SUITS BY FOREIGN PLAINTIFFS: KEEPING THE DOORS OF AMERICAN COURTS OPEN

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"When a stranger resides with you in your land, you shall not wrong him. The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt."[1]

I. INTRODUCTION

The global economy of the 1990s will increasingly confront United States courts with the problems associated with international litigation.[2] United States courts will often be asked to resolve disputes between foreign nationals and American citizens. The problems that arise from these disputes are largely unfamiliar to American judges, particularly in the state courts. The Federal Foreign Sovereign Immunities Act[3] creates an entire set of complex jurisdictional problems for the federal courts.[4] The Hague Conventions on service of process[5] and discovery[6] create a complex and little understood body of specialized treaty law that must be consulted in any international suit.[7] Monumental choice of law issues exist which are further complicated

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1. Leviticus 19:33-34 (Torah).

2. The problems engendered by international litigation are many. A recent law school casebook by my colleague Gary Born covers many of the specialized topics that this kind of litigation brings. *See*, G. BORN & D. WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS (1989).

3. 28 U.S.C. §§ 1602-1611 (1982).

4. *See generally* LaCroix, *The Theory and Practice of the Foreign Sovereign Immunities Act: Untying the Gordian Knot*, 5 INT'L TAX & BUS. L. 144 (1987); Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302 (1986); and G. BORN & D. WESTIN, *supra* note 2, at 328-91.

5. Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature*, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163; *see generally* Amram, *The Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 59 AM. J. INT'L L. 90 (1965).

6. Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231; *see generally* Cole, *The Hague Evidence Convention: Determining Its Applicability Through Comity Analysis*, 38 SYRACUSE L. REV. 717 (1987).

7. *See, e.g.*, Société Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987); and Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988).

by language barriers.[8] Furthermore, the fundamental difference between the American common law judicial system and the varied judicial systems of other nations makes many of the traditional assumptions about the nature of law and adjudication inoperative.[9] In the years to come, the judicial system and scholarly publications will continually address these issues. This comment, however, has a much more modest goal. It is limited to a seemingly narrow question: whether, and under what circumstances, may a United States court refuse to entertain an action brought by a foreign plaintiff against United States or foreign defendants? A recent Texas Supreme Court decision, *Dow Chemical Co. v. Castro Alfaro*,[10] is the focal point of my inquiry.

II. THE CONTOURS OF THE PROBLEM

Foreign plaintiffs come to United States judicial fora from every corner of the world, and thus from judicial systems of every known type and stage of development. The nature of the judicial system in the country from which the plaintiff's come is an important and variable factor in the problem. From the defendants' point of view, there may be substantial differences between suits brought in state and federal courts. Those differences fall into three general categories: 1) problems of personal and subject matter jurisdiction; 2) problems of venue; and 3) problems relating to changes of venue and transfer of cases between courts. Issues relating to the nature of the foreign plaintiff's claim against a domestic defendant also exist. The considerations that apply to parties involved in complex international commercial agreements may be very different from the problems associated with specific tort law matters, such as products liability questions.

The various and variable considerations noted in the preceding paragraph create what one author, writing in a related context, has called a "pulsating mass"[11] in which changes in one variable may induce changes in all the other

8. *See* Lipstein, *The General Principles of Private International Law*, 135 RECUEIL DES COURS 96 (Hague Academy 1972); and Kahn-Freund, *General Problems of Private International Law*, 143 RECUEIL DES COURS 139 (Hague Academy 1974).

9. At the most superficial level, there is the obvious difference between the adversary system characteristic of Anglo-American courts and the non-adversary models that exist in most other parts of the world. At a more complex level is the special set of assumptions that American lawyers make about the role of the judiciary in the execution of matters of public policy. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

10. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991), *aff'g* Alfaro v. Dow Chem. Co., 751 S.W.2d 208 (Tex. Ct. App. 1988).

11. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 875 (1987). Professor Greenstein says:

> I have tried to present personal jurisdiction doctrine as a pulsating mass with irreconcilable parts, as an amoeba whose shape continually changes within a confining membrane. Moreover, I assert that this characterization is not limited to personal jurisdiction; it describes all legal doctrine.

