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Phantom Torts and Forum Non Conveniens Blocking Statutes: Irony and Metonym in Nicaraguan Special Law 364

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Jeff Todd*

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I. INTRODUCTION

Nicaragua enacted Special Law 364 to block the *forum non conveniens* ("FNC") dismissals of cases brought in the United States by Nicaraguan plaintiffs who claimed injuries from the pesticide dibromochloropropane ("DBCP").¹ Special Law 364 offers one of two unappealing options to DBCP defendants: either allow cases to go forward in the U.S. and waive the right to challenge the forum, or litigate in Nicaragua with plaintiff-friendly procedural and evidentiary mechanisms, multi-million-dollar bond requirements, and an irrefutable presumption of causation.² Though the Nicaraguan Supreme Court affirmed the propriety of Special Law 364,³ one court in the U.S. called it a "significant impetus" for fraud while another ruled that it does not comport with international standards for due process.

In June 2009, the Los Angeles County Superior Court dismissed with prejudice two related DBCP actions brought by eleven persons—two bellwether cases that were among the first of thousands of claims pending and would help determine settlement of those claims.⁴ The plaintiffs in *Mejia v. Dole Food Co.* and *Rivera v. Dole Food Co.* (collectively "*Mejia*") alleged that they

1. See Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 HARV. INT'L L.J. Online 95, 100-102 (2009); Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 628, 631 (2008); Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 158-59 (2005); Paul Santoyo, Comment, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUST. J. INT'L LAW 703, 729 (2005); Alejandro M. Garro, *Forum Non Conveniens: "Availability" and "Adequacy" of Latin American Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65, 80-81 (2003-04); Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 22 (2003-04).

2. E.g., Scott, *supra* note 1, at 100-02; Heiser, *supra* note 1, at 633.

3. Dahl, *supra* note 1, at 57.

4. Judgment Dismissing All Plaintiffs with Prejudice, *Mejia v. Dole Food Co.*, No. BC340049 (L.A. Cnty. Super. Ct. June 26, 2009); Judgment Dismissing All Plaintiffs with Prejudice, *Rivera v. Dole Food Co.*, No. BC379820 (L.A. Cnty. Super. Ct. June 26, 2009); see Edvard Petterson, *Dole Wins Dismissal of Nicaraguan Banana Workers'*

were rendered sterile from applying the pesticide on banana farms in the 1970s.⁵ However, after a three-day evidentiary hearing, Judge Victoria G. Chaney found “that there is clear and convincing evidence that Plaintiffs and their U.S. counsel, Juan J. Dominguez, and their Nicaraguan counsel, Antonio Hernandez Ordeñana . . . have committed fraud on this Court and on the Defendants.”⁶ She found that U.S. and Nicaraguan attorneys from multiple firms conspired—with each other and with at least one Nicaraguan judge and several medical laboratories—to recruit plaintiffs who had never worked on banana farms and who were not sterile; to falsify work histories, sterility tests, and the paternity of children born in the 1980s and 1990s; to train plaintiffs to lie about farm facts; and to threaten and intimidate witnesses and investigators.⁷ Given the outrageous details of this fraudulent scheme, one might easily overlook Judge Chaney’s finding on Special Law 364: “The advent of Special Law 364 was a significant impetus in establishing an industry that developed around DBCP litigation in Nicaragua for the purpose of bringing fraudulent claims.”⁸

A few months later, on October 20, 2009, the District Court for the Southern District of Florida in *Osorio v. Dole Food Co.* ordered that a \$97 million judgment obtained in Nicaragua “be neither recognized nor enforced.”⁹ Hundreds of persons, again claiming sterility from exposure to DBCP, had brought the underlying action under Special Law 364.¹⁰ Judge Paul C. Huck found that the underlying judgment could not be enforced against

Lawsuits, BLOOMBERG.COM, Apr. 24, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=auzqr9rexj5c&refer=us>.

5. Findings of Fact and Conclusions of Law Supporting Order Terminating *Mejia* and *Rivera* Cases for Fraud on the Court ¶ 11, Nos. BC340049 and BC379820 (L.A. Cnty. Super. Ct. June 17, 2009) (hereinafter “*Mejia* Findings”).

6. *Id.* ¶ 3.

7. *Id.* ¶¶ 75-85, 103, 113. These findings garnered international media attention. See, e.g., Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, WALL STREET J., Aug. 19, 2009, <http://www.online.wsj.com/article/SB12508138340501.html>; Victoria Kim & Alan Zarembo, *Pesticide cases could be upended*, L.A. TIMES, Jul. 12, 2009, <http://www.articles.latimes.com/2009/jul/12/local/me-dole12>; Petterson, *supra* note 4; Gina Keating, *Judge Throws Out Dole “Bananeros” Cases, Citing Fraud*, REUTERS UK, Apr. 24, 2009, <http://uk.reuters.com/article/2009/04/24/bananas-idUKN2150339620090424>; Linda Deutsch, *LA Judge Rules Fraud in Suits Against Dole*, AP, Apr. 23, 2009, <http://www.guardian.co.uk/world/feedarticle/8471259>.

8. *Mejia* Findings, *supra* note 5, ¶ 73.

9. 665 F. Supp. 2d 1307, 1352 (S.D. Fla. 2009), *aff’d* 2011 U.S. App. LEXIS 6208 (11th Cir. Mar. 25, 2011).

10. *Id.* at 1318. The *Osorio* Order attaches an English translation of Law 364 as Appendix I, so all quotations in this article are from that translation.

defendants Dole Food Company, Inc. and The Dow Chemical Company (hereinafter "Dole" and "Dow") pursuant to Florida's Uniform Out-of-country Foreign Money-Judgments Recognition Act on four separate grounds, three of them related to Special Law 364:

The evidence before the Court is that the judgment in this case did not arise out of proceedings that comported with the international concept of due process. It arose out of proceedings that the Nicaraguan trial court did not have jurisdiction to conduct. During those proceedings, the court applied a law that unfairly discriminates against a handful of foreign defendants with extraordinary procedures and presumptions found nowhere else in Nicaraguan law.¹¹

Judge Huck further denied recognition on the separate ground that Nicaragua has "a weak and corrupt judiciary, such that Nicaragua does not possess a 'system of jurisprudence likely to secure an impartial administration of justice.'"¹²

One approach to understanding the causes that led to the enactment of Special Law 364 and the effects as manifested in these two cases is to apply two of the four master tropes from rhetorician Kenneth Burke: metonymy and irony.¹³ Under his approach to irony, we can read the *Mejia* and *Osorio* judgments in terms of each other—and in terms of the scholarship about DBCP litigation—to produce a dialectic that offers a "perspective of perspectives" on Special Law 364: the conditions that led to the enactment of this FNC blocking statute also underlay its ultimate failure.¹⁴ And by applying metonymy, one sees that the need for justice for those exposed to DBCP was reduced merely to attempts to defeat FNC. Because of this metonymic reduction, Special Law 364 achieved an ironic effect: rather than force a trial on the merits, it ensured that Nicaraguan plaintiffs would be denied any meaningful resolution of their claims.

After a brief discussion of Burke's master tropes in Part II, this article in Part III recounts the history of DBCP litigation, in particular defendants' successful employment of FNC dismissals. Part IV summarizes the critical responses both for and against FNC as applied in DBCP litigation. Part V describes the efforts of

11. *Id.* at 1351.

12. *Id.* at 1351-52 (quoting *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995)).

13. See KENNETH BURKE, *A GRAMMAR OF MOTIVES* 503 (Cal. ed. 1969).

14. *Id.* at 512.

various countries to prevent FNC dismissals by enacting blocking statutes, with a focus on Nicaragua and Special Law 364. Part VI discusses the findings from *Mejia* and *Osorio* on Special Law 364 in more detail to show how Special Law 364 was an impetus for fraud and why it denies due process. Part VII then offers a meta-analytical “dialectic” of these two judgments and the relevant scholarship on DBCP litigation, FNC, and blocking statutes.

II. A PRIMER ON THE FOUR MASTER TROPES

Burke conscripts several concepts from literature, in particular drama, in crafting his system of rhetoric and rhetorical criticism. One of his approaches involves the four master tropes—metaphor, synecdoche, metonymy, irony—and their “role in the discovery and description of ‘the truth.’”¹⁵ By applying these common literary tropes as an analytical frame, one gains fresh perspectives from which to understand art, history, and, as is relevant here, law.¹⁶

While this article applies only metonymy and irony, the four tropes are so intertwined in Burke’s system that we must first touch on metaphor and synecdoche. Metaphor is “perspective,” a “device for seeing something *in terms of* something else.”¹⁷ While the scientific approach to achieve objective reality is to winnow down multiple theories to “the” correct view, the dramatic approach is that a “variety of perspectives” establishes reality.¹⁸ In a sense, the other tropes are “species” of metaphor.¹⁹ Synecdoche is “representation,” to substitute “part for the whole, whole for the part, container for the contained, sign for the thing signified, material for the thing made [], cause for effect, effect for cause,

15. *Id.* at 503. The term “trope” might be best understood by describing its function in figurative language. All figurative language “is a departure from what users of the language apprehend as the standard meaning of words, or else the standard order of words, in order to achieve some special meaning or effect.” M.H. ABRAMS, A GLOSSARY OF LITERARY TERMS 66 (Ted Buchholz ed., 6th ed. 1993). Figurative language is often subdivided into two categories: figures of speech and figures of thought, more commonly called tropes. *Id.* The distinction between the two involves pattern versus meaning. Figures of speech depart from standard usage “in the syntactical order or pattern of the words”; common examples include the rhetorical question, antithesis, and parallelism. *Id.* at 66; *see id.* at 183-84. On the other hand, tropes are “words or phrases . . . used in a way that effects a conspicuous change in what we take to be their standard meaning.” *Id.* at 66.

