

# LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL HARM & EMERGING GLOBAL ENVIRONMENTAL LAW



NOAA  
October 12, 2010

# GLOBAL ENVIRONMENTAL LAW

School of Law

Pace Environmental Law Review

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Year 2009

## The Globalization of Environmental Law

Robert V. Percival



26 Pace Env't L. Rev. 451 (2009)

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36 Ecology Law Q. 615 (2009)

## The Emergence of Global Environmental Law

Tseming Yang\* & Robert V. Percival\*\*

*With the global growth of public concern about environmental issues over the last several decades, environmental legal norms have become increasingly internationalized. This development has been reflected both in the surge of international environmental agreements as well as the growth and increased sophistication of national environmental legal systems around the world. The result is the emergence of a set of legal principles and norms regarding the environment, such that one can arguably describe it as a body of law. After exploring the diverse forces that are contributing to the emergence of what we call "global environmental law," this Article considers the implications of this emergence for the implementation, practice, and development of environmental law worldwide.*

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\*\* Robert F. Stanton Professor of Law and Director, Environmental Law Program, University of Maryland School of Law.

# Chemical Policy Initiatives

UNEP, OECD, WHO  
SAICM/ICCM, IFCS, IPCS

## Canada

- DSL Categorization
- CEPA Reauthorization
- GHS Implementation

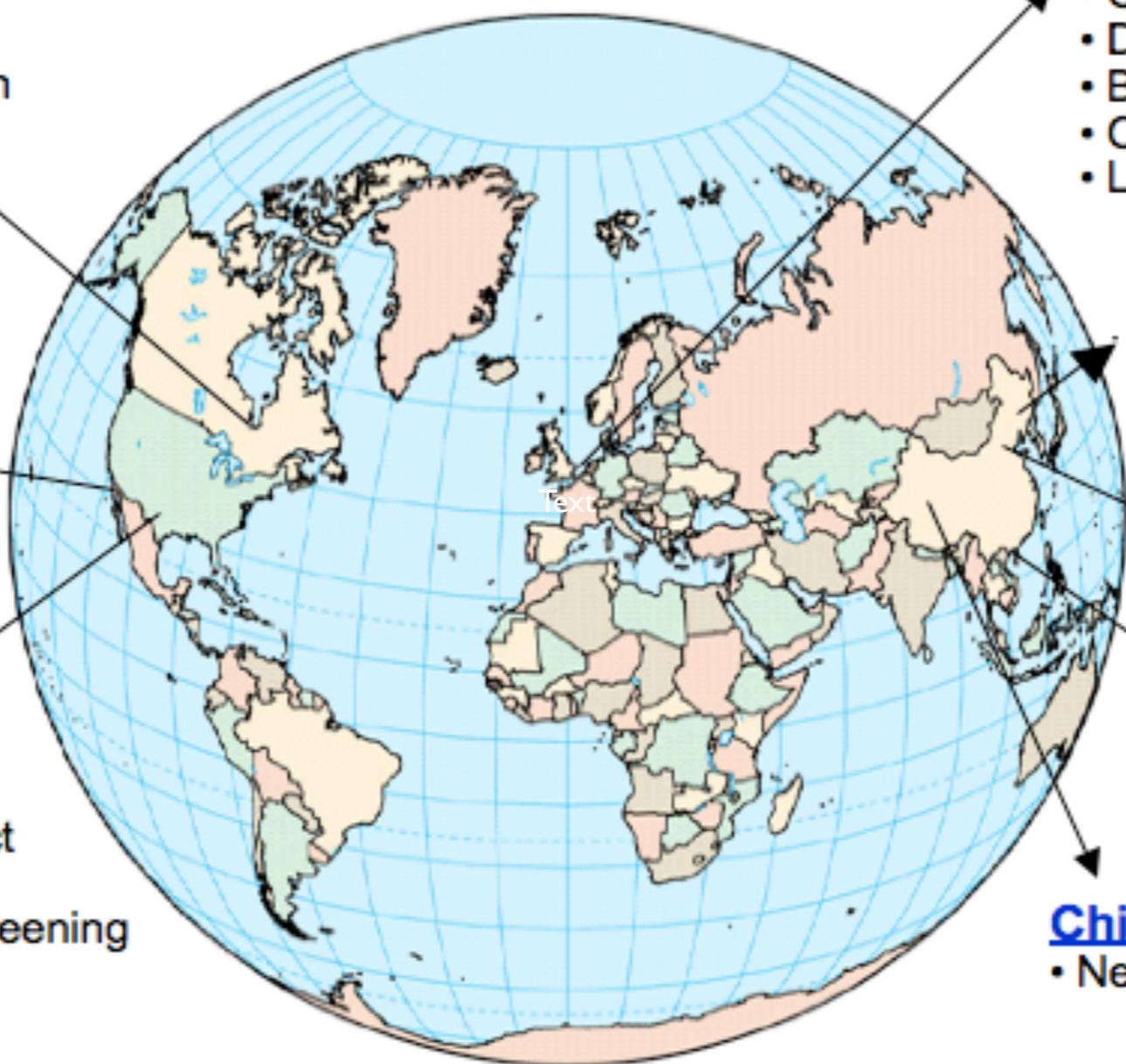
## CA, WA, NY, MA, MN

- Numerous proposals



## US

- Kid Safe Chem Act
- Env. Health Tracking Act
- Biomonitoring
- Endocrine Disruptor Screening
- GHS Implementation



## EU

- REACH
- Cosmetic Directive
- Detergents Regulation
- Biocides
- Children's Health/SCALE
- Labeling Policy

## Japan

- Chem Safety Control Law
- GHS
- PRTR

## Korea

- Toxic Chemical Law

## Philippines

- Toxic Substances

## China

- New Chemical Control Law

### Voluntary Industry Initiatives

ICCA HPV	US EHPV	HERA
GPS	VCCEP	ACA
RCMS	Japan HPV Challenge	

### Retailer/Purchaser Initiatives

Wal-Mart	Institutional Purchasers
NGOs	Public "Deselection"

