

The History of DBCP from a Judicial Perspective

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The efforts of workers in less-developed countries who have been exposed to 1,2-dibromo-3-chloropropane (DBCP) to obtain redress through the courts for damages suffered from these exposures are reported. The authors, who are lawyers, have represented more than 26,000 such workers. Evidence of the culpability of the U.S. manufacturers and the corporate users of DBCP, particularly Standard Fruit Company in Costa Rica, is presented. The damaged-worker plaintiffs are stymied by the application by the U.S. judicial system of *forum non conveniens*, which works in the defendants' favor by shunting the cases back to the plaintiffs' home countries, where the judicial systems are inadequate to deal with such cases and unlikely to be able to enforce judgments against the defendants. *Key words:* 1,2-dibromo-3-chloropropane; multinational corporations; judicial system; legal redress; hazard exports; toxic torts.

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The much heralded "global economy" has its less-heralded unfortunate side: increased pollution of the environment, increased exploitation of limited natural resources, and increased worker exposures to harmful substances and dangerous working conditions. It has become an editorial-page commonplace that Americans cannot put designer jeans on their legs, space-age basketball shoes on their feet, cheap gas in their foreign cars, or videos in their VCRs without some degradation to either human or environmental resources somewhere beyond American borders.

Economists and ethicists might well, and do, debate to an inconclusive standoff the values of a system in which 12-year-old Bangladeshi children earn pennies per 12-hour day making sneakers, to be purchased by 12-year-old American kids at prices that eclipse the annual salaries of the children who made them. While the ethicist decries the deplorable conditions under which the product was made, the economist might reply that the Bangladeshi has the most coveted job in town.

The authors are members of the Texas Bar. For many years, they have represented claimants seeking damages for sterility as a result of occupational exposure to DBCP. The evidence discussed in this paper was produced and authenticated in the legal discovery process, primarily from the internal files of the companies involved. Copies of any documents, or other evidence discussed in this paper, are available from the authors.

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These facts are perhaps ultimately irreconcilable in any coherent way.

But other, less ambiguous, effects of the global economy are readily discernible. Unfortunately, all too often, American multinational companies, as well as those from other developed countries, are willing to do business in the less-developed world with a much lower regard for worker safety and environmental protection than they display in their home countries. Recent headlines offer ample proof of this phenomenon: Texaco, extracting oil, has despoiled the Ecuadorian rain forest and displaced indigenous Indians. Shell has done the same in Nigeria, simultaneously exacerbating an allied deadly human rights struggle there. Nike has been harshly criticized for its labor practices overseas. NAFTA has worsened the situation in many cross-border maquiladoras. Western tobacco companies sold cigarettes in the Third World without the basic disease warnings that First-World packages had for 30 years after such labels were required in the United States.

But long before the most recent headlines brought to light these abuses, American companies operated in the Third World according to a different set of safety and environmental standards. This paper details one of the more egregious manifestations of this international double standard: the sale and use of pesticides in the Third World.

HISTORY OF THE DEVELOPMENT OF DBCP

1,2-Dibromo-3-chloropropane (DBCP) was developed to attack an ancient agricultural menace, the nematode. The nematode has plagued farmers worldwide since the dawn of organized agriculture—from Genghis Khan, who was compelled to invade Europe after worms destroyed his Asian fields, to the Mayans whose corn crops were destroyed, to today's large-scale agribusiness farms. It was not until the early 1940s that scientists began to make progress in controlling the pest. Chemists at Shell Chemical Company developed D-D, a forerunner of DBCP, and Shell hired the Andrews Sisters to market the pesticide, popularizing the "D-D Hop" on rural radio stations nationwide.

Naturally, Shell's successful product brought other companies into the market. A competing team of scientists at Dow Chemical Company quickly developed a similar nematocide, ethylene dibromide (EDB). However, both D-D and EDB killed the host plants as well as the targeted nematodes. DBCP was actually developed in

Hawaii by the Pineapple Research Institute, which then turned the bromine compound over to Dow and Shell for testing. DBCP killed the nematodes but spared the plants.

With a new and apparently effective nematocide on its hands, and eager to begin generating sales, Dow and Shell began to test DBCP for hazards. What little toxicologic research was done on DBCP was led, on Dow's part, by in-house physician Dr. Ted Torkelson. Shell contracted with Dr. Charles Hine of the University of California Medical School in San Francisco. Though the two labs were not working together, both almost immediately detected danger signals in their DBCP animal-testing results. Exposure of rats to a low 5 ppm retarded growth, caused organ damage, and shrank the testes. At 10 ppm, all surviving rats but one had testes half their normal size. At 20 ppm all rats were sterile.