16. *See* BURKE, *supra* note 13, at 516.

17. *Id.* at 503.

18. *See id.* at 504.

19. ABRAMS, *supra* note 15, at 68.

genus for species, species for genus, etc.”²⁰

Metonymy is “the *reduction* of some higher or more complex realm of being to the terms of a lower or less complex realm of being.”²¹ “The basic ‘strategy’ in metonymy is . . . to convey some incorporeal or intangible state in terms of the corporeal or tangible.”²² Metonymy is therefore a “special application” of synecdoche. Synecdoche “stresses a *relationship* or *connectedness* between two sides of an equation,” such as the movement from quantity to quality or from quality to quantity.²³ Metonymy, however, only allows for reduction: from quality to quantity.²⁴ Literary critic M.H. Abrams offers several examples that help refine this distinction between reduction and representation. In synecdoche, “[w]e use the term ‘ten *hands*’ for ten workmen, or ‘a hundred *sails*’ (for ships).”²⁵ For metonymy, “‘the crown’ or ‘the scepter’ can be used to stand for a king and ‘the turf’ for horse racing.”²⁶ The former examples show connectedness between a tangible object and its component part: hands are a physical part of men, sails are rigged to ships. The latter, however, are tangible devices that are merely associated with intangible concepts. “Turf” is a literal component of the physical venue for horse racing, which is a sport rather than an object. And while the person of a “king” may be tangible, the functions of a king that are associated with his “crown”—government, currency, law—are not.

The most common understanding of irony is verbal irony: “a statement in which the meaning that a speaker implies differs sharply from the meaning that is ostensibly expressed.”²⁷ Burke takes a broader view by comparing irony to dialectic. “Irony arises when one tries, by the interaction of terms upon one another, to produce a *development* which uses all the terms.”²⁸ Burke calls irony “total form,” a “perspective of perspectives”: “none of the participating ‘sub-perspectives’ can be treated as either precisely right or precisely wrong. They are all voices, or personalities, or positions, integrally affecting one another.”²⁹ “Inevitability” is key to an ironic perspective, which allows one to see how “the develop-

20. BURKE, *supra* note 13, at 507-08.

21. *Id.* at 506.

22. *Id.*

23. *Id.* at 509 (emphasis original).

24. *Id.*

25. ABRAMS, *supra* note 15, at 69 (emphasis added).

26. *Id.*

27. *Id.* at 97.

28. BURKE, *supra* note 13, at 512 (emphasis in original).

29. *Id.*

ments that led to the rise will, by the further course of their development, ‘inevitably’ lead to the fall.”³⁰ As in classical drama, the essence of irony is the “‘peripety,’ the strategic moment of reversal.”³¹ Accordingly, Abrams’ understanding of irony is akin to dramatic irony: “Dramatic irony involves a situation in a play or a narrative in which the audience or reader shares with the author knowledge of present or future circumstances of which a character is ignorant; in that situation, the character unknowingly acts in a way we recognize to be grossly inappropriate to the actual circumstances. . . .”³² The difference is that Burke extends irony beyond literary criticism and applies it as a device to help understand real-life situations: because irony as dialectic invites in all perspectives—not just writer and reader—it “moves us into the area of ‘law’ and ‘justice.’”³³

The abstract concepts behind the tropes of metonymy and irony should become more concrete as they are applied in the following sections. Two themes will emerge. First, the attempts to resolve DBCP claims by forcing litigation in U.S. courts is a metonymic reduction from “justice” to “U.S. trial”: by ignoring other options like banana worker settlement programs, proponents of blocking statutes were blinded to the already-evident downside of litigating in the home countries. Second, reading together all the sub-perspectives on Special Law 364 reveals an irony in that the moment of its greatest success—multi-million-dollar judgments in both Los Angeles and Nicaragua—was also the inevitable reversal, the beginning of the end.

III. FORUM NON CONVENIENS DISMISSALS OF DBCP CASES BROUGHT BY FOREIGN PLAINTIFFS

A. *DBCP Application, Male Sterility, and the Banana Industry in Nicaragua*

The nematode is a microscopic worm that damages the roots of crops.³⁴ DBCP was the active ingredient in some nematocides that were effective in controlling the pest, which allowed for significantly larger crop yields.³⁵ DBCP was applied in the U.S. and throughout the world on a variety of crops, including bananas in

30. *Id.* at 517.

31. *Id.*

32. ABRAMS, *supra* note 15, at 99.

33. BURKE, *supra* note 13, at 516.

34. Stecklow, *supra* note 7.

35. *Id.*

Central and South America, the Philippines, and Ivory Coast.³⁶ Several Nicaraguan banana farms—which had contracted with Standard Fruit Company, a subsidiary of Dole—sprayed DBCP for a few weeks at a time approximately 13 times during the 1970s.³⁷

In 1977, three dozen factory workers who manufactured DBCP at the Occidental Petroleum Corporation plant in Lathrop, California, learned that they were sterile.³⁸ Within months, the U.S. Environmental Protection Agency suspended the registration for DBCP, and by 1979 it had cancelled the registration for DBCP for all uses except pineapples.³⁹ The Dole-contracted farms in Nicaragua halted DBCP applications shortly thereafter.⁴⁰ Epidemiological studies have shown that overexposure to DBCP can cause significantly reduced or even zero sperm counts, but there is no evidence of other harmful effects in humans.⁴¹

B. DBCP Lawsuits Dismissed Under Forum Non Conveniens Doctrine

Beginning in the mid-1980s, foreign plaintiffs brought numerous lawsuits against fruit companies and chemical manufacturers and alleged harm from exposure to DBCP.⁴² Although some cases were filed in their home countries, the plaintiffs preferred to file these actions in the United States.⁴³ Professor Alexandra Albright writes that an American forum “provides considerable procedural and substantive advantages over the aliens’ home forum.”⁴⁴

For example, unlike most other countries, the American judicial system allows for contingent fee representations and does not require the losing party to pay the defendants’ legal costs.⁴⁵ U.S. rules also provide for more sophisticated discovery and evidence,

36. T. Christian Miller, *Plantation Workers Look for Justice in the North*, L.A. TIMES, May 27, 2007, <http://articles.latimes.com/2007/may/27/nation/na-pesticide27/3>.

37. *Id.*; *Meija Findings*, *supra* note 5, ¶ 11.

38. Miller, *supra* note 36.

39. *Id.* DBCP’s use on pineapple farms in Hawaii remained lawful until 1985. Diana Jean Schemo, *U.S. Pesticide Kills Foreign Fruit Pickers’ Hopes*, N.Y. TIMES, Dec. 6, 1995, <http://www.nytimes.com/1995/12/06/world/us-pesticide-kills-foreign-fruit-pickers-hopes.html?pagewanted=all&src=PM>.

40. Stecklow, *supra* note 7.

41. Miller, *supra* note 36; see Scott, *supra* note 1, at 100.

42. Don Mayer & Kyle Sable, *Yes! We Have No Bananas: Forum Non Conveniens and Corporate Evasion*, 4 INT’L BUS. L. REV. 130, 153 (2004).

43. *Id.* at 136-37.

44. Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 353 (1992).

45. *Id.*

and U.S. courts can better accommodate complex mass tort actions.⁴⁶ And perhaps most importantly, U.S. juries award significantly higher damages, including punitive damages; neither juries nor punitive damages are available in all countries.⁴⁷

The defendants knew this as well, so they fought to have the cases removed from the U.S., primarily by seeking dismissal on the grounds of FNC. A motion to dismiss for FNC does not dispute that a claim properly falls within the court's jurisdictional rules; instead, it argues that the claim could be tried more conveniently in another country.⁴⁸ The federal FNC doctrine was first articulated by the Supreme Court in *Gulf Oil Corp. v. Gilbert* and *Koster v. Lumbermens Mutual Casualty Co.*, with the only significant review coming in *Piper Aircraft Co. v. Reyno*.⁴⁹ A large majority of states, as well as the District of Columbia and all U.S. territories, apply essentially the same test as the federal courts.⁵⁰

The first stage of the analysis asks whether an alternative forum is available, and if so, whether that forum is adequate. An alternative foreign forum is available when the defendant is amenable to process in the other jurisdiction.⁵¹ An alternative foreign forum is adequate if the parties will not be deprived of all remedies nor be treated unfairly.⁵² The alternative forum is not inadequate merely because it provides the plaintiff with a less generous remedy than U.S. law: the *Piper Aircraft* Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."⁵³

If the foreign alternative forum is found available and adequate, the court considering a motion to dismiss then weighs the two groups of factors articulated in *Gilbert*. The private interest factors are concerned primarily with the difficulty of obtaining evidence from abroad:

[T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the

46. See *id.*

47. *Id.*

48. Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 311 (2002).

49. *Id.*; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

50. Davies, *supra* note 48, at 315.

51. *Piper Aircraft*, 454 U.S. 235, 254 n.22 (1981).