Id. at 875.

variables. Making sense out of this is a large order that will occupy lawyers, courts, and scholars for many years. For the courts, the "end of history"[12] may simply be the point of beginning for the development of legal methods for dealing with an era of international cooperation and commercial intercourse.[13]

A. The Castro Alfaro Case

Domingo Castro Alfaro and 81 other Costa Rican employees of the Standard Fruit Company claimed personal injuries arising out of their exposure to Dibromochloropropane (DBCP). DBCP is a pesticide designed to kill insect larvae; it is manufactured by Dow Chemical Company (Dow), Shell Oil Company (Shell), and several other manufacturers. DBCP was banned in the United States on November 3, 1977 because of conclusive evidence that it caused male sterility and indications that it might also cause cancer and other illnesses.[14] Notwithstanding the ban by the Environmental Protection Agency, Dow and Shell continued to manufacture and distribute DBCP in other countries. Standard Fruit Company purchased DBCP from Dow and Shell and used it on its banana plantations in Costa Rica. The plaintiffs are Costa Rican farmworkers who have suffered sterility and other injuries by virtue of their exposure to DBCP.

According to Charles S. Siegel, the plaintiffs' attorney, suit was brought against Dow in the United States because "as a practical matter, the farmworkers' suits cannot be brought in Costa Rica. The workers are too poor to afford a lawyer and their maximum recovery would be about $1500."[15] Given such limited damages, and understanding the high cost of litigation in toxic tort cases, Mr. Siegel's conclusion is well founded.

The first of the cases seeking redress was filed in the Florida state court in May of 1983 by fifty-eight Costa Rican agricultural workers who claimed they had been sterilized as a result of their exposure, in Costa Rica, to DBCP.[16] The suit named Dow and Shell as defendants, the manufacturers of the chemical.[17] Dow and Shell promptly removed the case to federal

12. *See*, Fukuyama, *The End of History?*, NAT'L INT., Summer 1989, at 3.

13. Trofimenko, *The End of the Cold War, Not History*, 13 WASH. Q., No. 12, at 21 (1989).

14. Chemical Marketing Reporter, May 8, 1989, at 7. This article discusses the problems associated with the fact the DBCP has now infiltrated ground water supplies and EPA regulation thereof.

15. Daily Lab. Rep. (BNA), April 6, 1990, at A-1; *see also* HOUS. BUS. J., July 3, 1989, § 1, at 6 for an interview with Attorney Siegel prior to the decision in the Texas Supreme Court. On September 6, 1990 the author spoke with Attorney Siegel by telephone and received the current information on the status of case which is included in this comment.

16. The District Court opinion is not reported. It is referenced, however, in the subsequent Court of Appeals decision, Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1216 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).

17. *Id.*

district court and moved to dismiss on the ground of *forum non conveniens*;[18] the plaintiffs argued that under the *Erie* doctrine[19] the district court was required to follow the Florida rule in regard to the doctrine of *forum non conveniens*.[20] Under Florida law, the fact that one of the plaintiffs was a Florida resident precluded application of that doctrine.[21] The district court held that it was not required to follow the Florida doctrine of *forum non conveniens* under the *Erie* mandate. The court applied the Florida rule even though use of the Florida rule would admittedly change the outcome of the case. The rule was clearly designed for a substantive purpose, the protection of local plaintiffs. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court.[22]

Shortly after the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of the Florida suit on *forum non conveniens* grounds,[23] the plaintiffs filed a new suit in the Florida state court naming additional defendants.[24] All of the defendants were Florida corporations, whose presence in the case would defeat diversity, and thus frustrate removal. That case was nonetheless removed to the United States district court. In 1987, the district court judge refused to remand the case. The district court judge did not acknowledge the Florida defendants' presence in the suit because he considered their joinder fraudulent.