Source: WJ Greggs & ES Rosenberg



# Forces Driving the Development of Global Environmental Law

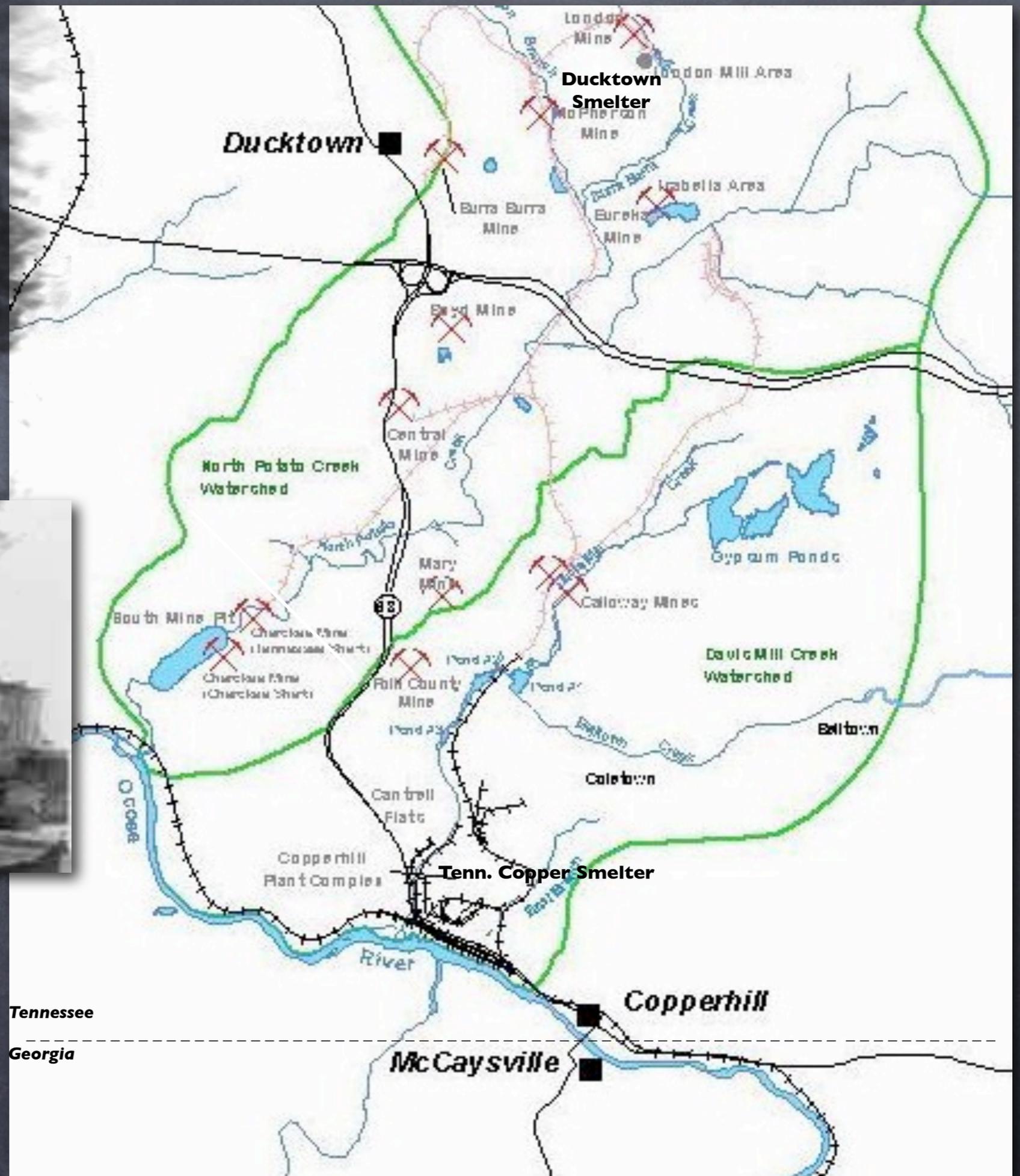


- Growth of international trade and multinational corporate enterprises
- Globalization of environmental concerns
