

2000

Forum Non Conveniens Checkmated? - The Emergence of Retaliatory Legislation

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Anderson, Winston (2000) "Forum Non Conveniens Checkmated? - The Emergence of Retaliatory Legislation," *Florida State University Journal of Transnational Law & Policy*. Vol. 10: Iss. 2, Article 2. Available at: <https://ir.law.fsu.edu/jtlp/vol10/iss2/2>

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Cover Page Footnote

LL.B., University of the West Indies (U.W.I.); Ph.D., Cambridge. Sr. Lecturer & Acting Executive Director, Caribbean Law Institute Centre (CLIC), Faculty of Law, U.W.I.; Attorney & Barrister-at-Law. Declaration of interest: Dr. Anderson provided consultancy services to Charles Siegel and Fred Misko, Jr. of the Texas law firm who represented the plaintiffs in the Delgado case. In the course of the consultancy, Dr. Anderson prepared the original draft of the Transnational Causes of Action Act (Products Liability), no. 16 of 1997, enacted into law in The Commonwealth of Dominica on January 15, 1998.

FORUM NON CONVENIENS CHECKMATED? - THE EMERGENCE OF RETALIATORY LEGISLATION

WINSTON ANDERSON*

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I. INTRODUCTION

Eight years ago, in the pages of an earlier volume of this Journal, I argued that the doctrine of *forum non conveniens* raised a serious constitutional issue of access to the courts.¹ That suggestion led to my involvement in a long-running transnational litigation,² the high watermark of which was probably the

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1. Winston Anderson, *Forum non conveniens and the Constitutional Right of Access: A Commonwealth Caribbean Perspective*, 2 J. TRANSNAT'L L. & POL'Y 51, 51-102 (1993).

2. See Declaration of interest, *supra*. Mr. Charles Siegel indicated that having read my article in the JOURNAL OF TRANSNATIONAL LAW & POLICY, *supra* note 1, his firm had determined that I could contribute to the debate of the jurisdictional issues involved in the

decision by Justice Lake in *Delgado v. Shell Oil*.³ In that case, nearly 26,000 plaintiffs from developing countries, including hundreds from the Caribbean, sought compensation in the courts of Texas for injuries allegedly caused by exposure to the fumigant dibromocloropropane (DBCP).⁴ The primary defendants were Shell Oil and Dow Chemical, two large American multinational corporations which manufactured DBCP in the United States.⁵ Justice Lake acceded to the defendants' request and declined to exercise jurisdiction because, in his view, alternative forums existed in the plaintiffs' home countries and trial there would best serve the private interests of the parties, the public interest of the states involved, and the ends of justice.⁶ The dismissal of the American action led to atomization of the litigation as thousands of suits were filed in hundreds of courts across the twenty-three affected foreign countries. Not unexpectedly, the actions became mired in wrangling over procedural and evidential matters. Eventually, in 1998, the parties agreed to a settlement, but the plaintiffs received only a fraction of what they could have reasonably anticipated to receive had the trial taken place in the United States.⁷

While *Delgado* undoubtedly represents another victory for the beneficiaries of *forum non conveniens*,⁸ the case may very well turn out to be the high water mark of the influence and effectiveness of the doctrine. States whose citizens have been affected by what one Texas Supreme Court Justice in an earlier DBCP case referred to as "connivance to avoid corporate accountability,"⁹ have been stung into taking retaliatory legislative action.

The *fons et origo* was the Bhopal Gas Leak Disaster (*Processing of Claims*) Act¹⁰ ("Bhopal Act"), which entered into

case. Subsequently, Mr. Siegel visited the Faculty of Law at U.W.I. and gave two very well received lectures on the DBCP litigation.

3. 890 F. Supp. 1324 (S.D. Tex. 1995).

4. *Id.* at 1335-36 (the plaintiffs were primarily from Costa Rica, Nicaragua and Panama).

5. *Id.*

6. *Id.* at 1355-75.

7. Anecdotal evidence suggests that on average each of the Caribbean claimants recovered less than \$2,000. By contrast, the average award made to American victims of DBCP was in the vicinity of \$500,000, and awards of over \$1 million were not unheard of.

8. Winston Anderson, *Forum Non Conveniens Strikes Again: American Court Closes its Door to Eastern Caribbean Litigants*, 23 J.E. CARIB. STUD. 77, 77-87 (1998).

9. *Dow Chem. Co v. Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring).

10. Bhopal Gas Leak Disaster (*Processing of Claims*) Act [the Bhopal Act], Indian Parliament Act No. 21 of 1985, Gazette of India (Extraordinary) pt. 2, sec. 2, Mar. 29, 1985,

force upon assent by the President of India on March 29, 1985.¹¹ The Act responded to the December 3, 1984, industrial accident in which some 40 tons of the highly toxic methyl isocyanate gas from the India Union Carbide plant was released and spread over the city of Bhopal, India.¹² Over two thousand persons died and approximately 200,000 suffered injuries from the leak.¹³ Union Carbide was a subsidiary of Union Carbide Corporation, U.S.A., and the most serious allegations of negligence related to the weaker safety and environmental standards in place in the India plant as compared with plants in the United States.¹⁴ The Indian government and other individual plaintiffs filed more than 145 lawsuits in the United States, but both the Federal Court for the Southern District of New York and the Second Circuit Court of Appeals dismissed the claims on the basis of *forum non conveniens*.¹⁵ Rejecting the opinion of the Indian government, the federal courts decided that the Indian courts would provide an adequate and appropriate forum for trial.¹⁶ The Bhopal Act was therefore intended to confer certain powers on the central government of India, including the right to secure the claims arising out of the disaster and to ensure the matter was dealt with "speedily, effectively, equitably and to the best advantage of the claimants."¹⁷

II. LEGISLATIVE ALTERNATIVES

In the wake of Justice Lake's dismissal of the DBCP litigation, states in the developing world had to consider how to respond in

available at http://www.zeenext.com/legal/laws/bareacts/b/bhopal_leak1985/bhopal_leak1985act.html.

11. The Bhopal Gas Leak Disaster Act repealed The Bhopal Gas Leak Disaster (Processing of Claims) Ordinance No. 1, reprinted in Lisa F. Butler, Comment, *Parents Patraiae Representation in Transnational Crises: The Bhopal Tragedy*, 17 CAL. W. INT'L L.J. 175, 200-04 (1987). However, the Act incorporated much of the Ordinance and section 12(2) of the Act deems anything done or any action taken under the Ordinance "to have been done or taken under the corresponding provisions of this Act."

12. For an overview of the Bhopal disaster and its lingering consequences see Joshua Karliner, *To Union Carbide, Life is Cheap: Bhopal - Ten Years Later*, THE NATION, Dec. 12, 1994, at 726.

13. Butler, *supra* note 11, at 175.

14. Karliner, *supra* note 12.

15. *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*, 809 F.2d 195, 202 (2d Cir. 1987).

16. *Id.*

17. Bhopal Act, *supra* note 10, Preamble. Under pressure from the Indian and American governments, as well as from public opinion, Union Carbide agreed to an Indian Supreme Court approved global settlement of \$470 million; this was significantly smaller than the award that could reasonably have been expected to be obtained in American proceedings. Karliner, *supra* note 12.

the best interests of their citizens and residents. Although passage of the Bhopal Act had been truly a watershed event, its limitation as precedent soon became obvious. The Act was geared exclusively to the Bhopal gas disaster. Its main terms provided for the granting of exclusive right to the central government to represent the claimants, giving the government the powers of a civil court in order to secure evidence of the accident and injuries alleged, and to frame a scheme for the registration and satisfaction of claims.¹⁸ That was soon found to be unsuitable to the DBCP litigation. The view of many developing countries was that the nexus between the United States and the tortious conduct of the defendants was so great that the cases should be returned for trial in the United States.

Adoption of overly anti-*forum non conveniens* legislation, which would extinguish national jurisdiction once the plaintiff had elected to file suit in America so that an American judge would not be able to find the foreign courts open to the plaintiff, was actively deliberated by legislatures in Africa and Latin America.¹⁹ Indeed, the Environmental Committee of the Latin American Parliament, PARLATINO, introduced a resolution to the Parliament which recommended that all Latin American and Caribbean countries adopt this type of legislation.²⁰

The extinguishing of jurisdiction in national courts was not considered feasible in the Commonwealth Caribbean. Apart from the issue of the constitutional right of access, there was also the consideration that legislative abolition of jurisdiction may not have resulted in the intended objective of retention of jurisdiction by the American court. The legislation eventually adopted was designed to obtain the best of both worlds; it made provision for local trial but also enabled the local court to utilize the rules of evidence, liability, and award damages available to foreign courts.

18. See *Bi v. Union Carbide Chemicals & Plastics Co., Inc.*, 984 F.2d 582, 585-86 (2d Cir. 1993) (summarizing the Bhopal Act, its implementation and its objectives).

