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## Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts

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## ARTICLE

# DOLING OUT ENVIRONMENTAL JUSTICE TO NICARAGUAN BANANA WORKERS: THE *JOSE ADOLFO TELLEZ V. DOLE FOOD COMPANY* LITIGATION IN THE U.S. COURTS

ARMIN ROSENCRANZ\*, STEPHEN ROBLIN\*\* & NICOLE BALLOFFET \*\*\*

## I. INTRODUCTION

On November 5, 2007, a Los Angeles Superior Court jury awarded six banana plantation workers from Nicaragua \$3.3 million in damages.<sup>1</sup> In *Tellez v. Dole Food Co.*, the jury found Dole Food Company (Dole) and Dow Chemical Company (Dow) responsible for exposing the plantation workers to dibromochloropropane (DBCP)—the key chemical in the pesticide Nemagon (also known as Fumazone)—more than thirty years ago.<sup>2</sup> The men claimed that their exposure to DBCP in banana

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<sup>1</sup> *Banana Workers Get \$3.3M in Pesticide Case - U.S. Jury Says Dole Must Pay Nicaraguan Workers Who Claim They Were Left Sterile*, CBS NEWS BUS., Nov. 5, 2007, [www.cbsnews.com/stories/2007/11/05/business/main3454902.shtml?source=RSS&tr=HOME\\_3454902](http://www.cbsnews.com/stories/2007/11/05/business/main3454902.shtml?source=RSS&tr=HOME_3454902).

<sup>2</sup> *Id.*

plantations during the 1970s caused their sterility.<sup>3</sup> On November 15, 2007, the same jury ordered Dole to pay \$2.5 million in punitive damages to five of the six men.<sup>4</sup> The case marks the first time that a jury in the United States has found Dole liable for its conduct outside of U.S. borders. In fact, the verdict is the first in more than 5000 cases filed by Central American agricultural workers against U.S.-based transnational companies such as Dole and Dow Chemical.<sup>5</sup>

After compensatory and punitive damages were awarded by the jury, Dole responded by moving for judgment notwithstanding the verdict (JNOV) with respect to punitive damages, strict liability, and fraudulent concealment. Judge Victoria Chaney denied the motion for JNOV on fraudulent concealment but granted JNOV on punitive damages and strict liability.<sup>6</sup> As a result, the punitive damages were vacated and the original verdicts, which totaled \$3.3 million against Dole, were reduced to \$1.58 million.<sup>7</sup> Furthermore, Dole's motion for a new trial with respect to the claims of one of the plaintiffs was granted.<sup>8</sup>

Despite Judge Chaney's rulings, *Tellez v. Dole Foods* is seen as significant because it held two multinational companies, Dole and Dow, accountable in the country where they are headquartered, as opposed to the country where they employed their workers and where the injuries occurred.<sup>9</sup> In the past, multinational corporations have successfully claimed *forum non conveniens*, blocking attempts by foreign nationals to bring suits in the United States.<sup>10</sup> This maneuver was overcome by the plaintiffs in *Tellez v. Dole Foods*. Despite this initial success for the plaintiffs, as the trial progressed their case faced legal obstacles that were not overcome.

<sup>3</sup> *Id.*

<sup>4</sup> Rita Cicero, *Banana Workers Win \$2.5 Million from Dole*, FINDLAW, Nov. 28, 2007, [http://news.findlaw.com/andrews/en/tox/20071128/20071128\\_tellez.html](http://news.findlaw.com/andrews/en/tox/20071128/20071128_tellez.html).

<sup>5</sup> Martha Neil, *First Banana Workers Get US Court Trial*, A.B.A. J., July 9, 2007, available at [www.abajournal.com/news/first\\_banana\\_workers\\_get\\_us\\_court\\_trial](http://www.abajournal.com/news/first_banana_workers_get_us_court_trial).

<sup>6</sup> *Tellez v. Dole Food Co.*, No. BC 312 852, 2008 WL 744052 (Cal. Super. Ct. L.A. County Mar. 7, 2008) (trial order); *Tellez v. Dole Food Co.*, No. BC 312 852, 2008 WL 744051, slip op. (Cal. Super. Ct. L.A. County Mar. 7, 2008) (trial order).

<sup>7</sup> Press Release, Dole Food Co., Dole Food Company, Inc. Wins Court Rulings (Mar. 10, 2008), available at [www.dolecsr.com/PressSection/PressReleases/Archives2008/March08\\_2008/tabid/1467/Default.aspx](http://www.dolecsr.com/PressSection/PressReleases/Archives2008/March08_2008/tabid/1467/Default.aspx).

<sup>8</sup> *Tellez v. Dole Food Co.*, No. BC 312 852, 2008 WL 744048 (Cal. Super. Ct. L.A. County Mar. 7, 2008) (trial order).

<sup>9</sup> *Banana Workers Get \$3.3M in Pesticide Case - U.S. Jury Says Dole Must Pay Nicaraguan Workers Who Claim They Were Left Sterile*, *supra* note 1.

<sup>10</sup> Paul Santoyo, *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 HOUS. J. INT'L L. 703, 704-05 (Spring 2005).

To complicate matters further, Dole now challenges the validity of the *Tellez v. Dole Foods* judgment (now pending on appeal in California) after Judge Chaney dismissed two other cases brought on behalf of other Nicaraguan plantation workers who claimed they were made sterile as a result of exposure to DBCP.<sup>11</sup> These cases were filed by some of the same lawyers—Juan Dominguez from Los Angeles, Antonio Ordeñana from Nicaragua, and others—who represented the plaintiffs in *Tellez v. Dole Foods*.<sup>12</sup> Judge Chaney found that these lawyers committed fraud by conspiring with Nicaraguan judges “to fix DBCP cases by manufacturing false lab reports.”<sup>13</sup>

In this article, we will explore the circumstances that led to this landmark ruling and verdict in Los Angeles, how Judge Chaney’s rulings changed the trajectory of the case, the recent developments concerning fraud by at least one U.S. lawyer, and how all of these factors might impact the future practices of transnational corporations.