- Increased global collaboration of environmental NGOs and environmental officials
- Development and implementation of multilateral environmental agreements

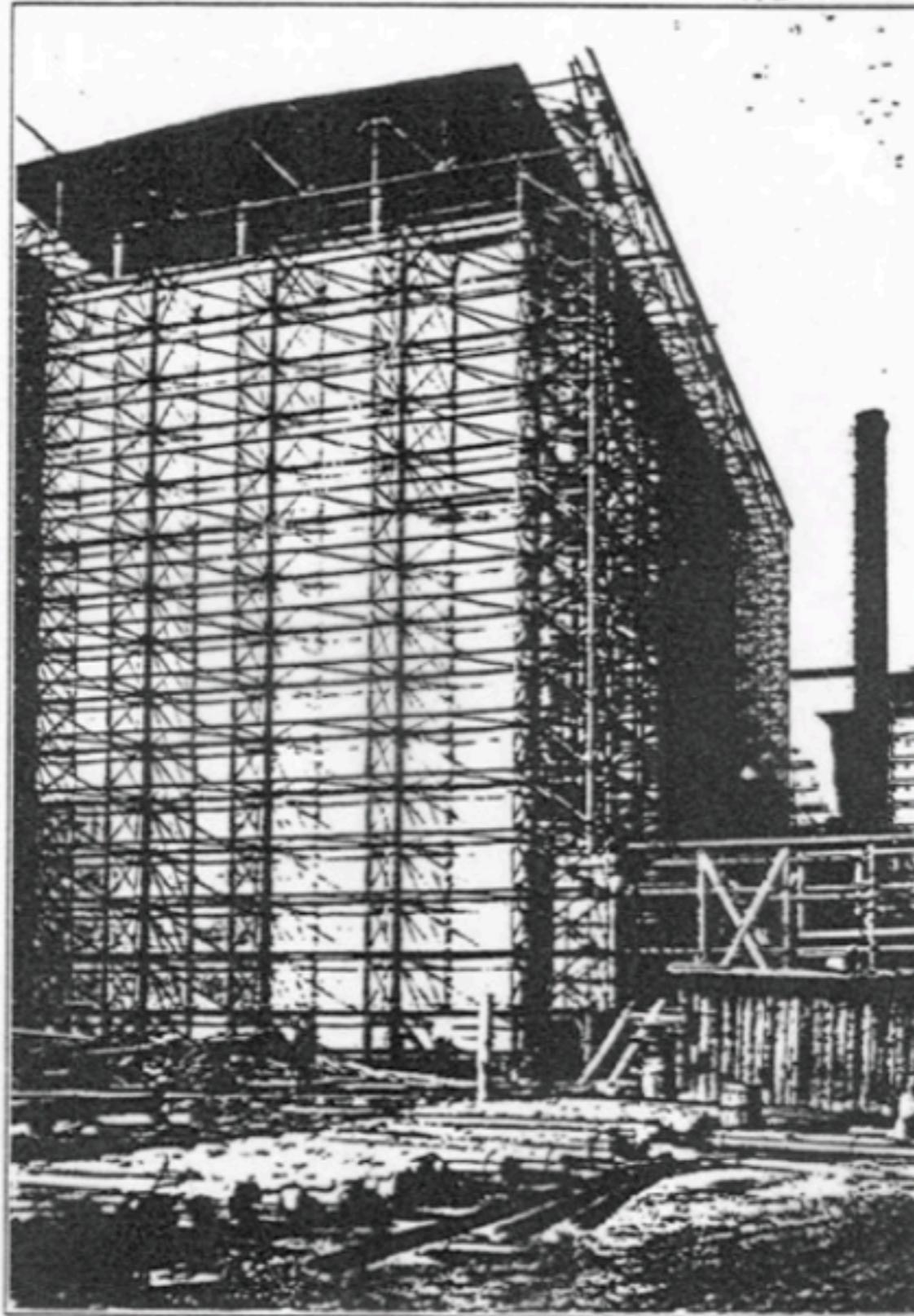
# GEORGIA v. TENNESSEE COPPER (1907)