19. See, e.g., *Costa Rica: Law in the Defense of Procedural Rights of Nationals and Residents* (a Bill which was pending before the Legislative Assembly on March 10, 1997); *Ecuador: Law of Defense of Procedural Rights of the Citizens and the Residents and for the Protection of the Environment* (debated before the National Congress of the Republic of Ecuador) [hereinafter *Ecuador Debate*]; *Honduras: Law for the Procedural Rights of Nationals and Residents* (debated in the National Congress of Honduras in 1996).

20. This Recommendation was made at the Rio + 5 Forum held in Rio de Janeiro on Mar. 19, 1997.

III. TRANSNATIONAL CAUSES OF ACTION (PRODUCT LIABILITY) ACT 1997

The proposed Transnational Causes of Action (Product Liability) Act was presented to the Cabinet of Saint Lucia on April 3, 1997.²¹ The Cabinet was broadly supportive and agreed "in principle" to the introduction of the bill to Parliament, but the dislocation of the subsequent general elections resulted in the stymieing of the legislative effort in that country. Accordingly, attention was turned to securing Cabinet interest in Dominica, another Caribbean country severely affected by DBCP injuries. Preliminary discussions with the Attorney General were followed by several meetings with officials from the Parliamentary Drafting Office. On the motion of the Attorney General, seconded by the Minister of Finance, Industry and Planning, the bill was read for the first time in the Unicameral House of Assembly on Monday, December 15, 1997. Subsequently, the motion by the Attorney General that the bill be read a second time was seconded by the Minister of Foreign Affairs, Trade and Marketing, and the question was proposed. The Act was passed without dissent and entered into force upon assent by the President, on January 15, 1998.²²

The statute is an outstanding and, to date, unique attempt to counteract the pernicious effects of *forum non conveniens*. As such, it deserves close examination.²³

A. Objective and Application

The preamble provides that the Act is intended "to make provision for the expeditious and just trial in the Commonwealth of Dominica of transnational product liability actions where any such action was dismissed in a foreign forum on the basis of *forum non conveniens*, comity, or on a similar basis."²⁴ The statutory objective is therefore very limited; it addresses *Delgado*-type litigation through the establishment of a legal regime in Dominica that facilitates the equitable resolution of such

21. Tom Hart, Leonard Riviere, and Winston Anderson, the present writer, made the presentation.

22. Transnational Causes of Action (Product Liability) Act, no. 16 of 1997, (Commonwealth of Dominica), [hereinafter Transnational Act].

23. The first attempt at critical examination was undertaken by my friend and colleague, Zanifa McDowell. Zanifa McDowell, *Forum Non Conveniens: The Caribbean and Its Response to Xenophobia in American Courts*, 49 INT'L & COMP. L.Q. 108, 115-30 (2000).

24. Transnational Act, *supra* note 22.

disputes. The provisions were crafted to deal specifically with this rather narrow objective and consequently the statute is unlikely to come into play very often. However, as indicated earlier, many countries consider the problem of providing juridical comfort against the abuse of the "convenience" doctrine well worth the legislative effort.

The precise situations in which the Act becomes applicable closely mirror the stated objective. In the words of section 3:

This Act shall apply to all transnational causes of action brought against a foreign defendant where:

- (a) any such action was dismissed in a foreign forum on the basis of *forum non conveniens*; or
- (b) on the basis of comity or other similar basis to the effect that the Courts in Dominica provide a more convenient forum for trial of the action.

Section 3 restricts the Act to the narrow band of cases dismissed in foreign forums on the basis that the courts in Dominica would provide a more convenient forum for trial. Admittedly, the final format in which the provisions are presented leaves room for argument that section 3(a) and 3(b) could read disjunctively. This would lead to application of the Act to cases where the action is dismissed for *forum non conveniens* (section 3(a)), as well as to the Act's application where the case was not previously dismissed by a foreign court, but where the trial would be more convenient in Dominica (section 3(b)).²⁵

In fact, the intention was the very opposite. The draftsman was concerned that if section 3(a) was left on its own, the Act could be rendered inapplicable simply because the foreign proceedings were technically dismissed on the grounds of comity or the like.²⁶ Thus, although the separation of section 3 into two paragraphs may be regarded as unfortunate, the intention is clear that the Act should apply only in situations where foreign proceedings are dismissed on the basis of convenience or appropriateness of place of trial. To some extent this intention is secured by the preambular statement of the objectives and several subsequent statutory provisions which contain language

25. McDowell, *supra*, note 23, at 117-18 (discussing the effects of the independence of the sections).

26. This would have been especially important in circumstances where lawyers sought to argue for limited application of the statute. For example, in local proceedings, an argument could be made that the Act did not apply because the foreign action was dismissed in words that did not include *forum non conveniens*.

indicating the applicability of the statute to cases dismissed in a foreign forum "on the basis of *forum non conveniens*, comity, or any similar basis."²⁷

It follows that the statutory intent is to afford an opportunity for cases, filed but dismissed in a foreign forum on a discretionary ground, to be heard and decided on the merits in Dominica. The Act does not apply to actions commenced locally, nor does it apply to actions taken in a foreign forum by one Dominican against another.²⁸ Admittedly, there could be a constitutional challenge by foreign defendants upon non-discrimination grounds, but this would be unlikely to succeed because Caribbean constitutions do allow for discrimination between protections awarded to citizens and foreigners.²⁹ Moreover, the provision was specifically tailored to the typical undertakings given by foreign defendants to the foreign court at the time of invocation of *forum non conveniens*. In a sense, therefore, the Act is simply geared to holding the defendants to their undertakings.

1. *The DBCP Litigation*

It may be reasonably postulated that the statute fills an important *lacuna*. It was clearly applicable to the facts of *Delgado* itself. There was no medical dispute that DBCP caused sterility or that it increased the risk of cancer.³⁰ Notwithstanding

27. Transnational Act, *supra* note 22, § 4(1). It should be noted that the original draft prepared and sent to the Attorney General by the present writer did not contain a subdivision into paragraphs (a) and (b).

28. This restriction was necessary in order to assure local importers, distributors, and plantation owners that the Act would not create any right of action against them by banana workers affected by DBCP.

29. Francis Alexis, *When Is "An Existing Law" Saved?*, PUB. L. 256, 278 (1976).

30. Anderson, *Strikes Again*, *supra* note 8, at 78.

DBCP was known by the American government to be toxic to laboratory animals as early as 1961, but was nonetheless registered for use in the United States in that year. In 1961, Shell Oil and Dow Chemical, the major American manufacturers of DBCP, petitioned the Food and Drug Administration for the establishment of tolerances for residues on crops resulting from application of DBCP. The toxicology data submitted with this application revealed the hazards of oral, dermal, and vapor exposure to DBCP, and that testicular atrophy had occurred to laboratory animals after repeated exposure. Over the next 15 years evidence establishing the danger to humans exposed to the chemical mounted. In July of 1977, many workers at the Occidental Chemical Corporation plant in Lathrop, California, were diagnosed as sterile. In August of 1977, the California Department of Food and Agriculture announced a statewide suspension of all sales and use of DBCP. Later that month, three federal agencies formed a task force to determine a course of action with respect to DBCP. Dow and Shell halted production and issued recalls of their products. As a result of the revelation of the sterility problem, and the growing evidence of the cancer risk, the U.S. government suspended many uses of DBCP. In 1979, the United States Environmental Protection Agency concluded that the dangers associated with DBCP outweighed the potential benefits and unconditionally banned all sale or use in

its known dangers, and after its use was either banned or sharply restricted in the United States, the defendants continued to manufacture and export DBCP to developing countries. Senator Patrick Leahy presided over the United States Congressional hearings into the DBCP affair. The Senator found that the Environmental Protection Agency had "banned DBCP from nearly all domestic farm uses, but the companies then dumped their unused stocks overseas where it continued to be used. As a result, more banana workers in [developing countries] were sterilized. The tale of DBCP is an appalling one."³¹

April 1984 marked the commencement of the litigation saga on behalf of the "third world" victims of DBCP. In *Alfaro v. Dow Chemical Co.*,³² some eighty-two Costa Rican banana workers and their wives sued Dow and Shell in a Texas court.³³ The defendants contested jurisdiction and in the alternative pleaded *forum non conveniens*.³⁴ Judge Smith of the Harris County District Court held jurisdiction was proper, but dismissed the claim for *forum non conveniens*.³⁵ On appeal, the Court of Appeals reversed, finding that section 71.031 of the Texas Civil Practice & Remedies Code³⁶ provided a foreign plaintiff with an

the United States. American plaintiffs recovered seven figure sums for injuries sustained in relation to their contact with the chemical. *Id.* at 78-79.

31. *Circle of Poison: Impact of U.S. Pesticides on Third World Workers: Hearing Before the Senate Comm. on Agric., Nutrition, and Forestry*, 102d Cong. 1-2 (1991). See also James H. Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States*, 13 UCLA J. ENVTL. L. & POL'Y 167 (1995).

32. 751 S.W.2d 208 (Tx. Ct. App 1988), *aff'd* Dow Chem. Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990).

33. *Id.* at 675.