## II. BACKGROUND

### A. BANANA CULTIVATION

Bananas are one of the world’s most popular fruits. Following rice, wheat, and corn, they are the fourth most valuable food crop in terms of gross value of production.<sup>14</sup> In 2000, bananas made up a U.S. \$5 billion export market.<sup>15</sup> The majority of bananas in the commodity market are produced in Latin America and the Caribbean (ten of twelve million tons by 2000 data).<sup>16</sup> The three largest companies in Central America are also the companies that dominate the world market: Chiquita, Dole, and Del Monte, with 25%, 25%, and 15% shares of the world market respectively.<sup>17</sup> Chiquita, formerly the United Fruit Company, and Dole,

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<sup>11</sup> Press Release, Dole Food Co., Dole Food Company, Inc. Judge Dismisses Remaining Two Lawsuits by Nicaraguan Plaintiffs Against Dole and Other Companies in Los Angeles Superior Court, Finding Widespread Fraud on the Court, Conspiracy, Blatant Extortion, and Denial of Due Process (Apr. 24, 2009), available at [www.dole.com/CompanyInfo/PressRelease/PressReleaseDetail.jsp?ID=2438](http://www.dole.com/CompanyInfo/PressRelease/PressReleaseDetail.jsp?ID=2438).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Food and Agric. Org. of the United Nations, Banana Experts Hold Landmark Meeting at FAO, Apr. 18, 2000, available at [www.fao.org/english/newsroom/highlights/2000/000402-e.htm](http://www.fao.org/english/newsroom/highlights/2000/000402-e.htm).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> UNITED NATIONS CONF. ON TRADE AND DEV., MAJOR DEVELOPMENTS AND RECENT TRENDS IN INTERNATIONAL BANANA MARKETING STRUCTURES 10 (Nov. 24, 2003), available at [www.unctad.org/en/docs/ditccom20031&c1\\_en.pdf](http://www.unctad.org/en/docs/ditccom20031&c1_en.pdf).

previously the Standard Fruit Company, have had active banana operations in Central America since the late 1800s.<sup>18</sup>

## B. PESTICIDE USE

Bananas are perennial herbs and are propagated on large banana plantations by cutting the main stem after harvesting the fruit and letting a genetically identical sucker grow, or by transplanting cuttings from the rhizome stem.<sup>19</sup> These large monoculture plantations are susceptible to diseases and pathogens.<sup>20</sup> To combat this, the banana companies have long relied on a suite of agrochemicals.<sup>21</sup> During the roughly ten months it takes for banana plants to grow and produce fruit, agrochemicals are applied continuously, through aerial application of fungicide with small planes, manual application of nematicides and herbicides with backpack sprayers, and placement of insecticide-laden bags over the fruit bunch. Once the bananas are harvested, workers cut and wash the bananas and apply additional agrochemicals for the journey to market. Central America leads the world in both the amount of pesticides used and the number of pesticide-induced problems.<sup>22</sup>

## C. DIBROMOCHLOROPROPANE (DBCP)

Nematicides, which target nematodes, or small worms found in the banana root system, historically were, and still are, among the most toxic chemicals used in large-scale banana cultivation.<sup>23</sup> DBCP, marketed as Nemagon or Fumazone, was produced by Shell Chemicals and Dow Chemical Company in the 1960s and used commonly in tropical agricultural regions, including Florida, Hawaii, the Philippines, the Ivory Coast, and throughout Central America.<sup>24</sup> Although the harmful effects

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<sup>18</sup> Chiquita Brands Int'l, 100 Years and Counting, [www.chiquita.com/CompanyInfo/History.aspx](http://www.chiquita.com/CompanyInfo/History.aspx) (last visited July 7, 2009); Dole Food Co., History 1930 – 1969, [www.dole.com/CompanyInfo/About/Timeline/3.jsp](http://www.dole.com/CompanyInfo/About/Timeline/3.jsp) (last visited July 7, 2009).

<sup>19</sup> Chiquita Brands Int'l, Top Banana, [www.chiquita.com/Products/Bananas.aspx](http://www.chiquita.com/Products/Bananas.aspx) (last visited July 7, 2009).

<sup>20</sup> PEDRO ARIAS ET AL., THE WORLD BANANA ECONOMY 1985-2002 §5.2 (FAO 2003), available at [www.fao.org/docrep/007/y5102e/y5102e08.htm#bm08](http://www.fao.org/docrep/007/y5102e/y5102e08.htm#bm08).

<sup>21</sup> *Id.*

<sup>22</sup> Douglas Murray et al., *Surveillance of Pesticide-Related Illness in the Developing World: Putting the Data to Work*, 8 INT'L J. OCCUPAT'L ENVTL. HEALTH 243, 243 (2002), available at [www.colostate.edu/Depts/Sociology/documents/spridw-doug.pdf](http://www.colostate.edu/Depts/Sociology/documents/spridw-doug.pdf).

<sup>23</sup> ROBERT A. DUNN & JOSEPH W. NOLING, CHARACTERISTICS OF PRINCIPAL NEMATICIDES 1 (Fla. Coop. Extension Serv., Inst. of Food and Agric. Sciences, Univ. of Fla. May 2003) (1997), available at <http://edis.ifas.ufl.edu/pdffiles/NG/NG00900.pdf>.

<sup>24</sup> See Morley Slutsky et al., *Azoospermia and Oligospermia Among a Large Cohort of*

of DBCP on male reproductive organs and sperm counts have been known since the early 1960s, DBCP was approved for use in the United States in 1964.<sup>25</sup>

It was not until after sixty workers in California who were employed in the manufacture of the pesticide were found to be sterile<sup>26</sup> that the U.S. Environmental Protection Agency (EPA) stopped issuing new permits for DBCP in 1977 and eventually banned its use, except for pineapples, in 1979.<sup>27</sup> The EPA totally banned the use of DBCP, including for pineapples, in 1985.<sup>28</sup> Nevertheless, Dow and Shell Oil continued selling DBCP products overseas, and Dole allegedly continued using DBCP in its Central American plantations into the mid-1980s.<sup>29</sup>

#### D. PRINCIPAL ISSUES

There are three main issues surrounding the use of Nemagon in banana plantations: persistent and significant health concerns, environmental damage, and the lack of disclosure of known risks associated with DBCP. According to the National Institutes of Health, DBCP is toxic, carcinogenic, and mutagenic.<sup>30</sup> It was listed in California in February 1987, under the Safe Drinking Water and Toxic Enforcement Act of 1986, as a chemical that is known to cause reproductive and developmental harm.<sup>31</sup> Specifically, DBCP is thought to cause male sterility and may be associated with genetic disorders in offspring of men and women continually exposed to DBCP.<sup>32</sup> Environmental concerns arise from the application of the nematicide to the roots of the banana

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*DBCP Applicators in 12 Countries*. 5 INT'L J. OCCUPAT'L AND ENVTL. HEALTH 116 (1999), available at [www.ijoh.com/index.php/ijoh/article/view/638/535](http://www.ijoh.com/index.php/ijoh/article/view/638/535).