Shortly after the Florida suit was filed in May of 1983, another suit was filed against the same defendants in the state trial court in Houston, Texas. The Texas suit alleged responsibility under products liability, strict liability, and breach of warranty theories. The then pending Florida action was based on similar theories. Since Shell had its principal place of business in Houston, it could not remove the case to federal district court as it had in Florida.[25] Shell and Dow therefore moved to dismiss the case on the grounds of *forum non conveniens*, and the trial judge granted that motion.[26]

In 1988, the Texas Court of Appeals reversed the dismissal, in the *Alfaro* case, on the ground that a Texas statute had abolished the doctrine of *forum non conveniens*.[27] In 1989, the United States Court of Appeals for the Eleventh Circuit reversed the dismissal by the United States district court in Florida and remanded for further factual development. The United States Court of Appeals for the Eleventh Circuit ruled that if the Florida defendants

18. *Id.*
19. This doctrine was first put forth in the case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
20. *Sibaja*, 757 F.2d at 1217.
21. Seaboard Coast Line R.R. Co. v. Swain, 362 So.2d 17, 18 (Fla. 1978).
22. *Sibaja*, 757 F.2d at 1219.
23. *Sibaja*, 757 F.2d at 1215.
24. Barrantes Cabalceta v. Standard Fruit Co., 667 F. Supp. 833 (S.D. Fla. 1987).
25. 28 U.S.C. §1441 (1982).
26. Alfaro v. Dow Chem. Co., 751 S.W.2d 208 (Tex. Ct. App. 1988).
27. *Id.* at 211.

had been properly joined, the case should be remanded to the state court.[28] In this environment, the Texas case, *Dow Chemical Company v. Castro Alfaro*,[29] reached the Texas Supreme Court. The plaintiffs had dropped all other appeals.[30]

That the plaintiffs' attorneys in this set of multiple litigations, arising out of the same transaction and occurrence, sought relentlessly to find a forum in which their clients' grievances against Dow and Shell could be heard is unquestionable. The reason for their fight is obvious. The defendants have always been willing to submit to the only alternative forum, Costa Rica. Under Costa Rican law, the plaintiffs are only entitled to a statutory award, roughly equivalent to $1500 per person.[31]

If the facts alleged by the plaintiff are true, the case presents a horrible example of corporate greed and arrogance. The gravamen of the case is that Shell and Dow allegedly continued to sell a verifiably dangerous product which had been banned for use in the United States by the Environmental Protection Agency because of its extreme danger.[32] The intentional imposition of that danger upon uneducated and unsuspecting peasant workers in Third World countries seems, on its face, to be a cynical and outrageous example of corporate misconduct. Therefore, the plaintiffs can hardly be faulted for attempting to find a forum within the United States in which American products liability law and American concepts of corporate responsibility can be applied to these corporate defendants.

Viewed in that light, the plaintiffs' manipulation of the various doctrines of personal and subject matter jurisdiction in the state and federal courts indicates creative lawyering. A majority of the Supreme Court has recognized that creative lawyering is permissible in such cases.[33] The plaintiffs and their lawyers obviously understand that their case would have tremendous appeal before an American jury. Since juries are not available in Costa Rica, they have sought to establish a forum for their grievances in the United States. In *Castro Alfaro*, the question presented was whether the doctrine of *forum non conveniens* should be utilized to defeat that choice of forum. The answer to that question had both common law and constitutional aspects.

An increasingly common situation confronted the Texas courts. Multinational corporations manufacturing products that are banned in the United

28. Cabalceta v. Standard Fruit Co., 883 F.2d 1553 (11th Cir. 1989).

29. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991), *aff'g* Alfaro v. Dow Chem. Co., 751 S.W.2d 208 (Tex. Ct. App. 1988).

30. Conversation with Plaintiffs' Attorney Charles Siegel on 9/5/90.

31. *Id.*

32. *Castro Alfaro*, 786 S.W.2d at 681 (Doggett, J., concurring).

33. Ferens v. John Deere Co., 110 S. Ct. 1274 (1990). There is also a recent note in the Harvard Law Review that makes a strong case for this kind of creative lawyering. *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

States by public agencies or have been withdrawn from the American market because of massive products liability suits, have often turned to the Third World as a marketplace for toxic or hazardous products. The ramifications of such corporate policies are self-evident and wide-ranging.[34] Fundamentally, the question is whether or not United States-based multinational corporations will be allowed to escape liability for technologies that have been developed in the United States and exported to Third World countries. United States strict liability law, presumably the most extreme in the world, dictates responsibility for those injuries. The logic of applying those rules to foreign as well as domestic sales is self-evident.

The law of many underdeveloped countries may provide nothing more than, at best, limited statutory damages for injuries caused by such products. The rationale that those governments are not concerned about their citizens is inapplicable. Greater damages are not available because those countries systems' for spreading social costs are different from ours. Furthermore, their judicial systems are not accustomed to dealing with matters of high technology and science.