In April 1958, Dr. Hine wrote in a confidential report that "among the rats that died, the gross lesions were especially prominent in lungs, kidneys and testes. Testes were usually extremely atrophied." Dow's preliminary findings came just three months later and echoed Shell's results. Dow's investigation found that DBCP was "readily absorbed through the skin and high in toxicity in inhalation." Dow also concluded that "liver, lung and kidney effects might be expected" and that "testicular atrophy may result from prolonged repeated exposure." By the summer of 1958, each company knew that the other had obtained similar results. In a letter dated June 4, 1958, Louis Lykken of Shell's Technical Service Department wrote to Shell researcher Dr. M. R. Zavon, at the University of Cincinnati, that "we understand that Dow Chemical Company have similar data and are very upset by the effect noted on the testes."

However, this troubling early information about the hazards of DBCP did not slow the development and marketing of the product. In fact, Dow and Shell had already begun producing DBCP in commercial quantities before their toxicologic studies had been completed. Finally, in 1961, Dow and Shell published their findings in a joint report in the journal *Toxicology and Applied Pharmacology*. Though Dow and Shell were willing to publish their research in an academic journal, they were not willing to include the most alarming findings of their research in their "technical data sheets," the forerunners to today's material safety data sheets (MSDSs).

The next hurdle for the companies to clear was federal registration of DBCP. The companies now jointly hired Dr. Hine to assist in the registration process. Dr. Hine drafted a report in May 1961 in support of Food and Drug Administration (FDA) registration. The report called for workplace concentrations of DBCP of no more than 1 ppm, and recommended that impermeable protective clothing be worn if skin contact was likely. Louis Lykken, in charge of government registration of chemicals for Shell, eviscerated Dr. Hine's report. With respect to Dr. Hine's safety recommenda-

tions, Lykken wrote in the margin of the report that the precautions were impractical. With respect to Hine's observation that repeated exposure to DBCP might adversely affect human reproduction, Lykken perfectly articulated the company's attitude toward worker safety: "Leave out speculation about possible harmful conditions to man. This is not a treatise on safe use."

Upon receipt of the joint Dow-Shell report in 1961, a U.S. Department of Agriculture (USDA) official wrote Shell, stating that "in view of the testicular atrophy demonstrated to occur in experimental animals, we would like to have information regarding health records of those individuals who have been employed for an extended period in the manufacture or formulation of products containing DBCP." Again, Shell demonstrated its lack of concern for worker safety by attempting to obfuscate the issue and stonewall the FDA's effort. Throughout the summer and fall of 1961, Shell and the FDA participated in the following exchange:

August 21

We have discussed with Dr. Zavon USDA's views on precautionary labeling and the hazards associated with this pesticide chemical. He shares our opinion that USDA is being overcautious in their views on labeling products containing this pesticide chemical. It is the consensus that Dr. Zavon and a representative of Dow's toxicology group should meet with USDA Toxicology Section representatives to settle this issue.

August 29

We have just received and reviewed the subject Technical Bulletin [an information brochure on Nemagon] and have some reservations with regard to the adequacy of the statements under Safety Precautions. In light of the fact that the threshold of odor detection has been reported at 1.7 parts per million and the lowest level studied [5 parts per million] has demonstrated damage after repeated exposures, it appears the statement "there is a good margin of safety in handling" would be difficult to justify and might be prosecuted as negligent.

November 9

The Pesticides Regulations Branch of the U.S. Department of Agriculture has expressed concern over the hazards associated with the use of Nemagon soil fumigant and has proposed stringent labeling for the various formulations now being marketed. It is the consensus in the Division office that the USDA is being overly cautious and the precautionary statements proposed could have an adverse effect on the sale of this product. This matter has been discussed with the USDA representatives and they are willing to relax their labeling requirements if we can provide them with a history of safe use experience in the field and in the manufacturing plant.

Shell was therefore compelled to begin a survey of its plant workers in Denver. However, Shell did not instruct the examining physician to check for testicular effects, and, of course, he did not because it was not part of a routine physical examination. Shell thus manipulated the examination of its workers to defeat the very purpose for which the FDA had insisted on the inquiry. Shell and Dow subsequently reported to the FDA that their DBCP products could be used without "undue hazard." Based on the incomplete disclosure made by Dow and Shell, the U.S. government relented and registered their products. Thereafter, workers applying the products learned nothing about sterility, testicular atrophy, or other organ damage. In fact, the strongest words of caution on the labels read, "Do not breathe vapors," and "Use only in well ventilated area." Dow's product simply read, "Avoid prolonged breathing." However, in Dow's internal toxicology card file in its medical library, the card for Fumazone noted eye and skin effects, and stated that testicular damage "may result from chronic exposure to active material." Liver and kidney damage were also mentioned.

However, soon even these grudging private acknowledgments of the dangers of DBCP exposure were altered. Dow's physician Dr. Torkelson later justified the dilution of the warnings on the toxicology cards by saying that "the cards addressed single exposures, and you don't see testicular changes on single exposures. It was put on some of the cards because whoever wrote it knew about it and thought it was important enough to put on there along with liver and kidney effects. When it was retested, the testes didn't show an effect from a single exposure, and a new card was made out." Did Dow really believe that people would be exposed only *once* to an agricultural chemical designed to be used repeatedly and over thousands of acres?

