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## *Dow Chemical Co. v. Castro Alfaro*: The Problems with the Current Application of Forum Non Conveniens: Is Texas' Solution a Sensible One or an Open Invitation to the World to Bring Suit There?

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# **DOW CHEMICAL CO. v. CASTRO ALFARO: THE PROBLEMS WITH THE CURRENT APPLICATION OF FORUM NON CONVENIENS: IS TEXAS' SOLUTION A SENSIBLE ONE OR AN OPEN INVITATION TO THE WORLD TO BRING SUIT THERE?**

## **I. INTRODUCTION**

As United States companies continue to expand into the world marketplace, the tremendous influx of litigation from abroad continues to rise.<sup>1</sup> When injured by a United States product, a foreign plaintiff typically seeks to bring a products liability suit in a United States forum. Litigating in the United States offers a plaintiff several favorable protections. They include: a contingency fee system,<sup>2</sup> more favorable substantive

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1. Robertson, *Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction,'* 103 LAW Q. REV. 398, 407 (1987) [hereinafter Robertson]. An increasing number of foreign plaintiffs are instituting products liability suits in the United States. Birnbaum & Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOKLYN J. INT'L L. 241, 242 (1990) [hereinafter Birnbaum & Dunham].

2. In contingency fee arrangements, the attorney collects a specific percentage of the plaintiff's recovery if successful, but nothing if the plaintiff loses. Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 196 n.19 (1985) [hereinafter Boyce, Note]. Most civil law countries share a deeply ingrained feeling of hostility toward the contingency fee system. *Id.* at 198. England and India prohibit contingency fee awards. *Id.* at 197. These countries dislike contingency fee awards because they usually significantly lower the award since the attorney takes a big percentage of it.

In the English case, *Smith Kline & French Laboratories Ltd. v. Bloch*, Lord Denning frankly expressed his opinion concerning the role of the contingency fee in the United States legal system:

As a moth is drawn to light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case "on spec" as we say, or on a "contingency fee" as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement.

*Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 2 All E.R. 72, 74.

law,<sup>3</sup> extensive discovery,<sup>4</sup> large damage awards,<sup>5</sup> and the availability of jury trials and class actions. Foreign forum remedies are often wholly inappropriate or nonexistent.<sup>6</sup> As a result of this disparity, the United States forum frequently is the only one in which the plaintiff can receive substantive relief and fair compensation.

Because of the tremendous amount of United States products sold abroad and the attractiveness of the United States forum, both federal and state courts have been forced to deal with an increase in foreign litigation. To stem this tide of foreign plaintiffs, courts frequently employ the judicially created doctrine of forum non conveniens, whereby the court, in its own discretion, has the power to dismiss the action even if jurisdiction is authorized by the letter of a statute.<sup>7</sup> By giving a court the discretion to dismiss an action, the doctrine operates to safeguard courts and defendants from the inconvenience and unfairness associated with actions brought in a forum geographically removed from the primary locus of the challenged conduct.<sup>8</sup> The "ultimate inquiry" in the application of the forum non con-

3. Federal and state courts provide strict tort liability and punitive damages, both of which are typically unavailable in foreign jurisdictions. Boyce, *supra* note 2, at 201. The Council of the European Communities adopted a directive in 1985 that provides for strict liability against manufacturers, sellers, or importers of defective products. Birnbaum & Dunham, *supra* note 1, at 242 n.6. The directive is not yet in force in all of the European Community states. For a more extensive discussion of this directive, see Steifel, *Resolution of International Products Liability Disputes: An Emerging Procedural Framework*, 16 BROOKLYN J. INT'L L. 267 (1990).

4. Federal and state rules regarding discovery are considerably broader than those permitted by other legal systems. Boyce, Note, *supra* note 2, at 200. Under the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." Fed. R. Civ. P. 26(b). English civil discovery law permits neither oral depositions of parties nor any discovery from nonparties. Boyce, Note, *supra* note 2, at 200. In addition, in civil law countries, the fact-finding process is likely to be conducted before a judge, who gathers the evidence in a series of hearings with limited discovery taking place between these hearings. Boyle, Note, *supra* note 2, at 200 n.45.

5. In federal and state courts, juries typically assess damages. Boyce, Note, *supra* note 2, at 203. There are no jury trials in European civil cases. Moreover, in civil law countries, awards are given by judges who are typically unaffected by emotional displays. BUSINESS LAW BRIEF. May 1990.

6. In lesser developed countries, worker and consumer health and safety laws are often nonexistent. Hosmer, *First World Justice*, THE TEXAS OBSERVER, July 13, 1990, at 12 [hereinafter Hosmer]. Moreover, the nonexistence of a contingency fee system and limited recoveries discourages plaintiffs from suing corporations. *Id.*

7. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

8. Duque, Comment, *The Southern District Reexamines the Doctrine of Forum Non Conveniens*, 54 BROOKLYN L. REV. 379, 391 (1988) [hereinafter Duque, Comment].

veniens doctrine is whether trial will best serve the convenience of the parties and the ends of justice.<sup>9</sup>

Due to the increase in transnational litigation, courts are applying the doctrine more readily than in the past and have modified the standards so that they are less stringent. As a result of relaxing the standard, the doctrine of forum non conveniens is frequently being used by multinational companies as a shield; a vehicle by which accountability for foreign torts can be avoided.<sup>10</sup> These companies know that it is nearly impossible for many foreign plaintiffs, especially indigent ones, to oppose large United States corporations in a foreign forum. Thus, the battle over where the litigation occurs is typically the hardest fought and the most important issue in a transnational case.<sup>11</sup> Plaintiffs ousted from United States courts by forum non conveniens dismissals often do not pursue their rights in foreign courts.<sup>12</sup>

Consequently, United States multinational corporations are reaping substantial profits by conducting business abroad, while not being subject to the stringent liability standards that are imposed in the United States.<sup>13</sup> Thousands of people abroad, both in the wealthier and in the less developed countries, are seriously injured or killed by United States products every year.<sup>14</sup> All too frequently the defendant corporations successfully avoid suit in the United States. The ease with which these types of suits are sometimes dismissed often offends a sense of fairness and justice.

In *Dow Chemical Co. v. Castro Alfaro*,<sup>15</sup> the Texas Supreme

9. *Gulf*, 330 U.S. at 507.

10. Boyce, Note, *supra* note 2, at 220.

11. Robertson & Speck, *Access to State Courts In Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 938 (1990) [hereinafter Robertson & Speck].

12. Robertson, *supra* note 1, at 419 (shows survey indicating the number of cases which are not pursued in foreign courts once plaintiffs are ousted from American courts as a result of a forum non conveniens dismissal).

13. Boyce, Note, *supra* note 2, at 220.

14. American products causing injury abroad include oral contraceptives, *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982), toxic herbicides, *Stewart v. Dow Chemical Co.*, 865 F.2d 103 (6th Cir. 1989), and damaged aircraft, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

15. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 59 U.S.L.W. 3460 (1991). During the 1991 spring term of the Texas legislature, a bill was introduced to enact forum non conveniens in Texas. See H.R. 8, 72nd Leg. (1991) (proposed); S.790, 72nd Leg. (1991) (proposed). The bill proposed that courts have the discretion to dismiss an action on the grounds of forum non conveniens when the court finds that Texas is an "inconvenient or

court set forth its solution to this problem. The *Alfaro* case involved a group of Costa Rican banana plantation workers who were injured as a result of exposure to a pesticide which was both developed and tested in the United States. The pesticide was then exported to Costa Rica by Dow Chemical Co. (Dow) and Shell Oil (Shell).<sup>16</sup> In this landmark decision, the Texas Supreme Court virtually eliminated the application of forum non conveniens in Texas.<sup>17</sup> The court held that a foreign plaintiff has an absolute right to maintain a wrongful death or personal injury cause of action in Texas, without the cause being subject to dismissal on the grounds of forum non conveniens.<sup>18</sup> The decision has drawn both praise from environmental groups and criticism from the business community. Environmental groups applauded the decision for taking a giant step toward forcing companies to be more accountable for harmful products which they produce.<sup>19</sup> In contrast, the business community claimed that companies will be discouraged from conducting significant business in Texas,<sup>20</sup> and, more dramatically, that Texas will become the "courthouse for the world."<sup>21</sup>

It is not appropriate for every foreign plaintiff to bring a

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inappropriate forum" in which to try the action or the action is "more properly heard in a forum" outside Texas. The bill required, however, that certain actions not be subject to the discretion of the court. Under this bill, Texas courts could not decline to exercise jurisdiction over actions in which the plaintiff was a Texas resident or where toxic chemicals manufactured in Texas were involved. The bill passed in the Texas House of Representatives by an overwhelming vote, but was killed in Senate committee.