## Tennessee Copper Smelter







B. ACID CHAMBER UNDER CONSTRUCTION, PLANT OF THE TENNESSEE COPPER CO.

# U.S./Canada Trail Smelter Dispute



The Trail smelter in 1930, with smoke going down the Columbia River Valley.  
(U.S. National Archives)

# 1972 Stockholm Declaration



“States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”



# 1992 Rio “Earth Summit”



# 1992 Rio Declaration

“States have . . . the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to insure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”



# Stockholm Declaration of the UN Conference on the Human Environment (1972)



- Principle 22: "States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."





# UN Conference on Environment & Development (1992)

- Principle 13: “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”



# UN Conference on Environment & Development (1992)

- Principle 13: “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate *in an expeditious and more determined manner* to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”



# International Law Commission

- 1978: ILC begins project on “Liability for Injurious Consequences of Acts Not Prohibited by International Law”
- 2001: Draft Articles on the Prevention of Transboundary Harm
- Dec. 12, 2001: UN General Assembly requests ILC to continue work on liability.
- 2004: Draft Liability Principles released





ПЕРВОЕ  
ПРОМЫСЛЕННОЕ  
ЯДРО, КТО  
ЗАЩИТИЛ МИР  
ОТ РАДИОИЗЛУЧЕНИЯ  
В ОБЪЕКТАХ  
СООБЩЕСТВА  
СНОВА "ЧЕРНОБЫЛЬ"  
30.11.2006









# Sandoz Chemical Spill

## November 1, 1986

### **1986: Chemical spill turns Rhine red**

There has been a catastrophic fire at a chemicals factory near Basel, Switzerland, sending tons of toxic chemicals into the nearby river Rhine and turning it red.

The fire broke out early this morning in a storage building used for pesticides, mercury and other highly poisonous agricultural chemicals.

Local residents were woken by sirens sounded by local authorities to alert them to the disaster.

People in the city of Basel and the surrounding region on the border between Germany and France were told to stay indoors.

Witnesses reported a foul smell of rotten eggs and burning rubber.

Fourteen people, including one of the firemen fighting the blaze, were treated in hospital after inhaling the fumes.

### **Crucial waterway**

It is thought the chemicals were washed into the river in the water used by firefighters to tackle the



The spill has reversed 10 years of work to clean up the Rhine river

### **In Context**

The leak at the Sandoz factory was Europe's worst environmental disaster for a decade.

Within 10 days the pollution had travelled the length of the Rhine and into the North Sea.