34. *Id.*

35. *Id.*

36. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1997):

- (a) An Action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
 - 1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
 - 2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
 - 3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
- (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

absolute right to maintain a death or personal injury cause of action in Texas.³⁷ Thus, such a suit could not be dismissed for convenience. This decision was upheld by the Supreme Court of Texas, albeit by the narrow majority of one vote.³⁸

Following the favorable decision in *Alfaro*, all alleged victims of DBCP sought to have their cases remanded to various Texas State courts. The defendants, on the other hand, sought to maintain federal court jurisdiction because, beginning with *Gulf Oil Corp. v. Gilbert*,³⁹ federal courts have favored application of the convenience doctrine. The defendants' initial attempt to implead federal jurisdiction failed in 1993.⁴⁰ However, on February 14, 1994 a third-party petition was served impleading Dead Sea Bromine Co. Ltd. on the ground that Dead Sea manufactured and sold DBCP to which the plaintiffs may have been exposed.⁴¹ Dead Sea, an Israeli company, was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act (FSIA), and therefore could invoke federal jurisdiction as of right.⁴² Despite offers of indemnification from the plaintiffs' attorneys, Dead Sea immediately removed the action to the federal court in Houston, Texas, and waived its defenses of sovereign immunity and lack of *in personam* jurisdiction.⁴³ Justice Lake held that the defendants had not improperly created a right to remove by collusively joining Dead Sea;⁴⁴ had not waived their right to seek dismissal on discretionary grounds;⁴⁵ and the action should indeed be dismissed in favor of litigation in

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

37. *Alfaro*, 751 S.W.2d at 208.

38. *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990).

39. 330 U.S. 501 (1947).

40. *Rodriguez v. Shell Oil Co.*, 818 F. Supp. 1013 (S.D. Tex. 1993) holding that even if the plaintiffs' claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), they did not present a removable federal jurisdiction question.

41. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1336 (S.D. Tex. 1995).

42. *Id.* at 1336-37.

43. *Id.*

44. Justice Lake was not persuaded by the plaintiffs' argument since Dead Sea's status as a foreign sovereign had not been impugned; neither had it been argued that the defendants could never have stated a claim for contribution or indemnity against Dead Sea. The mere fact of the plaintiffs disclaiming any intention of seeking recovery for damages against Dead Sea could not establish that Dead Sea was collusively joined. The plaintiffs' arguments related to the merits of the third-party actions, not to any jurisdictional competence in Dead Sea to seek removal.

45. Whether by relying on TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1997) or 28 U.S.C. § 1404(a), initiating a declaratory judgment action in the United States District Court for the Northern District of Texas, or by participating in discovery.

the plaintiffs' home countries.⁴⁶ The critical factor was the availability of an adequate alternative forum. Justice Lake refused to accept the distinction (urged by the present writer) between the theoretical possibility of action in these plaintiffs' home countries and the pragmatic realities rendering these possibilities of virtually no practical value.⁴⁷

An altogether more realistic view of the corporate strategy behind the invocation of *forum non conveniens* was taken by the Supreme Court of Texas in *Alfaro*, the earlier DBCP case.⁴⁸ The majority held the doctrine had been statutorily abolished in wrongful death and personal injury actions arising out of an accident in a foreign state or country, but Justice Doggett would have abolished it on wider grounds of public policy.⁴⁹ For him, the doctrine was obsolete in a world of global markets and heightened awareness of the delicate ecological balance of all life on earth.⁵⁰ It enabled corporations to evade legal control merely because they were transnational. Furthermore, the parochial perspective ignored the reality that actions by Texan corporations affecting those abroad would also affect Texans.⁵¹ For Justice Doggett, refusal of a Texas corporation to confront a Texas judge

46. On the ground that even if the standard of review to be employed was the deference owed to an American plaintiff, factors of the availability of an adequate alternative forum, private interest factors, and public interest considerations favored trial in the foreign forums.

47. The present writer urged this distinction upon the Justice through lead counsel for the plaintiffs, Mr. Charles Siegel. *Supra* note 2. The Justice's comment in relation to Dominica was typical:

Defendants submit affidavits . . . stat[ing] that the Commonwealth of Dominica 'subscribes to and applies faithfully the English common law,' and that the English common law provides plaintiffs a tort cause of action that might lead to the recovery of damages for their injuries from any of the defendants found negligent and causally responsible for the injury. Plaintiffs' affiants on the law of Dominica do not question the accuracy of this statement. Accordingly, the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of the Commonwealth of Dominica. *Delgado*, 890 F.Supp at 1359.

The Court accepted this view even though Dominica had just one judge for its High Court and no history of litigating product liability on any scale comparable to the DBCP litigation. The suggestion that judicial proceedings would become mired in wrangling over procedural and evidential matters received rather short shrift, but subsequent efforts to instigate litigation became stymied upon just such matters.

48. *Dow Chem. Co.*, 786 S.W.2d at 674.

49. *Id.* at 688-89 (Doggett, J. concurring).

50. *Id.* at 689.

51. The judge gave the example that although DBCP was banned from use within the United States, it and other similarly banned chemicals have been consumed by Texans eating foods imported from Costa Rica and elsewhere. *Id.* at 689.

and jury did not have to do with inconvenience but rather with "connivance to avoid corporate accountability."⁵² The learned judge accepted empirical data that less than four percent of cases dismissed under the doctrine ever reach trial in a foreign court.⁵³ The bottom line, therefore, was that dismissal for lack of convenience meant an end to the litigation and corporate savings of billions of dollars properly owed to the victims of corporate wrongdoing.

Moreover, the Justice found that even the traditional balancing of factors favored trial in Texas. As far as public interest factors were concerned, Texas had an interest in asserting jurisdiction over defendants domiciled there.⁵⁴ Additionally, docket backlog was not caused by foreign litigation but by local disputes and judicial comity was not achieved when the United States allowed its multinational corporations to adhere to a double standard when operating abroad by refusing to hold them accountable for those actions.⁵⁵ According to Justice Doggett, private interest factors of the parties were "obsolete" in an era of modern transportation and communication.⁵⁶

2. *The OMAI Spill Litigation*

A few months after the Transnational Causes of Action Act entered into force, another incident in the Caribbean illustrated the applicability of the statute to the regional activities of multinational corporations. *Recherches Internationales Quebec v. Cambior Inc.*, involving a gold mining spillage in Guyana, was

52. *Id.* at 680.

53. *Id.* at 683; see also David W. Robertson, *Forum non conveniens in America and England: A Rather Fantastic Fiction*, 103 L.Q. REV. 398 (1987).

54. *Alfaro*, 786 S.W.2d at 684-86 (Doggett, J. concurring).

55. *Id.* at 686-87.

56. *Id.* at 683-84. The post-*Delgado* history of the DBCP saga revealed the ethical superiority of the judicial wisdom of Justice Doggett. Justice Lake's dismissal of the plaintiffs' American action led to fragmentation of the lawsuit. Thousands of suits were filed in hundreds of courts across the 23 different foreign countries affected. Immediately upon being sued locally, the defendants changed their posture. Allegations that the foreign courts' proceedings were in breach of the defendants' American due process rights were soon raised. Local judicial proceedings became mired in wrangling over procedural and evidential matters; across the Eastern Caribbean years passed after proceedings were commenced without the matter ever being set down for mention. There were allegations that the defendants threatened to appeal any unfavorable decision all the way up to the Privy Council, and then to embark on another round of constitutional motions. There were fears that any judgment given against the defendants would remain unsatisfied. The plaintiffs' American lawyers were hampered by the lack of an audience in local courts and frustrated by the mounting level of their own investment in a seemingly endless litigation. [This information came to the present writer during the course of his consultancy on the DBCP litigation. (See Declaration of interest, *supra*)].

judicially described as "one of the worst environmental catastrophes in gold mining history."⁵⁷ On August 18, 1995, the dam of the gold mine's effluent treatment plant began to rupture, spilling some 2.3 billion liters of liquid containing cyanide, heavy metals, and other pollutants into two rivers, one of which was the Essequibo.⁵⁸ Approximately 23,000 Guyanese victims of the spill instituted class action proceedings in Quebec, suing Cambior Inc. (a Quebec corporation owning 65% of Omai Gold Mines Ltd., the Guyanese corporation which owned the mine here) for \$69 million.⁵⁹ The plaintiffs were represented by the Quebec company, Recherches Internationales Quebec (RIQ).

The report of the Commission of Inquiry, named by the government of Guyana shortly after the disaster, depicted the reaction of many citizens of Guyana, whose very existence depends on the integrity of the Essequibo River, as shock, fear, anger, and in some cases, panic and terror.⁶⁰ The Commission found that the cause of the discharge of effluent from the treatment plant was the erosion of the core of the dam due to faulty construction of the rock fill foundation on which the dam was built. It also found the Omai Gold Mine company responsible for the loss since the Company was the party who brought the cyanide, a noxious substance, onto its property.