The rush to get DBCP to market in the United States at the expense of adequate testing and of full disclosure of the dangers that had been discovered was regrettable enough, perhaps standard behavior for American (U.S.) industry. But the story of the use of DBCP in farming operations owned by large multinationals is truly appalling. As the remainder of this paper discusses, American companies showed an almost total lack of regard for worker safety in their foreign operations. This callousness is all the more reprehensible for having been calculated. American companies knew that because these operations were overseas and the endangered workers were not American citizens, their right to legal redress in American courts would be severely curtailed.

CENTRAL AMERICAN TRIAL AND FULL-SCALE USE

Just a few years after government registration of DBCP in the United States, Standard Fruit Co. (today Dole) began trials of DBCP on its Central American banana

plantations. William Liebhardt, now a professor of agriculture at the University of California, Davis, and then a young scientist with Standard Fruit in Honduras, recalled:

In the DBCP trials, toxicological analyses were not undertaken on the potential effects of those chemicals on users' health or in the environment. We did not consider such factors at all at that time. . . . While working, all of us never used any kind of safety equipment in those days.

Standard Fruit began full-scale commercial use of DBCP in 1969. Throughout Costa Rica and at Standard Fruit plantations around the world, warehouse mixers, field applicators, and irrigation tower workers experienced regular, heavy exposures to DBCP through vapor inhalation and skin absorption.

During this period, Standard Fruit's production manual contained no warning of the testicular effects of DBCP, and did not advise the use of safety gear or precautions. In Costa Rica, an official of the Instituto Nacional de Seguros stated that "none of them—workers, captains and field managers—knew about the hazards and the necessary precautions for handling DBCP." The labels on Nemagon and Fumazone certainly did not tell them, and workers throughout the world whom we have interviewed have consistently stated that no warning of the products' dangers was ever given.

This failure to protect its workers was not excusable on the ground that Standard was only a fruit producer and could not have been expected to know the risks of chemicals. As early as 1967, a document from Dow recommended to Standard that its workers use protective gloves, shoes, and goggles, and that they avoid inhalation of DBCP vapors. Not only was Standard not prompted to do its own toxicologic analyses on a chemical it intended to use worldwide, but it also failed to employ the precautions urged by its supplier. Instead, Standard was content to expose thousands of its workers in less-developed countries to risks that it would never have tolerated in its American operations. It neither monitored the level of exposure to DBCP in its fields nor monitored the health of its workers.

This behavior was certainly negligent enough. After the dangers of DBCP to humans became explicitly known in the United States, however, Standard's response was truly shocking.

U.S. REGULATION, BANNING, AND POST-BAN OVERSEAS USE

In the United States, DBCP had, by 1975, been targeted as a suspected carcinogen by the Environmental Protection Agency (EPA). Then, in the summer of 1977, a group of workers on a DBCP formulating line at an Occidental Chemical Company plant in Lathrop, California, all began to make a disturbing observation at the

same time. During lunch at the plant, these men would hesitantly discuss a shared problem: they were having trouble making their wives pregnant. And at company softball games, the wives would wonder together why none of them seemed to be having children. The men consulted with their union representatives, who took their concerns to company management. Testing ensued, and 35 of 114 workers at the Occidental plant were found to be sterile. This event broke the story in the national press and triggered the government scrutiny that ultimately led to the banning of DBCP in the United States.

In response to the revelation of the situation at Occidental's Lathrop plant, Dow temporarily halted its production of DBCP, and at first was reluctant to continue selling its already existing inventory. The State of California and the Environmental Protection Agency (EPA) both quickly ordered a temporary ban on the sale and use of DBCP pending further study. Next, the EPA issued a Rebuttable Presumption Against Registration and Continued Registration of Pesticide Products Containing DBCP, concluding that no safe exposure level could be determined. The EPA's position statement on DBCP was published in the *Federal Register* on September 22, 1977, and was certainly available to any conscientious corporation seeking guidance on whether to continue using DBCP. Given the publicity surrounding the revelation of the sterility problem at the Occidental plant, and the temporary ban by the government and its publication of its findings, it was no longer plausible after the summer of 1977 for users, such as Standard Fruit, to claim ignorance of the hazards of DBCP.

Indeed, Standard knew from its pineapple operations what type of safety precautions were required for DBCP use. During the EPA's preliminary, temporary ban on DBCP usage, an exception was made for Hawaiian pineapple cultivation. Use was permitted there only under very restricted conditions, with extensive protective equipment. And, even before the sterility link was conclusively established and publicly revealed, the National Cancer Institute had conducted studies that showed that DBCP caused stomach cancer in laboratory animals.

