaining of violence directed by management of a Coca-Cola plant in Guatemala).

[20] *Sahu v. Union Carbide Corp.*, No. 04-cv-08825 (S.D.N.Y. filed Nov. 8, 2004).

[21] *Bano v. Union Carbide Corp.*, 361 F.3d 696, 711 (2d Cir. 2003).

[22] *See Sahu v. Union Carbide Corp.*, 548 F.3d 59, 62 (2d Cir. 2008).

[23] *Bano v. Union Carbide Corp.*, No. 05-6082, 2006 U.S. App. LEXIS 21022, *34-35 (2d Cir. Aug. 10, 2006).

[24] *Sahu v. Union Carbide Corp.*, No. 07-cv-02156 (S.D.N.Y. filed Mar. 13, 2007).

[25] Ruling on Defs.' Mot. for Judgment, *Doe v. Unocal Corp.*, No. BC 237980 (Sup. Ct. Los Angeles County Sep. 14, 2004), *available at* http://www.earthrights.org/sites/default/files/legal/doe-v-unocal-09-14-2004.pdf.

jury trial on the merits for June 21, 2005.[26] The settlement was then announced in December 2004[27] and finalized in March 2005.[28] While the report's presentation suggests that Unocal settled when it was winning the case, notwithstanding a lack of legal merit, in truth the settlement occurred only after Unocal had exhausted all attempts to avoid a jury trial.

- The report's history of *Wiwa v. Royal Dutch Petroleum* and related cases (pp. 94-95) similarly omits details relevant to the 2009 settlement of these cases. The report correctly notes that the district court dismissed the lawsuit against Shell's Nigerian subsidiary for lack of personal jurisdiction. But the report fails to acknowledge that the Second Circuit reversed this dismissal on June 3, 2009, shortly before the June 8th settlement.[29]
- Also in the *Wiwa* cases (p. 95), the report states that the court allowed crimes against humanity claims to proceed under the ATS, but in fact the court also allowed claims for summary execution, arbitrary arrest and detention, and cruel, inhuman, and degrading treatment[30] (as well as torture, which the defendants did not challenge).
- The report's history of *Bowoto v. Chevron* (pp. 85-86) correctly notes that the district court dismissed all ATS claims except crimes against humanity in 2006, based on the notion that private actors could not be held liable for aiding and abetting a state actor in committing a state-action offense, but it misleadingly omits the court's subsequent reconsideration and reversal of this position in an August 14, 2007, order.[31] Ultimately, the court also found that claims for torture and cruel, inhuman, or degrading treatment were actionable.[32]
- The report's case history of *Doe v. Exxon Mobil Corp.* (pp. 86-87) misstates which party appealed from a 2005 ruling that only partly granted a motion to dismiss; the report states that the "plaintiffs appealed," whereas it was actually the defendants that did so. Thus when the appeal was dismissed for lack of appealability, this was a victory for the plaintiffs, not the defendants.

Supporting the arguments with errors

The report contains additional factual and legal errors that contribute to various other points. Among them:

- In support of its argument that transnational cases are uniquely problematic, the report states (p. 17) that "the ATS is unique among modern legal systems" because it "permits the filing of tort actions that lack a factual nexus to the locale where the underlying acts

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[26] *See* Case Summary for *Doe v. Unocal Corp.*, http://www.lasuperiorcourt.org/civilcasesummary/index.asp (search for "BC 237980") (listing "Jury Trial" scheduled to begin June 21, 2005).
[27] ERI, *Settlement in Principle Reached in Unocal Case*, Dec. 13, 2004, *at* http://www.earthrights.org/legal/settlement-principle-reached-unocal-case.
[28] ERI, *Final Settlement Reached in Doe v. Unocal*, Mar. 21, 2005, *at* http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal.
[29] *Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd.*, No. 08-1803-cv, 2009 U.S. App. LEXIS 11873 (2d. Cir. June 3, 2009).
[30] *Wiwa v. Royal Dutch Petroleum Corp.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009)
[31] Order Granting Leave to File a Mot. for Reconsideration & Denying Without Prejudice Certification of Orders 1202, 1203, and 1204 for Interlocutory Appeal, *Bowoto v. Chevron Corp.*, No. C 99-02506, (N.D. Cal. Aug. 14, 2007).
[32] *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1091-95 (N.D. Cal. 2008).