However, the Quebec Court dismissed the claims on *forum non conveniens* grounds. The Court found that Guyana was clearly the most natural and appropriate forum for the case to be tried.⁶¹

57. Recherches Internationales Quebec v. Cambior Inc., unreported judgment of Aug. 14, 1998 (Canada Superior Court, Quebec, no. 500-06-000034-971).

58. *Id.* at p. 2.

59. *Id.* at p. 2.

60. The Court noted that the emotional response was heightened by the fact that the water of the Essequibo river now contained cyanide. Etched in the memories of many Guyanese was, no doubt, the 1978 macabre tragedy in Jonestown, Guyana, when over 900 cult followers committed suicide by ingesting lethal quantities of a cyanide laced brew.

61. In the words of the Court:

[N]either the victims nor their action has any real connection with Quebec. The mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. The law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgment are located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It included the voluminous documentary evidence relevant to the spill and its consequences. *Recherches*, unreported judgment no. 500-06-000034-971 at XX.

B. Jurisdiction of the Dominican Courts

Section 4 deals with the jurisdiction of the Dominica courts over the kinds of transnational actions in issue and effects radical alterations in the common law. The section contains three subsections, each worthy of separate examination.

1. Section 4(1): abolition of *forum non conveniens*

Section 4(1) provides spectacular vindication of the view doubting the legitimacy of the convenience doctrine. It provides:

Subject to subsection (3) where the High Court or Court of Appeals in Dominica has jurisdiction to hear a civil matter, the Court shall assume jurisdiction in all cases to which this Act applies and shall not dismiss or stay proceedings on the basis of *forum non conveniens*, comity or any similar basis.

The intent of this provision (subject to 4(3)) is to abolish the convenience doctrine in relation to actions where the plaintiff sues as of right.⁶² This is a radical step, given the clear acceptance of the doctrine by the House of Lords in the leading case of *Spiliada Maritime Corp v. Cansulex Ltd.*;⁶³ an acceptance that was supposed to signal the rejection of xenophobic parochialism and an embrace of judicial comity.⁶⁴ In *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak*,⁶⁵ the Privy Council accepted "the law in *The Spiliada*" and in this way *forum non conveniens* became binding judicial precedent for countries, including Dominica, over which the Privy Council retains appellate jurisdiction.

Notwithstanding these judicial authorities, it was argued that the doctrine violated basic constitutional guarantees to citizens of unfettered access to superior courts for determination of their

62. For example, pursuant to relevant common law and statutory rules granting jurisdiction on the basis of presence (*Maharanees of Baroda v. Wildenstein* [1972] 2 Q.B. 283 (Eng. C.A.)) or submission (*in re Dulles Settlement (No. 2)* [1951] ch. 842); *Henry v. Geopresco Int'l Ltd.* [1976] Q.B. 726 (Eng. C.A.)).

63. [1986] 1 App. Cas. 460 (Eng.).

64. For Lord Diplock, the English embrace of *forum non conveniens* meant that "judicial chauvinism had been replaced by judicial comity." *The Abidin Daver* [1984] 1 App. Cas. 398 (Eng.), [1984] 1 All E.R. 470.

65. [1987] 1 App. Cas. 871 (Eng. P.C.), [1987] 3 All E.R. 510.

civil rights and responsibilities.⁶⁶ In their own words, Caribbean constitutions provide that proceedings instituted by any person "for the determination of the existence or extent of any civil right or obligation ... shall be given a fair hearing within a reasonable time."⁶⁷ Lord Diplock for the Privy Council in *Attorney General of Trinidad and Tobago v. McLeod*, said that "[a]ccess to a court of justice" was "itself, 'the protection of the law' to which all individuals are entitled."⁶⁸ Similarly, in *Hinds v. The Queen*, Lord Diplock, again speaking for the Privy Council, declared that the constitution gave the individual citizen the right "of having important questions affecting his civil ... responsibilities determined by" the Supreme Court.⁶⁹ These and other considerations suggested that the constitutions prohibit judicial abdication of jurisdiction.

In addition to the constitutions, there are specific examples of commonwealth statutory law designed to protect the right of access by litigants in transnational disputes. The Unfair Contract Terms Acts of the United Kingdom⁷⁰ and of Trinidad and Tobago⁷¹ seek to regulate the kind of exemption clauses that might be inserted in certain consumer contracts. This regulation cannot be avoided by simply choosing a foreign law as the governing law of the contract.⁷² Again, the parties' choice of a foreign forum will also be struck down if the practical effect is to allow the evasion of overriding local statutes guaranteeing, for example, consumer protection in insurance contracts.⁷³

2. Section 4(2): abolition of *forum conveniens*

Section 4(2) progresses beyond the view doubting the legitimacy of the convenience theory where the plaintiff sues as of right. The subsection abolishes the doctrine even in instances where jurisdiction is based upon service of the *writ ex juris*, i.e., on the defendant in a foreign country, pursuant to the terms of Order 11. Section 4(2) provides as follows:

66. See Anderson, *Caribbean Perspective*, *supra* note 1, at 58-84.

67. *Id.* at 61 (quoting BARB. CONST. ch. III. § 18(8),(9)).

68. [1984] 1 All E.R. 694, 701 (Eng. P.C.) (emphasis added).

69. [1977] 1 App. Cas. 195, 221 (Eng. P.C.) (emphasis added).

70. Unfair Contract Terms Act, 1977, 50 (Eng.).

71. Unfair Contract Terms Act, 1985, no. 28 (Trin. & Tobago).

72. Unfair Contract Terms Act, 1977, 50, § 27(2) (Eng.); Unfair Contract Terms Act, 1985, no. 28, § 17(2) (Trin. & Tobago).

73. *Akai Pty. Ltd. v. The People's Ins. Co.* [1997] 141 A.L.R. 374 (Austl.). See also Winston Anderson, *Party Autonomy and Overriding Statutes in Private International Law: The High Court of Australia Takes the Lead*, 9 CARIB. L. REV. 16, 16-25 (1999) (discussing *Akai*).

Where the Court has jurisdiction to effect service out of the jurisdiction under Order 11 of the Rules of the Supreme Court (Revision) 1970, such jurisdiction will apply where the plaintiff has established to the satisfaction of the Court that the proposed cause of action falls within one of the categories under the Order.

Traditionally, an applicant for leave to serve the writ *ex juris* under Order 11 was required to satisfy both a question of law (that the cause of action fell within one of the categories of the Order) and a question of discretion (that this was a proper case for the court to allow service out). These requirements are disjunctive in that the applicant may establish applicability of Order 11, but could then be refused leave because the local forum was not the most appropriate for trial.⁷⁴ *Spiliada*, itself a case on Order 11, confirmed the principle, found in a long line of cases, that the court would only exercise its discretion to allow extra-territorial service if the court itself is the forum *conveniens*.⁷⁵ That learning is now swept away by the Act. Henceforth, the requirement that the applicant satisfy the question of law is sufficient. There is no further requirement that a question of judicial discretion be satisfied.⁷⁶

3. Section 4(3): *lis alibi pendens*

A very limited role is retained for *forum non conveniens* by section 4(3). Where relevant proceedings are pending in a foreign forum *other than* the forum in which the cause of action was stayed or dismissed, it is permissible "to suspend the local proceedings until the conclusion of those foreign proceedings or until such other time as the local court shall determine". This provision is based on the stream of law developed in *The Atlantic Star* case.⁷⁷ The intent is to give another foreign court the opportunity to "do the right thing" and deliver judgment on the

74. *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.* [1983] 2 All E.R. 884.

75. [1986] 1 App. Cas. 460 (Eng.).

76. Accordingly, in *Delgado v. Shell Oil Co.*, the jurisdiction of the Dominica courts would have been established simply on the basis of the applicants' proof that the tort had been committed within Dominica, thereby requiring the courts to permit service out. 890 F. Supp. 1324 (S.D. Tex. 1995).

77. [1974] 1 App. Cas. 436, [1973] 2 All E.R. 175.

merits before the Dominican courts become obliged to bring the radical provisions of the Act into operation.

This is a worthy objective, although the provision could be criticized for being applicable only to section 4(1) actions (where the plaintiffs sue as of right) and not to actions falling under section 4(2) (where the applicant establishes jurisdiction under Order 11). This is an anomaly that does not further the objective just described. At all events, it should be noted that the judicial power is to "suspend" (rather than "dismiss" or "stay") local proceedings in the face of a *lis alibi pendens*. Furthermore, that power can only be exercised where it appears "just and convenient" to do so.

4. Conclusion

The abolition of *forum non conveniens* in Dominica does not merely ensure judicial fidelity to the constitutional rights of litigants, it also closes another loophole to unscrupulous transnational defendants. It is not beyond the realm of possibility that having successfully argued that the doctrine prohibited the hearing of their case in their home country, defendants could then also argue that it prohibited the hearing of the case in the plaintiffs home country as well.⁷⁸

To be fair, in both *Delgado* and *Recherches*, the foreign forum, before dismissing, sought to ensure that trial could take place in the local forum. In *Delgado*, Justice Lake made his dismissal of the plaintiffs' action conditional "upon acceptance of jurisdiction by the foreign courts involved in [the] cases."⁷⁹ In the event that the highest court of any foreign country finally affirmed the dismissal for lack of jurisdiction, the action could be returned to the United States for resumption "as if the case had never been dismissed."⁸⁰ In *Recherches*, Justice Maughan found that the Guyana court had jurisdiction, and noted that "Cambior had undertaken not to invoke any ground based on *forum non conveniens* if the Court [dismissed the action] and the victims of the spill instituted suit in Guyana."⁸¹ These comments are, respectfully, very apposite.