16. According to a 1989 report by the General Accounting Office, there are 400-600 million pounds of United States produced pesticides exported annually. N.Y. Times, May 25, 1990, at B6, col. 3. Approximately one-fourth of these pesticides are either banned by the Environmental Protection Agency (EPA) or not registered with the proper authorities. *Id.* Despite these restrictions, many of these products are exported overseas. Lesser developed countries are particularly vulnerable. Since these countries often lack the sophistication to govern and monitor the safety of products, many people are injured as a result. *Id.* Consequently, the export of hazardous pesticides alone is said to be responsible for a million poisonings and 20,000 deaths each year in the lesser developed countries. Hosmer, *supra* note 6, at 12.

17. *Alfaro*, 786 S.W.2d at 674.

18. *Id.*

19. N.Y. Times, May 25, 1990, at B6, col. 3.

20. Texas is a corporate powerhouse with 39 of the Fortune 500 companies having headquarters there. N.Y. Times, May 25, 1990, at B6, col. 3. Texas is the fourth largest home for the biggest companies in the nation, behind New York, Illinois, and Ohio. *Id.* Furthermore, hundreds of major companies manufacture products in Texas, which most likely subjects these companies to jurisdiction there. *Id.* The Texas Association of Business stated, "allowing foreign workers to sue Texas companies could drive industry from the state or keep new companies from moving in." Hosmer, *supra* note 6, at 10.

21. *Alfaro*, 786 S.W.2d at 707 (Hecht, J., dissenting).

cause of action in a United States court when injured by a United States product. A fair and just balance must be struck in order to force companies to be more accountable for their actions abroad, and yet not cause an undue burden on the United States court system or on citizens of United States communities.

This Comment examines the Texas Supreme Court's solution to the problems associated with the current application of forum non conveniens. First, this Comment outlines the historical development and evolution of the forum non conveniens principle. Next, this Comment discusses the court's interpretation of the doctrine of forum non conveniens in *Alfaro* and evaluates its approach to the problems posed by the current application of the doctrine. Lastly, this Comment argues that the forum non conveniens doctrine should not be abolished, but, in light of the dangers associated with the doctrine, it should only be applied in limited cases.

## II. HISTORICAL BACKGROUND

The forum non conveniens doctrine has its origins in several Scottish cases and in English common law.<sup>22</sup> By the end of the nineteenth century, English courts accepted the doctrine as a means of preventing abuse of the court's process.<sup>23</sup> The origin of the doctrine of forum non conveniens in the United States is unclear. In 1929, a leading authority brought the term "forum non conveniens" into United States law, and suggested that United States courts had been applying the forum non conveniens doctrine for years without realizing it.<sup>24</sup>

The United States Supreme Court formally incorporated the doctrine of forum non conveniens into federal law with its decision *Gulf Oil Corp. v. Gilbert*<sup>25</sup> in 1947. The *Gulf* case involved the dismissal of an action to another federal forum, not dismissal to a foreign forum. In *Gulf*, the plaintiff, a Virginia resident, filed suit in New York to recover for damages sustained by a fire caused by the negligent delivery of gasoline by the de-

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22. Duque, Comment, *supra* note 8, at 391 n.59.

23. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 388 (1947).

24. Paxton Blair brought the term "forum non conveniens" into American law with his article, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929). In this article, Blair suggested that United States courts had been applying the doctrine for years without realizing it. *Id.* at 21-22.

25. 330 U.S. 501 (1947).

fendant.<sup>26</sup> The defendant was a Pennsylvania corporation, but did substantial business in New York.<sup>27</sup> In affirming the lower court's dismissal of the action, the Court set forth the standard which courts were to follow in conducting a forum non conveniens analysis. The Court directed trial courts to weigh both private and public interest factors implicated by the particular litigation.<sup>28</sup> In evaluating the private interest factors, a court should examine: the relative ease of access to proof; the availability and cost of compulsory process for the attendance of unwilling persons; and the possibility of viewing the premises and all other practical problems that make trial of a case relatively easy, expeditious, and inexpensive.<sup>29</sup> In considering public interest factors, the Court stated that trial courts should examine whether there are administrative difficulties for the court to overcome and whether there is a local interest in the controversy.<sup>30</sup> The Court emphasized that "localized controversies" should be decided "at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."<sup>31</sup> The Court also added that a plaintiff may not "vex, harass, or oppress" the defendant in its choice of forum. However, the Court insisted that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>32</sup>

Soon after the Supreme Court decided *Gulf*, Congress enacted legislation providing for the free transfer of venue among the United States district courts. The change of venue statute provided: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."<sup>33</sup> As a result of this statute, when a federal court is convinced that a case before it should be tried elsewhere in the United States, it will transfer the case to a federal court in that

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26. *Id.* at 502.

27. *Id.* at 503. The plaintiff lived in Virginia and the defendant did business in Virginia, where all events regarding the litigation took place and where most of the witnesses resided.

28. *Id.* at 508-09.

29. *Id.* at 508.

30. *Id.* at 508-09.

31. *Id.* at 509.

32. *Id.* at 508.

33. 28 U.S.C. § 1404(a) (1990).

location.<sup>34</sup> In essence then, Congress enacted legislation that addressed the concerns set forth in *Gulf*. Obviously, this legislation only applies to domestic actions.

Consequently, after the enactment of the change of venue statute, the issue of forum non conveniens dismissal only arose in transnational cases.<sup>35</sup> In such instances, courts applied the *Gulf* factors in considering whether a dismissal should be granted. During the initial period following *Gulf*, courts typically applied the "abuse of process" version of the forum non conveniens doctrine, refusing to dismiss on forum non conveniens grounds unless the defendant would be "unfairly prejudiced" or "vexed or harassed" by the plaintiff's choice of forum.<sup>36</sup> Relatively few forum non conveniens cases were decided during this initial period.<sup>37</sup>

In the mid-1970s, United States courts began shifting away from the "abuse of process" approach to a "most suitable forum" approach, in which courts concentrated more on convenience to both the court and the parties.<sup>38</sup> This shift was primarily the result of the continued increase in transnational litigation coupled with the growth of international business transactions.<sup>39</sup> Consequently, courts found their dockets crowded with foreign actions, and dismissals on forum non conveniens grounds became more frequent as courts adopted and applied the "most suitable forum" approach.<sup>40</sup>

In its 1981 decision, *Piper Aircraft Co. v. Reyno*,<sup>41</sup> the Supreme Court specifically authorized that convenience to the court be a consideration in a forum non conveniens inquiry. In *Piper*, Scottish plaintiffs brought a wrongful death action on behalf of several citizens of Scotland who were killed in an airplane

34. Robertson, *supra* note 1, at 402.

35. Robertson, *supra* note 1, at 402.

36. Robertson, *supra* note 1, at 403. This initial period extended into the mid-1970s.

An example of this approach is *Thompson v. Palmieri*, 355 F.2d 64 (2d Cir. 1966). In *Thompson*, the Second Circuit held that there was no abuse of discretion in the district court's decision to deny a New York corporation's request to dismiss a British stockholder's derivative action on grounds of forum non conveniens. The court stated that, "[t]he central question is one of convenience, and we should respect plaintiff's choice of forum as long as no harassment is intended." *Id.* at 66.

37. Robertson, *supra* note 1, at 403.

38. Robertson, *supra* note 1, at 403.

39. Robertson, *supra* note 1, at 407.

40. Robertson, *supra* note 1, at 407.

41. 454 U.S. 235 (1981).



crash in Scotland.<sup>42</sup> Plaintiffs brought this action in a California state court against the Pennsylvania manufacturer of the plane and the Ohio manufacturer of the plane's propellers in Ohio.<sup>43</sup> Plaintiffs sought to recover on the basis of negligence and strict liability. Strict liability was not recognized by Scottish law. Plaintiffs admitted that the action was filed in the United States in order to take advantage of strict liability and the higher damages awards typically available in the United States.<sup>44</sup> Separate actions against Air Navigation Trading Co., Ltd., the owner of the aircraft, and the pilot's estate were filed in the United Kingdom.<sup>45</sup>

The Court concluded that the district court's dismissal was appropriate under the *Gulf* standards even though the alternate forum would apply less favorable law.<sup>46</sup> The possibility of an unfavorable change of law should not, by itself, bar dismissal.<sup>47</sup> The Court reasoned that if the possibility of a change of law was given substantial weight, deciding motions for forum non conveniens dismissals would become more complex since the courts would have to engage in a substantial choice-of-law analysis to determine the rights, remedies, and procedures available in the alternative forum.<sup>48</sup> The Court pointed out that the inconvenience of conducting such complex exercises in comparative law is precisely what the doctrine was designed to avoid.<sup>49</sup> It should be noted that the Court did not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration; it should just not be a determinative one.<sup>50</sup>

The *Piper* court also addressed the weight accorded to a foreign plaintiff's choice of forum.<sup>51</sup> The Court recognized that ordinarily there is a strong presumption in favor of the plaintiff's choice of forum, and that it may be overcome only when the private and public interest factors clearly point toward trial in the alternative forum.<sup>52</sup> But the Court reasoned, because the

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42. *Id.* at 238.