occurred." This is incorrect and betrays a lack of understanding of basic legal principles. The Supreme Court has recognized since 1843 that, if a defendant is subject to jurisdiction in the United States, it may be sued here for wrongs that arise anywhere in the world.[33] This is the same rule that has been followed in the United Kingdom (and in numerous other common-law systems) since at least 1774.[34]

- In support of its argument that the Chevron-Ecuador litigation is fraudulent, the report (pp. 37-39) both overstates the actual evidence of fraud in *Gonzales v. Texaco* and misleadingly attempts to tie the *Gonzales* case to the Lago Agrio litigation. With respect to the so-called fraud, although the district court in *Gonzales* found that the attorneys knew or should have known that their clients did not have cancer, there was no evidence of actual knowledge—the facts pointed to a lack of diligent investigation and an improper delegation of duties to paralegals, but it was undisputed that attorney Cristobal Bonifaz did ask his paralegal to identify people "who had discovered they had cancer" and for whom a doctor "could confirm that there was 'at least a 51% probability' that the cancer had been caused by petroleum contamination."[35] No evidence of any deliberate attempt to defraud the court, as opposed to miscommunication and incompetent investigation, was identified; none of the opinions in *Gonzales*, not even the one in which the judge levied sanctions of $45,000 against Mr. Bonifaz, characterizes the misconduct as fraudulent.[36] As to the connections to Lago Agrio, although Mr. Bonifaz was one of the attorneys who had organized the Lago Agrio litigation, the court's ruling makes clear that *Gonzales* was filed only after Mr. Bonifaz's relationship with the Lago Agrio team had been severed, and not on especially good terms.[37] Indeed, Mr. Bonifaz argued when he filed *Gonzales* that his clients feared for their safety due to his rift with the Lago Agrio team[38]; that rift was not, as the report suggests (p. 38 n.168), later orchestrated "out of a desire to distance Bonifaz from the Lago Agrio litigation."
- In support of its argument that public campaign tactics are orchestrated by lawyers and plaintiffs, the report captions a picture (p. 57) "Bano v. Union Carbide Campaign from EarthRights International." While the photo is from ERI's website (and is used by ERI with permission and not licensed for use in the report), it is taken from the page describing the legal case—not any kind of campaign page. It is of course no secret that activists and advocates have been campaigning against Union Carbide for over 25 years,

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[33] *See McKenna v. Fisk*, 42 U.S. 241, 249 (1843) ("It then appears from our books, that the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions. . . . The courts in the District of Columbia have a like jurisdiction in trespass upon personal property with the courts in England . . . .").

[34] *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774).

[35] *Gonzales v. Texaco, Inc.*, No. C 06-02820, 2007 U.S. Dist. LEXIS 81222, *6-7 (N.D. Cal. Oct. 16, 2007).

[36] *See generally id*.

[37] The Lago Agrio team terminated Bonifaz in 2006, stating that his actions "'in the last few years have been unilaterally decided and personal' and constituted 'more than a grave lack of respect but a violation of [the Amazon Defense 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.'" *Id.* at *6.

[38] *See, e.g., id.* at *6-7 (noting that in 2006, Bonifaz sought to identify three or four potential plaintiffs to file a new suit in the United States); *Doe v. Texaco, Inc.*, 71 Fed. R. Evid. Serv. 493, 2006 U.S. Dist. LEXIS 76111, *4, *16 (N.D. Cal. 2006) (noting that the plaintiffs argued that they feared that "the [Amazon Defense Coalition] will harass them if they knew their identities," which was apparently based on Bonifaz's "problems between himself and the Frente leading to their parting ways").

but while ERI has active public campaigns to promote corporate accountability in many cases, we have no active campaign against Union Carbide. The campaign work on this issue is amply done by numerous advocates with no connection to the lawyers.