78. This argument could succeed because different courts use different criteria to decide upon the convenient forum.

79. *Delgado*, 890 F. Supp. at 1357.

80. *Id.* at 1375.

81. *Recherches Internationales Quebec v. Cambior Inc.*, unreported judgment of Aug. 14, 1998 (Canada Superior Court, Quebec, no. 500-06-000034-971).

The African and Latin American response to this conundrum was interesting. Active consideration was given to legislation that would deny local courts any jurisdiction to hear cases dismissed on discretionary grounds in foreign forums.⁸² The objective was to ensure a return of the DBCP cases to the United States. If, despite Justice Lake's assurances, the United States refused to accept jurisdiction, the legislation would then make special provision for the hearing of the case locally.⁸³

By contrast, section 4 of the Transnational Causes of Action Act of Dominica is concerned, first and foremost, with emphasizing a positive duty imposed upon the local court. This is the responsibility, abdicated by others, of determining transnational disputes in the interests of all the parties, in the interest of justice, and in the interest of bringing the matter to closure. The legislation is based upon the idea that the state, through its courts, has an obligation to protect citizens and residents from transnational wrongs and thus accords with similar views expressed in the Canadian case of *Moran v. Pyle*.⁸⁴

C. Consolidation of Action

A major weakness of Caribbean rules governing the local prosecution of civil claims with respect to multi-jurisdictional torts is the real risk of fragmentation of the lawsuit. Fragmentation might occur by virtue of the claim being pursued in different countries and/or by the necessity to bring individual local actions and is normally the effect of dismissals in cases such as *Delgado*.⁸⁵

1. Internal atomization

Section 6(1) attempts to deal with the prospect of internal atomization by empowering the court to allow the mass trial of actions. It provides that:

When in a transnational cause of action under this Act it appears to the Court that common questions

82. See *supra* note 20 and accompanying text.

83. These provisions included such matters as the posting of a bond; attorney's fees; presumption of ecological violation; tables of amounts payable for compensation in respect of harm suffered; retroactivity of the law; non-discrimination between nationals and foreigners; interpretation in favor of the plaintiffs; and preservation of penal action. See, e.g., Ecuador Debate, *supra* note 19.

84. [1973] 43 D.L.R. 3d. 239, 250-51.

85. This effect, it should be noted, is a primary motivation behind the invocation of *forum non conveniens*.

of law or fact or both are raised or are likely to be raised by more than one plaintiff with respect to the same action the Court shall allow for –

- (a) consolidation of the action;
- (b) representative action; or
- (c) class action.

Consolidation of actions, representative actions, and class actions are very well known devices in United States jurisprudence that facilitate expeditious resolution of complex litigation, particularly those involving product liability.⁸⁶ These techniques are less well known in the Caribbean although some provision is made for the use of consolidated actions in the Rules of the Supreme Court (RSC) in the broad context of civil litigation. Under the RSC, where two or more causes or matters pending in the same court relate to common questions of law or fact, rights, or claims arising out of the same transaction, the Court may take certain measures to save costs. The Court may order that:

- (a) the causes or matters be consolidated, i.e., treated as one action;
- (b) the actions be consolidated so far as the common issues are concerned but thereafter tried separately;
- (c) the actions be tried at the same time;
- (d) one action be tried first and that the remaining actions be stayed until the result of the test case is known; and
- (e) one action be tried immediately after another so that the judge hears the evidence in all actions, sometimes before giving judgment in any.

An example of the workings of consolidation is provided by the English case of *Healey v. A. Waddington & Sons*.⁸⁷ In that case, a colliery accident resulted in the death of six miners and serious injuries to two others.⁸⁸ The dependants of the deceased and the injured men brought separate actions in the tort of negligence against the owners of the mine.⁸⁹ However, the judge ordered

86. See, e.g., *Brits Adopt U.S.-Style Tort Litigation Methods*, NAT'L L.J., Jan. 13, 1997.

87. 1 W.L.R. 688 (1954). See also DAVID BARNARD & MARK HOUGHTON, *THE NEW CIVIL COURT IN ACTION 52* (1993).

88. *Healey*, 1 W.L.R. at 688.

89. *Id.*

that one action be tried first as a test case on the issue of liability.⁹⁰ The defendants were dissatisfied with the notion of a test case because they felt that different questions on liability arose with respect to the different claims.⁹¹ At the same time, it was obvious that six separate cases would cause significant expense, most of which would be unnecessarily incurred.⁹² Accordingly, the Court of Appeal ordered that the actions be consolidated on the question of liability so that slightly different issues in respect of each action could be heard together and determined at one time.⁹³ However, the court directed that there should then be separate trials on the issues of quantum of damages.⁹⁴

Representative actions are also familiar to Caribbean law books but have very rarely been used in practice. Under the RSC, a representative action may be ordered where there are so many people having an interest in the proceedings that it would be impractical to join all of them as co-plaintiffs or co-defendants.⁹⁵ In England, such representative actions (also known as "class actions") are based upon the fact that all persons represented have a common interest that is threatened, and that the relief claimed will benefit all of them.⁹⁶ A good example of the certification of such a representative action is provided by the "open" litigation in *Nash v. Eli Lilly & Co.*⁹⁷ However, it is clear that this kind of action, which is available to allow the plaintiffs to sue the defendants collectively, lacked the "procedural and evidentiary advantages [of] a class action."⁹⁸

The Transnational Causes of Action Act uses the terms "consolidation of the action," "representative action," and "class action" in ways analogous to their usage in English and North American law.⁹⁹ Indeed, the three terms were employed instead of one in order to accommodate both the English and the American contexts in which the Act is likely to be utilized. So, following the *Delgado* dismissal, a representative action was filed in the High Court of Dominica, and a class action was also

90. *Id.* at 689.

91. *Id.*

92. *Id.*

93. *Id.* at 689-90.

94. *Id.*

95. *See generally*, The Judicature (Civil Procedure Code), cap. 177 of Jamaica. Title 15, esp. at sections 89-92.

96. BARNARD & HOUGHTON, *supra* note 87.

97. 1 W.L.R. 782 (1993).

98. *Recherches*, unreported judgment no. 500-06-000034-971 at XX

99. Act no. 16 of 1997 (Commonwealth of Dominica), § 6(1).

initiated although the class was, at the time of settlement, still to be certified by the Court.¹⁰⁰

2. *External atomization*

There is little that a Caribbean legislature or court could do to avoid external atomization apart from facilitating trial within its domestic legal system. Of course, there is always the possibility of issuing an anti-suit injunction restraining trial in the foreign forum, but the cases emphasize that the anti-suit injunctions should be issued sparingly and never in breach of the rules of comity.¹⁰¹ Certainly, the injunction should not be issued if it would be ineffective because it was issued against a foreign defendant who was not a resident within the forum.¹⁰² In these circumstances, the Act makes a simple plea for international cooperation to defeat external fragmentation, albeit in doing so, it potentially allows implementation of treaties without need for specific transforming legislation.¹⁰³ Section 6(2) of the Act provides: "to facilitate the expeditious and just settlement of the issues between the parties and to co-operate with other judicial authorities whether within the Caribbean or elsewhere, the Courts shall give recognition to any international convention existing between the States of the parties."¹⁰⁴

100. Note: the typical action was styled as follows:

IGNUS DEGALLERIE of Portsmouth and JOSEPH George of Castle Bruce suing on behalf of themselves and on behalf of and as representing all other farmers and farm workers in Dominica affected adversely in their health by the use of the chemical DBCP in certain pesticides, namely, Nemagon and Fumazone, manufactured and/or supplied by the Defendants

PLAINTIFFS

and

SHELL OIL COMPANY, DOW CHEMICAL COMPANY, OCCIDENTAL CHEMICAL CORPORATION, AMVAC CHEMICAL CORPORATION, DEAD SEA BROMIDE CO. LTD., AMERIBROM INC., & BROMINE COMPOUNDS LTD.
DEFENDANTS

101. *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak* [1987] AC 871; *Airbus Indus. v. Patel* [1998] 2 All E.R. 257.

102. *In re North Carolina Estate Co.*, 5 T.L.R. 328 (Ch. 1889).