52. See *id.* at 255.

53. *Id.* at 247.

cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.⁵⁴

The public interest factors relate to functional concerns for the court considering the motion: administrative difficulties arising from congestion of court dockets; the burden placed on a jury required to decide a case with no connection to the community from which it is drawn; and the desirability of having the dispute tried in a forum familiar with the governing law.⁵⁵

Defendants in the DBCP cases brought in the 1980s and 1990s argued that the foreign nations had available and adequate courts and that both groups of factors were satisfied—and the courts “would always dismiss the lawsuit based on *forum non conveniens*.”⁵⁶ For example, in *Delgado v. Shell Oil Co.*, Judge Sim Lake examined the laws of twelve different foreign legal systems (including Nicaragua) and found that each of them had a legal system that would not deprive plaintiffs of all legal remedies, and, because defendants had stipulated to submit to the jurisdiction of the foreign courts, those courts were adequate and available.⁵⁷ Courts would then turn to the private and public interest factors and find that those both weighed heavily in favor of dismissal. For example, in *Sibaja v. Dow Chemical Co.*, which was filed in Florida by Costa Rican plaintiffs, the district court found that most of the evidence and witnesses were in Costa Rica, compulsory process would not be available to compel production of the evidence or attendance of the witnesses, and the defendants would not be able to implead potential third-party defendants.⁵⁸ Turning to the public interest factors, the *Sibaja* Court found that the case would contribute to the congestion of the court docket, a complex comparative law analysis of an unfamiliar legal system in a foreign language would be required, and the dispute had no connection to the community.⁵⁹ Nor could plaintiffs avoid FNC dismissal by litigating in state court. In *Dow Chemical Co. v. Alfaro*, the

54. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

55. *Id.* at 508-09.

56. Mayer & Sable, *supra* note 42, at 139; *see, e.g., Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985).

57. 890 F. Supp. at 1356-66.

58. 757 F.2d at 1217 n.5.

59. *Id.*; *see* Molly M. White, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 LOY. L.A. L. REV. 491, 514-15 (1993).

Supreme Court of Texas had held that dismissal for FNC was improper because the Legislature had abolished that doctrine when it enacted the Texas Wrongful Death Statute in 1913.⁶⁰ Several commentators criticized both the outcome and the reasoning employed in *Alfaro*, and shortly thereafter, the Texas Legislature responded by enacting FNC legislation.⁶¹

IV. PERCEIVED SHORTCOMINGS OF FORUM NON CONVENIENS DISMISSALS IN DBCP CASES

While FNC has its proponents, many commentators—be they student note writers, torts practitioners, or international law scholars—attacked the doctrine as applied in DBCP litigation. Turning back to the language of Burke, we see in the critical responses on both sides the “developments” that gave birth to blocking statutes as well as the “inevitable” problems that would cause these statutes to fail: Latin American fraud and corruption; ill-equipped courts; and inability to obtain evidence from abroad. And in many of those who opposed FNC we see the first seeds of metonymic thinking in the argument that lack of access to a U.S. court equals a denial of justice.

A. *Arguments in Favor of FNC*

Several of the primary arguments in favor of FNC are summarized by Professor Albright. One is that FNC avoids paternalism: hearing foreign cases in the U.S. under U.S. law advances U.S. social policy and disrupts the policy of foreign nations.⁶² Further, other developed nations do not provide a forum for foreign cases, which puts U.S. corporations at a competitive disadvantage.⁶³ Another argument is that multinational corporations have many “homes,” so trying cases in a nation closer to the cause of action is more convenient.⁶⁴ Finally, the courts themselves “dread the prospect of becoming a ‘dumping ground’ for the world’s tort

60. 786 S.W.2d 674, 674, 677-78 (Tex. 1990).

61. Charles Eric Ruhr, *Forum Non Conveniens: A Review of Its Application in Past and Recent Cases*, 6 TULSA J. COMP. & INT’L L. 247, 251 (1999); Albright, *supra* note 44, at 364-68; Bill C. Anderson, *Dow Chemical Co. v. Alfaro: Forum Non Conveniens—Now Isn’t That Convenient?*, 42 BAYLOR L. REV. 375, 402-03 (1990). For a thorough discussion of the FNC statute enacted by the Texas Legislature in response to *Alfaro*, see Nicola Fuentes, *The Re-Establishment of Forum Non Conveniens in Texas: What Does It Mean?*, 24 ST. B. TEX. ENVTL. L.J. 77, 77 (1993).

62. Albright, *supra* note 44, at 361-62.

63. *Id.* at 362.

64. *Id.* at 362-63.

litigation,” so FNC prevents forum shopping.⁶⁵

The doctrine itself also offers its own defenses: the public and private interest factors. After all, the court applies these factors only after first determining whether an alternative and adequate forum even exists. While the public interest factors offer a justification from the perspective of the court, the private interest factors address the concerns of the defendants: the difficulty of obtaining evidence from abroad, including the lack of compulsory process and access to documentary evidence. “When most of the relevant events occurred in a foreign country, most of the witnesses and evidence will be located in that country as well. . . . Because these witnesses are located outside of the territorial jurisdiction of the United States, United States courts cannot compel the attendance of a witness at court via a subpoena.”⁶⁶

B. Criticisms of FNC

Critics of FNC found these justifications slight when compared to its drawbacks. Indeed, many contended that the application of FNC to DBCP litigation highlights the shortcomings of this doctrine: “While the problems inherent in the doctrine of *forum non conveniens* affect virtually any type of claim filed by foreign plaintiffs, its misuse is particularly egregious in the field of international environmental litigation.”⁶⁷ The criticisms fell into two categories: the doctrine was misapplied, and the doctrine was unfair to plaintiffs.

1. Courts Misapplied the *Forum Non Conveniens* Test

The first group of criticisms was that courts misapplied the *Gilbert* and *Koster* tests and reached incorrect results. Perhaps the most obvious shortcoming was that these foreign courts were inadequate. One of the reasons plaintiffs chose to litigate in the United States is because her courts have the resources and the body of law to accommodate complex mass tort claims.⁶⁸

By contrast, the courts of the plaintiffs’ home countries could not handle these cases. The DBCP plaintiffs typically came from

65. *Id.* at 363.

66. Jennifer L. Woulfe, *Where Forum Non Conveniens and Preemptive Jurisdiction Collide: An Analytical Look at Latin American Preemptive Jurisdiction Laws in the United States*, 30 ST. LOUIS U. PUB. L. REV. 171, 195 (2010).

67. White, *supra* note 59, at 511.

68. See Albright, *supra* note 44, at 353.

developing nations, so their judiciary had scarce resources.⁶⁹ Moreover the procedural and administrative mechanisms in Latin American courts were geared toward resolving individual disputes.⁷⁰ Combined, these factors meant that the foreign judges were ill-equipped to manage the logistics of the claims of hundreds or even thousands of plaintiffs against multiple defendants.⁷¹

Another critique regarding adequacy was the presence of judicial corruption and the absence of judicial independence in the home country.⁷² Instances of “bribery, abuse, and fraud are well documented in many legal systems of the Americas.”⁷³ “The U.S. State Department reports that fair trials and due process are often unavailable to those pursuing claims in Latin American jurisdictions . . . because their courts are often influenced by corruption.”⁷⁴ Indeed a 2004 report authored by Professor John S. Baker, Jr. for USAID described a “judicial crisis in Nicaragua,” quoting the Agency’s in-country Mission Director James Vermillion as stating “some judges were being politically manipulated.”⁷⁵ That same report added that “appointment of many of these judges was reportedly achieved through political favor, and few, if any, have adequate qualifications to serve as judges.”⁷⁶

Critics also attacked the findings that the private and public interest factors favored dismissal. The private interest factors could not be met by dismissal because Latin American courts either did not provide for—or they curtailed—depositions, discovery, access to witnesses, the use of experts, and the production of documents.⁷⁷ Thus, while one goal in granting dismissal is access to evidence and witnesses located in the home country, the effect was actually a loss of evidence.⁷⁸ Further, many of the defendants’ witnesses and documents would be located in the United States.⁷⁹

In fact, the potency of the evidence justification for dismissing

69. See Garro, *supra* note 1, at 84.

70. *Id.* at 85.

71. *Id.* at 85-86.

72. Figueroa, *supra* note 1, at 149.

73. Christopher M. Marlowe, Comment, *Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America*, 32 U. MIAMI INTER-AM. L. REV. 295, 303 (2001).

74. *Id.* at 296-97.

75. John S. Baker, Jr. & Agustín Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 U. MIAMI INTER-AM. L. REV. 1, 15 (2010).

76. *Id.* at 15-16.

77. Garro, *supra* note 1, at 91-94.

78. See Saint Dahl, *supra* note 1, at 37.

79. White, *supra* note 59, at 529-30.

to the home country had been diminished by the Hague convention and new technologies—including videoconferencing and videotaped depositions—which afford access to witnesses and evidence located abroad.⁸⁰

Nor did the commentators think that the public interest factors were satisfied. They argued that there was no evidence of a flood of foreign cases into U.S. jurisdictions.⁸¹ And the cases bore a significant relationship to the U.S. forum: not only did the profits earned overseas flow back to the U.S.,⁸² but U.S. citizens had an interest in deterring domestic corporations from engaging in harmful conduct, both here and abroad.⁸³

2. Forum Non Conveniens Is Not Fair to Foreign Plaintiffs

The second group of criticisms was that FNC is not fair to foreign plaintiffs. For example, although the general rule is that the plaintiff's choice of forum is entitled to deference, the application of FNC meant that a foreign plaintiff's choice received less deference than a domestic plaintiff's.⁸⁴ As another example, Latin American jurisdictions often require the losing side to pay the winning side's costs, and they do not allow contingency fee agreements.⁸⁵ The foreign DBCP plaintiff, who was often indigent, therefore could not afford to bring an action in his home court.⁸⁶

Ultimately, FNC tended to be outcome determinative: once dismissed, the claims were not usually tried elsewhere.⁸⁷ One survey showed that only one of over fifty personal injury actions that were dismissed for FNC was actually tried in a foreign court.⁸⁸ Another survey of 85 cases revealed that 18 were not pursued further, 22 settled for less than half the estimated value, and not one proceeded to a courtroom victory in the foreign forum.⁸⁹

Given that venue and jurisdiction over the defendants was

80. Davies, *supra* note 48, at 326-27, 333.

81. Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 676 (1992).

82. *Id.* at 675.