- In support of its argument that plaintiffs enlist foreign governments in order to influence U.S. courts, the report (p. 79) misstates the role of letters from foreign governments in the *Apartheid* and *Union Carbide* cases. These letters were not campaign tactics designed to influence the court to find the defendants liable, but legally relevant statements of position. In *Apartheid*, the Government of South Africa originally made multiple statements in opposition to the suits, including filing an amicus brief before the Second Circuit and a declaration by the Justice Minister at the district court.[39] The subsequent letter referenced in the report was obviously intended to counteract these earlier statements, rather than to apply pressure against the court. Similarly, in *Union Carbide* the Second Circuit had stated that the district court should "revisit its dismissal of the claim for plant-site remediation in the event that the Indian government or the State of Madhya Pradesh . . . urges the court to order such relief."[40] The submission of a letter from the Government of India was in direct response to this, not an effort to exert "political pressure."

Numerous factual mistakes

Additionally, the report contains errors that do not appear to support any particular argument, but are simply incorrect:

- The report (p. 18 n.7) states that the Second Circuit's decision in *Kadic v. Karadzic* was "overruled in part" by *Khulumani v. Barclay Nat'l Bank Ltd.* (although it gives only the citation for *Khulumani* and not the case name). Nothing in *Khulumani* implicitly or explicitly overrules any part of *Kadic*. One concurrence in *Khulumani* did acknowledge[41] that *Kadic* was overruled in part by *Sosa v. Alvarez-Machain*; although the Supreme Court in *Sosa* essentially ratified the substantive approach to ATS claims taken by the Second Circuit in *Kadic*,[42] it did clarify, contrary to *Kadic*, that the cause of action in an ATS case was derived from the common law, not from the ATS itself.[43]
- The report (p. 18 n.7) confuses the case history of *Doe v. Unocal Corp*. The Ninth Circuit's 2002 three-judge panel opinion in the case was not vacated by the 2005 order; it was vacated in 2003 when the court of appeals voted to take the case *en banc*.[44] The 2005 order, issued following the settlement in the case, actually vacated the underlying district court decision dismissing the case, making that dismissal no longer good law.[45]
- The report (p. 18 n.9) states that Terry Collingsworth stopping running International Rights Advocates (IRA) when he became a partner at Conrad & Scherer LLP. In fact Mr.

[39] *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 277-78 (S.D.N.Y. 2009).
[40] *Bano v. Union Carbide Corp.*, 361 F.3d 696, 717 (2d Cir. 2004).
[41] *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 265 (2d Cir. 2007) (Katzmann, J., concurring).
[42] *Sosa*, 542 U.S. at 732.
[43] *Id*. at 724.
[44] *Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003).
[45] *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *vacated by* 403 F.3d 708 (9th Cir. 2005).

Collingsworth still heads IRA, whose cases are now administered through the offices of Conrad & Scherer.[46]

- The report (p. 18 n.9) states that ERI is counsel in 9 ATS cases. ERI has actually represented plaintiffs in 8 ATS cases, of which two were suits by the same *Doe* plaintiffs against multiple Unocal defendants and three were suits by the same *Wiwa* plaintiffs against multiple Royal Dutch Shell defendants. ERI is also counsel in three other cases mentioned in the report, none of which have any ATS claims.
- The report (p. 18 n.10) states that Paul Hoffman, one of ERI's co-counsel, has been counsel in 11 ATS cases. In fact, Mr. Hoffman has been co-counsel on 7 ATS cases with ERI in addition to at least 6 others against corporations (*Apartheid, Mujica v. Occidental Petroleum Corp.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, *Kiobel v. Royal Dutch Petroleum Corp.*, *Doe v. Wal-Mart Stores, Inc.*, and *Roe v. Bridgestone Corp.*), as well as several ATS cases against individuals.
- The report (p. 18 n.10) states that Judith Brown Chomsky, also one of ERI's co-counsel, has been counsel in 6 ATS cases. In fact, Ms. Chomsky has been co-counsel on 7 ATS cases with ERI alone, and has also been counsel in other cases against corporations including the *Apartheid* litigation, as well as several ATS cases against individuals.
- The report (p. 37) states that "Judge Williams Asup" presided over *Gonzales v. Texaco*; it is actually Judge William Alsup.
- The report's Appendix A (p. 83) makes some basic errors regarding public education strategies that have been used in cases. We are only familiar with the few cases that ERI has been counsel in, and there are several errors relating to those. For example, with respect to both *Doe v. Unocal* and the *Occidental* cases, the table shows that there have been "Reports" related to the cases as a "Parallel tactic that could not be connected to plaintiffs." To the contrary, ERI itself, counsel in *Unocal* and in one of the *Occidental* cases, has issued publications on the human rights and environmental abuses at issue in each case.[47] With respect to *Bowoto v. Chevron* and *Wiwa v. Royal Dutch Petroleum*, the table does not show any "Reports" related to the cases, but in fact Human Rights Watch published a report regarding the abuses at issue in both cases,[48] and several additional reports have been published regarding the execution of Ken Saro-Wiwa.[49] Conversely, the report suggests that the plaintiffs in *Wiwa* have been involved in calls to boycott Shell; we are unaware of such action in that case.[50]