103. Winston Anderson, *Treaty Implementation in Caribbean Law and Practice*, 8 CARIB. L. REV. 182, 185-211 (1998).

104. Transnational Act, *supra* note 22, § 6(2).

D. Posting of Bond

The matter of the posting of a bond is dealt with in section 5 which provides that:

- (1) Subject to section 4 the Court shall order that any defendant who enters an appearance makes a deposit in the form of a bond in the amount of one hundred and forty percent per claimant of the amount proved by the plaintiff to have been awarded in similar foreign proceedings.
- (2) The terms and conditions for the posting and disposal of a bond under subsection (1) shall be determined by the Court.¹⁰⁵

This provision is necessary if the transnational suit, validly filed before a foreign court but transferred to Dominica at the request of the defendant, is to result in a judgment that may be enforced. Normally, the defendant will not have its place of business or have any assets in Dominica. Consequently, any judgment given locally against it will not usually be satisfied by a simple lien on its property. Instead, such judgment is to be satisfied from the bond itself. In the absence of a bond, satisfaction of judgment would probably face another round of complex, tiresome, and frustrating litigation to secure recognition and enforcement abroad.¹⁰⁶ Specifically, if the defendant's assets are in a country with which Dominica does not have a Recognition and Enforcement of Foreign Judgments Agreement, the effort to make the Dominican judgment effective there might well be futile.

The figure of 140 percent of the total claim was enacted to take into consideration the satisfaction of an award of damages as well as the associated costs. In this regard, the Act simply adopted the precedent set in other developing countries grappling with similar problems. The Law of Defense of Procedural Rights of the Citizens and the Residents, considered by the Latin American legislatures, makes provision for the posting of a bond of 140 percent of the sum awarded in similar suits abroad to "take care" of any compensation awarded to the claimants' expense and

105. *Id.* § 5.

106. *See, e.g., Anderson, Strikes Again, supra* note 8, at 87 (stating that in the DBCP saga the defendants indicated the intention of using every available device to ensure that any judgment given in the plaintiffs' home country would remain unsatisfied).

procedural costs.¹⁰⁷ It is worth emphasizing that the plaintiff bears the burden of proving (a) the similarity of foreign proceedings, and (b) the amount awarded in those proceedings. Where the plaintiff does not discharge the burden of proof, the section simply does not apply. Where the section does apply, and the defendant fails to make good on the bond ordered, the defendant has committed a contempt of court and will be susceptible to punishment in the usual way (i.e., by sanctions including reprimand, dismissal of defense, fine, or imprisonment).

Legislative empowerment of the court to require the posting of a bond gives rise to certain problems, the most important of which shares a similarity with the requirement for provision of security for costs. In *Smithfield Foods Ltd. v. Attorney-General of Barbados*,¹⁰⁸ the Privy Council acknowledged that the judicial staying of proceedings, until the applicant made a large deposit as security for costs, could amount to violation of the constitutional guarantee of protection of the law. On the other hand, section 5(1) is unlikely to be the subject of a successful challenge for several reasons. First, section 5(2) provides that the terms and conditions for the posting and disposal of the bond "shall be determined by the court."¹⁰⁹ A judicial tribunal therefore makes the ultimate decision concerning all matters concerning the bond. An influential factor may well be the strength of the plaintiff's case. For example, the court may require that the plaintiff prove that there is a substantial issue to be tried and that there is reasonable likelihood of success. This may roughly approximate the requirement for the plaintiff's proof of a *prima facie* case.

Second, a defendant who is unhappy with the court's decision has a right of appeal in the usual way. *Smithfield* itself went on appeal to the Privy Council, which eventually rejected the argument that the deposit, as security for costs, was unconstitutional.¹¹⁰ Third, it is becoming commonplace for defendants, eager to avoid litigation in their own home country, to agree to the posting of a bond or to satisfy any final judgment rendered in favor of the plaintiffs by the foreign court.¹¹¹ In this way, the requirement for the posting of a bond merely codifies

107. See *supra* notes 19 & 83.

108. 1 W.L.R. 197 (1992).

109. Transnational Act, *supra* note 22, § 5(2).

110. The Court held that a remedy other than a constitutional challenge was available to the applicant; specifically, the applicant should have appealed the judge's order. See *id.* at 201 (quoting BARB. CONST. ch. III, § 24(2)). Therefore, constitutional redress could not be granted by the court.

111. See, e.g., *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1369 (S.D. Tex. 1995).

undertakings given in foreign judicial proceedings. Fourth, the award is made subject to section 4 where, as mentioned above, the court retains a discretion to suspend local proceedings in favor of pending proceedings in a foreign forum.

Whatever the legal niceties, the enactment of section 5 achieves the powerful indication of the intention to checkmate *forum non conveniens*. Read in conjunction with sections 9 and 12, it becomes obvious that the Act proposes to facilitate awards comparable to those that would be made in similar foreign proceedings. Avoidance of such awards is the single most important reason for the invocation of convenience doctrine. It therefore follows that the Act should serve to remove the main incentive for pleading that the defendant's home court (where the original action is likely to have been brought) is not the appropriate place for trial. The provision on the posting of bonds was therefore intended to make trial unattractive in the *plaintiff's* home country and thereby promote trial in the *defendant's* home court, in the first place.

E. Governing Law

Section 7 takes the opportunity presented by the DBCP litigation to effect a radical development of the common law rule concerning the governing law in transnational torts. The section provides as follows:

- (1) Without prejudice to subsection (2), the governing law of a transnational cause of action under this Act shall be determined in accordance with existing the rules whether statutory or common law.
- (2) Where an action is founded in tort or delict, the right and liabilities of the parties with respect to a particular issue or the whole cause of action shall be determined by the local law of the country which, as to the issue or cause of action, has the most significant relationship to the cause of action and the parties.
- (3) In determining the significance of the relationship the Court shall take into account all relevant circumstances, including the following factors:

- (a) the place where the injury occurred;
- (b) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (c) the place where the relationship, if any, between the parties is centered.¹¹²

Section 7(1) makes pellucidly clear that Dominica's law, as the *lex fori*, determines the identity of, but need not itself be, the governing law or *lex causae*. The identity of the *lex causae* is derived from section 7(2), which engineers a complete overhaul of the traditional rules as derived from *Phillips v. Eyre*,¹¹³ and modified in *Boys v. Chaplin*¹¹⁴ and *Red Sea Insurance Co. v. Bouygues SA*.¹¹⁵

The old law was complex and highly unsatisfactory. In order to establish a tortious claim in Dominica for a wrong alleged to have been committed abroad, the plaintiff had to establish two elements. First, that the wrong would have been actionable had it been committed in Dominica, and second, that the wrong was actionable as a tort by the law of the place where committed. The requirement that the plaintiff must satisfy both the *lex fori* and the *lex loci delicti commissi*, appropriately dubbed the "rule of double actionability," was subject to severe and cogent criticism.¹¹⁶ Most obvious was its unique disadvantage to the plaintiff in having to establish his cause of action under two systems of law rather than one system, as per the normal requirement in private international law.

Boys did suggest, in 1971, that in exceptional circumstances, the rule of double actionability could be ignored with respect to an issue in controversy; the (single) system of law most closely related to that issue and the parties could be applied to determine liability.¹¹⁷ This suggestion, acted upon in a series of first instance judgments,¹¹⁸ led to the assertion that English courts had accepted Dr. Morris' proper law of torts.¹¹⁹ In 1984 the

112. Transnational Act, *supra* note 22, §7.

113. [1870] L.R. 6 Q.B. 1.

114. [1971] App. Cas. 356 (appeal taken from Eng.).

115. [1994] 3 All E.R. 749.

116. *M'Elroy v. M'Allister* [1949] S.L.T. 139; DAVID MCCLEAN, MORRIS: THE CONFLICT OF LAWS 353-77 (5th ed. 2000).

117. *Boys v. Chaplin* [1971] App. Cas. 356 (appeal taken from Eng.).

118. *See, e.g., Coupland v. Arabian Gulf Oil Co.*, 1 W.L.R. 1136 (C.A. 1980); *Church of Scientology of Cal. v. Commissioner of Metro Police*, 120 Sol. J. 690 (C.A. 1976).

119. *See MCCLEAN, supra* note 116; J.H.C.M., *Torts in the Conflict of Laws*, 12 MOD. L. REV. 248 (1949).

English Law Commission did indeed recommended legislative reform to provide for the adoption of the proper law,¹²⁰ and in 1994 the Privy Council's decision in *Red Sea Insurance Co. v. Bougues SA* confirmed the suggestion in *Boys v. Chaplin* that the proper law could be applied as an exception to double actionability.¹²¹

Section 7(2) moves significantly beyond *Red Sea*. First, *Red Sea* had merely provided for adoption of the "most significant relationship" test as an *exception* to the general rule requiring double actionability.¹²² The most cogent criticism of the case was the lack of clarity as to when the exception would apply. By contrast, the Act of 1997 makes the proper law the rule for identifying the governing law and does not allow for any exceptions. Second, *Red Sea* suggested that the proper law could be the *lex loci delicti commissi* rather than the *lex fori*, which admittedly, clarifies one of the many questions left by *Boys*.¹²³ But the Act goes even further by opening up the distinct possibility that the *lex causae* could be the law of a third country. Third, the statutory provision gives the precise definition of the proper law offered by Morris in the *fons et origo* of the concept, and it keeps substantive faith with the description used in the American Restatement (Second) of the Law of Torts, Conflict of Laws, which is widely accepted as adopting the proper law concept.¹²⁴ The factors that the court must take into account in determining the significance of the relationship reproduces the considerations mentioned by both Morris and the American Restatement.