<sup>25</sup> See Ruth H. Allen, *Breast Cancer and Pesticides in Hawaii: The Need for Further Study*, 105 ENVTL. HEALTH PERSPECTIVES 679, 681 (Apr. 1997), available at [www.pubmedcentral.nih.gov/picrender.fcgi?artid=1469894&blobtype=pdf](http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1469894&blobtype=pdf).

<sup>26</sup> See David Gonzalez & Samuel Loewenberg, *International Business; Banana Workers Get Day in Court*, N.Y. TIMES, Jan. 18, 2003, available at <http://query.nytimes.com/gst/fullpage.html>.

<sup>27</sup> See U.S. Env'tl. Prot. Agency, 1, 2-Dibromo-3-chloropropane (DBCP), [www.epa.gov/ttn/atw/hlthef/dibromo-.html](http://www.epa.gov/ttn/atw/hlthef/dibromo-.html) (last visited July 4, 2009); see also Gonzalez & Loewenberg, *supra* note 26.

<sup>28</sup> U.S. Env'tl. Prot. Agency, *supra* note 27.

<sup>29</sup> See Gonzalez & Loewenberg, *supra* note 26.

<sup>30</sup> NAT'L INSTS. OF HEALTH DIV. OF OCCUPATIONAL HEALTH AND SAFETY, SAFETY DATA SHEET: 1, 2-DIBROMO-3-CHLOROPROPANE 1 (2007), available at <http://dohs.ors.od.nih.gov/pdf/1,2-Dibromo-3-chloropropane%20REVISED.pdf>.

<sup>31</sup> STATE OF CAL. ENVTL. PROT. AGENCY OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986, CHEMICALS KNOWN TO THE STATE TO CAUSE CANCER OR REPRODUCTIVE TOXICITY 6 (2009), available at [www.oehha.org/prop65/prop65\\_list/files/P65single061909.pdf](http://www.oehha.org/prop65/prop65_list/files/P65single061909.pdf).

<sup>32</sup> Gonzalez & Loewenberg, *supra* note 26.

plant. The chemical drains into the water table, producing groundwater contamination and developmental and mortality effects on fish and mollusks.<sup>33</sup>

In the case of Central American plantations, nematicide application was considered one of the least desirable tasks and in general fell to the most marginalized workers, who were often poorly educated, illiterate, and indigenous.<sup>34</sup> In addition, it appears that these workers may not have been given appropriate equipment and training in order to minimize exposure.<sup>35</sup> The chemical and banana companies purportedly exploited the fact that DBCP was legal throughout Central America, as well as the fact that the lives and well-being of most of the workers exposed to the chemical were not highly valued.<sup>36</sup> Furthermore, when Central American agricultural workers have taken their grievances to U.S. courts, the companies have successfully argued that the cases should be litigated in the workers' home countries—countries often marked by weaker laws and weaker justice systems.<sup>37</sup>

### III. *FORUM NON CONVENIENS*

Each year, several cases brought by plaintiffs from the developing world against U.S.-headquartered transnational corporations have been dismissed on the ground of *forum non conveniens*.<sup>38</sup> *Forum non conveniens* allows a court to dismiss a case when an alternative forum is more convenient and just.<sup>39</sup> Prior to dismissal, a court must consider whether an alternative forum exists, and the court must balance both private and public interests.<sup>40</sup> Although there is generally a strong presumption not to disturb the plaintiff's choice of forum, in *Piper Aircraft Co. v. Reyno*, the U.S. Supreme Court concluded that when a plaintiff is foreign, the presumption that the U.S. forum is convenient is less reasonable.<sup>41</sup> Given that the actions in question occurred outside of

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<sup>33</sup> PAN Pesticides Database – Chems., DBCP - Identification, Toxicity, Use, Water Pollution Potential, Ecological Toxicity and Regulatory Information, [www.pesticideinfo.org/Detail\\_Chemical.jsp?Rec\\_Id=PC33459#Toxicity](http://www.pesticideinfo.org/Detail_Chemical.jsp?Rec_Id=PC33459#Toxicity) (last visited July 4, 2009).

<sup>34</sup> PHILIPPE BOURGOIS, *ETHNICITY AT WORK: DIVIDED LABOR ON A CENTRAL AMERICAN BANANA PLANTATION* 127 (1989).

<sup>35</sup> Gonzalez & Loewenberg, *supra* note 26.

<sup>36</sup> BOURGOIS, *supra* note 34, at 127.

<sup>37</sup> See Winston Anderson, *Forum Non Conveniens Checkmated? - The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 183-216 (Spring 2001).

<sup>38</sup> Santoyo, *supra* note 10, at 704.

<sup>39</sup> *Id.*

<sup>40</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

<sup>41</sup> *Id.*

the United States, defendants have used *forum non conveniens* to argue that the chosen U.S. venue is not convenient and that another venue would be more appropriate and just.<sup>42</sup> In the case of foreign plaintiffs, one assumes that the judicial systems in their home countries would tend to favor them. Therefore, a trial in their native country would be an adequate alternative to trial in the United States.<sup>43</sup>

Although this doctrine was developed before the establishment of many transnational corporations, more recently, it has been used by these corporations to avoid going to court, particularly in the United States.<sup>44</sup> Theoretically, a foreign court would be less favorable to a U.S.-based company. However, transnational companies have been able to employ the best lawyers in foreign countries, which has helped them to take advantage of weaker judicial systems.<sup>45</sup> This certainly has been the case in many Latin American countries.<sup>46</sup> In addition, disputes have tended to be settled out of court.<sup>47</sup>

To combat this trend, civil society and international organizations for decades have been pressuring Central American governments to implement policies that would protect local workers from exploitation by transnational corporations. In the last decade or more, Central American governments have responded by strengthening their human-rights laws. In fact, Nicaragua passed a DBCP law in 2000 that offers protection and financial incentives to workers harmed by the negligent practices of transnational corporations. This established a framework for a trial in 2002 in which a court in Nicaragua ordered Shell, Dow, and Dole to pay \$489 million in damages to 450 banana workers.<sup>48</sup> These companies have rejected the judgment and the authority of the court in Nicaragua.<sup>49</sup> While there are concerns over the enforceability of this judgment in the United States, the Nicaraguan DBCP law made the *alternative forum* in Nicaragua less desirable for transnational corporations.<sup>50</sup>

#### IV. *DOE V. UNOCAL* SETS JURISDICTION PRECEDENT

The *Doe v. Unocal Corp.* case is significant because it may have

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<sup>42</sup> Santoyo, *supra* note 10, at 707.

<sup>43</sup> *Id.* at 708.

<sup>44</sup> *Id.* at 712-13.