43. *Id.* at 239.

44. *Id.* at 240.

45. *Id.*

46. *Id.* at 249.

47. *Id.* at 250-51.

48. *Id.* at 251.

49. *Id.*

50. *Id.* at 254 (emphasis in original).

51. *Id.* at 255.

52. *Id.*

central purpose of any forum non conveniens inquiry is to insure that the trial is convenient, a foreign plaintiff's choice deserves less deference since it is not the home forum.<sup>53</sup> Finally, the Court in *Piper* emphasized each state's interest in having localized controversies decided at home, as *Gulf* suggested.<sup>54</sup> Since the accident occurred in Scotland's airspace, almost all of the plaintiffs were Scottish, and almost all of the potential defendants were either Scottish or English, the Court reasoned that Scotland had a very strong interest in this litigation, and it should therefore be conducted in Scotland.<sup>55</sup> The Court concluded that the United States interest in this accident was simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried in the United States.<sup>56</sup>

Since the *Piper* Court encouraged courts to concentrate more on whether there is a sufficient nexus between the controversy and the forum, courts gradually began to use the forum non conveniens doctrine as a form of docket control, freely granting forum non conveniens dismissals whenever "on balance, forum contacts are more strongly in favor of a foreign forum."<sup>57</sup> With *Piper* then, the Court clearly abandoned the "abuse of process" approach since it is usually impossible for a defendant sued at home to make a credible claim of vexation or harassment.<sup>58</sup> Unfortunately, this current perception of forum non conveniens greatly diminishes a foreign plaintiff's chances of success in bringing a personal injury action in federal court since the injury occurred abroad and most of the evidence of the injury remains there.<sup>59</sup> In fact, it makes success in federal court close to impossible since *Piper*'s concentration on the convenience factor will almost always outweigh a foreign plaintiff's choice of a United States forum.

Consequently, many foreign plaintiffs are bringing their personal injury actions in state courts since these courts are not bound by the *Piper* decision.<sup>60</sup> Application of the forum non

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53. *Id.* at 255-56.

54. *Id.* at 260.

55. *Id.*

56. *Id.* at 261.

57. Robertson, *supra* note 1, at 405.

58. Robertson, *supra* note 1, at 405.

59. Robertson & Speck, *supra* note 11, at 940.

60. Robertson & Speck, *supra* note 11, at 940.

conveniens doctrine differs from state to state. Thirty-two states and the District of Columbia apply the doctrine as federal courts do.<sup>61</sup> Some states have adopted more limited versions of forum non conveniens.<sup>62</sup> For example, the Vermont Supreme Court has remarked that forum non conveniens dismissal is inappropriate unless the plaintiff is "seeking to vex, harass, or oppress the defendant" or to "abuse" the defendant's rights.<sup>63</sup> Other states have left the question of a forum non conveniens doctrine wide open.<sup>64</sup> Louisiana precludes forum non conveniens dismissals except in limited circumstances.<sup>65</sup> Georgia completely rejects the doctrine.<sup>66</sup> However, after the Texas Supreme Court's *Alfaro* decision, Texas became the largest and most internationally entwined state to reject the doctrine altogether as it applies to personal injury and wrongful death actions.

### III. *Dow Chemical v. Castro Alfaro*

#### A. *Facts*

Domingo Castro Alfaro, a Costa Rican resident and employee of the Standard Fruit Company (a subsidiary of Dole), and eighty-one other Costa Rican employees and their wives brought suit against Dow and Shell.<sup>67</sup> Shell has its world headquarters in Texas, and Dow operates the country's largest chemical manufacturing plant in Texas.<sup>68</sup> Dow and Shell were the first to manufacture a pesticide called dibromochloropane

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61. Robertson & Speck, *supra* note 11, at 950.

62. Robertson & Speck, *supra* note 11, at 951.

63. Robertson & Speck, *supra* note 11, at 951 n.76, (quoting *Burrington v. Ashland Oil Co.*, 134 Vt. 211, 216, 356 A.2d 506, 510 (1976)).

64. Robertson & Speck, *supra* note 11, at 951 & n.77. Courts in Idaho and Wyoming have noted the issue. See *Nelson v. World Wide Lease, Inc.*, 110 Idaho 369, 374 n.1, 716 P.2d 513, 518 n.1 (Ct. App. 1986); *Booth v. Magee Carpet Co.*, 548 P.2d 1252, 1255 & n.2 (Wyo. 1976). In Rhode Island, South Dakota, and Virginia, however, there seems to be no indication of forum non conveniens at all.

65. Robertson & Speck, *supra* note 11, at 951 & n.79. The Louisiana legislature amended the state's procedure code to provide for the use of forum non conveniens to dismiss cases "in which a claim or cause of action is predicated solely upon a federal statute" and is not "brought pursuant to [the Jones Act] or federal maritime law." La. Code Civ. Proc. Ann. art. 123 (West Supp. 1989).

66. Robertson, *supra* note 1, at 951 & n.80. See *Smith v. Board of Regents*, 165 Ga. App. 565, 565-66, 302 S.E.2d 124, 125-26 (1983) (recognizing previous apparent applications of the forum non conveniens doctrine, but stating that it "has never been expressly sanctioned in Georgia courts.")

67. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990).

68. N.Y. Times, May 25, 1990, at B6, col. 5.

(DBCP) in the 1970s. DBCP was found to be effective against nematodes, a microscopic worm that destroys the roots of plants.<sup>69</sup> Dow and Shell sold DBCP to Standard Fruit for use in its banana plantations in Costa Rica.

In 1977 the Environmental Protection Agency (EPA) banned DBCP for use as a pesticide in the United States since it had been found to be a powerful carcinogen in animals and possibly caused damage to human reproductive functions.<sup>70</sup> In spite of this ban, Dow sales to Standard Fruit in Costa Rica continued until at least November 1978, over a year after Dow recalled all DBCP from United States users.<sup>71</sup> Unfortunately there is no United States export policy forbidding corporations from exporting pesticides banned by the EPA.<sup>72</sup>

Meanwhile, many Standard Fruit employees suffered injuries, including sterility, as a result of exposure to DBCP.<sup>73</sup> The plaintiffs brought their suit in a United States court because this country's legal system represents their only chance of receiving meaningful relief. In Costa Rica, the estimated maximum recov-

69. Matthiessen & Weir, *The Forest of Sterility*, *HISPANIC*, July 1990, at 48 [hereinafter Matthiessen & Weir].

70. See Environmental Protection Agency Suspension Notice at 6; see generally 43 Fed. Reg. 40911 (Sept. 13, 1978).

71. Respondents' Supplemental Brief in Response to New Amici Curiae's and Other Post-Argument Briefs at 6, *Alfaro* (No. C-7743). After the EPA's suspension notice, Dow and Shell recalled all DBCP from users and distributors in the United States. In February 1978, Dow sent a signed letter agreement to Standard Fruit, acknowledging the toxic effect of DBCP and requiring Standard Fruit to hold Dow harmless for injuries resulting from continued use of the pesticide. Sales continued to Standard Fruit in Costa Rica until at least November 1978, over a year after Dow recalled all DBCP from American users. For further discussion, see *supra* note 16.

72. Picarazzi, Note, *Regulating the Exports of Hazardous Pesticides: In Search of an Ecological World Order*, 15 *BROOKLYN J. INT'L L.* 431, 439 [hereinafter Picarazzi, Note]. The United States adopted the Federal Insecticide, Fungicide, and Rodenticide Act (Act) in 1972, which provided a mechanism by which pesticides exported to foreign countries are regulated. Pub. L. No. 92-516, § 2, 86 Stat. 975 (codified as amended at 7 U.S.C. § 136a-y (1988)). The Act provides foreign purchasers with a means by which to make informed decision regarding the importation of pesticides deemed too dangerous for use in the United States. Picarazzi, Note, *supra*, at 440. Section 136o(a) of the Act requires a corporation to comply with two requirements when exporting pesticides. *Id.* at 439. First, any pesticide prepared or packed in violation of the specifications of the foreign purchaser is restricted. *Id.* Second, the Act requires a signed consent statement by the foreign purchaser "acknowledging that the purchaser understands that such pesticide is not registered for use in the United States and cannot be sold in the United States." *Id.* at 440. In addition, under the Act, the EPA has a duty to inform foreign countries of its decisions regarding the registration or suspension of the pesticides in the United States. *Id.*

73. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990).

ery would have been limited to approximately \$1,500 per person.<sup>74</sup> An award of this amount is clearly not sufficient for the damages these plaintiffs have suffered. Furthermore, lawyers in Costa Rica cannot work on contingency fee arrangements. Since Alfaro and the other farmworkers earn only meager wages of approximately a dollar an hour, they would be unable to pay the necessary legal fees.<sup>75</sup>

### B. Trial Court Proceedings

This action is one of four lawsuits involving many of the same plaintiffs, the same defendants, and identical facts.<sup>76</sup> In April 1985, this action was filed in a Houston state court three blocks away from Shell's headquarters. The case was then removed to federal court, but was ultimately remanded back to the state court in November 1984. Like the three trial courts in the three other lawsuits, the Harris County District Court also dismissed this case on forum non conveniens grounds.<sup>77</sup> The trial judge dismissed the case without specifying on the record the factors that were considered and the manner in which those considerations influenced his determination.<sup>78</sup>

In order to illuminate some of the concerns the court may have had concerning the facts of this case, an examination of the similar case, *Sibaja v. Dow Chemical*,<sup>79</sup> where virtually the same parties and facts were present, is helpful. In dismissing the case on forum non conveniens, the *Sibaja* court reasoned that the case should be dismissed since the alleged injuries occurred in

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74. Hosmer, *supra* note 6, at 11.