In *Castro Alfaro*, the plaintiff farmworkers worked on a banana plantation owned by the Standard Fruit Company, an American company headquartered in Boca Raton, Florida. The plaintiffs brought suit against Shell Oil Company and Dow Chemical Company in Texas. Shell is a multinational corporation with its world headquarters in Houston, Texas. Dow, though headquartered in Michigan, operates the world's largest chemical plant in Freeport, Texas. The plaintiffs brought suit in the state court in Houston, three blocks from Shell's world headquarters and 60 miles from the Dow Chemical plant. Dow and Shell asked the trial judge to send the case back to Costa Rica under the doctrine of *forum non conveniens*, notwithstanding that the plaintiffs sustained injuries during their employment by an American company on American owned land, and were growing bananas solely for American consumption. Without a hearing, the trial court dismissed the suit because the injury itself occurred in Costa Rica and the plaintiffs were Costa Rican nationals. The Texas Court of Appeals reversed and a bitterly divided Texas Supreme Court affirmed the reversal by a vote of 5 to 4.[35]

B. Personal Jurisdiction

Under the standards of personal jurisdiction extant in the United States, both Dow and Shell were subject to the personal jurisdiction of the Texas courts. Shell is headquartered in Texas, and under traditional doctrine it is

34. *See Castro Alfaro*, 786 S.W.2d at 687-89 (Doggett, J., concurring). Justice Doggett discusses some of the authorities in his concurring opinion.

35. *Id.* at 674.

subject to suit in the courts of its home state.[36] Dow is not a corporate citizen of Texas; but operating, in Texas, the world's largest chemical plant, would subject Dow to the personal jurisdiction of the Texas courts. Pursuant to the theory of "general jurisdiction," the Texas court's jurisdiction arises out of Dow's systematic and continuous activity in the state of Texas. Indeed, the personal jurisdiction of the Texas courts is so clear and undisputable that apparently it was not even contested. Though, one of the justices did express some reservations about asserting jurisdiction,[37] recent Texas judicial authority indicates no basis for such a challenge.[38] The defendants had to choose a different tactic in order to successfully block the plaintiffs' attempt to invoke the Texas forum, and with it the American doctrines of strict liability and damage theory. They chose to use the doctrine of *forum non conveniens*. That doctrine is a common law doctrine that allows a trial judge to make a conditional dismissal of a case, thus effectively transferring it to another forum.[39] In the federal courts, the judicial code governs similar transfers between the district courts. The judicial code provides the federal judge with the authority to exercise broad discretion to implement an interdistrict transfer in order to accommodate the "interest of justice" and "the convenience" of the parties.[40] The caselaw surrounding such transfers is well established and relatively clear. The doctrine of *forum non conveniens* is almost as clear as the judicial code.[41] Even though the Texas court avoided the doctrine, some of the opinions reach conclusions which raise profound problems of international law and commercial relations.

C. The Doctrine of Forum Non Conveniens

The doctrine of *forum non conveniens* allows a court vested with personal and subject matter jurisdiction to decline exercising that jurisdiction because processing the case in the plaintiff's chosen form is deemed inconvenient.

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36. We would say that Shell is subject to "general" personal jurisdiction in Texas. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

37. *See* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 697-700 (Tex. 1990) (Cook, J., dissenting), *cert. denied* 111 S. Ct. 671 (1991), *aff'g* Alfaro v. Dow Chem. Co., 751 S.W.2d 208 (Tex. Ct. App. 1988).

38. Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 203 (Tex. 1985). *See also* General Electric Co. v. Brown & Ross Int'l Dist., 804 S.W.2d 527 (Tex. Ct. App. 1990).

39. *See generally*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, (1947); Koster v. (American) Lumbermen's Mut. Casualty Co., 330 U.S. 518 (1947). The Supreme Court has recently reaffirmed the applicability of the doctrine of *forum non conveniens* in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). The classic articulation of the common law doctrine can be found in Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

40. 28 U.S.C. § 1404(a) (1982). *See also*, Van Duesen v. Barrack, 376 U.S. 612 (1964); Ferens v. John Deere Co., 110 S. Ct. 1274 (1990); and 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 3827-45 (1976).