<sup>45</sup> See Anderson, *supra* note 37.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Santoyo, *supra* note 10, at 730-31.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

helped to establish legal avenues for U.S. courts to hold transnational corporations liable for human-rights abuses that were committed in foreign countries. As the case advanced through both the federal and state court proceedings, the judges ruled in favor of the plaintiffs on many of their motions.<sup>51</sup> However, no legal precedent was established after the eight-year legal battle, because the plaintiffs settled with Unocal out of court. Notwithstanding the settlement, some of the judges' dicta suggest that the Alien Tort Claims Act (ATCA)—a little-known provision of the Judiciary Act of 1789—is a promising avenue for holding corporations liable for international human-rights violations.

The case of *Doe v. Unocal* involved the construction of the Yadana pipeline in Burma.<sup>52</sup> The plaintiffs, villagers from the Tenasserim region of Burma, sued Unocal for its complicity in human-rights atrocities committed by the Burmese government and military during the construction of the pipeline.<sup>53</sup> The plaintiffs claimed that Unocal aided and abetted the Burmese military, intelligence, and/or police forces in using violence and intimidation to relocate whole villages, enslave villagers living in the area of the pipeline, steal property, and commit assault, rape, torture, forced labor, and murder.<sup>54</sup>

By allowing foreigners to sue in U.S. courts for customary international law violations committed abroad, the ATCA allowed the plaintiffs to sue Unocal.<sup>55</sup> Before it was vacated, the panel decision in *Doe v. Unocal* upholding the ATCA's reach gave human-rights activists reason to believe that, in certain instances, the ATCA grants the federal jurisdiction necessary to hold corporations liable for human-rights offenses that corporations commit or contribute to abroad.<sup>56</sup> Even though the Ninth Circuit panel's ruling was voided by the en banc order, the panel's ruling suggests that at least some of the judges on the Ninth Circuit take an expansive view of the jurisdiction granted by the ATCA. In a parallel case taken to the California Superior Court, the plaintiffs similarly argued Unocal was vicariously liable for human-rights

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<sup>51</sup> See *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) (en banc) (granting unopposed motion to vacate district court opinion at 110 F. Supp. 2d 1294 (C.D. Cal. 2000)).

<sup>52</sup> *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997) (clarifying order).

<sup>53</sup> *Id.* Since 1988, the military junta in Burma has promoted the name of the state as Myanmar. *Id.* at 884. The United States continues to refer to the state as Burma. Although referred to as Burma in this article, both names are used throughout the *Doe v. Unocal* lawsuits.

<sup>54</sup> *Id.* at 883-84.

<sup>55</sup> See Terese M. O'Toole, *Amerada Hess Shipping Corp. v. Argentine Republic: An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 839 (1988).

<sup>56</sup> See *Doe v. Unocal Corp.*, 395 F.3d 932.

atrocities committed by the Burmese government and military during the pipeline construction.<sup>57</sup> Unocal's motion for summary judgment on the plaintiffs' claim of vicarious liability was denied because the court found a triable issue of fact.<sup>58</sup>

More promising for future plaintiffs was Judge Stephen Reinhardt's concurring opinion in the Ninth Circuit panel's decision to reverse the district court's grant of summary judgment. Judge Reinhardt found that the plaintiffs did not need to satisfy international-law tests of liability to hold Unocal accountable.<sup>59</sup> Using the federal common-law theories of joint venture liability, agency liability, and reckless disregard liability, Reinhardt would create more viable ways for future plaintiffs to sue corporations under the ATCA.<sup>60</sup>

#### V. *TELLEZ V. DOLE FOOD CO.*: COMPENSATORY DAMAGES

Twelve workers originally filed the lawsuit against Dole and Dow, claiming that their exposure to DBCP during the 1970s and 1980s made them sterile.<sup>61</sup> Duane C. Miller, the attorney for the plaintiffs, argued Dole was aware that DBCP could harm the workers but did not inform them,<sup>62</sup> while Dole attorney, Rick McKnight, argued that the workers were not exposed to high enough levels of the pesticide to cause their sterility.<sup>63</sup> In the end, the jury determined that only six of the twelve plaintiffs had been substantially harmed by the pesticide DBCP.

According to Miller, Dole executives ignored safety recommendations from Dow and continued using the pesticide.<sup>64</sup> During his opening statements, Miller demonstrated how Dole had been informed by Dow of the dangers of the pesticide when he used a large screen to show the jury internal memos from Dole and Dow, some dating back to the early 1960s. Miller told the jury that the documents show that

<sup>57</sup> *Doe v. Unocal*, Nos. BC 237 980, BC 237 697, 2002 WL 33944505 (Cal. Super. Ct. L.A. County June 10, 2002) (trial order).

<sup>58</sup> *Id.*

<sup>59</sup> *Doe v. Unocal Corp.*, 395 F.3d 932, 965 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated, reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) (en banc) (granting unopposed motion to vacate district court opinion at 110 F. Supp. 2d 1294 (C.D. Cal. 2000)).

<sup>60</sup> *Id.*

<sup>61</sup> See First Amended Complaint, *Tellez v. Dole Food Co.*, No. BC 312 852, 2004 WL 5468592 (Cal. Super. Ct. L.A. County Sept. 7, 2004).

<sup>62</sup> *Id.*

<sup>63</sup> See Answer and Affirmative Defenses to Plaintiffs' First Amended Complaint, *Tellez v. Dole Food Co.*, No. BC 312 852, 2004 WL 5535854 (Cal. Super. Ct. L.A. County Sept. 22, 2004).

<sup>64</sup> *Tellez v. Dole Food Co.*, 2004 WL 5468592.

despite Dow's knowledge of the dangers, Dole did not warn its workers.<sup>65</sup> According to McKnight, the twelve plaintiffs were not exposed to harmful levels of the pesticide.<sup>66</sup> He told the jury during his opening statements that the twelve plaintiffs were exposed to levels of DBCP much lower than the pesticide applicators and the sixty men from California who became sterile from working in the pesticide manufacturing plant.<sup>67</sup>

The key question in the trial became the point at which exposure to DBCP—through contact with the skin or through inhalation—is dangerous to field workers.<sup>68</sup> Dow maintained that the chemical was not harmful if administered properly; Dole insisted that careful measures were taken to minimize the hazards when applying DBCP, such as applying the pesticide during the night.<sup>69</sup> McKnight denied that Dole had fraudulently concealed the danger from workers, and he claimed that the plaintiffs had become sterile before exposure.<sup>70</sup> Miller, the plaintiffs' attorney, asked whether applying the chemical during the night would minimize exposure, especially if used in high quantities.<sup>71</sup> He claimed that Dole had "used 1.4 million pounds of [DBCP]."<sup>72</sup>