75. Hosmer, *supra* note 6, at 11.

76. The first action, *Sibaja v. Dow Chemical Co.*, was brought in a Florida state court in 1983. That action was removed to a federal district court where it was dismissed under the doctrine of forum non conveniens. See *Sibaja v. Dow Chemical Co.*, No. 83-1347-Civ. JLK (S.D. Fla. 1983). The Court of Appeals for the Eleventh Circuit affirmed. 757 F.2d 1215 (11th Cir.) *cert. denied*, 474 U.S. 948 (1985). *Aguilar v. Dow Chemical Co.*, was filed in a California state court in October 1985, in which thirty-four Costa Rican plaintiffs sued Dow, Shell, and Amvac Chemical Company. That case was removed to federal court, and, like *Sibaja*, was dismissed on forum non conveniens. See *Aguilar v. Dow Chemical Co.*, No. 86-4753-JGD, Slip op. (C.D. Cal. 1986). Following the dismissal in *Aguilar*, the plaintiffs from *Sibaja*, *Aguilar*, this action, and thirty-eight new plaintiffs filed a fourth action, again, in a Florida state court. That action, *Cabalceta v. Standard Fruit Co.*, was removed to federal court and subsequently dismissed on grounds of forum non conveniens. See *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987).

77. *Domingo Castro Alfaro v. Dow Chemical Co.*, No. 84-17,171 (Harris County Distr. Ct. 1987).

78. *Id.*

79. No. 83-1347-Civ. JLK (S.D. Fla. 1983).

Costa Rica, most of the evidence and witnesses were in Costa Rica, and compulsory process would not have been available to compel production of this evidence or the attendance of these witnesses.<sup>80</sup> The court further reasoned that it would have had to conduct a complex exercise in comparative law since the cause of action arose in Costa Rica.<sup>81</sup> The court's docket would have become congested.<sup>82</sup> Finally, the court reasoned that trial in Texas would have required local jurors to hear and decide a dispute that had no connection with the community.<sup>83</sup>

### C. *Court of Appeals Decision*

The Texas Court of Appeals reversed the trial court's decision and held that *forum non conveniens* is precluded by Texas law.<sup>84</sup> Specifically, the court held that *forum non conveniens* cannot be used to divest a court of jurisdiction validly obtained under section 71.031 of the Texas Civil Practice and Remedies Code (section 71.031).<sup>85</sup> Section 71.031 creates jurisdiction for personal injury and wrongful death claims arising outside the state. The court interpreted the language, "[a]n action may be enforced in the courts of this state . . .," to mean that a foreigner has an absolute right to bring a cause of action in Texas and the trial court is precluded from invoking the doctrine of *forum non conveniens* in any situation.<sup>86</sup> The courts of Texas,

80. *Sibaja*, 757 F.2d at 1217 n.5, (quoting *Sibaja v. Dow Chemical Co.*, No. 83-1347-Civ. JLK).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Alfaro v. Dow Chemical Co.*, 751 S.W.2d 208, 211 (Tex. App. 1988).

85. TEX. CIV. PRAC. & REM. CODE ANN. §71.031 (West 1986).

Act or Omission Out of State:

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

86. *Alfaro*, 751 S.W.2d at 210-11.

have been presented with this question before, but a rule has never been definitively developed. The Texas Supreme Court had previously declined to address the question directly, and *forum non conveniens* had never been applied to dismiss a suit brought under section 71.031 nor to a single personal injury or death case.<sup>87</sup> However, after examining several of the recent Texas Supreme Court opinions, the court concluded that the Texas Supreme Court seemed to be leaning toward the view that the Texas legislature abolished the doctrine in 1913, therefore requiring a holding that section 71.031 provides a foreign plaintiff with an absolute right to maintain a wrongful death or personal injury cause of action in Texas.<sup>88</sup>

#### *D. Texas Supreme Court's Decision*

A bitterly divided court affirmed the appellate court's dismissal. Both the split among the members of the court and the predominant issues on each side are evident in the seven separate opinions filed by the court. Both the majority opinions and the dissenting opinions range from arguments focusing on statutory interpretation, to discussions of caselaw, to policy considerations.

##### 1. The Majority

In the majority opinion, Justice Ray analyzed the forum

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87. In *Flaiz v. Moore*, the Texas Supreme Court stated that:

[W]e have not considered or attempted to decide in this case: (1) the extent to which the *forum non conveniens* principle is recognized in Texas (2) whether Article 4678 (predecessor of section 71.031) is mandatory and deprived the court of any discretion where considerations relating to either the parties or the subject matter indicate that the controversy should be submitted to and determined by another forum . . . .

359 S.W.2d 872, 876 (Tex. 1962). More recently, the Texas Supreme Court decided *Couch v. Chevron Int'l Oil Co.*, 682 S.W.2d 534 (Tex. 1984). The appellate court had stated that article 4678 did not give a foreign plaintiff an absolute right to bring his cause of action in Texas courts. 672 S.W.2d 16, 17 (Tex. App. 1984), *writ ref'd n.r.e. per curiam*, 682 S.W.2d 534 (Tex. 1984), (op. on reh'g). The Texas Supreme Court then refused the writ application, noting that although the court of appeals reached the right result in the case, the applicability of *forum non conveniens* to section 71.031 is still an open question. 682 S.W.2d at 535. In *McNutt v. Teledyne Indus., Inc.*, 693 S.W.2d 666 (Tex. App. 1985), the court of appeals held that *forum non conveniens* was available under section 71.031. The Texas Supreme Court granted a writ of error, but the case was settled prior to oral argument. The court voluntarily issued a judgment letter setting aside the judgment of the trial court and the court of appeals.

88. *Alfaro*, 751 S.W.2d at 211.

non conveniens doctrine in light of the history of the doctrine and Texas caselaw. Justice Ray argued that the doctrine of forum non conveniens did indeed exist in the early twentieth century, thereby making it possible for the legislature to have intended to abolish it with the enactment of article 4678, the predecessor to section 71.031, in 1913.<sup>89</sup> He based this assertion on two old Scottish cases, *Vernor v. Elvies*<sup>90</sup> and *Longworth v. Hope*,<sup>91</sup> both of which supposedly applied the forum non conveniens doctrine. In addition, Justice Ray, relying on a leading commentator, claimed that United States courts had been applying the doctrine for years in the nineteenth century without knowing it.<sup>92</sup> For example, the majority opinion argued that in the late nineteenth century Texas courts recognized the power to refuse to exercise jurisdiction on grounds essentially the same as those of forum non conveniens.<sup>93</sup> In *Morris v. Missouri Pacific Railroad*,<sup>94</sup> the court stated that "where the parties were non-residents and the cause of action originated beyond the limits of the state, those facts would justify the court in refusing to entertain jurisdiction."<sup>95</sup> Likewise, in *Mexican National Railroad v. Jackson*,<sup>96</sup> the court stated that docket backlog could be a consideration "where the plaintiff chooses this jurisdiction as a matter of convenience, and not of necessity."<sup>97</sup>

After determining that the doctrine did in fact exist in 1913, Justice Ray next considered whether article 4678 abolished the doctrine in Texas. Relying on the Texas Supreme Court's refusal of writ of error in *Allen v. Bass*,<sup>98</sup> Justice Ray concluded that the legislature did indeed abolish it.<sup>99</sup> *Allen* involved an accident in New Mexico between the plaintiff and defendant, both New Mexico citizens.<sup>100</sup> Justice Ray insisted that the El Paso Court of

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89. Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d at 677.

90. 6 Dict. of Dec. 4788 (1610), noted in, Alfaro, 786 S.W.2d at 677.

91. 35 Sess. Cas. (3d ser.) 1049, 1053 (1865), noted in, Alfaro, 786 S.W.2d at 677.

92. Alfaro, 786 S.W.2d at 677. (quoting Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 21-22 (1929)).

93. Alfaro, 786 S.W.2d at 677. For a discussion of the dissimilarity doctrine, see *infra* note 121 and accompanying text.

94. 78 Tex. 17, 14 S.W. 228 (1890).

95. *Morris*, 78 Tex. at 21, 14 S.W. at 230.

96. 89 Tex. 107, 112, 33 S.W. 857, 862 (1896).