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[46] *See, e.g.*, International Rights Advocates, *Job Announcement (Human Rights Law)*, http://www.iradvocates.org/Employment.html ("All cases are administered through the Washington, DC office of Conrad & Scherer, LLP.").

[47] *See, e.g.*, ERI, *Total Denial* (1996), *available at* http://www.earthrights.org/publication/total-denial-report-yadana-pipeline-project-burma; ERI, *Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma* (2000), *available at* http://www.earthrights.org/publication/total-denial-continues; ERI, Racimos de Ungurahui, & Amazon Watch, *A Legacy of Harm: Occidental Petroleum in Indigenous Territory in the Peruvian Amazon* (2007), *available at* http://www.earthrights.org/publication/legacy-harm.

[48] *See* Human Rights Watch, *The Price of Oil* (1999), *available at* http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf.

[49] *See, e.g.*, Amnesty Int'l, *Nigeria: Time to End Contempt for Human Rights* (1996), *available at* http://www.amnesty.org/en/library/asset/AFR44/014/1996/en/5b885ee6-eaef-11dd-b22b-3f24cef8f6d8/afr440141996en.pdf; Article 19, *Nigeria: Fundamental Rights Denied* (1995), *available at* http://www.article19.org/pdfs/publications/nigeria-fundamental-rights-denied.pdf.

[50] Earlier in the text, the report (p. 73) acknowledges that "it is unclear whether" an NGO's call to boycott Shell was "related to the plaintiffs." Nonetheless, in Appendix A the boycott is listed as being a "Plaintiffs' tactic."

- The report (p. 86) erroneously counts only four ATS cases in the *In re Chiquita Brands* coordinated litigation. While four ATS cases were originally coordinated in 2008, one more was filed later in 2008, and two more were filed in 2010, for a total of seven suits.[51]
- Also with respect to *In re Chiquita Brands* (p. 86), it is somewhat misleading to refer to "allegations" that Chiquita funded the Colombian paramilitaries known as the AUC; Chiquita admitted and pled guilty to doing so.[52]
- The case history of *Doe v. Exxon Mobil Corp.* (pp. 86-87) ignores the fact that there are two related cases against Exxon Mobil, the *Doe I* case filed in 2001 and the *Doe VIII* case filed in 2007.[53]
- The case history of the *Exxon Mobil* cases (p. 87) also incorrectly states that the district court dismissed the cases in 2009 because "although the ATS permits aliens to file tort actions in U.S. courts for violations of the 'law of nations,' the case should nonetheless not be heard in this country." No ATS claims were at issue; those claims had been previously dismissed in *Doe I* and were never asserted in *Doe VIII*. The case was dismissed based on a unique (and almost certain to be overturned) ruling that, as a general matter, non-resident aliens do not have standing to sue in U.S. courts.[54]
- The case history of the *Occidental Petroleum* cases (pp. 90-91) strangely groups together three almost entirely unrelated cases, arising out of different factual situations in three different countries. Treating these cases as related in the discussion of the campaign tactics used (p. 83) is highly misleading, because there is no joint campaign regarding the three cases. For example, ERI is counsel in *Maynas Carijano v. Occidental Petroleum*, but is not counsel on the other two cases.
- The case history of *Galvis Mujica v. Occidental Petroleum* (p. 91) also omits the fact that, subsequent to the district court remand discussed, the district court ruled on March 8, 2010, that "it would not impose a prudential exhaustion requirement in this case."[55]
- The report (p. 94) states that the second *Wiwa* case is *Wiwa v. Royal Dutch Petroleum*, but it is actually *Wiwa v. Anderson*.[56]
- The report relies on "press reports" for the amount of the *Wiwa* settlement (p. 95), which is curious because the settlement documents are public and are available online.[57] Also, the report states that "*Wiwa I*" and "*Wiwa III*" settled; the settlement actually applied to all three *Wiwa* cases (*Wiwa v. Royal Dutch Petroleum Corp.*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Co. of Nigeria*).[58]