The jurors found that DBCP was harmful and that Dole actively concealed the danger from the plantation workers.<sup>73</sup> The jury determined that six of the twelve plaintiffs had been sterile before exposure, and their suits were dismissed. The victorious plaintiffs were awarded damages ranging from \$311,200 to \$834,000 each.<sup>74</sup> Total damages amounted to \$3.3 million.<sup>75</sup> Furthermore, the jury found that the companies acted with malice and fraud<sup>76</sup> because Dole concealed from

<sup>65</sup> T. Christian Miller, *Pesticide Trial Begins Against Dole, Dow - The Food Company Used a Product Made by the Chemical Firm That Left Nicaraguan Workers Sterile, Lawyer Says. The Companies Deny It*, L.A. TIMES, July 20, 2007, available at <http://articles.latimes.com/2007/jul/20/local/me-pest20>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> John Spano, *Dole Must Pay Farmworkers \$3.2 Million; Six Nicaraguans Win Lawsuit Alleging That a Dow Pesticide Used To Boost Banana Harvests Made Them Sterile. Four More Suits Are Pending*, L.A. TIMES, Nov. 6, 2007, available at <http://articles.latimes.com/2007/nov/06/local/me-dole6>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Banana Workers Win \$2.5M in Dole Lawsuit*, CBS NEWS BUS., Nov. 16, 2007, [www.cbsnews.com/stories/2007/11/16/business/main3512301.shtml](http://www.cbsnews.com/stories/2007/11/16/business/main3512301.shtml).

<sup>75</sup> Spano, *supra* note 68.

<sup>76</sup> John Spano, *Executive Says "New Dole" Should Not Pay for Misdeeds of "Old Dole,"*

the plaintiffs how DBCP had sterilized California workers in the past.<sup>77</sup> This gave the plaintiffs the opportunity to pursue punitive damages.

## VI. *TELLEZ V. DOLE FOOD CO.*: PUNITIVE DAMAGES

Because the jury found Dole and Dow had acted with malice and fraud, the plaintiffs were entitled to a separate proceeding over punitive damages. In California, punitive damages are designed to punish wrongdoers. Generally punitive damages are capped at about ten times actual damages.<sup>78</sup> Dow, whose headquarters are in Michigan, was not subject to punitive damages.<sup>79</sup> It won a pretrial motion to establish that the case against it was governed by Michigan law, which does not allow punitive damages.<sup>80</sup> Dole was therefore left to defend itself against the plaintiffs' pursuit of punitive damages.

### A. DOW AND PUNITIVE DAMAGES

During the 1950s, 1960s, and 1970s, Dow formulated and manufactured DBCP in California as well as other places and sold it to Dole. This set up a horizontal choice-of-law question to determine whether Michigan or California law applied. Dow argued successfully that California law does not apply to Dow. The plaintiffs argued that California law applies because Dow used California laboratories and markets to develop and sell DBCP. Judge Chaney decided in favor of Dow on the choice-of-law dispute<sup>81</sup> and granted the company's motion for the application of Michigan law.<sup>82</sup> The grant of the motion was

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L.A. TIMES, Nov. 15, 2007, available at <http://articles.latimes.com/2007/nov/15/local/me-dole15>.

<sup>77</sup> See John Spano, *Dole Must Pay \$2.5 Million to Farmhands; The Verdict on Behalf of Five Nicaraguan Banana Harvesters Punishes the Giant Food Grower for Using a Pesticide That Had Caused Sterility*, L.A. TIMES, Nov. 16, 2007, available at <http://articles.latimes.com/2007/nov/16/local/me-dole16>.

<sup>78</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

<sup>79</sup> *Banana Workers Win \$2.5M in Dole Lawsuit*, *supra* note 74.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Tellez v. Dole Food Co.*, No. BC 312 852, 2006 WL 5001327 (Cal. Super. Ct. L.A. County Sept. 14, 2006) (trial order). Judge Chaney ruled that for the constitutional application of California law to a Michigan corporation, the following must exist: "(1) the defendant did business in California; (2) the defendant's princip[al] offices were located in California; (3) a significant number of class members were located in California; and (4) the challenged conduct emanates from California." Judge Chaney admitted that Dow had *extensive* contacts with California. For example, Dow performed research and conducted presale negotiations in California. Furthermore, Dow employees in Michigan and Florida communicated with Dole employees in California regarding the hazards and safe-handling procedures of DBCP. *Id.*

However, the contacts, according to Judge Chaney, are not enough for California law to be

significant because it meant Dow could not be held liable for punitive damages.<sup>83</sup>

#### B. DOLE AND PUNITIVE DAMAGES

During the trial, Dole lawyers made the distinction between the “old Dole” from 1977 and the “new Dole” of today, arguing that the “new Dole” should not be punished for what the “old Dole” had done.<sup>84</sup> C. Michael Carter, Dole’s Vice President and General Counsel, testified that “today’s Dole” would never have ignored evidence that the pesticide DBCP could leave its banana workers sterile, as the “old Dole” from 1977 did. He asserted that “today’s Dole” does not put concern for production over the safety of its 75,000 workers. Carter also mentioned how only one of the sixty top executives employed by the firm in 1977 is still working for Dole today and that the new corporate code of conduct is designed to “empower” employees. According to Carter, the company has pledged never to use pesticides banned in the United States or Europe.<sup>85</sup> McKnight and the company’s other defense attorneys argued that the company now emphasizes worker and environmental safety.<sup>86</sup>

Duane Miller, the workers’ lawyer, attempted to undermine the distinction between the “old Dole” and the “new Dole.” Miller challenged Carter’s assertion that the company indeed emphasizes worker and environmental safety when he suggested that Dole still uses dangerous pesticides in Central America. He referred to paraquat, a commonly used herbicide that when ingested in high enough amounts can cause liver failure, heart failure, kidney failure, and other perverse side effects.<sup>87</sup> Miller went on to say that Dole not only failed to protect its workers but also made it impossible for the workers to protect

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*constitutionally* applied for the following reasons:

Plaintiffs are not residents of California and have never visited, except for purposes of this litigation. Dow is not a resident of California. The DBCP that allegedly injured plaintiffs (in Nicaragua) was shipped by Dow from Arkansas to Nicaragua via Mississippi and Louisiana, never passing through California. There appears to be no evidence Dow used any California facility or relied on any California regulation or law to get the DBCP to Nicaragua. Dow executed all sales contracts outside California and performed them all outside California. *Id.*

For these reasons, Judge Chaney ruled against the plaintiffs’ claims against Dow. However, she conceded to one of the arguments made by the plaintiffs, which could be relevant for the plaintiffs in the future. *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Spano, *supra* note 76.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Ctrs. for Disease Control and Prevention, Facts About Paraquat, Feb. 22, 2006, <http://emergency.cdc.gov/agent/paraquat/basics/facts.asp>.