So, by the end of the summer of 1977, it was known that DBCP caused sterility in humans and cancer in laboratory animals. *Amazingly, Standard insisted on continuing to use DBCP and insisted that its supply lines not be interrupted.* When Dow became hesitant to continue selling after the revelations of the summer of 1977, Standard responded with a blunt legal threat: "Your halt of shipping our outstanding orders is viewed as a breach of contract."

Dow relented to continue selling DBCP to Standard only after Standard made two promises. First, it promised that new, much more stringent safety precautions would be followed in the field. Second, Standard was so intent upon continuing to use DBCP, and so willfully

dismissive of its dangers, that it also promised that it would indemnify Dow against any liability arising from continued use of the product.

Standard did indeed enter into an indemnity agreement with Dow. However, thousands of workers we have represented for more than ten years consistently maintain that Standard did not adhere to its promise to ensure that safety would be made a priority. Protective clothing was not provided, nor was instruction given to managers or workers concerning safe handling procedures.

Dow's safety recommendations after July 1977 were almost identical to the conditions placed on further use in Hawaii by the EPA. Rather than implementing all necessary precautions, Standard simply selectively instituted those steps that would not interfere with its operations. For example, Dow required Standard to agree not to apply DBCP unless the area to be treated was a safe distance from worker housing and work areas such as packing stations, or unless the area had been previously evacuated. People in the area were to be notified in their native language.

In response to these suggested precautions, which Standard promised to implement to induce Dow to sell to it, Dr. Jack de Ment, the Standard executive in charge of the company's worldwide pest-control program, decided they were unnecessary. Dr. de Ment wrote to all of the company's field managers. "[T]his is not operationally feasible and does not need to be implemented." Dr. de Ment's memo went on to indicate that only personnel working at the DBCP pump, rather than field applicators, should be provided respiratory devices for protection against vapor inhalation. This was not a distinction made by Dow, but rather one unilaterally decided on by Dr. de Ment. It bespoke either an ignorance of, or a gross lack of concern for, the levels of exposure experienced by field applicators through both vapor inhalation and skin absorption.

Dr. de Ment's memo exhibited a reckless attitude throughout. Again ignoring Dow's recommendation, he wrote that empty DBCP drums could be reused for storing other liquids. Dr. de Ment revealed Standard's indifference to worker safety when he concluded that enforcement of the safety precautions insisted on by Dow was "well near impossible. It is important however, that we make a best effort, at least to the extent of having this equipment available." It is, of course, no surprise that such a grudging attitude toward worker safety, exhibited at the top of the company, filtered down through the hierarchy to the point of utter disregard out in the field. If, as Dr. de Ment maintained, it truly was not "operationally feasible" to implement adequate safety measures, then DBCP use should simply have stopped. Instead, company management left a paper trail of self-serving memos about safety, but continued to use DBCP while doing nothing in the field to ensure safety.

Indeed, as late as December 1978—more than a year after the disclosure of the sterility problem in American factory workers, another Standard official admitted that even though some protective equipment had been made available in Costa Rica during the preceding five months, the company had not effectively insisted that it be used. The company would continue to use DBCP in Honduras until 1982, and at its Philippine plantations until well into the late 1980s.

It is clear that Standard's overriding concern was maintaining a profitable business as opposed to guaranteeing worker safety. After the health crisis became public in the United States, the Costa Rican government began an inquiry to determine whether to permit the continued use of DBCP. That investigation lasted several years and ultimately led to the Costa Rican government's prohibiting further use of DBCP in the early 1980s. But Standard, knowing as it did the dangers of DBCP, lobbied the government for the right to continue using it. It presented a risk-benefit analysis designed to intimidate the government by positing an economic doomsday scenario if DBCP usage were discontinued. Standard predicted a 20% drop in banana production and also referred to indirect effects, such as maintaining employment and tax revenues. The company went so far as to make explicit its notion that concern for safety must be tempered by economics, arguing that Costa Rica's "duty to safeguard the health and safety of its citizens. . . must be considered in relation to the economic and social well-being. . . of the country."

LITIGATION: FORUM NON CONVENIENS AND THE SEARCH FOR JUSTICE

Background

As stated at the outset, there are numerous instances of irresponsible conduct conceived and carried out by American corporations in foreign countries, usually less-developed ones. For problems such as the systematic degradation of the environment in Ecuador, as only one example, remediation of the environment and justice for the individuals affected sometimes depend on the application of international environmental laws. Scholars and environmentalists have come to believe that there are no strictly "local" environmental phenomena.

Enforcement of environmental laws, however, remains a largely local task. Some see the interest of an individual nation in protecting its own resources as a matter of its sovereignty. As a result, international environmental agreements are not self-executing, and in the words of one commentator, "international environmental protection is only as strong as the sum of individual states' domestic environmental regimes."