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[51] The case filed later in 2008 is *Lopez Valencia v. Chiquita Brands Int'l, Inc.*, No. 08-cv-80508 (S.D. Fla.); the cases filed in 2010 are *Henao Montes v. Chiquita Brands Int'l, Inc.*, No. 10-cv-60573 (S.D. Fla.) and *Does 1-976 v. Chiquita Brands Int'l, Inc.*, No. 10-cv-80652 (S.D. Fla.).
[52] *See* Factual Proffer, *United States v. Chiquita Brands Int'l, Inc.*., No. 07-055 (D.D.C. Mar. 19, 2007).
[53] *See, e.g.*, *Doe VIII v. Exxon Mobil Corp.*, 658 F. Supp. 2d 131, 132 (D.D.C. 2009).
[54] *Id.* at 134-35.
[55] Ruling on Limited Remand as to the Prudential Exhaustion Issue at 13, *Galvis Mujica v. Occidental Petroleum Corp.*, No. CV 03-2860 (C.D. Cal. Mar. 8, 2010).
[56] No. 01 Civ. 1909 (S.D.N.Y.).
[57] *See* Settlement Agreement and Mutual Release, *available at* http://wiwavshell.org/wiwa-v-shell-victory-settlement/, *and* Settlement Agreement Between Wiwa Plaintiffs and Energy Equity Resources Limited re Wiwa v Shell Settlement, *available at* http://wiwavshell.org/documents/Wiwa_v_Shell_EER%20AGREEMENT.pdf.
[58] *See id.*

IV. Conclusions

The basic observation underlying "Thinking Globally" is sound: companies that are sued for serious human rights and environmental abuses will often face public education and advocacy campaigns in addition to the litigation. This should not be surprising; what is objectionable, rather, is Mr. Drimmer's insinuation that campaigns are somehow manipulated or controlled by litigators to compel companies to settle weak cases case for their own financial gain. The report is so riddled with errors of fact and logic that the conclusions that it draws from this observation are anything but sound. The report relies on cases litigated in foreign countries to draw conclusions about transnational cases in the United States, uses the only cases in which false claims have been documented as its primary examples, frequently makes errors of law and fact that have the effect of downplaying the legal merits of the cases it analyzes, and generally fails to perform any rational comparisons that would lead to real insights.

All the same, "Thinking Globally" is a useful study. The data that it collects hold two key lessons for multinational corporations: first, beware of becoming complicit in severe human rights and environmental abuses abroad, because not only is litigation likely, but a multi-layered public outreach, education and advocacy campaign may well accompany that litigation; second, if you do get sued, think twice before attempting to move the litigation to another country that seems more hospitable to corporate defendants, because the results may be unpredictable and not up to the standards of the United States justice system. Indeed, far from suggesting the need for legislative reform, the report does a great job at highlighting what's right with American society and the American courts. It should be a matter of pride that in this country, corporate abuse is often targeted by a number of different advocates and groups with a range of strategies, which is the only way of successfully countering multi-billion-dollar enterprises. And the U.S. courts remain the preeminent judicial institution in the world, where both plaintiffs and defendants alike have the best chance for justice.