97. *Mexican Nat'l Ry.*, 89 Tex. at 112, 33 S.W. at 862.

98. 47 S.W.2d 426 (Tex. Civ. App. 1932) (writ ref'd).

99. Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990).

100. The connection with Texas in *Allen* was defendant's insurer. 475 S.W.2d at 426.



Civil Appeals clearly addressed and rejected the doctrine of forum non conveniens in *Allen*, since the *Allen* opinion states "article 4678 opens the courts of this state to citizens of a neighboring state and gives them an absolute right to maintain a transitory action of the present nature and to try their cases in the courts of this state."<sup>101</sup> By refusing the application for writ of error in *Allen*, Justice Ray argued that the Texas Supreme Court manifested its approval of the court of appeals decision.<sup>102</sup> Therefore, Justice Ray reasoned, the doctrine of forum non conveniens was abolished by the legislature in 1913.

Although Justice Hightower concurred with the majority, he did so solely on the basis of statutory construction.<sup>103</sup> Justice Hightower argued that the words "may be enforced" in the statute give rise to an obligatory basis of jurisdiction, therefore requiring a cause of action for death or personal injury to be sustained by Texas courts.<sup>104</sup> He emphasized that the language of the statute is clear, and that courts must exercise judicial restraint in such instance.<sup>105</sup> If this interpretation is not accurate, Justice Hightower encouraged the legislature to amend section 71.031 to clarify its intent.<sup>106</sup>

Justice Doggett took yet another approach in his concurring opinion; he argued that the forum non conveniens doctrine is without justification, both as a matter of judicial and public policy.<sup>107</sup> He suggested that the doctrine does not promote fair, sensible, and effective judicial administration as its proponents suggest, but instead, achieves the opposite.<sup>108</sup> In fact, Justice Doggett insists, the doctrine violates public policy and, as such, is "favored by multinational defendants because a forum non conveniens dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery."<sup>109</sup> Moreover, he argued that the Texas citizenry recognizes that a wrong

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101. *Alfaro*, 786 S.W.2d at 678 (quoting *Allen*, 47 S.W.2d at 427).

102. *Alfaro*, 786 S.W.2d at 679.

103. *Id.* (Hightower, J., concurring).

104. *Id.*

105. *Id.* at 680.

106. *Id.*

107. *Id.* (Doggett, J., concurring).

108. *Id.* at 682. "In the forty-three years in which the courts have grappled with the *Gulf Oil* factors, it has become increasingly apparent that their application fails to promote fairness and convenience. Instead, these factors have been used by defendants to achieve objectives violative of public policy." *Id.* at 683.

109. *Id.* at 682.

does not fade away simply because it's immediate consequences are first felt far away rather than close to home.<sup>110</sup> Justice Doggett then argued that the refusal of a Texas corporation to face a Texas judge and jury because of inconvenience is ridiculous and suggested that what is really involved "is not convenience but connivance to avoid corporate accountability."<sup>111</sup>

The abolition of forum non conveniens, according to Justice Doggett, will further important public policy considerations by providing a check on the conduct of multinational corporations.<sup>112</sup> Justice Doggett insisted that some United States multinational corporations will continue to endanger human life and the environment until it becomes unprofitable to operate in this manner.<sup>113</sup> He pointed out that tort laws of many lesser developed countries are not yet developed; therefore prosecution in a foreign country does not provide the needed deterrence.<sup>114</sup> Consequently, Justice Doggett argues, by dismissing a case against a United States multinational corporation on forum non conveniens grounds, the court is often removing the most effective restraint on corporate misconduct.<sup>115</sup> Justice Doggett concluded by stating that the doctrine of forum non conveniens is obsolete in a world in which markets are global, and it therefore should be abolished.<sup>116</sup>

## 2. The Dissent

The four dissenters vehemently opposed the court's decision, defending the forum non conveniens doctrine and predicting dire consequences as a result of its abolition in Texas. First, Chief Justice Phillips agreed that section 71.031 allows these plaintiffs to bring suit in Texas, but he did not agree that the statutory language prohibited the trial court from applying any common law procedural defense.<sup>117</sup> Although Chief Justice Phillips offered no explanation for his conclusions, he expressed concerns regarding the majority decision to discard a procedural

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110. *Id.* at 680.

111. *Id.*

112. *Id.* at 688.

113. *Id.* at 689.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 689 (Phillips, J., dissenting).

tool which has proved useful to both federal and state courts.<sup>118</sup>

The second dissenter, Justice Gonzalez, engaged in a thorough analysis of caselaw, section 71.031, and policy considerations. First, Justice Gonzalez questioned Justice Ray's reliance on the theory that forum non conveniens has been employed in the state courts since the early nineteenth century.<sup>119</sup> Other scholars, he argued, doubt this conclusion because until 1929 it was thought that the doctrine was a violation of the privileges and immunities clause of the United States Constitution.<sup>120</sup> Justice Gonzalez then argued that it was not forum non conveniens principles that the legislature sought to abolish in 1913. Instead, he argued, in enacting the original version of section 71.031, the legislature was concerned with the preclusive effect of the dissimilarity doctrine upon actions brought by Texans injured in foreign countries and intended only to prohibit courts from dismissing a case solely on the grounds that the law to be applied was dissimilar.<sup>121</sup> He stated that the forum non conveniens doc-

118. *Id.*

119. *Id.* at 692 (Gonzalez, J., dissenting).

120. *Id.*; Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 n.43.

121. *Alfaro*, 786 S.W.2d at 693. Until the Texas Supreme Court decided *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979), both the lex loci rule and the dissimilarity doctrine were applied by Texas courts. The lex loci rule was a long-standing rule in tort cases in Texas. It required that the law of the place where the tortious conduct occurred dictate the substantive law to be applied in the trial of the case. *Gutierrez*, 583 S.W.2d at 313. The dissimilarity doctrine is a jurisdictional rule requiring a court to dismiss suits when the conflict-of-laws rules require the application of foreign law that differs substantially from the law of the chosen forum. Hunsaker, Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEX. L. REV. 1281 (1977).

Texas courts viewed the dissimilarity doctrine as addressing public policy concerns and the difficulty in enforcing foreign law. Under this doctrine, Texas courts refused to apply foreign law that was so different than that of Texas such that Texan public policy was violated. *Id.* at 1285. In addition, Texas courts would dismiss an action under the dissimilarity doctrine when local procedural rules rendered the foreign law difficult or impossible to enforce. *Id.* at 1287.

Reversal of the dissimilarity doctrine seems to have been precisely the legislative intent behind article 4678, the predecessor to section 71.031. *Id.* at 1293. First, the language of article 4678 appears to be a clear mandate to Texas courts to apply the substantive law of the jurisdiction in which the tort occurred. *Id.* Second, the language of article 4678 implies that it provides a means by which Texas citizens may bring a suit in Texas for injuries which occurred in Mexico. *Id.* Third, the act was introduced by legislators from El Paso, a city located very near the Mexican border, whose courts were frequently confronted with its citizens wishing to sue in Texas for injuries occurring in Mexico. *Id.*

However, article 4678, or section 71.031, has not been interpreted as having reversed the dissimilarity doctrine. *Id.* Instead, section 71.031 has been construed as having allowed plaintiffs to bring previously unenforceable rights of action for wrongful death in

trine cannot be equated with the dissimilarity doctrine.<sup>122</sup> Justice Gonzalez also mentioned several decisions in which Texas courts have emphasized that the existence of forum non conveniens in Texas is an open question.<sup>123</sup>

Justice Gonzalez continued his attack on the majority by arguing that *Allen v. Bass* does not control the issue of forum non conveniens dismissals under section 71.031 as the majority held.<sup>124</sup> Nowhere in the *Allen* decision is the doctrine mentioned. Instead, Justice Gonzalez argued that *Allen* involved the doctrine of comity.<sup>125</sup> Additionally, Justice Gonzalez emphasized that the doctrine of forum non conveniens was not firmly embedded in United States jurisprudence until the United States Supreme Court's *Gulf* decision; hence, *Allen* could not have precluded it years earlier.<sup>126</sup> Lastly, Justice Gonzalez concluded that the court has neither the authority nor the power to make the public policy decisions involved in determining how to hold multinational corporations more accountable.<sup>127</sup>

Finally, both Justice Cook and Justice Hecht argued that no reason existed, either in law or policy, to support the plaintiffs' presence in Texas.<sup>128</sup> For example, Justice Hecht argued that the language "may be enforced" in section 71.031 is permissive. If

Texas courts and it requires the application of the lex loci rule. *Id.*

With the *Gutierrez* decision, the Texas Supreme Court abolished the dissimilarity doctrine and the common law doctrine of lex loci in Texas. 583 S.W.2d 312 (Tex. 1979). The court reasoned that access to translations of Mexican statutes and cases may have been a very real problem in the 1890s, but is not such a problem today. *Id.* at 320. The court explained that the members of the Texas judiciary were fully capable of understanding and applying the laws of another jurisdiction. *Id.* at 321. The court concluded that the dissimilarity doctrine would no longer be a defense, nor would the common law application of the lex loci rule be permitted. *Id.* at 318, 321.