83. White, *supra* note 59, at 522-23 (citing *Piper Aircraft Co.*, 454 U.S. at 260-61 (1981)).

84. White, *supra* note 59, at 528-29.

85. Garro, *supra* note 1, at 89.

86. *Id.* at 88-91.

87. White, *supra* note 59, at 518-20.

88. Figueroa, *supra* note 1, at 153.

89. *Id.*

proper in the United States, and that the defendants were corporations with substantial operations in the United States, these critics concluded that application of FNC led to inequitable results.⁹⁰ “As demonstrated, U.S. courts engage in foreign policy through FNC, having held over and over that U.S. corporations doing business in Latin America cannot be held liable in U.S. courts for actions that occurred in Latin America.”⁹¹

Such criticisms can be understood as a metonymic reduction because they equate justice—a higher or more complex realm of being—with a U.S. court trial—a lower or less complex realm of being. Many critics used language that described “justice” for the workers in terms of a U.S. trial. Consider the claim of one student note writer: “The goal of a *forum non conveniens* analysis is to ensure that the case is tried in the forum that ‘will best serve the convenience of the parties and the ends of justice.’ If the case is not tried at all, this goal is not met.”⁹²

Another writer bemoaned the fact that “none of the reported cases ended with a courtroom victory.”⁹³ One critic argued that the claim “must eventually be heard in some court.”⁹⁴ And that court must be in the U.S.: “Without the opportunity to litigate in the United States, foreign plaintiffs from less developed countries are left without any forum for redress because the judicial systems of their countries are often plagued with ‘inadequacies in . . . law, procedures or available remedies.’”⁹⁵

V. LATIN AMERICA RESPONDS WITH BLOCKING STATUTES— A METONYMIC REDUCTION

Several Latin American countries agreed that a trial in the

90. See, e.g., Donna Solen, Comment, *Forum Non Conveniens and the International Plaintiff*, 9 FLA. J. INT'L L. 343, 343, 349-51 (1994) (“*Forum non conveniens* has been used as a tool by U.S. corporations to evade responsibility for their conduct abroad.”).

91. Figueroa, *supra* note 1, at 168.

92. Megan Waples, Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1512 (2004) (punctuation and citation omitted).

93. Solen, *supra* note 90, at 350.

94. Marlowe, *supra* note 73, at 303-04.

95. Rosemary H. Do, Note & Comments, *Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light of Nicaragua's DBCP Litigation*, 14 SW. J.L. & TRADE AM. 409, 418 (2008); see Figueroa, *supra* note 1, at 137 (“Basically, the only option available to the Latin American plaintiff [following *forum non conveniens* dismissal] is to re-file in her home country jurisdiction.”).

U.S. offered their citizens the only chance of justice: those countries enacted retaliatory legislation in the form of blocking statutes, laws intended to prevent FNC dismissal from U.S. courts.⁹⁶ Such metonymic reduction ignored that justice can be achieved via means outside of trial, such as settlement programs. More significantly, metonymic thinking created blinders to the negative consequences that forcing litigation in the U.S. would inevitably create.

A. *Alternatives to U.S. Trial*

At least one approach to “justice” for injured workers lay outside of U.S. courts. In 2006 Dole established a settlement program with banana workers and the Honduran government that was 10 years in the making.⁹⁷ Under the Honduran program, workers who could verify employment and sterility received settlements up to \$5,800.⁹⁸ Dole also attempted to establish a similar program with injured workers in Nicaragua if that country would have repealed Special Law 364.⁹⁹ While modest by American standards, \$5,800 represents five times the average annual per capita income in Nicaragua, \$1,126.¹⁰⁰

However, U.S. Plaintiffs’ attorneys representing foreign plaintiffs in DBCP suits called the settlement program a “cynical effort to prevent those cases from going to lawyers who would pursue significantly greater value.”¹⁰¹ Likewise, scholars characterized settlements where plaintiffs received as much as half of the theoretical amounts they could have received in the U.S. as inadequate.¹⁰² Accordingly, this alternative was largely ignored in favor of pursuing blocking statutes that would force access to U.S. courts.

96. See Figueroa, *supra* note 1, at 156.

97. David Hechler, *The Kill Step*, CORPORATE COUNSEL, Oct. 2009, at 90. Commentators have suggested other options as well, such as multinational treaties. See Figueroa, *supra* note 1, at 168-69.

98. Hechler, *supra* note 97, at 90.

99. Do, *supra* note 95, at 414.

100. Bureau of W. Hemisphere Affairs, , *Background Note: Nicaragua*, U.S. DEP’T OF STATE, (Aug. 1, 2011), <http://www.state.gov/r/pa/ei/bgn/1850.htm>.

101. Hechler, *supra* note 97, at 90. While the DBCP plaintiffs themselves tend to be poor, it should be noted that they are represented by some of the most sophisticated U.S. plaintiffs’ attorneys. See James M. Sabovich, *Petition Without Prejudice: Against the Fraud Exception to Noerr-Pennington Immunity From the Toxic Tort Perspective*, 17 PENN ST. ENVTL. L. REV. 1, 24 (2008).

102. See, e.g., Figueroa, *supra* note 1, at 153.

B. Latin American Blocking Statutes In General

The blocking statutes followed one of two basic forms: they either eliminated the jurisdiction of the local forum, thus rendering the home country “unavailable”; or they expressly allowed for jurisdiction in the local forum but with such onerous provisions that defendants would choose to remain in the U.S. rather than appear in a jurisdiction where an adverse finding was “all but assured.”¹⁰³

The first approach was comparatively benign: the blocking statute extinguished the jurisdiction of the home country to consider a claim once that claim was first filed in the U.S. Thus, by statute, no court of the home country would be “available” because this part of the FNC test was not met.¹⁰⁴ Professor Heiser writes that “a handful of [U.S.] courts have followed this line of reasoning and denied motions to dismiss for forum non conveniens.”¹⁰⁵ At least five countries have this type of blocking statute in place: Guatemala, Ecuador, Honduras, Venezuela, and the Philippines.¹⁰⁶ Although the Costa Rican legislature declined to pass a similar statute in 1997,¹⁰⁷ at least one court has nevertheless found that that country is unavailable once a claim is filed in the U.S.¹⁰⁸

The second form of blocking statute, on its face at least, established procedural and evidentiary rules for trying DBCP cases in the home country. The intended effect, however, was to make trial in the foreign country less appealing than trial in the U.S., thus dissuading defendants from even attempting to dismiss for FNC.¹⁰⁹ These statutes achieved this by imposing strict liability, providing damages at a level equivalent to U.S. standards, requiring the posting of bonds, and establishing summary proceedings.¹¹⁰ Two countries passed this form of blocking statute:

103. Scott, *supra* note 1, at 99.

104. Heiser, *supra* note 1, at 622.

105. *Id.* at 624.

106. *Id.* at 623; Figueroa, *supra* note 1, at 157-58. Though several Ecuadorian courts have held that Law 55 prohibits jurisdiction following dismissal for FNC, the Ecuadorian Constitutional Court has declared Law 55 unconstitutional. Compare Garro, *supra* note 1, at 78-79, with Figueroa, *supra* note 1, at 158.

107. Garro, *supra* note 1, at 81.

108. Heiser, *supra* note 1, at 623; see Canales Martinez v. Dow Chem. Co., 219 F. Supp. 2d 719, 728 (E.D. La. 2002).

109. Heiser, *supra* note 1, at 622; see Woulfe, *supra* note 66, at 176 (“Special Law 364 still has the effect of pushing the case into the United States.”).

110. Scott, *supra* note 1, 100-01; Figueroa, *supra* note 1, at 156.

Dominica and Nicaragua.¹¹¹

C. *Nicaragua Special Law 364*

In response to FNC dismissals in cases like *Delgado*, thousands of persons who claimed injury from exposure to DBCP organized into “unions” and, aided by U.S. plaintiff’s attorneys, lobbied the Nicaraguan Legislature to pass Special Law 364.¹¹² Enacted in late 2000 and published in early 2001, Special Law 364 is more formally called Special Law for the Conduct of Lawsuits Filed by Persons Affected by the Use of Pesticides Manufactured with a DBCP Base.¹¹³ By its very terms, Special Law 364 attempts to defeat FNC dismissals of DBCP cases. Article 7, in conjunction with Articles 4 and 5, prevents a defendant who is first sued in Nicaragua from asserting FNC if the case is later refiled in the U.S. Special Law 364 requires that, “[t]o guarantee the outcome of the lawsuit, the defendants are to deposit, within ninety (90) days after the respective lawsuits have been brought before the courts of the Republic, the sum of one hundred thousand dollars . . . as a procedural prerequisite for being able to take part in the lawsuit.”¹¹⁴ If the defendants choose not to post the \$100,000 bond within 90 days, however, then they “must subject themselves unconditionally to the jurisdiction of the courts of the United States of America for the final judgment of the case in question, expressly waiving the defense of *forum non conveniens* invoked in those courts.”¹¹⁵

Other provisions of Special Law 364 operate to encourage defendants to litigate in the U.S., or, more accurately, to discourage them from litigating in Nicaragua. Article 3 does authorize jurisdiction in Nicaraguan courts following dismissal from a U.S. court.¹¹⁶ However, other provisions ensure that no defendant would seek dismissal. For example, in addition to the \$100,000 bond, Article 8 requires defendants to post a \$300 million cordoba bond (roughly U.S. \$15 million) “in order to guarantee payment of

111. Heiser, *supra* note 1, at 628.

112. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT’L L. 456, 490 (2010); David Gonzalez & Samuel Loewenberg, *Banana Workers Get Day in Court*, N.Y. TIMES, (Jan. 18, 2003), available at <http://www.nytimes.com/2003/01/18/business/worldbusiness/18BANA.html?pagewanted=all>.

113. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, app. I at 1353-55 (S.D. Fla. 2009).

114. *Id.* at 1354.

115. *Id.*

116. *Id.*

the possible compensation to the workers and other costs of the lawsuit.”¹¹⁷ Article 9 presumes causation: if someone was exposed to DBCP and provides two lab reports showing sterility, then there is an “irrefutable presumption that such condition was caused by the same.”¹¹⁸ Article 11 provides minimum damages of \$100,000 for azoospermia (zero sperm count), \$50,000 for severe oligospermia (low sperm count), and \$25,000 for other injuries.¹¹⁹ This is in addition to the \$100,000 that each successful plaintiff shall be awarded under Article 3.¹²⁰ Article 12 establishes an “unavoidable 3-8-3 term,” meaning 3 days for defendants to answer the claim, 8 days for parties to offer evidence, and 3 days for the court to issue a decision.¹²¹ Finally, Article 6 provides that claims are “not subject to a statute of limitations.”¹²²

The Nicaraguan Supreme Court affirmed the constitutionality of Special Law 364 in an advisory opinion.¹²³ The Nicaraguan Attorney General had issued an opinion singling out several provisions of Special Law 364 that he thought violated Nicaragua’s constitution or that deviated from established Nicaraguan law.¹²⁴ For example, he found the 3-8-3 summary procedure was inappropriate for complex cases, the disparate treatment of defendants and plaintiffs violated the constitutional right of equality, and the deposit for future compensation assumed that a ruling for plaintiffs was taken for granted.¹²⁵ The Supreme Court disagreed. It held that the “Principle of Equality” meant that the law merely provided “positive discrimination” by ameliorating the disadvantages to poor plaintiffs.¹²⁶ The Court also held that Special Law 364 comported with due process because it gave defendants the right to opt out of litigation in Nicaragua and instead choose a

117. *Id.*

118. *Id.* While only sterility is presumed, the language of Law 364 is broad enough to encompass claims for other types of injuries. Article 5 provides that the \$100,000 bond “shall be considered as part of future compensation that the affected persons may receive for any physical, psychological or pathological deformation resulting from sterility, cancer and other illnesses and physical damage and pain and suffering that may be confirmed, as a result of the use and application of the pesticide DBCP.” *Id.*

119. *Id.* at 1354-55.

120. *Id.* at 1355.

121. *Id.*

122. *Id.* at 1354.

123. Saint Dahl, *supra* note 1, app. at 53-57 (Consultation to the Judges of the Supreme Court of Justice of Nicaragua (Nicar. Oct. 16, 2003)).

124. *Id.* at 53.

125. *Id.*; *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1315-17 (S.D. Fla. 2009).

126. Saint Dahl, *supra* note 1, app. at 55 (Consultation to the Judges of the Supreme Court of Justice of Nicaragua (Nicar. Oct. 16, 2003)).

U.S. forum.¹²⁷ Thus, defendants could avoid the strictures of Special Law 364 altogether.

D. Commentators' Responses to Special Law 364

The academic response to Special Law 364 was mixed. Among the negative critiques, even some who advocate change to the FNC calculus criticized the law. Professor Garro called blocking statutes in general, "not only unnecessary but also counter-productive. Several provisions are patently unconstitutional and others appear highly questionable."¹²⁸ Dante Figueroa wrote that blocking statutes, "have only contributed to aggravate the FNC impasse."¹²⁹ Casey and Ristroph argued that blocking statutes contribute to boomerang litigation, in which cases refiled in Latin America must then be filed a third time in U.S. Courts, either after the Latin American court denied jurisdiction or as an enforcement action.¹³⁰ Professor Scott condemned Special Law 364 for containing, "very harsh measures," so that ". . . [d]efendants thus face a no-win scenario: either litigate in the wrong place or litigate in the right place with unfair procedures."¹³¹ He suggested new federal legislation requiring U.S. courts to dismiss cases premised on blocking statutes and to refuse to enforce judgments obtained under them.¹³²

Professor Heiser's critique was more moderate. He thinks that the preemptive jurisdiction statutes, which merely make the home country statutorily unavailable, can "effectively counter dismissal."¹³³ Potential problems could arise, however, from a judgment obtained in Nicaragua that is then brought to the U.S. for enforcement under the Uniform Foreign Money-Judgments Recognition Act. The presumption of causation, minimum damages, required bonds, and expedited procedures under Special Law 364 raise procedural and substantive due process concerns that "make enforcement under the UFMJRA less than certain."¹³⁴ However, he sees no problems with enforcement if the action was first filed

127. *Id.*

128. Garro, *supra* note 1, at 78.

129. Figueroa, *supra* note 1, at 156.

130. M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 *BYU INT'L L. & MGMT. REV.* 21, 31-32 (2007).

131. Scott, *supra* note 1, at 100-02.

132. *Id.* at 102-04.

133. Heiser, *supra* note 1, at 658.

134. *Id.* at 660.

in the U.S., then defendants moved for dismissal knowing that Special Law 364 was in place.¹³⁵

Others have come out squarely in favor of blocking statutes in general and Special Law 364 in particular. For example, Winston Anderson praised the blocking statute of Dominica, writing that it “deserves the highest commendation” as a “landmark development in ‘checkmating’ the pernicious effects of forum non conveniens.”¹³⁶ Regarding Special Law 364, Mayer and Sable attacked corporate defendants who in the 1990’s argued that Nicaragua offered an adequate forum and then “contradictorily” objected that Special Law 364 offends American notions of fair play and substantial justice.¹³⁷ They concluded that if a U.S. court were to deny enforcement, it would be a “direct challenge to the sovereignty of the foreign state” by “declaring a public act contrary to customary international law [and] challenging the Nicaraguan judiciary’s use of that legislative act.”¹³⁸ Rosencranz, Roblin, and Balloffet characterized blocking statutes as “human-rights laws,” and they wrote that Special Law 364 “enables [Nicaraguan] citizens to hold transnationals accountable.”¹³⁹ One student commentator claimed that the blocking statutes “have done much to combat the effects of forum non conveniens,” and Special Law 364 in particular “is a more direct attack on the procedural doctrine. . . [and] more likely to achieve the long-standing goal of thousands of victimized foreign laborers—corporate accountability.”¹⁴⁰ He concluded that “[w]orkers in Nicaragua will receive their justice.”¹⁴¹ The irony of this pronouncement will become apparent in the next two sections, which describe how the effects of Special Law 364 have been anything but justice, for either the banana workers or the multinational corporations.

VI. THE REVERSAL: SPECIAL LAW 364 AS UNCONSTITUTIONAL IMPETUS FOR FRAUD

In classical drama, the action accelerates as the play draws

135. *Id.* at 660-61.

136. Winston Anderson, *Forum Non Conveniens Checkmated?—The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT’L L. & POL’Y 183, 215 (2001).

137. Mayer & Sable, *supra* note 42, at 163.

138. *Id.* at 163-64.

139. Armin Rosencranz, Stephen Roblin, & Nicole Balloffet, *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161, 167, 178 (2009).

140. Santoyo, *supra* note 1, at 729.

141. *Id.* at 736.

closer to the reversal. Similarly, U.S. plaintiffs' attorneys responded enthusiastically to Special Law 364; after all, they had helped draft and usher the law through the Nicaraguan legislature.¹⁴² They set up offices in northwest Nicaragua in the city of Chinandega, the heart of the country's banana region.¹⁴³ They filed hundreds of lawsuits on behalf of thousands of plaintiffs, both in Nicaragua and in several state and federal courts. By 2003, over 7,000 plaintiffs had filed 400 cases seeking more than \$9.6 billion in damages.¹⁴⁴ As of 2009, Nicaraguan courts had issued judgments in 32 of those cases totaling \$2.05 billion.¹⁴⁵

Thousands of claims were filed in Los Angeles County, and in 2007 the first bellwether case, *Tellez*, went to trial and resulted in a \$2.3 million verdict for six plaintiffs.¹⁴⁶ However, *Tellez* would prove to be the "peripety": just as Special Law 364 had seemingly delivered a U.S. court victory for Nicaraguan plaintiffs, the developments that gave rise to this law "inevitably" reached the attention of two U.S. courts. Rather than offer plaintiffs a trial on the merits of their negligence and products liability claims, Special Law 364 was itself put on trial. This "further course of the[] development" of Special Law 364 put the *Tellez* judgments—and the claims of all Nicaraguans—into jeopardy.

A. *Mejia v. Dole Food Co.*: Original Action in U.S. Dismissed as Fraud on the Court

Mejia was filed in Los Angeles County Superior Court, and Hollywood seems to have scripted the findings in this case. Judge Chaney held a three-day hearing pursuant to an order to show cause re terminating sanctions why *Mejia* should not be dismissed with prejudice.¹⁴⁷ Discovery in *Mejia* had been conducted under a Protective Order because of danger of annoyance, oppression, and potential intimidation of witnesses.¹⁴⁸ Accordingly, portions of the

142. Drimmer & Lamoree, *supra* note 112, at 490-91.

143. *Id.* at 492.; Miller, *supra* note 36; Stecklow, *supra* note 7.

144. Gonzalez & Loewenberg, *supra* note 112.

145. Edvard Pettersson & Mort Lucoff, *Dole Fights Workers' Nicaraguan Verdict in U.S. Court*, BLOOMBERG.COM (Sept. 1, 2009), available at [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ai\]xiWsRnvGnY](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ai]xiWsRnvGnY).

146. Judgment on Jury Verdict and Post-Trial Orders at 4, *Tellez v. Dole Food Co.*, Case No. BC312852 (L.A. Cnty. Super. Ct. Oct. 6, 2008) (The jury had awarded a total of \$5.8 million against Dole and Dow in damages, and after a JNOV and motion for new trial, the final judgment was reduced to a combined \$2.3 million); see also Pettersson, *supra* note 4.