One antidote to lax environmental regulation in the

Third World would be facilitating access to American courts for private tort suits brought by the individual foreign victims of American corporations abroad. Certainly the pattern of behavior of Standard in Central America would have been more than sufficient to impose tort liability on the company, had it transpired in the United States and injured Americans. Indeed, there has been litigation here arising out of worker exposures to DBCP. Some of the Occidental workers at Lathrop won large jury verdicts. But the foreign plaintiff seeking justice in the United States faces almost insuperable jurisdictional challenges that must be overcome before he will be able even to present the merits of his case. Simply put, American courts are largely willing to dismiss cases brought by foreigners on technical jurisdictional grounds, knowing full well that they are, in the process, consigning the victims to a very primitive tort system with no real prospect of recovery.

The primary weapon employed against the foreign plaintiff by the corporate defendant, with the blessing of compliant courts, is the doctrine known as *forum non conveniens*. The Latin phrase simply means "inconvenient forum." Essentially, the concept means that there is a more convenient forum in which to try the case. It is important to realize that as a technical matter, when employing *forum non conveniens*, a court is not ruling that it does not have jurisdiction over the case. In other words, the court *has* the authority to hear the case because the defendant is domiciled in the state where the case is brought, or does a sufficient amount of business in that jurisdiction such that it would be fair to make the defendant appear in that court.

Rather, *forum non conveniens* theoretically means that, notwithstanding the existence of proper jurisdiction, another forum would better serve the interests of justice and the convenience of the parties. The doctrine is premised on the existence of an "adequate alternative forum." The case of *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947), was an early Supreme Court articulation of the concept that a plaintiff should not be able to "vex," "harass," or "oppress" a defendant by putting it to the expense or trouble of defending itself in an inconvenient forum. The court delineated several factors, both public and private in nature, to be used in determining whether a plaintiff was unfairly suing in an "inconvenient" forum. The private-interest factors included ease of access to proof, the availability of compulsory process for attendance of unwilling witnesses; the cost of attendance of willing witnesses; the ability to view the premises if relevant; and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." The public-interest factors included the resolution of conflicts-of-laws issues; clogging local courts and burdening local juries with non-local controversies; and asserted interest of the plaintiff's home forum in resolving localized controversies at home. Interestingly, at this early stage of the evolution of the doctrine in American jurisprudence,

the Supreme Court was of the opinion that the doctrine should be applied only in rare cases, and that ordinarily a plaintiff's choice of forum should not be disturbed.

Unfortunately for foreign plaintiffs, this jurisprudential reticence to apply the *forum non conveniens* doctrine has changed to an almost knee-jerk willingness to employ it in cases brought by foreign victims against American defendants. *Forum non conveniens* is now primarily a means by which cases brought to the United States by foreigners are sent packing out of the country.

The change became formalized with the U.S. Supreme Court's opinion in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *Piper* was a tort action brought here by Scottish citizens. Whereas the earlier jurisprudence, exemplified by *Gilbert*, had held that a plaintiff's choice of forum was entitled to great deference, and that *forum non conveniens* was to be applied sparingly, *Piper* enunciated a different rule for foreigners. The court held that the traditional presumption in favor of the forum chosen by the plaintiff did not apply to foreigners:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. [*Piper*, *id.* at 255-56]

A key part of the Court's opinion related to whether it mattered that the plaintiff's home country's laws were as favorable as those in the United States. The court said that the possibility of less favorable laws being applied in the home country should not ordinarily prevent dismissal. Only in those cases where the remedy provided by the alternative forum is so blatantly inadequate as to amount to no remedy at all should the court give substantial weight to this factor in deciding whether to return or dismiss the case.

With *Piper* the evolution of the doctrine of *forum non conveniens* into a potent defensive weapon for U.S. corporations had begun.

The "Banana Workers" Saga

The authors have represented more than 26,000 banana (and pineapple) workers from around the world who were exposed to DBCP while working on large plantations for Dole/Standard, Del Monte, and Chiquita, or farming small plots independently in the Caribbean and West Africa. The defendants include not only the fruit companies, but the American DBCP manufacturers as well—Dow, Shell, and Occidental. But the initial foray into the American justice system for these workers focused on a smaller group of workers from one area of plantations run by Standard in Costa Rica. The case made its way to the Texas Supreme Court, which issued a lengthy opinion holding that *forum non conveniens* could not be used to dismiss the worker's claims back to

the courts of Costa Rica [*Dow Chemical Co. v. Castro Alfar*, 786 S.W.2d 674 (Tex. 1990)]. In the wake of the *Alfar* opinion, the Texas Legislature, heavily lobbied by business interests, passed a new law enabling Texas judges to employ the doctrine of *forum non conveniens* to dismiss cases brought by non-U.S. residents.