122. *Alfaro*, 786 S.W.2d at 693. Justice Gonzalez further disputed the majority's assertion that Mexican Nat. Ry. Co. v. Jackson involved the forum non conveniens doctrine. *Id.* at 694 n.8. He argued that *Jackson* does not indicate that the court engaged in discretionary balancing of public and private interest factors that is required in a proper forum non conveniens analysis. *Id.*

123. *Id.* at 693 (discussing *Flaiz v. Moore*, 359 S.W.2d 872, 876 (Tex. 1962); *Couch v. Chevron Oil Int'l Co., Inc.*, 682 S.W.2d at 535. For further discussion, see *supra* note 87.

124. *Alfaro*, 786 S.W.2d at 694 (Gonzalez, J., dissenting).

125. *Id.* Comity "is a willingness to grant a privilege, not as a matter of right, but out of deference and good will." *Id.* (quoting *Black's Law Dictionary*, 5th ed. 1979). Comity does not rely on a balancing of private and public interest factors. *Id.* at n.9.

126. *Id.* at 694.

127. *Id.* at 697.

128. *Alfaro*, 786 S.W.2d at 697 (Cook, J., dissenting); Justice Hecht stated that this decision "inflicts a blow upon the people of Texas, its employers and taxpayers, that is contrary to sound policy." *Id.* at 703 (Hecht, J., dissenting).

the legislature had intended the statute to be mandatory, it would have used the word "shall" instead of "may."<sup>129</sup> Interpreting the statute as the majority did, argued Justice Cook, places too great a burden on citizens of Texas. Texas courts would be forced to hear all claims no matter how loosely connected with Texas.<sup>130</sup> Also, Texas' interest in such disputes is likely to be slight, while the foreign forum's interest is probably more substantial.<sup>131</sup>

Although the dissenters disagreed as to whether the rule of forum non conveniens should be applied in the case at hand, they did concur that courts should have discretion to apply the doctrine and that it should not be abolished.

#### IV. ANALYSIS

By forbidding the application of forum non conveniens in Texas courts, *Alfaro* attempts to prevent the abuses associated with the current expansive application of the doctrine. Admittedly, multinational corporations should not be allowed to easily escape responsibility for their defective products sold abroad, but the doctrine should not be abolished, leaving Texas without discretion to dismiss foreigners' claims which are inappropriate for trial in the United States. Courts should have some discretion in order to be able to insure fairness to plaintiffs, defendants, and the community. However, as *Alfaro* indicates, the current application of the doctrine certainly does not insure fairness to foreign plaintiffs. Therefore, it is necessary for courts to focus more on the dispute's connection with the chosen forum. In doing so, courts will have the opportunity to adjudicate the case if it is determined that United States involvement is substantial, or to dismiss the case if the involvement is only slight. This approach will undoubtedly limit United States corporations' ability to use the forum non conveniens doctrine as a shield, avoid unfairness to the defendants, and not overwhelm United States courts with tenuous claims to the chosen forum.

##### A. *The Necessity of Forum Non Conveniens*

Multinational corporations should not be allowed to escape liability for causing death and injury abroad because of the ex-

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129. *Id.* at 704.

130. *Id.* at 697 (Cook, J., dissenting).

131. *Id.*

pansive application of the doctrine of forum non conveniens. But, on the other hand, the doctrine should not be abolished, as it is in *Alfaro*, thereby leaving Texas courts without discretion to dismiss foreigners' claims that seek to take unfair advantage of the United States system and have little contact with the forum. The *Alfaro* solution is too drastic. In spite of its problems, the doctrine of forum non conveniens is a useful one that can help to insure that only cases with strong connections to the United States forum are adjudicated in United States courts. By abolishing the forum non conveniens doctrine, the *Alfaro* decision will undoubtedly encourage foreign plaintiffs to file suits in Texas which will have only tenuous connections to the Texas forum, and courts will be without a procedure to resist them. Hence, *Alfaro's* checks against abuse will simply not be effective.

*Alfaro* holds that the doctrine of forum non conveniens cannot be used to divest a court of jurisdiction validly obtained under section 71.031 of the Texas Civil Practice and Remedies Code.<sup>132</sup> Section 71.031 allows a cause of action to be maintained in Texas for a death or personal injury that occurred in a foreign state or country.<sup>133</sup> Commentators suggest that the statute itself contains its own checks and balances to assure that a suit brought under it is fair to all parties.<sup>134</sup> For example, first, in accordance with due process, the defendant must have sufficient contacts with Texas in order to be subject to personal jurisdiction there.<sup>135</sup> Second, a plaintiff can only bring a cause of action in Texas if "a law of the foreign state or country or of this state" gives the plaintiff a right to do so.<sup>136</sup> Third, the plaintiff is bound by the Texas statute of limitations in order to assure that stale claims are not brought.<sup>137</sup> Fourth, a foreign plaintiff cannot bring a cause of action in Texas unless the plaintiff's country has "equal treaty rights" with the United States.<sup>138</sup> Many United

132. *Id.* at 679.

133. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986). See *supra* note 85 for text of statute.

134. Fisher, *Alfaro Case Did The Right Thing*, TEX. LAWYER, June 4, 1990, at 30 [hereinafter Fisher].

135. TEX. CIV. PRAC. & REM. CODE ANN. §17.042 (West 1986).

136. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a)(1) (West 1986).

137. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a)(2) (West 1986).

138. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a)(3) (West 1986). Counsel for plaintiffs, Charles Siegel, stated that in order for a foreign claim to be adjudicated in a Texas court, Texas requires that the foreign country grant United States nationals equal access to its courts. He claims that this provision would exclude 80% of foreign plaintiffs. Fisher, *supra* note 134.

States treaties with foreign nations have "equal-access-to-the-courts" provisions.<sup>139</sup> These provisions concern equal rights of access to courts for citizens of the signatory countries. Finally, section 71.031 requires the application of the "most significant contact" analysis to determine the appropriate substantive law.<sup>140</sup> Proponents of section 71.031 claim that under this statute, "only the culpable defendant stands to lose" and that a suit brought in Texas will be "fair to all parties."<sup>141</sup> However, it seems unlikely that these five criteria will accomplish these goals. What does seem likely, however, is that Texas courts will be forced to adjudicate cases with little nexus to the forum.

Consider, for example, the unfairness that would result if a "Bhopal-type" litigation was filed in a Texas court. The Bhopal litigation involved a gas leak from a chemical plant, owned and operated by Union Carbide India Limited (UCIL), in Bhopal, India.<sup>142</sup> Union Carbide is a New York corporation and owns 50.9 percent of UCIL's stock.<sup>143</sup> UCIL was incorporated under Indian law and manufactured pesticides at the Indian Government's request and approval.<sup>144</sup>

As a result of the accident, over 2,000 people were killed and approximately 200,000 others were injured.<sup>145</sup> Eager United States lawyers flew to Bhopal to organize suits against Union Carbide,<sup>146</sup> signing clients on a contingency fee basis.<sup>147</sup> Four days after the leak, the first suit was filed in a United States court on behalf of thousands of Indian nationals.<sup>148</sup> Over one hundred additional actions were subsequently filed in United

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The United States and Costa Rica have a treaty in which their citizens receive free and open access to each other's courts. See *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 n.2 (Tex. 1990).

139. Approximately thirty-five countries have treaties with the United States containing provisions concerning equal rights of court access. Respondent's Supplemental Brief in Response to New Amici Curiae's and other Post-argument Briefs at 7, *Alfaro* (No. C-7743).

140. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(c) (West 1986).

141. Fisher, *supra* note 134 at 30.

142. *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195, *cert. denied*, 484 U.S. 871 (1987).

143. *Id.* at 844.

144. *Id.*

145. *Id.*

146. Schwadron, Note, *The Bhopal Incident: How the Courts Have Faced Complex International Litigation*, 5 B.U. INT'L L.J. 445, 446 (1987).

147. *Id.*

148. *Bhopal*, 634 F. Supp. at 844.

States federal courts.<sup>149</sup> The cases were ultimately consolidated into one action and assigned to the Southern District of New York.