41. *See, e.g., Reyno*, 454 U.S. 235; and Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

In *Piper Aircraft Co. v. Reyno*,[42] the United States Supreme Court specifically enumerated the standards to be used in balancing the factors laid out in *Gulf Oil Corp. v. Gilbert*[43] that determine inconvenience. As the Court notes in *Reyno*, the *forum non conveniens* determination is a matter committed to the sound discretion of the trial court: "It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."[44]

The Texas Supreme Court wrote the *Castro Alfaro*[45] opinion against the background of the trial court's fundamental abuse of the doctrine of *forum non conveniens*. Nothing in the case remotely justifies application *forum non conveniens* to the plaintiffs. A comparison of *Castro Alfaro* to *Bhopal*[46] illustrates the lack of applicability of the doctrine of *forum non conveniens* to *Castro Alfaro*.[47] In *Bhopal*, the plaintiffs were residents of Bhopal, India. The chemical plant was in Bhopal, India, and was owned by Union Carbide India, Ltd., a wholly-owned subsidiary of Union Carbide Corporation. Through negligence or sabotage, poisonous gas in large quantities escaped from the plant, and killed over 2100 people in Bhopal, and injured nearly a

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42. 454 U.S. 235 (1981).

43. 330 U.S. 501, 508-09 (1947). The Court stated that two types of factors had to be considered, private and public. Private interest factors include:

(1) relative ease of access to sources of proof;
(2) availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing, witnesses;
(3) possibility of view of premises if view would be appropriate to the action; and
(4) all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 508.

Public interest factors include:

(1) administrative difficulties flowing from court congestion;
(2) local interest in having localized controversies decided at home;
(3) interests in having trial of a case in a forum that is at home with the law that must govern the action;
(4) avoidance of unnecessary problems and conflicts of law or in the application of foreign law; and
5) the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. at 508-09.

44. *Reyno*, 454 U.S. at 235.

45. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991), *aff'g* Alfaro v. Dow Chem. Co., 751 S.W.2d 208 (Tex. Ct. App. 1988).

46. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part*, 809 F.2d 195 (2d Cir. 1987); *discussed in* Galanter, *When Worlds Collide: Reflections on Bhopal, the Good Lawyer, and the American Law School*, 36 J. LEGAL EDUC. 292 (1986).

47. *See, e.g.*, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193 (1985). *Bhopal* has also engendered great debate about the issue of forum shifting to protect American multinational corporations.

quarter million others. A large group of plaintiffs, including the Indian government, brought at most one hundred eighty suits, in the Federal District Court for the Southern District of New York; the plaintiffs sought over 100 billion dollars in damages.[48] Union Carbide moved for a dismissal pursuant to the doctrine of *forum non conveniens*, which Judge Keenan granted after an extensive hearing.[49] His decision was upheld on appeal.[50] Many have criticized *Bhopal*.[51] Activists in the fight for corporate accountability view the dismissal as a capitulation to one of the world's leading multinational corporations.[52] Even so, the trial and appellate court decisions are within the mainstream of United States caselaw on the doctrine of *forum non conveniens*. Three factors were significant. First, the acts of causation, whether they were intentional or negligent, obviously occurred in India. Virtually all of the evidence regarding them was available only in India. In regard to the defendant's defense of sabotage, it would undoubtedly be difficult to bring recalcitrant witnesses from India to the United States. Thus, the defendant had a legitimate interest from a standpoint of trial convenience in having the case litigated in the Indian courts. Second, the Indian judicial system is roughly comparable to the American judicial system in terms of both principles of liability and the theoretical basis for damage awards. Third, the measurement and calculation of damage in the mass tort context strongly favors suit in the locale of the tort. This preference is strengthened if the locale has a court competent to act and law capable of providing a remedy on a class basis. All three elements existed in *Bhopal*. While fair minded people may argue about whether or not Judge Keenan and the Second Circuit were correct in their decision, no one has argued that the decision is fundamentally defective from the standpoint of accepted forum shifting principles.