Any possibility of the application of the doctrine of *renvoi* is excluded by use of the "local" law of the country with the most significant relationship to the cause of action and the parties. It should also be borne in mind that the proper law test applies only to actions falling under the scope of the Act; other transnational torts remain governed by the common law rules as enshrined in *Red Sea*.¹²⁵

120. *But see* Jonathan Harris, *Choice of Law in Tort - Blending in with the Landscape of the Conflict of Laws?*, 61 MOD. L. REV. 33 (1998) (noting that the eventual statute, Private International Law (Miscellaneous Provisions) Act of 1995, part III (Eng.), adopts the law of the place where the tort was committed as a rule, as the governing law of the transnational tort).

121. *See* *Red Sea Ins. Co. v. Bouygues SA* [1994] 3 All E.R. 749.

122. *Id.*

123. *Id.*

124. *See, e.g.,* *Babcock v. Jackson*, 191 N.E.2d 279 (1963).

125. *See* *Red Sea Ins. Co.* 3 All E.R. at 749.

Finally, the provision applies only in relation to an action founded in "tort or delict." It does not apply to identification of the governing law in contract which continues to be governed by rules outside of the Act. Where an action in respect of a wrong is framed in tort but also gives rise to a contractual claim, the availability of a defense based upon the contractual terms would appear to depend initially upon the provision of the governing law of the contract and ultimately, upon any overriding rules of public policy in the forum. To put the matter squarely, if the Dominican courts were persuaded that the Act embodied overriding public policy considerations, the provisions would apply regardless of whether exculpatory claims in contract were valid under the governing law of the contract.¹²⁶

F. Strict Liability

Where a transnational tort to which the Act applies is governed by the law of Dominica, there is no longer a requirement that the plaintiff establish that the defendant acted negligently.¹²⁷ Section 8(2) imposes strict liability upon any person who manufactures, produces, distributes or otherwise places any product or substance into the stream of commerce which results in harm or loss.¹²⁸ Harm or loss is covered whether it is caused by the use or consumption of the product or substance. Moreover, the regime of liability without fault exists whether the defendant is a national, a domiciliary or resident, or is otherwise incorporated or carrying on business in a foreign country. Whether contractual terms in agreements for sale for the product or substance could take precedence over the legislative protection given to tortious claims depends upon the considerations just discussed.¹²⁹

G. Judicial Notice of Evidence in Foreign Proceedings

A fundamental rule in private international law is that the forum does not take judicial notice of foreign law. Consequently, foreign law must be pleaded and proved before it can be applied in

126. *Brodin v. A/R Seljan* [1973] S.L.T 198. I am grateful to Diana Thomas, one of the students in my 2000/01 Private International Law class, for reminding me of this case in the context of contract defenses to tort claims.

127. The terms of negligence are expounded by Lord Atkin. *Donohue v. Stevenson* [1932] App. Cas. 562.

128. Transnational Act, *supra* note 22, § 8(2).

129. See *supra* text accompanying note 126. See also *Sayers v. International Drilling* 1 W.L.R. 1176 (C.A. 1971) (discussing the effect of a contractual exemption clause on a tort claim).

the forum. In the absence of such allegation and proof, the forum must apply its own law simply because there is no other law of which it can take notice.¹³⁰ This rule, which extends to evidence tendered in foreign proceedings in order to establish the cause of action, has been modified by another innovative provision of the Act. Section 9 provides that Dominican courts "shall take judicial notice of evidence presented and accepted by foreign courts in similar proceedings involving the same or similar parties, or the same or similar causes of action."¹³¹

Section 9 was inserted to ensure access by the local courts to probative evidence adduced in foreign proceedings. In *Delgado*, for example, the defendants had stipulated to more than 100,000 documents in the United States. Judicial findings had been made concerning the toxic and carcinogenic effects of the chemical upon human beings and the environment. Jury awards in excess of \$1 million had been returned. Without this evidence the court in the plaintiffs' home country would have to start from scratch. It would be forced to endure months of contentious evidence, hear conflicting opinions from expert witnesses, and decide afresh with the risk of coming to a contrary view to that adopted abroad in relation to the same issue. Contrary findings of fact in the hundreds of lawsuits scheduled to be heard in over 23 countries had the potential to bring the law into disrepute. Reinventing the wheel also carried the risk of gratuitous and unnecessary embarrassment to the plaintiffs.¹³²

An important and salutary feature of section 9 is the wide margin of discretion left to the court. It is for the court to decide, for example, whether the foreign proceedings meet the test of similarity so as to allow the introduction of the evidence. The court also decides upon "the value and weight it shall attach to such evidence."¹³³

130. See, e.g., *Warner Bros. Pictures, Inc. v. Nelson* [1937] 1 K.B. 209; *Schneider v. Eisovitch* [1960] 2 Q.B. 430. These cases are cited in Winston Anderson, *Conflict of Laws Points Arising from Belle v. Belle*, 17 COMMONWEALTH L. BULLETIN 1079, 1080 (1991).

131. Transnational Act, *supra* note 22, § 9.

132. Note the intention of the defendants, expressed in the DBCP saga, to explore all possible causes of infertility on the part of the plaintiffs other than their exposure to the chemical. It was also feared that this line of inquiry could cause significant tension in many families since doubts surrounded the paternity of some children originally thought to be fathered by the plaintiffs.

133. Transnational Act, *supra* note 22, § 9(2).

H. Court Orders Including Awards of Compensatory, Exemplary, and Punitive Damages

Sections 10, 11, and 12 empower the court to make a variety of orders where a transnational cause of action is established to its satisfaction. The court may order (a) that an apology be made by the defendant to the plaintiff, (b) publication of the facts about the defendant's product in newspapers, health magazines and journals in Dominica and abroad, (c) the placing of advertisements and warnings about the defendant's products, and (d) the publication of the health, environmental, and economic consequences of the wrongful act of the defendant.¹³⁴ These kinds of orders, which seek to bring home to the defendant the ethical and moral culpability of the wrongful act, have been possible in other regulatory contexts in Belize,¹³⁵ and have been used to good effect in Canada in environmental cases.¹³⁶

1. Award of damages

The award of compensation is usually central to the superficial wrangling over *forum non conveniens*. The American system of jury awards in tort and delict is very attractive to persons allegedly injured by the actions of American corporations. American defendants, on the other hand, have the opposite incentive to keep the litigation out of American Courts. In circumstances where 26,000 plaintiffs alleged infliction of chemical castration and cancer caused by the deliberate, cynical, and contemptuous behavior by the defendants, it is not hard to imagine the financial damage that could be inflicted by the outrage of an American jury.¹³⁷ In practice, the frequent dismissals on the basis that foreign courts are more "convenient" for trial now commonly effect a windfall for corporate defendants.

2. Compensatory, punitive and exemplary damages

The Transnational Causes of Action Act "checkmates" the convenience stratagem in two ways. First, compensatory damages are always awarded upon proof of loss or harm caused

134. *Id.* § 10(2).

135. Environmental Protection Act, no. 2 of 1992, §34 (Belize).

136. *See, e.g.*, *R. v. Northwest Territories Power Corp.* [1990] 5 C.E.L.R. 67.

137. Note Justice Lake suggested that American juries would apply the measure of damages awarded in the plaintiffs home countries. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995). This view runs counter to the well accepted principle that the quantum of damages is a matter for the law of the court hearing the case. *Boys v. Chaplin* [1971] App. Cas. 356 (appeal taken from Eng.).

by the culpable conduct of the defendant. Beyond this, section 11(1) provides that the court "shall" make an award of exemplary or punitive damages in particular circumstances.¹³⁸ Such awards may only be made where the court is satisfied that the defendant (a) acted in bad faith or in reckless disregard for the welfare of others, or (b) having knowledge of the likely harm, nevertheless persisted in the relevant action with a motive for making a profit. This reflects the common law rules as outlined in *Rookes v. Barnard*.¹³⁹ The Act then goes beyond the common law to specify some of the pertinent factors to be considered in a transnational product liability case, many of which fit hand-in-glove with the allegations against the defendants in *Delgado*. Thus, the Court must take into account the fact, if established:

- (a) that the defendant continued to produce or sell any product or substances after the product or substance was banned or its use restricted in the country of manufacture or in any other country in which it was used or consumed;
- (b) that the defendant failed to issue a warning to the Government of Dominica or to any other relevant person of the harmful effects of the product or substance;
- (c) that where a warning was issued under (b) the warning was inadequate; and
- (d) that the defendant had been guilty of relevant culpable past conduct.¹⁴⁰

Second, the Act creates exciting history by linking the level of damages that may be awarded by the courts in Dominica to the damages awarded in the defendants' home country. Section 12 is therefore critical to the entire legislative regime. The court is obliged to take judicial notice of awards made in relevant foreign proceedings.¹⁴¹ This obviates the need for the plaintiff to adduce evidence of awards though, as a matter of practice, Counsel would normally make sure that the court is fully cognisant of them. The effect of evidence of awards in analogous cases is detailed in section 12(1). In awarding damages, whether exemplary or punitive, the court "shall consider and be guided by" awards made

138. Transnational Act, *supra* note 22, ¶ 11(1).

139. [1964] App. Cas. 1129 (Eng.).