Judge Keenan undertook the forum non conveniens analysis set forth in *Gulf* and in *Piper*. First, as *Piper* requires, the court considered whether an alternative forum existed. It concluded that the courts of India "appear[ed] to be well up to the task of handling this case" and that "[d]ifferences between the two legal systems, even if they inure[d] to plaintiff's detriment, [did] not suggest that India [was] not an adequate forum."<sup>150</sup>

The court then engaged in the analysis of public and private interest factors required by *Gulf*.<sup>151</sup> First, in analyzing the private interest factors, the court explained that virtually all of the evidence that would be relevant at trial was located in India.<sup>152</sup> This evidence included documentary material concerning design of the plant, training, and safety procedures.<sup>153</sup> Relatively few witnesses resided in the United States.<sup>154</sup> Moreover, the plant was managed and operated entirely by Indian nationals, who were employed by UCIL. UCIL had virtually no contact with the United States.<sup>155</sup> In fact, the Government of India had expressly precluded Union Carbide from any authority to "detail design, erect and commission the plant."<sup>156</sup> UCIL was solely responsible for these tasks.<sup>157</sup> Furthermore, the Indian Government regulated the Bhopal plant directly under a series of environmental laws enforced by numerous agencies.<sup>158</sup> Judge Keenan thus concluded that the private interest factors weighed heavily in favor of dismissal.<sup>159</sup>

The court also considered the public interest factors. It acknowledged the huge administrative burden this litigation would impose on the court.<sup>160</sup> The court stated that "[n]o American interest in the outcome of this litigation outweighed the interest

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149. *Id.*

150. *Id.* at 852.

151. See *supra* notes 25-32 and accompanying text.

152. *Bhopal*, 634 F. Supp. at 853.

153. *Id.* at 858.

154. *Id.* at 860.

155. *Id.* at 853.

156. *Id.* at 856.

157. *Id.*

158. *Id.* at 863.

159. *Id.* at 860.

160. *Id.* at 861.



of India in applying Indian law and Indian values to the task of resolving this case."<sup>161</sup> Moreover, the court warned against imposing typically United States standards on other countries' concerns.<sup>162</sup> Ultimately, the court granted the dismissal because there was a very strong connection between the litigation and India and only a tenuous one with the United States.

The *Bhopal* litigation clearly illustrates the increasing tendency of foreign plaintiffs to sue in the United States and the important role that forum non conveniens can play in stemming that tide.<sup>163</sup> The doctrine helps to reduce the glut of litigation of foreign claims in United States courts by eliminating those, like the *Bhopal* case, that have only a tenuous connection with the United States.<sup>164</sup> Use of this doctrine can alleviate, at least somewhat, the burden on courts and to encourage other forums to solve their own problems.<sup>165</sup> But with the Texas Supreme Court's decision in *Alfaro*, *Bhopal*-type litigation will be maintained in a Texas forum. For example, in light of *Alfaro*, if a *Bhopal*-type tragedy occurred now, and the case was brought in Texas, the courts would be required to adjudicate it. First, the court would be able to obtain jurisdiction over Union Carbide since the corporation does significant business in Texas. Second, the statute of limitations would likely not present a problem since lawyers quickly filed over one hundred actions after the real accident in 1984. Indian substantive law would likely apply, while Texas law would govern matters of procedure. However, this hypothetical case would fail the last prong of *Alfaro*'s test because India does not have equal treaty rights with the United States. But if a *Bhopal*-type accident occurred in a country which does have equal treaty rights with the United States, Texas courts would be forced to adjudicate the action in spite of the many difficulties with doing so. Just because the United States does not have equal treaty rights with every country does not mean Texas courts will not be forced to adjudicate inappropriate cases. Abolishing the doctrine of forum non conveniens altogether is not an adequate solution; courts should have some discretion in order to be able to insure fairness to the plaintiff,

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161. *Id.* at 867.

162. *Id.* at 865 (citing *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 4 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982)).

163. Birnbaum & Dunham, *supra* note 1, at 419.

164. Boyce, Note, *supra* note 2, at 195.

165. Boyce, Note, *supra* note 2, at 195.

the defendant, and the community.

*B. Criticism of the Current Application of Forum Non Conveniens*

The way in which most courts are currently applying the doctrine of forum non conveniens, dubbed the "most suitable forum" approach, does not insure fairness to foreign plaintiffs. Instead, it is the "most suitable forum" approach which has led to abuse of the doctrine of forum non conveniens. In almost every case, the place of the injury would seem to be the most suitable forum since it is reasonable to assume that most of the witnesses and evidence will be there. This approach works well when dealing with a case like *Bhopal* where there really was little significant contact with the United States. But this approach is not appropriate for a case like *Alfaro*. In *Alfaro* two United States corporations had primary responsibility for the testing, development, and marketing of the product, all of which are the main issues pertaining to liability. Shell's headquarters are only three blocks away from the court in which this action was filed. Dow had the nation's largest chemical manufacturing plant in Texas and its headquarters are in Midland, Michigan, much closer to Texas than to Costa Rica. To apply the "most suitable forum" approach would be grossly unfair to foreign plaintiffs, and encourage multinational corporations to be less careful in selling their products abroad. It would also damage the United States' reputation abroad, and violate human rights concerns and principles of international law.

As a result of courts applying the "most suitable forum" approach, the doctrine is frequently used by multinational corporations as a shield against foreign plaintiffs, and injured foreigners are being denied meaningful relief. These companies know that it is nearly impossible for many foreign plaintiffs, especially indigent ones, to take on a huge United States corporation in the foreign forum. These companies frequently seek to invoke application of forum non conveniens knowing that in light of the current forum non conveniens standards, the court is likely to dismiss the case. Furthermore, these companies know that such a dismissal is usually outcome determinative since plaintiffs ousted from United States courts by forum non conveniens dis-

missals frequently do not pursue their case in foreign courts.<sup>166</sup> If they do choose to continue to fight, these plaintiffs almost inevitably have to hire new lawyers and lose the benefit of contingency fee financing.<sup>167</sup> In addition, the products of discovery that have occurred in the United States proceedings may very well be unusable in the foreign forum.<sup>168</sup> Often, different substantive law will apply, and it is unlikely that strict liability will be available in the foreign forum.<sup>169</sup> Finally, it is likely that the frustrated plaintiff will simply give up, with resources and energy both exhausted.<sup>170</sup> Therefore, with the help of courts applying the "most suitable forum" version of *forum non conveniens*, United States corporations are succeeding in reaping the benefits from doing business abroad without being subject to the same liability standards as they are under in the United States.

In addition, in not forcing United States corporations to be more accountable for the safety of their products, courts are allowing these corporations to tarnish the United States' reputation abroad and to violate human rights concerns and principles of international law. As a signatory of the United Nations Charter, the United States assumed a legal obligation to insure respect for human rights throughout the world.<sup>171</sup> The charter further provides that "the United Nations shall promote . . . universal respect for, and observance of human rights and fundamental freedoms for all . . . ."<sup>172</sup> It seems clear that under international law, the United States has an obligation to guard against its corporations acting in a manner violative of human rights. It therefore makes sense that the exportation of hazardous chemicals deemed too dangerous for use in a developed country and the failure to take precautions against hazards that accompany such exports violates established principles of international law.<sup>173</sup> United States corporations cannot be permitted to export dangerous products without regard for the possible deadly consequences these products may cause. In addition, these consequences may quite possibly be felt at home in the

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166. Robertson, *supra* note 1, at 419.

167. Robertson, *supra* note 1, at 418.

168. Robertson, *supra* note 1, at 418.

169. Robertson, *supra* note 1, at 418.

170. Robertson, *supra* note 1, at 418.

171. U.N. CHARTER art. 13.

172. U.N. CHARTER art. 55(c).

173. Picarazzi, Note, *supra* note 72, at 449.

United States since many pesticides are banned for use in this country, but are used to grow crops in other countries. These crops are later imported for domestic consumption.<sup>174</sup> A statute limiting the exportation of harmful products is one way of addressing the problem, but a far more effective way is to hold these companies to the same standard of liability abroad as they are under at home. The surest way to make these companies take precautionary measures is to force them to consider the huge damage awards they may have to pay out as a result of a tort litigation.<sup>175</sup>

Therefore, the "most suitable forum" approach should be rejected. The convenience of the forum should be a consideration, but it should not be the dominant concern as the current application of the doctrine by most courts indicates. Fundamental fairness is not achieved if United States defendants are able to use the doctrine as a shield against foreign plaintiffs, who are then left without a means of obtaining meaningful relief. The overriding inquiry should not be whether another forum is a *better* one, but whether the plaintiffs' chosen forum is itself inappropriate or unfair because of the various private and public interest considerations involved.<sup>176</sup>

### C. Recommendation

A return to an "abuse of process" approach is necessary, whereby courts focus more on the litigation's connection with the chosen forum and whether this choice unfairly prejudices the defendant. This proposal contrasts with the currently applied "most suitable forum" approach in which convenience is the dominant concern and often outweighs the litigation's strong connection with the forum. Even though both *Gulf* and *Piper* sought to relieve courts from adjudicating cases with tenuous connections to the chosen forum, neither decision encouraged courts to be blind to the concerns of the foreign plaintiffs simply because key witnesses may live abroad and foreign law may ap-

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174. Jacob, Note, *Hazardous Exports from a Human Rights Perspective*, 14 Sw. U.L. Rev. 81, 89 (1983).