themselves from sterility. He referred to the company's conduct as "reprehensible" and asserted that such conduct "should be punished."<sup>88</sup>

The jury awarded the five workers \$500,000 each, amounting to \$2.5 million. Both lawyers' initial reaction showed that they were pleased with the verdict. The defendants' lawyer, McKnight, said that the verdict was "a huge defeat" for the plaintiffs.<sup>89</sup> Typically, plaintiffs are awarded punitive damages that are multiples of compensatory damages, he said.<sup>90</sup> Clare Pastore, a University of Southern California law professor, supported McKnight's claim when she observed, "Dole got out of this very cheaply."<sup>91</sup> Plaintiffs' lawyer Miller, however, said the importance of the verdict is that Dole now can be held accountable for what they do "south of our [U.S.] border."<sup>92</sup> Antonio Hernandez Ordeñana, the Nicaraguan lawyer for the workers, agreed with Miller that the importance of the verdict should not be judged in monetary terms: "What really matters is that Dole sterilized these peasants and thousands more humble Nicaraguan peasants, and in the rest of Central America, and we proved it."<sup>93</sup> Alejandro Garro, a professor of Latin American law at Columbia University, agreed that the importance lies in the verdict rather than the amount because it will make corporations such as Dole "pay attention to what they do abroad."<sup>94</sup> However, these reactions changed after Judge Chaney overturned the jury verdict.

#### VII. *TELLEZ V. DOLE FOOD CO.*: JUDGMENT NOTWITHSTANDING VERDICT (JNOV)<sup>95</sup>

Judge Chaney modified the jury's compensatory damages verdict and denied punitive damages because she believed that the jury did not correctly apply the law and that there were insufficient facts on which to base its decision.<sup>96</sup> Judge Chaney originally granted compensatory damages on the basis of fraudulent concealment because she saw that a special relationship was established between the plantation workers and

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<sup>88</sup> Spano, *supra* note 76.

<sup>89</sup> Spano, *supra* note 77.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> "A JNOV must be granted where, viewing the evidence in the light most favorable to the party securing the verdict, the evidence compels a verdict for the moving party as a matter of law." *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.*, 144 Cal. App. 4th 1175, 1194 (2006).

<sup>96</sup> See *Tellez v. Dole Food Co.*, No. BC 312 852, 2008 WL 744051, slip op. (Cal. Super. Ct. L.A. County Mar. 7, 2008).

Dole.<sup>97</sup> This relationship gave the company the duty to disclose the information about the potential hazards of DBCP.<sup>98</sup> She, therefore, denied the defendants' motion to vacate damages based on *fraudulent concealment*.<sup>99</sup> However, Judge Chaney ruled in favor of the defendants, granting their motion for JNOV regarding strict liability, because there was no evidence demonstrating that Dole was a seller or distributor of DBCP.<sup>100</sup> Judge Chaney agreed with the defendants that the plaintiffs sought to expand strict liability in order to apply the doctrine to Dole.<sup>101</sup> Judge Chaney also sided with the defendants and granted the motion for JNOV regarding punitive damages.<sup>102</sup> The primary reason was that Dole's major actors from the 1970s—such as officers, directors, and managing agents—are no longer active today. Because none of these actors is active currently, Judge Chaney noted that awarding punitive damages as a means of punishment would be “arbitrary.”<sup>103</sup>

#### VIII. TELLEZ V. DOLE FOOD CO.: RESPONSE TO JUDGE CHANEY'S RULINGS

Judge Chaney's ruling alters the case in major ways. First, the original verdicts, which totaled \$5.8 million against Dole, have now been reduced to \$1.58 million.<sup>104</sup> Second, Dole's motion for a new trial with respect to the claims of one of the plaintiffs has been granted.<sup>105</sup> Dole representatives and lawyers were pleased with this development. Dole's general counsel Michael Carter agreed with Judge Chaney that awarding punitive damages in this case would be improper: “We always have

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<sup>97</sup> Tellez v. Dole Food Co., No. BC 312 852, 2008 WL 744052 (Cal. Super. Ct. L.A. County Mar. 7, 2008).

<sup>98</sup> *Id.* Central to establishing fraudulent concealment is deciding whether the defendant had the duty to disclose facts to the plaintiffs. Without this duty, the courts cannot hold the defendant accountable for fraud. Judge Chaney saw that such a duty existed for Dole because

there was a very close, convoluted and intertwined contractual working relationship between the Dole entities and the plantation owners that it is impossible to tease apart what was originally an instruction by Dole followed by the plantation owners and the directions to the farm workers initiated solely by the owners. *Id.*

In short, the farm operated according to defendant's instructions. *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Tellez v. Dole Food Co., No. BC 312 852, 2008 WL 744051 (Cal. Super. Ct. L.A. County Mar. 7, 2008) (trial order).

<sup>103</sup> *Id.*

<sup>104</sup> Press Release, Dole Food Co., *supra* note 7.

<sup>105</sup> Tellez v. Dole Food Co., No. BC 312 852, 2008 WL 744048 (Cal. Super. Ct. L.A. County Mar. 7, 2008).

maintained that punitive damages are inappropriate in these cases and would violate fundamental constitutional principles.”<sup>106</sup>

Carter also commented on the future implications of this ruling. He said, “The rationale of Judge Chaney’s ruling clearly appears to preclude the award of punitive damages against Dole in any of the other cases pending in California, regardless of whether the plaintiffs are from Nicaragua or any other foreign country.”<sup>107</sup> Dole attorney, Rick McKnight, agreed with Carter that the judge’s ruling will affect the over 6000 pending claims filed against Dole by other plantation workers in Latin America: “These cases will dry up, and they should.”<sup>108</sup> In McKnight’s opinion, “These cases ought to be settled by neutral principles, not litigation.”<sup>109</sup>

#### IX. *TELLEZ V. DOLE FOOD CO.*: RECENT FRAUD CHARGES

Dole now challenges the validity of the 2008 verdict in *Tellez v. Dole Food Co.*, which is pending on appeal in the California state court system. Dole’s appeal is based on allegations that some of the lawyers who represented the plaintiffs—lawyers Juan Dominguez from Los Angeles, Antonio Ordeñana from Nicaragua, and others—conspired with Nicaraguan judges to falsify documents claiming the plaintiffs were sterile.<sup>110</sup> Given recent events surrounding two other cases brought by these lawyers, these allegations appear to be legitimate.