147. *Mejia* Findings, *supra* note 5, ¶¶ 57, 69.

148. *Id.* ¶ 33.

hearing were conducted in closed court, and several video deposition snippets were shown that pixelated the images and altered the voices of the witnesses.¹⁴⁹ A few live witnesses, including two of Dole's investigators, also testified.¹⁵⁰ These witnesses described a massive fraudulent enterprise, driven by plaintiffs' attorneys and corrupt government officials, to recruit thousands of bogus plaintiffs for the purpose of extorting billions of dollars out of the defendant transnational companies. And the "impetus" behind the scheme was Special Law 364.¹⁵¹

Like its sister case *Tellez, Mejia* had started as a tort action brought by persons who claimed to have been injured while working on Dole-contracted farms in Nicaragua in the 1970s.¹⁵² After the verdicts in *Tellez*, a "Witness X" had come forward with allegations of fraud by plaintiffs and their attorneys, but, because of threats against him, he refused to testify or sign a declaration.¹⁵³ Further, the Court lacked any authority to compel Witness X's testimony, or the testimony of any Nicaraguan or the production of any documents located in Nicaragua, because there are no treaties between the United States and Nicaragua that govern the gathering of evidence.¹⁵⁴ However Dole acted on this suspicion of fraud and gathered 10 declarations from witnesses who recounted that plaintiffs had never worked on banana farms, that plaintiffs were not sterile, that plaintiffs' attorneys were engaged in fraud, and that the attorneys engaged in acts of intimidation.¹⁵⁵ Based on these declarations, the Court entered a Protective Order so that Defendants could notice and take "John Doe" depositions to uncover admissible evidence of the potential fraud.¹⁵⁶ Dole had already taken 17 depositions and had noticed several more when, because of threats of violence and other intimidation in Nicaragua, the Court halted discovery and entered the OSC re terminating sanctions.¹⁵⁷

149. *E.g.*, Transcript of Oral Argument at 792:8-12, *Mejia*, No. BC340049 (L.A. Cnty. Super. Ct. Apr. 23, 2009); Hechler, *supra* note 97, at 90; Catherine Ho, *Over Objections, "Documentary" About Banana Workers Is Screened*, THE L.A. DAILY J., June 23, 2009; Deutsch, *supra* note 7; Keating, *supra* note 7.

150. Transcript of Oral Argument at 792:8-12, *Mejia*, No. BC340049 (L.A. Cnty. Super. Ct. Apr. 23, 2009).

151. *Mejia* Findings, *supra* note 5, ¶ 73.

152. *Id.* ¶¶ 11, 17.

153. *Id.* ¶¶ 22-23.

154. *Id.* ¶ 133.

155. *Id.* ¶¶ 29-31.

156. *Id.* ¶ 33.

157. *Id.* ¶¶ 43, 57-58.

Judge Chaney found that “[a]n entire industry has developed around DBCP litigation in Nicaragua for the purpose of bringing fraudulent claims.”¹⁵⁸ At least four law firms—including the *Oficinas Legales Para Los Bananeros* of Juan Dominguez and Antonio Hernandez Ordeñana, who represented the plaintiffs in *Mejia* and *Tellez*—operated out of Chinandega.¹⁵⁹ Although these firms initially attempted to recruit legitimate banana workers, there were too few men who had worked at the Dole-contracted farms from the 1970s—and too few of them for whom lab results showed sterility—to make the enterprise profitable.¹⁶⁰ The firms therefore conspired and colluded with each other, with Nicaraguan laboratories, and with corrupt Nicaraguan judges in a position to influence the outcome of DBCP cases, in order “to manufacture evidence and improperly influence the outcome of DBCP cases pending in Nicaraguan courts in favor of Plaintiffs.”¹⁶¹

In furtherance of the conspiracy, “recruiting captains were issued ‘guidelines’ instructing them to bring in as many men as possible, regardless of whether they had ever worked on a banana farm.”¹⁶² They recruited from the poorest areas of Nicaragua—persons “thought most susceptible to exploitation.”¹⁶³ In return for the promise of an imminent windfall, recruits had to pay to attend monthly meetings, receive training materials, and participate in field trips to the farms.¹⁶⁴ Next, the captains coached the recruits to give false testimony with the assistance of “brochures” that contained information about the farms in general, agricultural jobs in particular, tasks associated with those jobs, and names and physical descriptions of farm personnel.¹⁶⁵ All personnel records from the banana farms had been destroyed after the Sandinistas took control of the banana farms.¹⁶⁶ Accordingly, the firms manufactured false employment histories in the form of “work certificates” signed by former banana farm supervisors that purported to verify the plaintiff’s work on the farm.¹⁶⁷ The plaintiffs’ firms paid former banana farm captains, managers, and supervisors to sign the forms in blank, and law firm employees later filled in the forms

158. *Id.* ¶ 75.

159. *Id.*

160. *Id.* ¶¶ 77-78.

161. *Id.* ¶ 79.

162. *Mejia* Findings, ¶ 81.

163. *Id.* ¶ 83.

164. *Id.*

165. *Id.* ¶ 81.

166. *Id.* ¶ 18.

167. *Id.* ¶ 82.

with information for individual plaintiffs.¹⁶⁸ The final step was to fake plaintiffs' sterility. In addition to telling plaintiffs simply to lie about the number of children they had and the existence of children born after alleged exposure to DBCP, the law firms rigged sperm tests—such as by sneaking in donor sperm.¹⁶⁹ The firms eventually paid four Nicaraguan labs to provide test results showing sterility, without doing an analysis, and often without even requiring the plaintiff to produce a sample.¹⁷⁰ The final aspect of the conspiracy was to keep it hidden, which attorneys and their agents attempted to do through a variety of means ranging from radio broadcasts requesting that the listeners not cooperate with Dole's investigators to personal meetings encouraging potential witnesses to remain silent, from death threats slipped under doors to a false criminal complaint filed by Ordeñana against one of Dole's investigators.¹⁷¹

Judge Chaney found that "Special Law 364 was a significant impetus in establishing [this] industry that developed around DBCP litigation in Nicaragua for the purpose of bringing fraudulent claims."¹⁷² Special Law 364 was so lopsided in plaintiffs' favor, both in terms of procedural devices and minimum damages, that it attracted multiple law firms to Nicaragua, but they all competed for the same handful of legitimate clients.

Special Law 364 was "specifically aimed at a handful of U.S.

168. *Id.*

169. *Id.* ¶ 84.

170. *Id.*

171. *Id.* ¶¶ 102-119. Seemingly to question the legitimacy of the *Mejia* findings, and their applicability to *Tellez*, Rosencranz, Roblin & Balloffet employ language that downplays the OSC proceedings. They refer to "allegations" of fraud against "some of the lawyers who represented the plaintiffs," state that *Mejia* was "brought on behalf of Nicaraguan banana plantation workers," and claim that Dole submitted the depositions of "unidentified witnesses" as proof of this fraud. Rosencranz et al., *supra* note 139, at 175-76. As the discussion above shows, however, *Mejia* is a final ruling (it was not challenged by appeal) where the Court found that some attorneys as well as *all* of the plaintiffs had engaged in a massive fraudulent scheme; it further found that nine of the eleven plaintiffs had not been banana farm workers, and that none of them had worked on a Dole-contracted farm as they had claimed; and it relied upon the depositions of credible John Doe witnesses, the identities of whom were known to the Court and counsel for all parties. *Mejia* Findings, *supra* note 5, ¶¶ 3, 7, 33, 70, 89, 101.

172. *Mejia* Findings, *supra* note 5 ¶ 73. In her oral ruling, Judge Chaney found that "the advent of Law 364 was a significant impetus in planting and nourishing a fraudulent industry whose roots may have its origins in Nicaraguan courts but whose fraudulent shoots have reached into the soil of the court systems in the United States, and specifically in California." Transcript of Oral Argument at 803:18-23, *Mejia*, Case No. BC30049 (L.A. Cnty. Super. Ct. Apr. 23, 2009).

companies, including Defendants Dole and Dow.”¹⁷³ While the procedural requirements of Special Law 364 took a “heavy toll” on defendants, the “vast majority of . . . plaintiffs” who litigated in Nicaragua under Special Law 364 did not make an appearance in court or submit to medical testing.¹⁷⁴ The Court’s findings show how plaintiff-friendly and defendant-adverse Special Law 364 is:

Under Special Law 364, essentially anyone who obtains the two required lab reports stating he is sterile and who claims to have been exposed to DBCP on a banana farm is entitled to damages; causation and liability are conclusively presumed and the minimum statutory damages provided for in the law are modeled on U.S. jury verdicts, far in excess of any other awards ever handed down in Nicaragua. To simply appear in court to defend itself, a defendant must post bonds of 300 million cordobas (currently more than \$15 million). Furthermore, cases under Special law 364 are required to follow a 3-8-3 format, in which a defendant has just 3 days to answer the complaint, the parties have 8 days to present evidence, and the court has 3 Days to issue a judgment.¹⁷⁵

In addition to establishing minimum, U.S.-sized damages, Special Law 364 demonstrated that it existed for profits because of the driving force behind its creation: it was “passed by the Nicaraguan legislature in 2001 in response to lobbying by a group of Nicaraguan and U.S. plaintiffs’ attorneys.”¹⁷⁶ Those who pushed Special Law 364 through failed to account for one effect: increased competition from modern-day legal carpetbaggers. After all, Juan Dominguez did not even begin his operations in Chinandega until 2002, two years after other firms had already started to solicit clients.¹⁷⁷ Multiple firms were therefore competing for the same finite resources: men who had worked on banana farms three decades ago and were now sterile.¹⁷⁸ When recruiters were unable to find enough legitimate clients to turn a profit, they turned to recruiting illegitimate clients.¹⁷⁹ By promoting profits over due process, Special Law 364 had provided the means to an unjust end, and the beginning of the end of DBCP litigation.