175. Plaintiffs' counsel, Charles Siegel, stated, "[G]oing to court may be the most effective way, if not the only way to get these companies to stop [dumping in the Third World]. It's been shown again and again: it's not legislation, but awards to victims, that have shaped corporate conduct." Weir & Matthiesson, *Will the Circle be Unbroken*, MOTHER JONES, June 1989, at 25.

176. *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 909 (S.D.N.Y. 1986).

ply. Therefore, if courts focus more on the dispute's *connection* with the chosen forum, corporations would be forced to be more accountable for their actions, plaintiffs would receive appropriate relief, and courts would not become unduly burdened.

For example, several courts recently have refused to grant forum non conveniens dismissals because, in their view, the connection with the chosen forum was not tenuous. In *Carlenstolpe v. Merck & Co., Inc.*,<sup>177</sup> the New York District Court denied the request for dismissal.<sup>178</sup> The case involved a Swedish citizen who was seriously injured after receiving two doses of a hepatitis vaccine that had been designed, tested, and manufactured by a United States pharmaceutical company.<sup>179</sup> Although Swedish Government agencies are responsible for licensing and distribution in that country, no independent testing was done in Sweden. Sweden relied on information furnished by the United States company.<sup>180</sup>

The *Carlenstolpe* court stated that the defendant had not convinced the court that "plaintiff's chosen forum is itself so inconvenient and unrelated to the subject matter of this litigation that trial in *this* forum would be adverse to the best interests of justice."<sup>181</sup> The court also correctly considered the real issue to be the adequacy of the drug's design, testing, and information package supplied to Swedish authorities.<sup>182</sup> For the most part, these issues centered on behavior that occurred in the United States.<sup>183</sup> Not only does the court's denial of dismissal force this company to be accountable for the harmful effects of its product to foreign citizens, but it satisfies *Gulf's* requirement that there be a local concern in the controversy so as not to burden the community with foreign matters.

Similarly, in *Chan Tse Ming v. Cordis Corp.*,<sup>184</sup> and in *Friends For All Children v. Lockheed Aircraft Corp.*,<sup>185</sup> both

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177. *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901 (S.D.N.Y. 1986).

178. *Id.* at 903.

179. *Id.*

180. *Id.*

181. *Id.* (emphasis in original).

182. *Id.* at 908.

183. *Id.*

184. 704 F. Supp. 217 (S.D. Fla. 1989). In *Chan Tse*, a Hong Kong plaintiff brought suit in a Florida federal district court against a Florida corporation that designed and tested the pacemaker which was surgically implanted in the plaintiff and later determined to be defective. *Id.* at 218.

185. 717 F.2d 602 (D.C. Cir. 1983). The case involved "Operation Babylift," a plan authorized by President Ford to evacuate Vietnamese orphans from Saigon shortly

courts held that a United States forum was not an inconvenient forum for prosecuting the lawsuits. In *Chan Tse*, the court concluded that the gravamen of the plaintiff's claims against the defendant involved the development, testing, and manufacturing of the pacemaker.<sup>186</sup> Since these events occurred primarily in Florida and since many of the witnesses who could testify regarding the design, manufacture, and testing of the pacemaker resided in the United States, the court refused to dismiss the case.<sup>187</sup> Similarly, the *Lockheed* court pointed out that most of the documentary evidence and many of the witnesses were in the United States. In addition, like *Carlenstolpe*, both courts determined that there was a strong local interest in adjudicating the cases in the United States. In *Chan Tse*, the court acknowledged that Hong Kong had a highly developed judicial system that was fully capable of adjudicating the issues;<sup>188</sup> but it determined that common sense dictated that the defendant not succeed in avoiding suit in its own home forum for conduct which occurred there.<sup>189</sup> Analogously, in *Lockheed*, the court reasoned that given the involvement of the United States in every phase of the operation, it seemed impossible to say that there was not a strong national interest in the litigation and in insuring that justice was done.<sup>190</sup>

Most courts have not followed the *Carlenstolpe* approach.<sup>191</sup> It is argued that by placing too much emphasis on the private interest factor concerning liability evidence, the *Carlenstolpe* approach ignores *Piper's* "admonition that no deferential weight should attach to any one of the private or public interest factors."<sup>192</sup> The *Piper* court reasoned that "[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the flexibility that makes it so valuable."<sup>193</sup> But since witnesses and the evidence regarding causation

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before United States forces were evacuated from South Vietnam. *Id.* at 603. Shortly after take off, the plane lost a cargo door and crash landed in a rice paddy, killing 154 people. *Id.* Some orphans survived the crash and were flown to the United States the next day. A year later, a complaint was filed on behalf of the surviving children against the company that designed and manufactured the aircraft. *Id.* at 604.

186. *Chan Tse*, 704 F. Supp. at 219.

187. *Id.* at 220.

188. *Id.* at 219 n.5.

189. *Id.* at 220.

190. *Friends for All Children v. Lockheed Aircraft Corp.*, 717 F.2d at 610.

191. *Birnbaum & Dunham*, *supra* note 1, at 259.

192. *Birnbaum & Dunham*, *supra* note 1, at 253.

193. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981).

and damages will almost always exist in the foreign plaintiff's home forum, where the injury most likely occurred, the scale will undoubtedly tip in favor of dismissal if the factors are weighed equally. Therefore, it seems only fair that if the connection regarding liability with the chosen forum is substantial, it should be given significant weight in the court's *forum non conveniens* analysis.<sup>194</sup> Otherwise, United States corporations will continue to succeed in avoiding accountability for defective products placed abroad.

Courts rejecting the *Carlenstolpe* approach have also concluded that United States forums do not have a significant interest in regulating the sale of products beyond their borders<sup>195</sup> and that courts should avoid imposing "characteristically American values" on a foreign sovereign's concerns.<sup>196</sup> In *Harrison v. Wyeth Laboratories, Inc.*,<sup>197</sup> the court explained that "[q]uestions as to the *safety* of drugs marketed in a foreign country are properly the concern of that country, the courts of the United States are ill-equipped to set a standard of product safety for drugs sold in other countries."<sup>198</sup> The *Harrison* court further emphasized that other countries have the right to consider for themselves the merits of permitting a particular drug's use and the necessity of requiring a warning.<sup>199</sup> In any event, the court argued that it would be "manifestly unfair to the defendant . . . for a court in this country to set a higher standard of care than is required by the government of the country in which the product is sold and used."<sup>200</sup> But if the United States standard regarding the safety of products is never applied in these cases, United States corporations will be able to continue to export dangerous products without being responsible for the harmful effects abroad where the standards are usually less strict or, in some cases, nonexistent. To allow such conduct encourages mul-

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194. A defendant's inability to compel foreign witnesses to testify at trial can be cured by taking their testimony in deposition or documentary form. *Birnbaum & Dunham, supra* note 1, at 252, 253 (citing *Carlenstolpe v. Merck & Co., Inc.*, 638 F. Supp. 901, 907 (S.D.N.Y. 1986)).

195. *Birnbaum & Dunham, supra* note 1, at 259.

196. In *Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 865 (S.D.N.Y.).

197. 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982). The case involved a group of British plaintiffs who were injured by oral contraceptives purchased in the United Kingdom, but labelled and marketed in the United States.

198. *Id.* at 4 (emphasis in original).

199. *Birnbaum & Dunham, supra* note 1, at 259-60.

200. *Harrison*, 510 F. Supp. at 5.

tinational companies to be less careful in selling their products abroad and implicitly condones such irresponsibility. It also is damaging to the United States' reputation abroad and is violative of human rights concerns.<sup>201</sup> Consequently, United States courts must play a role in making multinational corporations more accountable for the export of their products.

## V. CONCLUSION

Undoubtedly, Dow and Shell should be forced to litigate the *Alfaro* plaintiffs' claims in a Texas court as the *Alfaro* decision holds. However, it is not necessary to abolish the forum non conveniens doctrine in order to insure that their claims will be adjudicated in a Texas court. Admittedly, most courts currently apply the "most suitable forum" approach in considering a forum non conveniens dismissal, and foreign plaintiffs' claims are very likely to be dismissed under this approach. It seems fundamentally unfair to allow a court to dismiss a case simply because it determines there exists a suitable foreign forum in which it would be more convenient for the trial to take place. But to abolish the doctrine completely eliminates a court's discretion altogether as to whether a case is appropriate for trial in a chosen forum, therefore opening the door to abuse by foreign plaintiffs. Therefore, in order to avoid unfairness, a renewed interest in whether the plaintiff is abusing the process of the court and emphasis on the chosen forum's connection with the controversy is necessary. With this consideration in proper perspective, courts will have the discretion to dismiss actions like *Bhopal*, which have tenuous connections to the chosen forum, but will be hard pressed to dispose of actions like *Alfaro*, where substantial connections exist with the chosen forum. This revised "abuse of process" approach will undoubtedly limit United States corporations' ability to use the forum non conveniens doctrine as a shield, while at the same time neither cause unfairness to defendants nor overwhelm United States courts with tenuous claims to the chosen forum.

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201. See *supra* notes 171-75 and accompanying text.