The original banana workers from Costa Rica were able to settle their cases because the threat of an actual trial in an American court exerted great leverage over Standard. The new law passed by the Texas Legislature became effective on September 1, 1993. For cases filed in Texas prior to that date, the old common law, affirmed by the Texas Supreme Court in *Alfar*, would hold and *forum non conveniens* would not be available to defendants.

The current group of worldwide cases was filed in various Texas state courts prior to the September 1, 1993, effective date of the new law. However, the *forum non conveniens* doctrine has remained available to federal judges. This anomaly played a central part in the saga of the banana workers' search for accountability, and set them on five-year digression that is not over yet.

To non-lawyers, it may be unbelievable that a consideration of the merits of a case could be postponed for several years while jurisdictional issues are hashed out, but that is exactly the fate that has befallen the banana workers. None of these workers, who were exposed to DBCP in the 1960s, 1970s, and 1980s, has yet had a trial in an American court.

As explained above, the current round of cases was filed in Texas prior to September 1, 1993, to take advantage of the unavailability of the *forum non conveniens* doctrine. However, at that time, the cases could be dismissed by federal judges. Therefore, the battleground was dictated at the outset: the defendant's primary strategic goal became getting the cases into federal court, a process known as removal.

The grounds for jurisdiction in federal courts are narrow. Federal courts have jurisdiction over cases where there is "diversity" of the parties, meaning traditionally that the plaintiff and defendant are from different states. Another basis of federal jurisdiction is known as "federal question" jurisdiction, meaning that federal courts have jurisdiction over disputes arising under federal laws.

Defendants in this case attempted both of these avenues into federal court and were rebuffed under both theories. Diversity jurisdiction was unavailable because of the related rule that a case cannot be removed to federal court if one of the defendants is a local corporation. Shell was such a defendant, because its world headquarters are in Houston. As for federal-question jurisdiction, defendants have routinely argued in pesticide cases that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) confers federal-question jurisdiction, and federal courts have routinely rejected

such arguments, as they did in the banana workers' cases.

With potentially hundreds of millions of dollars in liability at stake, the defendants could not have been expected to give up so easily in their efforts to gain access to federal court and its promise of a *forum non conveniens* dismissal, and indeed they did not give up. A relatively obscure federal statute known as the Foreign Sovereign Immunities Act (FSIA) affords "foreign sovereigns," or entities directly owned or controlled by them, to have cases in which they are involved adjudicated in federal court. Moreover, even if the foreign sovereign is only one of many parties in the case it has the right to put all the other parties on its back and remove everyone to federal court.

A small amount of DBCP was manufactured by the Dead Sea Bromine Company, an Israeli entity ultimately owned, several rungs up the corporate chain, by the Israeli government. However, the plaintiffs did not choose to sue this Israeli company because none of them had been exposed to product manufactured by Dead Sea. And, because their cases were originally filed in Texas state courts, the addition of new parties to the case was governed by the Texas rules of procedure. In Texas, a defendant originally sued by the plaintiff has an unfettered right to add other potentially liable parties into the suit for 30 days after the original defendant is sued. After the 30-day period has elapsed, the defendant must petition the court for permission to add new parties. The defendants here did not attempt to add Dead Sea into these cases until well beyond the expiration of the 30-day period.

Knowing the strategic significance of being in federal court, knowing that permission to add Dead Sea might well have been denied because of its highly tenuous attachment to the facts of the case, and knowing that they had delayed so long in attempting the addition, the defendants simply decided to blatantly circumvent the Texas rule requiring court permission. In a prearranged end run around the rules, counsel for the original defendants served "courtesy copies" of the papers bringing Dead Sea in as a new party on Dead Sea's counsel, who then immediately filed removal papers in federal court. That this maneuver was orchestrated in advance is beyond dispute. The removal papers are voluminous and could not have been prepared in the several minutes between service on Dead Sea and filing in federal court.

The cases were consolidated in front of two federal judges in Houston and Dallas. The courts were faced with two successive questions: 1) Were the removals to federal court proper?, and 2) If so, should the cases be dismissed under *forum non conveniens* doctrine?

The first question, propriety of removal to federal court, was itself a two-part question. First, it had to be shown that the Texas procedural rules had been followed. The federal court in Houston essentially ruled

that the defendants had not properly followed the requirement of first getting state court approval for the addition of a new party. Based on this ruling, both federal courts did remand discrete groups of the cases back to state court. However, certain of the cases had first been removed to other federal courts prior to consolidation in Houston. Some of those federal courts had "cured" the procedural defect in the state court proceedings by granting permission for the addition of Dead Sea under federal procedural rules after the removal. The Houston federal judge clearly stated that he found no support for such an approach, but nevertheless declined to overturn the handiwork of his fellow district-court-level judges. When the dust cleared, two case groups had been remanded and the rest, comprising about 10,000 plaintiffs, remained in federal court, poised on the brink of a *forum non conveniens* dismissal.