173. *Mejia Findings*, *supra* note 5, ¶ 72.

174. *Id.*; Transcript of Oral Argument at 803:13-15, *Mejia*, No. BC30049 (Apr. 23, 2009).

175. *Mejia Findings*, *supra* note 5, ¶ 73.

176. *Id.* at ¶ 72.

177. Stecklow, *supra* note 7.

178. *Mejia Findings*, *supra* note 5 ¶¶ 77-78.

179. *Id.*; see Drimmer & Lamoree, *supra* note 112, at 493-94.

B. Osorio v. Dole Food Co.: Enforcement of Underlying Nicaraguan Judgment Denied

Though *Osorio* lacks the drama of *Mejia*, it compensates by flashing the cash: A Nicaraguan trial court had already awarded the plaintiffs almost \$100 million, with another \$800 million awarded by the same judge to over 1200 plaintiffs in the sister case *Herrera Rios v. Standard Fruit Co.*¹⁸⁰ In fact, Nicaraguan courts to date have awarded over \$2 billion in judgments, which is approximately one-third the gross national product of that entire country.¹⁸¹ So when Judge Huck found that Special Law 364 was unconstitutional and rendered under a corrupt judicial system, he instantly erased the potential for U.S. dollars.

The underlying lawsuit in *Osorio* was filed pursuant to Special Law 364 in February 2002 in Chinandega, Nicaragua by 201 plaintiffs.¹⁸² All of the plaintiffs claimed to have worked at Dole-contracted banana farms where they were exposed to DBCP manufactured by Dow Chemical Company, Shell Oil Company, and Occidental Petroleum Corporation.¹⁸³ Although Dole and Dow refused to make the deposits required under Special Law 364 and thereby agreed to subject themselves to jurisdiction in the U.S., the trial court exempted them from the bond based on “express waiver of the Plaintiffs.”¹⁸⁴ Dow declined to participate further because it did not wish to be perceived as having waived its jurisdictional objections, but Dole remained in Nicaragua and defended itself under protest.¹⁸⁵ Of the 150 plaintiffs who prevailed, 148 submitted spermograms with diagnoses that showed they suffered from a variety of sperm impairments; only 10 of the plaintiffs testified.¹⁸⁶ Dole’s requests to have an independent doctor examine the individual plaintiffs, to depose the laboratory technicians who took the spermograms, and to submit birth certificates showing that many of the plaintiffs had fathered children after their alleged exposure to DBCP were all denied.¹⁸⁷ The trial

180. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1311-12 (S.D. Fla. 2009).

181. *Id.* at 1338.

182. *Id.* at 1318.

183. *Id.* at 1311-12. Judge Huck had earlier dismissed Occidental and Shell from the lawsuit because they were not subject to personal jurisdiction in Nicaragua. *Id.* at 1311 n.1.

184. *Id.* at 1318. Defendants appealed the interlocutory order denying their jurisdictional challenge, but that appeal was still pending as of the time of Judge Huck’s order. *Id.* at 1318-19.

185. *Id.* at 1319.

186. *Osorio*, 665 F. Supp. 2d at 1319.

187. *Id.*

court awarded the 150 prevailing plaintiffs a total of \$97.4 million, an average award of \$650,000.¹⁸⁸ For each successful plaintiff, the Judgment cites the opinion of the court-appointed medical expert that the particular plaintiff “is infertile” and states a “possible link” between DBCP exposure and various psychological or physical problems.¹⁸⁹

The prevailing plaintiffs sought recognition of this award in the Circuit Court of Miami-Dade County in August 2007, but the defendants removed to district court.¹⁹⁰ In response to cross-motions for summary judgment, the Court bifurcated the case, holding an evidentiary hearing on September 1-4, 2009, in which “[b]oth sides submitted substantial expert testimony and documentary evidence . . . on the Nicaraguan judicial system, Special Law 364, and the specific Nicaraguan trial proceedings in this case.”¹⁹¹

The purpose of the hearing was to determine whether . . . (1) the Nicaraguan trial court lacked personal and subject matter jurisdiction over the Defendants, (2) the underlying judgment was rendered under a system which does not provide procedures compatible with the international concept of due process of law, (3) the cause of action or claim of relief on which the judgment is based is repugnant to the public policy of the State of Florida, and (4) the judgment was rendered under a system without impartial tribunals.¹⁹²

Each of these grounds is alone sufficient to deny recognition of the judgment, and Judge Huck found for Dole and Dow on all four.¹⁹³

The Nicaraguan court denied defendants their right to opt out of Nicaragua’s jurisdiction as provided by Special Law 364, so that court lacked jurisdiction over them.¹⁹⁴ The Court found that Special Law 364 was a blocking statute, “a law that closes the doors of a foreign country’s courts to prevent a United States court from finding that an alternative forum exists under the *forum non conveniens doctrine*.”¹⁹⁵ Special Law 364 is “somewhat unique among

188. *Id.*

189. *Id.* at 1320.

190. *Id.* at 1321.

191. *Id.* at 1321-22. Though *Mejia* made findings that indicated fraud in *Osorio*, the bifurcation eliminated any consideration of this fraud evidence. *Id.* at 1321, n.7.

192. *Osorio*, 665 F. Supp. 2d at 1321.

193. *Id.* at 1321.

194. *Id.* at 1326.

195. *Id.* at 1325.

blocking statutes because it establishes onerous conditions and then provides defendants with the right to opt out of jurisdiction in Nicaragua.¹⁹⁶

In light of the onerous conditions imposed on DBCP defendants by Special Law 364, the history of the DBCP litigation, the Nicaraguan legislature's reaction to the dismissal of DBCP claims in *Delgado*, and the acknowledged discriminatory treatment of DBCP defendants in Nicaragua, it is not undue speculation to infer that Special Law 364 may not have been primarily intended for the actual litigation of cases in Nicaragua, but instead to provide Nicaraguan plaintiffs with a forum in the United States.¹⁹⁷

The opt-out provision goes hand-in-hand with the denial of due process: by depriving defendants of due process in an effort to mount a defense, Special Law 364 provides "ample incentives" to exercise the opt-out right.¹⁹⁸

Special Law 364 fails to comport with international standards of due process for a number of reasons. First, Special Law 364 creates an irrefutable presumption that exposure to DBCP causes sterility, which is inconsistent with medical and scientific facts.¹⁹⁹ Not only does Special Law 364 exempt plaintiffs from having to prove causation, it ensures that scientific evidence that conclusively rebuts this presumption "will have no effect on the outcome of the litigation."²⁰⁰ Indeed, the evidence submitted to the Nicaraguan trial court supported a finding of sterility for only 9 of the 150 plaintiffs who recovered.²⁰¹ "In this way, Special Law 364 deprives defendants of any meaningful opportunity to contest the essential allegation against them—that DBCP caused a plaintiff's sterility."²⁰² Thus by allowing for damages without regard for fault, Special Law 364 denies basic fairness under both domestic and international concepts of due process.²⁰³

Second, the specific procedural mechanisms of Special Law 364 also violate due process, in particular because they discriminate against a handful of U.S. companies.²⁰⁴ For example, the law

196. *Id.* at 1325.

197. *Id.* at 1324.

198. *Osorio*, 665 F. Supp. 2d at 1325.

199. *Id.* at 1327.

200. *Id.* at 1332.

201. *Id.* at 1328.

202. *Id.* at 1332.

203. *Id.* at 1335.

204. *Osorio*, 665 F. Supp. 2d at 1335-36.

provides for *minimum* damages of \$125,000, while other Nicaraguan statutes provide for *maximum* damages of \$6,000.²⁰⁵ Special Law 364 additionally requires defendants to pay millions of dollars in deposits as a condition to defend themselves while plaintiffs enjoy the presumption of indigence.²⁰⁶ Special Law 364 further limits the right to appeal to an intermediate appellate court and without a stay of execution.²⁰⁷ The 3-8-3 procedure allows only eight days for the submission of evidence, compared with the standard procedure in Nicaragua of 20 days.²⁰⁸ "It appears that the clear intent of requiring a 3-8-3 summary proceeding was to unfairly fast track these substantial and complex cases, and thereby deny DBCP defendants sufficient time to present an adequate defense."²⁰⁹ Finally, Special Law 364 abolished the statute of limitations and imposed retrospective liability.²¹⁰ Both on their face and as applied by the Nicaraguan trial court, these procedures denied defendants due process.²¹¹ "The Court, therefore, finds that Defendants have met their burden of proving that the legal regime set up by Special Law 364 and applied in this case does not comport with the 'basic fairness' that the 'international concept of due process' requires. It does not even come close."²¹²

The opt-out provision and onerous provisions of Special Law 364 combined for a Catch 22 that operated to deny enforcement: "either DBCP defendants have a right to opt out of Nicaragua's jurisdiction, which requires that the Court deny recognition under FLA. STAT. 55.605 § (1)(b)-(c), or they are subject to a legal regime that does not provide due process, which requires denying recognition under FLA. STAT. 55.605.605 § (1)(a)."²¹³

After finding that the irrefutable presumption of causation violates Florida public policy,²¹⁴ the Court turned to the partiality

205. *Id.* at 1337-38. In comparison, typical damages in wrongful death cases are \$10,000. *Id.* at 1338.

206. *Id.* at 1338-39.

207. *Id.* at 1339-40.

208. *Id.* at 1340.

209. *Id.* at 1340. Further, although the 3-8-3 procedures are non-waivable, the trial court extended the evidentiary period—to permit plaintiffs to offer more evidence. *Id.* at 1340-41.