On April 23, 2009, Judge Chaney dismissed the cases *Mejia v. Dole Food Co.* and *Rivera v. Dole Food Co.*<sup>111</sup> Like the *Tellez* case, these cases were brought on behalf of Nicaraguan banana plantation workers who said they were made sterile from exposure to DBCP over three decades ago on banana farms contracted by Dole. In September 2008, Dole’s lawyers began filing depositions of unidentified witnesses in Nicaragua who claimed that some of the plaintiffs had never worked on banana farms; that work certificates and lab reports had been falsified; and that some of the plaintiffs have fathered children, despite their

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<sup>106</sup> Press Release, Dole Food Co., *supra* note 7.

<sup>107</sup> *Id.*

<sup>108</sup> John Spano, *L.A. Judge Reduces Dole’s Damages in Pesticide Case*, L.A. TIMES, Mar. 11, 2008, available at <http://articles.latimes.com/2008/mar/11/local/me-dole11>.

<sup>109</sup> *Id.*

<sup>110</sup> Press Release, Dole Food Co., *supra* note 11.

<sup>111</sup> See generally *Mejia v. Dole Food Co.*, No. BC 379 820, 2009 WL 1615826 (Cal. Super. Ct. L.A. County Mar. 11, 2009) (trial order) (issuing an order to show cause as to why dismissal should not be granted; explaining the complexities and current status of *Tellez v. Dole Food Co.*).

claimed sterility.<sup>112</sup> Dole's lawyers' motions led Judge Chaney to order a separate trial concerning allegations of fraud.<sup>113</sup>

The separate trial eventually led to the April 23rd dismissal of the *Mejia* and *Rivera* cases.<sup>114</sup> Judge Chaney determined that Dole and the other companies were deprived of due process as a result of conspiracy committed by the lawyers.<sup>115</sup> These lawyers apparently conspired with Nicaraguan judges to recruit fraudulent plaintiffs, teach the plaintiffs to lie about working on banana farms, and assist them in obtaining false lab reports and other documents concerning their sterility.<sup>116</sup> Furthermore, intimidation and obstruction were used to prevent any investigation into the fraudulent scheme. According to Judge Chaney, the court found "by clear and convincing evidence that both Dominguez and Ordeñana directed people to hurt investigators on site and hurt anybody that came forward to testify about illegal schemes brewing in Nicaragua."<sup>117</sup> In fact, one day during the three-day hearing was held behind closed doors to protect witnesses.<sup>118</sup> According to Judge Chaney, there was a "pervasive atmosphere of fear and extreme danger" that threatened the witnesses.<sup>119</sup>

Judge Chaney has gone on record stating the evidence of fraud in the *Mejia* and *Rivera* cases has contaminated the judgment in another case concerning Nicaraguan banana workers' supposed exposure to DBCP.<sup>120</sup> Judge Chaney found evidence that the U.S. and Nicaraguan plaintiffs' lawyers, in *Osorio v. Dole Food Co.*, had "conspired with Nicaraguan judges to fix DBCP cases by manufacturing false lab reports."<sup>121</sup> The conspiracy included the Nicaraguan judge who issued the *Osorio* judgment, Judge Socorro Toruao. According to Judge Chaney's findings, Judge Toruao not only directed the participants of a meeting with U.S. and Nicaraguan law firms and laboratories to obtain falsified medical reports for use in trials, but also threatened "jail time"

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<sup>112</sup> Amanda Bronstad, *Judge Alleges Possible Fraud in Banana Cases*, NAT'L L.J., Mar, 24, 2009, [www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202429313658](http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202429313658).

<sup>113</sup> *Id.*

<sup>114</sup> *See generally Mejia*, 2009 WL 1615826.

<sup>115</sup> Press Release, Dole Food Co., *supra* note 11.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Edvard Pettersson, *Dole Uses Judge Attack in Banana Case to Undo \$2 Billion Awards*, BLOOMBERG, June 24, 2009, available at [www.bloomberg.com/apps/news?pid=20601127&sid=aS5ED.ApmVPk](http://www.bloomberg.com/apps/news?pid=20601127&sid=aS5ED.ApmVPk).

<sup>119</sup> Press Release, Dole Food Co., *supra* note 11.

<sup>120</sup> *See generally Mejia v. Dole Food Co.*, No. BC 379 820, 2009 WL 1615826 (Cal. Super. Ct. L.A. County Mar. 11, 2009).

<sup>121</sup> Press Release, Dole Food Co., *supra* note 11; *see also Osorio v. Dole Food Co.*, No. 07-22693-CIV, 2009 WL 48189 (S.D. Fla. Jan. 5, 2009).

for anyone who talked. The *Osorio* case is currently pending before a federal district court in Miami, where Dole and other companies are opposing efforts by Nicaraguan plaintiffs to enforce a \$98 million DBCP-related judgment delivered by a Nicaraguan judge.<sup>122</sup>

As in the *Osorio* case, Judge Chaney ruled that the fraudulent conspiracy that prompted the court's dismissal of the *Mejia* case also "contaminated each and every one of the plaintiffs in the *Tellez* trial." Judge Chaney elaborated by saying, "[H]ad I known about [the fraud]" during the *Tellez* case, "I would have acted differently."<sup>123</sup> Judge Chaney has referred Juan Dominguez to the State Bar of California and other agencies for prosecution on charges of perjury, obstruction of justice, defrauding a court, conspiring to extort a U.S. company, and possibly federal racketeering violations.<sup>124</sup> The lawyers from the Sacramento law firm Miller, Axline & Sawyer were absolved of wrongdoing by the judge.<sup>125</sup>

#### X. *TELLEZ V. DOLE FOOD CO.*: WHAT DOES THIS MEAN FOR THE FUTURE?

After overcoming *forum non conveniens* and after the *Tellez* jury awarded the plantation workers compensatory and punitive damages, the *Tellez v. Dole Foods* case led human-rights advocates to believe that we were entering a new era of corporate accountability in which transnational corporations could no longer evade domestic and international laws. This sentiment was expressed by one plaintiffs' attorney, Duane Miller, when he stated that Dole and other U.S. transnational corporations from now on must be mindful of what they do "south of our [U.S.] border."<sup>126</sup> Evidently, Miller's optimism was expressed prematurely. Judge Chaney's overruling of the jury's verdicts revealed that it takes more than overcoming *forum non conveniens* to hold transnational corporations responsible in U.S. courts for their actions abroad. More damaging to Miller's optimism is the impact that Judge Chaney's recent ruling in the *Mejia* and *Rivera* cases will likely have on the future of the *Tellez* case as well as the more than forty cases pending in Los Angeles, where thousands of plaintiffs from Latin

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<sup>122</sup> *Osorio*, 2009 WL 48189.