The trial court decision in *Castro Alfaro* is very different. In the first place, the trial judge did not hold a hearing. Accordingly no predicate findings of fact substantiated the doctrine's application. Second, the limited statutory remedy provided under Costa Rican law was pitifully small in light of the damage alleged. Furthermore, the statutory remedy is not subject to judicial modification as were the common law damage theories articulated in *Bhopal*. Third, virtually no evidence regarding plaintiffs' case existed in Costa Rica. The documents that evidenced the various factors relating to the

48. *Id.* at 193.

49. *Bhopal*, 634 F. Supp. at 842.

50. *Bhopal*, 809 F.2d at 195.

51. *See, e.g.*, Green, *When Toxic Worlds Collide: Regulatory and Common Law Prescriptions for Risk Communication*, 13 HARV. ENVTL. L. REV. 209 (1989).

52. Indeed, at this writing the case has not been settled and argument continues about large issues of responsibility and accountability. In the Indian Supreme Court the case was recently submitted following oral argument. *See, Bhopal Arguments End*, Wall St. J., Aug. 30, 1990, at A5, col. 6. The insurance industry has been confronted with demands for unlimited liability covered by insurance. McIntyre, *Unlimited Liability Urged; Global Standards for Disasters Sought*, BUS. INS., July 3, 1990, at 3.

design and production of the chemical were located in Texas. The plaintiffs brought their evidence of injury with them and committed themselves in court to bringing to the United States any witnesses necessary to prove their case. No records indicated that any defense witnesses were located in Costa Rica. The only conceivable basis for invoking the doctrine of *forum non conveniens* was the notion that Costa Rican law imposed substantial limits upon recovery on behalf of Costa Rican plaintiffs. Such a choice of law problem should be confronted directly, not through the manipulation of the doctrines relating to initial forum selection or jurisdiction.

Clearly, the trial court grossly abused its discretion by invoking the doctrine of *forum non conveniens* and summarily sending the plaintiffs back to Costa Rica to seek a very limited remedy against a United States banana company and two huge United States multinational chemical companies. One suspects that not very far beneath the surface of the various opinions upholding that conclusion lies an anti-alien bias of the worst kind.

Nothing in the Supreme Court's opinion in *Reyno* indicates that Justice Marshall believed that such discrimination was permissible. Indeed, he only observed that it was permissible to exclude foreign plaintiffs' suits that had absolutely no rational connection the United States.[53] In a footnote, he suggested that the court could logically measure a foreign plaintiff's claim of relative convenience in light of the availability of her home forum.[54] Such functional distinctions may avoid the problem of discrimination. Whether or not the distinctions accomplish their purpose is not clear. The lower federal courts, however, have generally accepted the propriety of the distinction and have incorporated it into the *forum non conveniens* analysis.

D. The Procedures for Implementing Forum Non Conveniens

In recent years, a relatively well articulated set of procedures has emerged for determining the applicability of the doctrine of *forum non conveniens* based upon the above noted public and private interest factors. The need for a "structured analysis" of the public and private interest factors was established in Judge Bork's important opinion in *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*[55] Friends for All Children, Inc. brought suit on behalf of a group of Vietnamese children injured by the crash of their American built aircraft during "Operation Babylift" in 1975. In rejecting the defendant's request for dismissal under the doctrine of *forum non conveniens*, Judge Bork established the need for a detailed and systematic analysis of the various factors.[56] In a recent Third Circuit case, Judge Higginbotham has

53. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981).

54. *Id.* at 256 n.24.

55. 717 F.2d 602 (D.C. Cir. 1983).

56. *Id.* at 607. Judge Bork's opinion emphasizes, however, that the process is functional, not mechanical.

summarized the procedures with great care.[57] The functional analysis and procedural framework thus established are now generally accepted as part of the law of *forum non conveniens*.[58]

At the outset, it is clear that a trial court abuses its discretion by failing to make detailed inquiry into the relevant factors. Before it does that, however, it must determine that an alternative forum which has jurisdiction exists to hear the case.[59] The Supreme Court has noted in *Reyno* that a foreign plaintiff's choice of a United States forum is entitled to less deference than a United States citizen's choice of a home forum. However, the courts have generally agreed that recognition does not mean that a foreign plaintiff is not entitled to a balancing of the public and private interest factors just as any other plaintiff.[60] While the court may give less deference to the foreign plaintiff's choice, it does not bar foreign plaintiffs entirely. Indeed, the court could not do so. As the Supreme Court has said:

> 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.[61]

As Judge Higginbotham notes, the reason for giving a foreign plaintiff's choice less deference is not "xenophobia," but a reluctance to assume the same level of convenience exists whether a plaintiff brings suit in a foreign forum or in her home forum.[62] Where a foreign plaintiff has made a strong showing of convenience, the trial court should conclude that the foreign plaintiff should be treated no differently than a domestic plaintiff. In such a circumstance, the plaintiff's choice is entitled to considerable deference.[63]

That deference might be stated as a rebuttable presumption in favor of the plaintiff's choice. The trial court would be required to balance the public and private interest factors to determine whether the presumption should be rebutted. To reject the plaintiff's chosen forum, the trial court would be compelled to find "trial in the chosen forum would 'establish . . . oppressive-

57. Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628 (3rd Cir. 1989).
58. *See, e.g.*, Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43 (3rd Cir. 1988).
59. *Lony*, 886 F.2d at 633.
60. *Id. See also In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1164 n.26 (5th Cir. 1987) where the Fifth Circuit stated:
> The Court's language that a foreign plaintiff's forum selection deserves less deference is not an invitation to accord a foreign plaintiff's selection of an American forum no deference . . . . The fact that plaintiffs are foreign is not, in and of itself, sufficient to require dismissal under forum non conveniens.
61. *Reyno*, 454 U.S. at 255-56.
62. *Lony*, 886 F.2d at 634.
63. *Id.*

ness and vexation to a defendant . . . out of all proportion to plaintiff's convenience.'"[64] Judge Higginbotham notes that such a burden of persuasion must be placed on the defendant and not shifted to the plaintiff. The defendant must demonstrate how inconvenienced it would be by being forced to resort to an alternative forum.

The detailed analysis of the public and private interest factors in Judge Higginbotham's opinion is a model for the correct exercise of discretion by trial courts. The opinion clearly demonstrates that the correct reading of footnote 24 of the *Reyno* opinion does not justify a xenophobic reaction to suit brought in United States courts by foreign plaintiffs.

E. The Foreign Plaintiff

The Supreme Court's opinion in *Reyno* emphasizes that the doctrine of *forum non conveniens* is misapplied where the alternative forum available to the plaintiff cannot provide an adequate remedy.[65] Where no recovery is available or the recovery is so limited that it precludes effective redress, there is no realistic alternative forum. The doctrine of *forum non conveniens* is simply inapplicable on those grounds alone. That is very often the case when foreign plaintiffs bring claims against United States manufacturers whose product have caused them injury. When the plaintiffs come from underdeveloped countries, that do not have sophisticated products liability laws, that problem is presented in stark relief.

In *Castro Alfaro*, the plaintiffs' remedy under Costa Rican law was limited to $1500 per person, and would not support suit on an individual basis. While it is theoretically possible that Costa Rican law could provide some form of class action relief for these plaintiffs that might justify suit, it is unknown here because the trial court did not inquire regarding the public or private interest factors. Instead, it simply dismissed because the plaintiffs were foreigners who had been injured on their home ground. That determination is inconsistent with the established doctrine of *forum non conveniens*. As the Second Circuit has held:

> It is almost a perversion of the forum non conveniens doctrine to remit a plaintiff, in the name of expediency, to a forum in which, realistically, it will be unable to bring suit when the defendant would not be genuinely prejudiced by having to defend at home in the plaintiff's chosen forum.[66]

It is also unconstitutional.

64. *Lony*, 886 F.2d at 635 (quoting from *Reyno*, 454 U.S. at 241).
65. *Reyno*, 454 U.S. at 254.
66. Manu Int'l, S.A. v. Avon Products, Inc., 641 F.2d 62, 67 (2d Cir. 1981).

F. Barring Foreign Plaintiffs As Unconstitutional Discrimination

The United States Supreme Court has interpreted the Fourteenth Amendment to the United States Constitution to forbid public entities from distinguishing between persons on the basis of their citizenship, unless such discrimination can meet a strict scrutiny test.[67] Recently the Court has also permitted a mere "rational basis" justification for excluding aliens from positions "intimately related to the processes of democratic self-government,"[68] such as police officers, teachers, parole and probation officers and others in similar positions.