210. *Osorio*, 665 F. Supp. 2d at 1341.

211. *Id.* at 1341-43.

212. *Id.* at 1345 (citing *Soc'y of Lloyds v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

213. *Id.* at 1325.

214. *Id.* at 1347.

of the Nicaraguan judiciary. “[T]he unanimous view among United States government organizations and officials (including United States ambassadors to Nicaragua), foreign governments, international organizations, and credible Nicaraguan authorities, is that the judicial branch in Nicaragua is dominated by political forces and, in general, does not dispense impartial justice.”²¹⁵ The Court even called Special Law 364 itself, and its application in the *Osorio* proceedings, “Exhibit A evidencing the lack of independent tribunals in Nicaragua.”²¹⁶

“The passage of Special Law 364 is itself further evidence of undue political meddling in Nicaragua’s judicial process. The law asks judges to enforce a set of procedures that the Nicaraguan Attorney General found were patently unconstitutional and the Nicaraguan Supreme Court upheld only because the defendants could choose to exempt themselves from the law.”²¹⁷

Yet the trial judge, whom Judge Chaney in *Mejia* had found was linked to fraud, denied defendants their right to opt out in brazen disregard of these opinions.²¹⁸

C. (No) Future for Nicaraguan DBCP Claims

The pernicious effects of Special Law 364 do not stop with the individual plaintiffs in these two cases. The findings in both *Mejia* and *Osorio* apply to all Nicaraguan DBCP claimants. Judge Chaney specifically extended her findings from *Mejia* to Nicaragua in general:

Because of the pervasive nature of the fraud that permeates the DBCP cases from Nicaragua, the Court questions the authenticity and reliability of any documentary evidence presented by plaintiffs that comes out of Nicaragua, and it has serious doubts about the bona fides of any plaintiff claiming to have been injured as a result of exposure to DBCP while employed on a Nicaraguan banana plantation associated with Dole.²¹⁹

These “serious doubts” were resolved in short order: in its appeal of *Tellez*, the sister case to *Mejia*, Dole filed a Petition for Writ of

215. *Id.* at 1349.

216. *Osorio*, 665 F. Supp. 2d at 1351.

217. *Id.*

218. *See Osorio*, 635 F.3d at 1279. Although it affirmed the District Court’s order, the Eleventh Circuit Court of Appeals declined to consider Judge Huck’s finding that Nicaragua lacks an impartial judiciary. *Id.*

219. *Mejia* Findings, *supra* note 5, ¶ 8.

Error *Coram Vobis* based upon the fraud evidence. The Court of Appeal ordered plaintiffs to file a return to the superior court, where, after six days of hearings, the writ was granted, the judgments vacated, and the entire case dismissed with prejudice.²²⁰

As for the \$2.1 billion in judgments awarded under Special Law 364, and the claims now pending for billions more, they have little chance of being enforced in the U.S. Not only is Judge Huck's order citable as persuasive authority, but he also made a finding on the \$800 million sister case to *Osorio, Herrera Rios*: "In effect, the Nicaraguan trial court admitted . . . Special Law 364 permits significant tort recoveries without any proof of causation, and in many instances in direct contravention of unrefuted medical evidence."²²¹

VII. IRONY, METONYMY, AND SPECIAL LAW 364

Recall that irony is dialectic, a reading of the various sub-perspectives in terms of one another. Reading the findings from these two judgments in light of the commentary about DBCP litigation and FNC, one attains a "perspective of perspectives" on how the factors that shaped the development of Special Law 364 inevitably led to its unraveling as a mechanism to force litigation.

Nicaragua had tens of thousands of citizens claiming injury from exposure to DBCP.²²² For reasons ranging from a body of law not designed to handle these types of claims, to an underfunded and overburdened judiciary, its own legal system could not redress these claims.²²³ But the legal system of the United States could. There was only one problem: none of those claims were heard in the U.S. because her courts routinely dismissed them under the FNC doctrine.²²⁴ Rather than pursue other options like settlement, which lacked the luster of seven-figure judgments, union leaders and U.S. plaintiffs' attorneys pressured the Nicaraguan legislature to enact a statute to attain those judgments.²²⁵

220. Statement of Decision at 2, *Tellez v. Dole Food Company, Inc.*, No. BC312852 (L.A. Cnty. Super. Ct. Mar. 11, 2011). Shortly after entering judgment in *Mejia*, Victoria G. Chaney was elevated to the Court of Appeal. Because of her experience in *Tellez* and *Mejia*, the Chief Justice of the Supreme Court of California appointed her to preside over the writ proceedings.

221. *Osorio*, 665 F. Supp. 2d at 1334.

222. See, e.g., *Gonzalez & Loewenberg*, *supra* note 112.

223. See discussion, *supra* Part IV.B.1.

224. *Mayer & Sable*, *supra* note 42, at 139.

225. *Mejia* Findings, *supra* note 5, ¶ 72; see *Hechler*, *supra* note 97, at 90; see *Figuerroa*, *supra* note 1, at 158-59.

That statute, Special Law 364, made defendants an offer they could not refuse: accept U.S. jurisdiction, or face trial in Nicaragua under a process rigged against them.²²⁶ That statute, Special Law 364, made defendants an offer they could not refuse: accept U.S. jurisdiction, or face trial in Nicaragua under a process rigged against them.²²⁷ The inherent flaw in Special Law 364 was that it did nothing to account for what made Nicaragua an inadequate forum in the first place: ill-equipped courts, untrained judges, and rampant corruption.²²⁸ Once Nicaragua unleashed the monster, it could not control the rampage.

The intent behind Special Law 364 was that claims filed in Nicaragua would be dismissed and refiled in the U.S.²²⁹ While Special Law 364 laid out procedures for DBCP trials and permitted all plaintiffs to claim indigent status, it did not fund the mandate, provide more judges or court personnel, or offer judicial training. Indeed, Special Law 364 fed the corruption that already existed in Nicaragua.²³⁰ The opportunity for U.S.-sized judgments provided an incentive for Nicaraguan lawyers, judges, union leaders, and lab workers to profit from their investment in these cases by bringing thousands of claims.²³¹

Thus, the expectation of dismissal was thwarted when these people did the one thing that would ensure them—as opposed to U.S. attorneys—a piece of the action: keep the claims in Nicaragua. When the *Osorio* defendants chose not to pay the bond and thereby accepted U.S. jurisdiction as provided under Special Law 364, Judge Toruño ruled that the plaintiffs “waived” *defendants’* bond requirement and subjected them to a trial with accelerated discovery, presumed causation, and large bond payments.²³² Ignored was the fact that the Nicaraguan Supreme Court affirmed the constitutionality of Special Law 364 by holding that it is the

226. See discussion *supra* Part V.C-D.

227. See discussion *supra* Sections IV(C) & (D).

228. See discussion *supra* Part IV.

229. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1326 (S.D. Fla. 2009).

230. See *id.* at 1349; see *Mejia* Findings, *supra* note 5, ¶¶ 73, 77-78; see generally Figueroa, *supra* note 1, at 149; see generally Marlowe, *supra* note 73, at 303.

231. See *Mejia* Findings, *supra* note 5 ¶ 72; see Drimmer & Lamoree, *supra* note 112, at 523-24 (“[T]he synergy of issues in these cases, involving facts that can be difficult to verify, zealous advocates, frequently indigent plaintiffs susceptible to undue influence, the potential for substantial damages, and foreign systems particularly prone to manipulation, creates certain vulnerabilities to fraudulent lawsuits and rule of law concerns.”).

232. *Osorio*, 665 F. Supp. 2d at 1326.

opt-out provision that affords due process.²³³ Also overlooked was that any judgment in Nicaragua had to be enforced where defendants had assets: the United States. Any judgment arising from these provisions—which after all were never meant to be employed in Nicaragua—risked being unenforceable by violating U.S. standards of due process.²³⁴

And this corruption, though planted in Nicaragua, branched into the U.S. Like a case study on the necessity of the private interest factors in the FNC analysis,²³⁵ the Los Angeles County Superior Court had no power to compel witness testimony or enter other orders that would have uprooted the fraud years earlier.²³⁶ When combined with the loss of employment records after the Sandinista takeover and the leverage from having thousands of plaintiffs, the hidden children, the fake lab reports, the falsified work histories, and the coached testimony all made their way into *Mejia*.²³⁷ After all, plaintiffs could not leave the rampant corruption of Nicaragua at home, given that their entire case was manufactured in a scheme made possible by Special Law 364.

VIII. EPILOGUE

Reading these judgments and related scholarship in terms of two of Burke's master tropes provides multiple perspectives from which to view Special Law 364. Applying metonymy, we see that calls for justice were reduced to a mandate for U.S. court trials. Applying irony, we see that attempts to force this mandate in disregard of the signs of fraud or the requirements of due process ensured that there can be no judgment from a trial on the merits. Burke writes that "the four tropes shade into one another",²³⁸ thus, the effects of irony are more pronounced in light of metonymy. Dole had attempted to establish a settlement program with injured workers if Nicaragua would have repealed Special Law 364, which inevitably became the very thing that denied plaintiffs an opportunity for a monetary recovery.²³⁹

233. Consultation to the Judges of the Supreme Court of Justice of Nicaragua (Nicar. Oct. 16, 2003), *translated in* Saint Dahl, *supra* note 1, at 55.

234. *See* Heiser, *supra* note 1, at 660.

235. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

236. *Mejia* Findings, *supra* note 5, ¶¶ 20, 133; *see* Woulfe, *supra* note 66, at 195.

237. *Mejia* Findings, *supra* note 5, ¶ 76.

238. BURKE, *supra* note 13, at 503.

239. Do, *supra* note 95, at 414.