140. Transnational Act, *supra* note 22, § 11(2).

141. *Id.* § 12(2).

in similar proceedings in other jurisdictions.¹⁴² In particular, the court must be guided by "damages awarded in the Courts of the country with which the defendant has a strong connection whether through residence, domicile, the transaction of business or the like."¹⁴³

Some important limitations placed on applicability of these provisions should be noted. First, punitive damages focus on the defendant and intend to punish outrageous conduct. The statute concedes that, in the case of multinational corporations, the objective of deterrence cannot be achieved by an award conditioned by local precedents. Accordingly, awards comparable to those given in foreign proceedings appear desirable. However, the Act does not bring an award of compensatory damages within the requirement for comparability with foreign awards. Compensation reflects the magnitude of loss or harm sustained, and common law rules establish that compensatory awards must reflect the economic circumstances of the victim and, by implication, the victim's environment. It was felt that these rules should not be disturbed.

Second, in order to obtain an award of exemplary damages, the plaintiff bears a heavy burden of proving contumacious conduct. Third, enforcement of an award of punitive damages could be problematic because there is room for debate concerning whether the amount to be posted for the bond refers to and reflects compensatory or exemplary damages. Foreign enforcement could also be troublesome because of the argument that a local award of punitive damages is penal, and therefore not enforceable abroad, although, it should be noted, Lord Denning was of the exact opposite view in *SA Consortium General Textiles v. Sun and Sand Agencies Ltd.*¹⁴⁴ In that case he asserted that exemplary damages which go to the individual litigant are not punitive, and therefore do not fall under the bar prohibiting enforcement of penal laws.¹⁴⁵

It is conceded that, prima facie, there could be a difficulty in seeing how a Dominican court could award punitive damages in light of the fact that the choice of law rules under section 7 empower the Dominican court to apply the law of another country, which in relation to the cause of action, or a particular

142. *Id.* § 12(1).

143. *Id.*

144. [1978] 1 Q.B. 279, 282.

145. *Id. See, to similar effect, Huntington v. Attrill* [1893] AC 150.

issue, has the most significant relationship.¹⁴⁶ However, fixation on this difficulty ignores the possibility that Dominican law could be the governing law of the tort. Moreover, even where a foreign law is relevant, under traditional common law rules as interpreted, for example, in *Boys v. Chaplin*, quantification of damages is a matter for the *lex fori*.¹⁴⁷ A fortiori, where legislation requires a court, when satisfied of the establishment of the transnational cause of action, albeit the latter by reference, possibly, to a foreign law, to make financial awards upon specific criteria.

I. Enforcement, Limitation Period, and Retroactivity

Section 13 encourages the enforcement of judgments given in transnational causes of action in member states of the Caribbean Community (CARICOM). Where such a judgment has been rendered, the courts in Dominica are required to promote its enforcement in Dominica and other CARICOM states. However, the court can only act in this way "in accordance with any applicable international convention and customary practice."¹⁴⁸ Accordingly, these provisions merely restate current private international law principles. The court may grant a *mareva* injunction where it is necessary and appropriate to do so.¹⁴⁹ For example, this power is likely to be used to prevent "asset-stripping," i.e., the removal of assets from the Dominican jurisdiction, which may otherwise frustrate judicial efforts to facilitate enforcement of a judgment given in a transnational dispute.¹⁵⁰

Section 14 provides that the limitation period for bringing a transnational cause of action under the Act shall be six years.¹⁵¹ The period of limitation runs from the date on which the cause of action arose, or, alternatively, from the time the plaintiff knew or ought to have known of the cause of action and the person against whom to proceed. Largely, this reproduces the current rules. An innovative element is introduced by section 14(2)(c) which provides, as another alternative commencement point for the limitation period, the date on which the transnational cause of

146. McDowell, *supra* note 23, at 123-24.

147. [1971] App. Cas. 356.

148. Transnational Act, *supra* note 22, § 13(2).

149. *Id.*

150. See MCCLEAN, *supra* note 116, at 396-98.

151. Transnational Act, *supra* note 22, § 14(1).

action was "stayed or finally dismissed in a foreign forum."¹⁵² For tactical reasons, Dominican plaintiffs arguing that a foreign court is the most appropriate forum for trial may be reluctant to file for action in Dominica until the jurisdictional issue is resolved in the foreign court. But foreign litigation over proper venue frequently takes upwards of a decade,¹⁵³ and is resolved long after the local limitation period has expired. The provision, which codifies undertakings normally given in DBCP or OMAI type litigation to waive defenses based on time-bars, ensures that the local court will not dismiss actions that would otherwise be considered "stale claims." Section 14(1)(c) makes clear that the various commencement points for the six-year period of limitation are disjunctive. Thus, the period begins to run from any of the three commencement points, whichever is "latest."¹⁵⁴ In the normal course of events, this would be the date on which the *forum non conveniens* issue is finally resolved in the foreign court.

Section 15 provides that the Act shall have retroactive effect on all actions that are pending at the date of its enactment. This ensures its application to the DBCP litigation, which was then pending.

IV. CONCLUSION

The 1997 Transnational Causes of Action Act of Dominica represents a significant Caribbean contribution to the jurisprudence of private international law. It does not contain all the protections sought by the local plaintiffs in transnational actions,¹⁵⁵ and it has been criticized for being excessively focussed

152. *Id.* § 14(2)(c).

153. See Robertson, *supra* note 53. In *Delgado*, for example, the argument over the most appropriate forum began in 1984 and lasted until settlement in 1998. Moreover, litigants not accepting the settlement can expect to face further delay in finding the most appropriate venue for trial. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995).

154. Transnational Act, *supra* note 22, § 14(1)(c).

155. The original draft of section 15 sought to encourage expeditious trial in Dominica by empowering the court to grant audience to foreign attorneys retained by the parties in the foreign action. Safeguards were suggested to ensure that the local court remained in control of the judicial process. Provision was made to ensure that participation by foreign attorneys did not lead to additional expense to the State, and that intervention by foreign attorneys did not have a negative impact on the local bar. It was argued that allowing an audience for foreign attorneys in the limited type of cases covered by the Act would have a salutary effect on the litigation process, and would lead to a more dynamic and specialized bar. However, such a provision had implications for Dominica's obligations under international treaties establishing the system of legal education and certification of Caribbean Attorneys, and thus was deleted from the bill before presentation to Parliament. See WINSTON ANDERSON, *CARIBBEAN INSTRUMENTS ON INTERNATIONAL LAW* 183 (Stone Publications, 1994).

on the need to remedy defects in one particular type of case.¹⁵⁶ Given the rather specialized area with which it deals, it is not expected that the Act will be used in everyday litigation. Further, the drafting of its provisions leaves large and important areas of discretion in the hands of local judges.

Nonetheless, the legislative effort of the Dominican House of Assembly and of the President of Dominica deserves the highest commendation. The Act is clearly a landmark development in "checkmating" the pernicious effects of *forum non conveniens*. The limited abolition of the doctrine does not in any way impinge upon the independence of the judiciary. Quite the contrary, it affirms the constitutionality of the right of access, and it is entirely consistent with the approach taken in virtually all civil law countries, as well as in countries within the European Union, and now, in the United Kingdom with respect to cases falling under the Brussels Convention.¹⁵⁷ Already, passage of the Act has had the salutary effect of facilitating a settlement of the long-running DBCP saga.

The statute speaks eloquently of the resolve of the legislature in the Commonwealth of Dominica to assert the rights of persons in that State against powerful corporate interests. The strength of that resolve is also illustrated by the fact that the Bill passed through the House of Assembly on a second reading without dissent. Unlike the attitude adopted elsewhere in the sub-region, the House was persuaded that there was no time to deliberate and arrive at consensus on "an OECS approach." In going it alone, Dominica has sent a clear and meaningful message to the international community in general and to other developing states in particular. That message is best articulated in the words of the Chief Justice of the Indian Supreme Court spoken in the context of upholding the constitutionality of broadly equivalent legislation enacted to protect the interests of victims of the *Bhopal Plant Gas Leak Disaster* against an American multinational corporation. The Chief Justice said:

[W]hen citizens of a country are victims of a tragedy because of the negligence of a multi-national corporation, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievance and demands of the

156. See McDowell, *supra* note 23.

157. See Anderson, *Caribbean Perspective*, *supra* note 1, at 51-102.

victims, for which the conventional adversary system could be totally inadequate. The state in discharge of its sovereign obligation must come forward.¹⁵⁸

158. *Sahu v. Union of India*, No. 258, 81-82.