<sup>123</sup> Press Release, Dole Food Co., *supra* note 11.

<sup>124</sup> Linda Deutsch, *Judge Refers Lawyer for Prosecution in Dole Fraud*, S.F. CHRON., May 8, 2009, available at [www.sfchroniclemarketplace.com/cgi-bin/article.cgi?f=/n/a/2009/05/08/state/n182124D64.DTL&hw=plaintiffs&sn=005&sc=461](http://www.sfchroniclemarketplace.com/cgi-bin/article.cgi?f=/n/a/2009/05/08/state/n182124D64.DTL&hw=plaintiffs&sn=005&sc=461).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

America are seeking damages in U.S. courts because of the use of DBCP and other chemicals.<sup>127</sup>

Despite these challenges, we ought not conclude that no progress has been made with respect to corporate accountability. The globalization of communications mechanisms such as the Internet has generated unprecedented awareness of human and environmental rights, and enabled non-governmental organizations (NGOs),<sup>128</sup> consumer groups, and even employees to publicly hold multinationals accountable for their business practices. Additionally, as countries in Central America have broken free from the political and economic influence of the banana multinationals, they have begun to advocate for their people, not only by passing legislation that enables their citizens to hold transnationals accountable, as in Nicaragua, but also by passing laws that regulate pesticides.

Furthermore, corporations are increasingly being held accountable by consumer choice. As consumers have more access to information, they are exerting influence on the banana multinationals to improve their environmental and social practices through their choice of which bananas to buy. NGO's are also more involved in pressuring transnationals to clean up their acts.<sup>129</sup> Chiquita and Dole participate in several programs that embrace social and environmental standards, such as the Rainforest Alliance's certified banana project and the "Better Banana Project" (formerly called "Eco OK").<sup>130</sup> Both programs stipulate a certain level of worker health and safety as well as environmental standards.<sup>131</sup>

Despite these trends that seem to improve corporate accountability, the *Tellez v. Dole Foods* case indicates that the pursuit of compensatory damages and punitive damages in U.S. courts for past wrongs committed overseas by U.S.-based transnational corporations faces substantial legal hurdles. After Judge Chaney's decision to throw out the punitive damages and reduce the compensatory damages, filing lawsuits against such corporations seems unlikely to measurably influence or change

<sup>127</sup> See Edvard Pettersson, *Dole Food Tells Judge That Banana Workers' Claims Are a Fraud*, BLOOMBERG, Apr. 22, 2009, available at [www.bloomberg.com/apps/news?pid=20601103&sid=aAxfXEj6jPT0](http://www.bloomberg.com/apps/news?pid=20601103&sid=aAxfXEj6jPT0).

<sup>128</sup> Non-governmental organizations (NGOs) represent groups of independent citizens at the United Nations and "are often the most effective voices for the concerns of ordinary people in the international arena." Global Forum Policy, NGOs, [www.globalpolicy.org/ngos.html](http://www.globalpolicy.org/ngos.html) (last visited July 12, 2009).

<sup>129</sup> See Global Forum Policy, NGOs, [www.globalpolicy.org/ngos.html](http://www.globalpolicy.org/ngos.html) (last visited July 12, 2009).

<sup>130</sup> Banana Link, Environmental and Social Certification, Banana Project, [www.bananalink.org.uk/content/view/112/64/lang/en/](http://www.bananalink.org.uk/content/view/112/64/lang/en/) (last visited July 12, 2009).

<sup>131</sup> ARIAS, *supra* note 20, at § 5.5.

future actions of companies operating overseas.

Secondly, and more importantly, the recent scandal surrounding the cases coming from Latin America raises serious concerns about whether truth can be ascertained when foreigners bring cases to U.S. courts. Some countries, such as Nicaragua, lack the institutional capacity to prevent conspiracy among lawyers, judges, and citizens, and to protect the integrity of evidence. According to one plaintiffs' lawyer, Michael Axline, "What we have all learned from this process is determining where the truth lies in Nicaragua is very difficult."<sup>132</sup> Thus, the question that will certainly be asked is "Why should U.S. courts be open to cases brought by foreigners from countries where truth is difficult to come by?"

These two challenges will make it more difficult for actual victims of abuse by transnational corporations to pursue their cases in American courts.

## XI. CONCLUSION

On November 5, 2007, a Los Angeles Superior Court awarded six banana plantation workers from Nicaragua \$3.3 million in damages. On November 15, 2007, the same jury ordered Dole Food Co. to pay \$2.5 million in punitive damages to five of the six men. While the case marked the first time that a jury in the United States found Dole liable for its conduct outside of U.S. borders, Judge Victoria Chaney substantially modified the verdict when she granted the defendants' motions for JNOV with respect to punitive damages and strict liability. By granting the two motions, she overturned the punitive damages award and reduced the compensatory damages. As a result, the \$5.8 million in damages that the plaintiffs were to receive was reduced to \$1.58 million.<sup>133</sup> Furthermore, Dole's motion for a new trial with respect to the claims of one of the plaintiffs was granted.<sup>134</sup>

In this article, we have explored the circumstances that led to the landmark verdict in Los Angeles, examined how Judge Chaney's rulings changed the trajectory of the case, and theorized how Judge Chaney's rulings might impact future practices of transnational corporations. In the past, multinational corporations have successfully claimed *forum non conveniens*, which blocked attempts by foreign nationals to bring suits in

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<sup>132</sup> Deutsch, *supra* note 124.

<sup>133</sup> Press Release, Dole Food Co., *supra* note 7.

<sup>134</sup> Tellez v. Dole Food Co., No. BC 312 852, 2008 WL 744048 (Cal. Super. Ct. L.A. County Mar. 7, 2008).

the United States.<sup>135</sup> This maneuver was overcome by the plaintiffs who filed the *Tellez v. Dole Foods* case. Nevertheless, the plaintiffs' case faced unexpected legal obstacles that were not revealed until Judge Chaney overruled the jury's verdicts. Ultimately, this case shows the difficulty that foreigners face when seeking justice in U.S. courts for actions committed against them by U.S.-based transnational corporations, especially when the actions occurred several decades ago.

Because of the many barriers the U.S. judicial system places before such foreigners, it is unlikely that the threat of pursuing litigation in U.S. courts will deter bad behavior by U.S.-based transnational companies operating abroad. Moreover, the whiff of fraud surrounding the Nicaraguan banana workers' cases will likely make it more difficult for foreigners to pursue their grievances in U.S. courts. These realities cloud the thousands of cases filed by foreign agricultural workers against American companies.

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<sup>135</sup> Santoyo, *supra* note 10.