But before that could happen, the Court had to satisfy itself that Dead Sea was, in fact, a foreign sovereign with the proper authority to remove the case to federal court. This issue precipitated a lengthy briefing battle over the meaning of the FSIA, the meaning of a 1951 treaty with Israel as it related to whether Dead Sea had waived its immunity by engaging in commercial activity, and the ownership structure of Dead Sea. One can see how these legal arcana have nothing to do with the merits of the workers' complaint, but because they ultimately would determine whether the claims would be tried here or dismissed on *forum non conveniens* grounds, they were exhaustively and expensively litigated.

The key battleground here was the immunity issue. Ordinarily a foreign sovereign wants to gain access to federal court so that it can be immune from liability. Indeed, at the outset Dead Sea fought to preserve its immunity.

But immunity for Dead Sea would have meant dismissal for Dead Sea. That, in turn, would have meant that there was no basis for federal court jurisdiction and that the cases would have been returned to state court and probable trial dates. The defendants needed Dead Sea to be deemed to be a foreign sovereign *but not to insist on its immunity*. Remarkably, Dead Sea did just that, by filing a contorted document that waived its immunity in these cases but insisted on it for all other purposes! In due course, the court found that Dead Sea's ownership structure was of the type to trigger the protection of the FSIA and the road was cleared for dismissal on *forum non conveniens* grounds.

This lengthy procedural history is recounted in order to give some sense of the almost surreal path the banana workers have been forced to follow in their efforts to hold the American companies accountable. Decades after their exposures to DBCP, their fates are being decided in an obscure legal world, preoccupied with baroque procedural technicalities far removed from the business of judging the conduct of the American defendants. Of course, the procedural rulings of the fed-

eral district court, which cleared the way for *forum non conveniens* dismissal, have been appealed. This appeal is still pending. However, the application of *forum non conveniens* to foreign plaintiffs has become so routine that the plaintiffs did not even appeal that portion of the district court's ruling.

Indeed, the federal district court judge exercised his *forum non conveniens* powers and sent the plaintiffs back to places such as Nicaragua, Guatemala, the Philippines, and Ivory Coast. Of course, the plaintiffs argued that such Third-World countries have neither the law in books, nor the experience in the courtroom, to adjudicate complicated toxic tort cases. The federal district court judge found that all of these Third-World countries did afford a more convenient, adequate alternative in which to try the plaintiffs' claims, 1) despite evidence that courts in many of the plaintiffs' home countries do not even function due to civil strife; 2) the absence of juries or mechanisms for pre-trial discovery; 3) the absence of a developed body of tort law; and 4) the absence of precedent in any of the plaintiffs' countries for a case remotely like this one. Never mind that all of the conduct of the American companies responsible for the banana workers' sterility was directed from the United States, and never mind that all or most of the relevant corporate documents are located here—*forum non conveniens* doctrine since *Piper* has afforded very little room for foreign plaintiffs to be optimistic.

Since the original case brought only against Standard and the manufacturers, and up through the current round of litigation, the legal meanderings of the banana workers have exemplified the theoretical debate over *forum non conveniens* and access to American justice for the victims of American corporate malfeasance overseas. Those in favor of the doctrine argue that it is a valuable tool in ensuring that American courts are not clogged and that foreign countries resolve cases involving their own citizens. Those opposed to the use of the doctrine claim that it is nothing more than an elaborate charade whereby valid claims are dismissed, by paying lip service to legal "arguments" that are in reality nothing more than a way to protect American companies from the consequences of their bad behavior. These two viewpoints were well summarized by two of the Texas Supreme Court justices writing in the *Alfaro* opinion. Justice Doggett, writing in support of the majority opinion, said:

The dissenters are insistent that a jury of Texans be denied the opportunity to evaluate the conduct of a Texas corporation concerning decisions it made in Texas because the only ones allegedly hurt are foreigners. Fortunately Texans are not so provincial and narrow minded as these dissenters presume. Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home. Never have we been required to forfeit our membership

in the human race in order to maintain our proud heritage as citizens of Texas.

Similarly, residents of the United States may well recognize that our character as a nation is implicated by our decision to allow [our] multinational corporations to adhere to a double standard when operating abroad and [to refuse to] hold them accountable for those action. [*Alfaro*, 786 S.W.2d at 680, 687 (Doggett, J., concurring)]

Justice Hecht, dissenting from the majority opinion in *Alfaro*, put the argument for *forum non conveniens* unabashedly, focusing on the alleged effects of allowing foreigners to sue here:

But what purpose beneficial to the people of Texas is served by clogging the already burdened dockets of the state's courts with cases which arose around the world and which have nothing to do with this state except that the defendant can be served with citation here? Why, most of all, should Texas be the only state in the country, perhaps the only jurisdiction on earth, possibly the only one in history, to offer to try personal injury cases from around the world? Do Texas taxpayers want to pay extra for judges and clerks and courthouses and personnel to handle foreign litigation? If they do not mind the expense, do they not care that these foreign cases will delay their own cases being heard? As the courthouse for the world, will Texas entice employers to move here, or people to do business here, or even anyone to visit? What advantages for Texas does the court see, or what advantages does it think the Legislative envisioned, that no other jurisdiction has ever seen, in abolishing the rule of *forum non conveniens* for personal injury and death cases? Who gains? A few lawyers obviously. But who else? If there are no good answers, then what the Court does today is very pernicious for the state. [*Alfaro*, 786 S.W. 2d 707 (Hecht J., dissenting)]

Justice Hecht could scarcely conceal his contempt for the plaintiffs' lawyers who might earn fees by representing foreign tort victims in the United States. Entirely absent from his analysis was any concern for the victim or the likelihood of the victim's obtaining justice in the courts of his own country. The authors of this paper concur from bitter experience with the conclusion expressed by Justice Doggett, that "[A] *forum non conveniens* dismissal is often, in reality, a complete victory for the defendant." [*Alfaro*, 786 S.W. 2d at 683].

This conclusion is based on the realization that countries such as Burkina Faso, Honduras, and Costa Rica have no established laws or mechanisms for delivering meaningful justice to thousands of claimants. In the final analysis, to believe in the "adequate alternative forum" required by the *forum non conveniens* doctrine, to believe that Guatemala's courts will hold Dow Chemical accountable in the same manner as an American court, is to believe, in the words of one scholar, a "rather fantastic fiction." The truth is that cases dismissed under *forum non conveniens* are rarely litigated in the fora to which the

cases have been "transferred." Professor David Robertson of the University of Texas Law School conducted a survey of dismissed cases and concluded that the vast majority of them never reach trial in the foreign courts [David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 Law Q. Rev. 398 (1987)].

For most banana workers, *forum non conveniens* dismissal would be the worst kind of fiction—consignment to countries with no tort law at all. For now, the value of the possible availability of an American venue for trial of their claims is apparent in the fact that several of the defendants have settled with the plaintiffs during the pendency of the case in the federal appeals court.

There is no better evidence of the utility of the Amer-

ican justice system in preventing and correcting the abuses of American companies abroad. Even the slight remaining chance that the facts of the workers' cases might, one day, be heard by an American jury was enough to prompt this settlement. The American tort system's success in driving hazardous products off the market—asbestos, diethylstilbestrol (DES), Dalkon Shields, and Ford Pintos, to provide just a few examples—is well known. It is the authors' fervent hope that if the manufacturers of such products know that non-American users of them who suffer the same injuries have a voice in our tort system, the callous use of other countries as dumping grounds for deadly American products may come to an end.

Exporting DBCP and Other Banned Pesticides:

Consideration of Ethical Issues

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Many developed countries permit the export of pesticides that are banned, restricted, or unregistered within their own borders. This practice, which leads to the exposure of agricultural workers in developing countries to high levels of pesticides that are not permitted in the country of manufacture, raises many ethical issues as well as economic, social, political, and public health issues. Worldwide attempts to control export of such pesticides, through the FAO/UNEP Prior Informed Consent program, moves this issue in the right direction. This article explores the current U.S. and international practices, using the specific example of export of DBCP to banana-producing countries. The actions taken by multinational corporations, manufacturers of the pesticides, and public health officials in both the exporting and importing countries are explored, along with the impacts on workers, local economies, governments, and the environment. *Key words:* DBCP; bananas; Circle of Poison; prior informed consent; banned pesticides; ethics.

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Disclaimer: This manuscript deals with information not generally in the peer-reviewed literature, such as the social and ethical issues regarding the export and importing of banned pesticides. Most of the information is from non-peer reviewed Internet sources. Some of these sources are considered to be objective, such as the FAO of the United Nations, and analyses based on U.S. Customs reports. Other sources are from organizations, news reports, and individuals that may have vested interests or bias for the control of pesticide usage.

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Many industrial countries export hazardous pesticides to developing countries even though the practice may be discouraged, or in some cases prohibited. These include pesticides banned for use in the country of manufacture. According to the World Resources Institute (WRI),¹ global pesticide use continues to expand.

Seventy-five percent of pesticide use is in developed countries, with the market dominated by herbicides. By contrast, in developing countries that use the remaining 25% of world pesticide production, insecticides dominate the market. It has been reported that pesticide use in developing countries is much greater per acre than in developed countries.¹ This practice leads to a disproportionate incidence of pesticide poisoning in developing countries.

Factors contributing to increased risk of pesticide poisonings include:

1. higher proportion of the economy devoted to agriculture;
2. lack of information about hazards of imported pesticides;
3. poor application practices;
4. lack of personal protective equipment;
5. antiquated equipment, often in poor repair;
6. use of more-toxic pesticides, often because of their lower costs and increased effectiveness; and
7. pressures to produce disease-free food for export to developed countries.