Foreign plaintiffs suing in state and federal courts do not come within the scope of the exceptions articulated by the Supreme Court. Their exclusion from the judicial process must be firmly based in precedent. Neither the Supreme Court nor any lower court has held that a compelling justification exists for the exclusion of all aliens from the United States judicial process no matter how powerful their claim may be nor inadequate their alternative forum. Given that state of legal affairs and the relative clarity of the doctrine of *forum non conveniens*, it is remarkable that the trial judge in *Castro Alfaro* actually invoked the doctrine of *forum non conveniens*. Remarkably the trial judge's decision was vociferously supported by several of the nine justices.

An ordinary country lawyer might be moved to ask why all this debate about suing a Texas company in Texas? The answer is revealed in the dissenting opinion of Justice Cook who begins his opinion with the following words:

> Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. Through three courts they moved, filing their lawsuits on one coast and then on the other. By each of those courts the plaintiffs were rejected, and so they continued their search for a more willing forum. Their efforts are finally rewarded. Today they hit pay dirt in Texas.[69]

Though the notion has a unmodern tone, characterizing plaintiffs in search of a forum in which to sue a culpable defendant as somewhat evil people is not unusual.[70] Indeed, §71.031 of the Texas Civil Practice and Remedies

67. Bernal v. Fainter, 467 U.S. 216 (1984); *see also* E. HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS (1985); and Perry, *Strangers to the Constitution*, 44 U. PITT. L. REV. 329 (1983).

68. *Bernal*, 467 U.S. at 216.

69. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 697, (Tex. 1990) (Cook, J. dissenting), *cert. denied*, 111 S.Ct. 671 (1991), *aff'g* Alfaro v. Dow Chem. Co., 751 S.W.2d 208 (Tex. at. App., 1988). (Cook, J., dissenting). This is hardly an accurate picture of the efforts of the plaintiffs lawyers to find a hospitable forum. The details are set forth in *supra* text accompanying notes 14-36.

70. Ferens v. John Deere Co., 110 S.Ct. 1274 (1990). *See also* Note, *supra* note 33, at 1677 which states: "This Note argues that actions described as 'forum shopping' lie on a continuum of activities, many of which are integral to the legal system and may actually enhance its capacity to provide needed remedies."

Code expressly holds the Texas courts open to all plaintiffs.[71]

The *Castro Alfaro* case met all the requirements of § 71.031 of the Texas Civil Practice and Remedies Code. The majority of the Texas Supreme Court held that the quoted provision was a legislative abolition of the doctrine of *forum non conveniens* in the Texas courts. Accordingly, the trial court could not under any circumstances exercise discretion to refuse to litigate the case. Apparently, only Louisiana has taken a similar stance.[72]

III. CONCLUSION

Since the *Castro Alfaro*[73] decision is limited to a narrow provision of Texas law, the case has little impact beyond the state of Texas in the pure sense. At a practical level, however, the various decisions of the justices in *Castro Alfaro* illustrate a remarkable degree of diversity in regard to the content of the doctrine of *forum non conveniens*. The call for legislative correction by some of the justices may actually be met.

When thinking about some of the decision's implications one should ask whether there is a need to enact some national statutory regulation of the doctrine as it is applied to cases involving foreign nationals. In his concurring opinion Justice Doggett accuses the dissenting justices of manipulating the doctrine to "implement their own preferred social policy that Texas corporations not be held responsible at home for harm caused abroad . . . . To accomplish the desired social engineering, they must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers."[74] A dissenting justice in turn casts similar stones.[75] Beyond the fiery rhetoric and accusatory tone, of the various opinions, lie complex and difficult problems such as the accountability of American multinational corporations in the Third World and the so-called "litigation explosion." The leaders in the global legal system must soon address these issues. Whether by treaty or by congressional initiative, the issue of United States enterprise liability now demands our focused attention.

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71. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986) states:
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 forum state or country, if:
(1) a law of the forum 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.

72. The issue is discussed in Duplantier, *Louisiana: A Forum Conveniens Vel Non*, 48 LA. L. REV. 761 (1988).

73. 786 S.W.2d 674.

74. *Id.* at 680 (Doggett, J., concurring).

75. *Id.* at 690 (Gonzalez, J., dissenting).