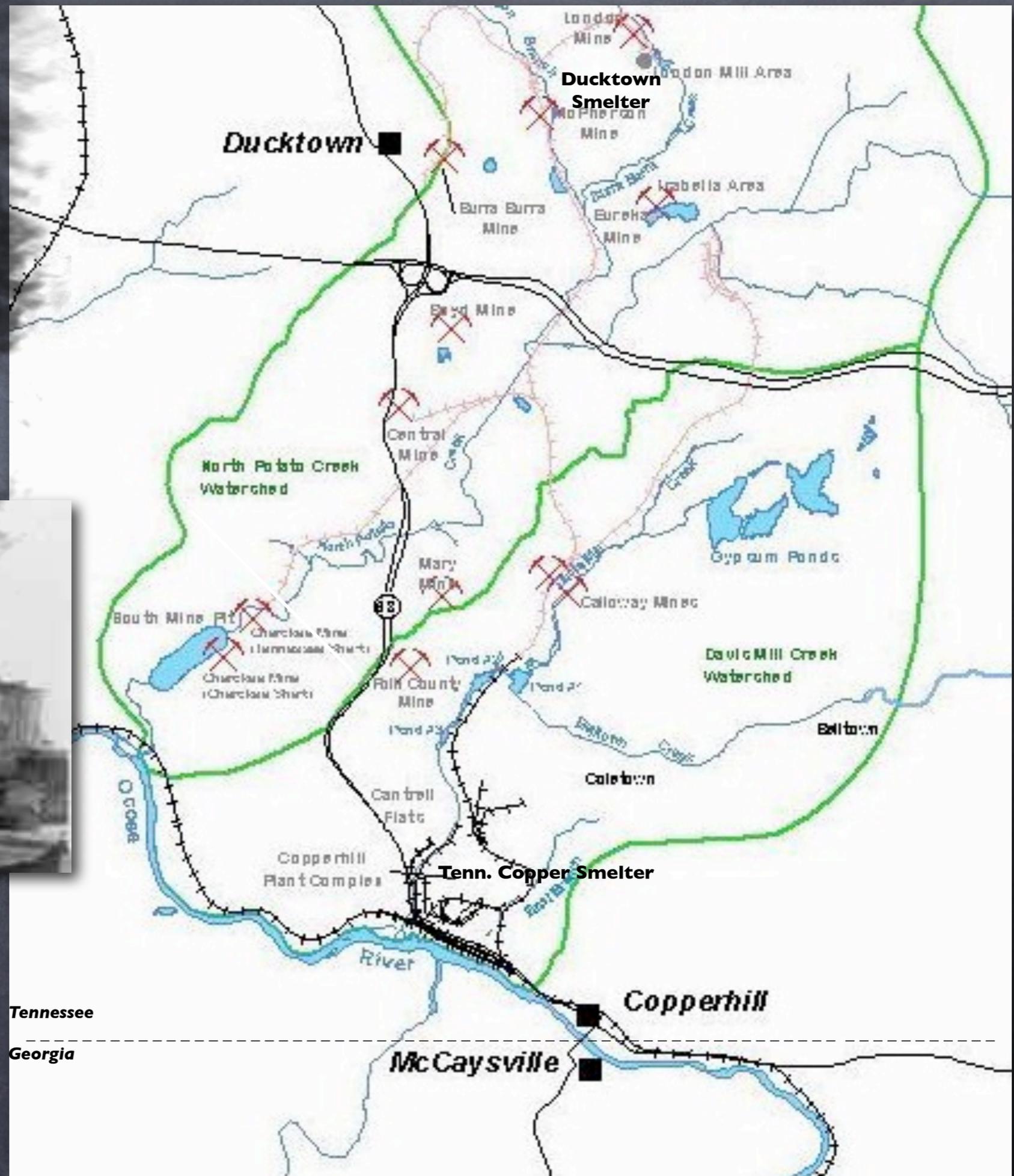
An estimated half a million fish were killed, and some species were wiped out entirely.

There was a public outcry, resulting in the Rhine Action Programme of 1987, sometimes known as "Salmon 2000" because its stated target was to see the return of salmon to the Rhine by the year 2000.

# GEORGIA v. TENNESSEE COPPER (1907)

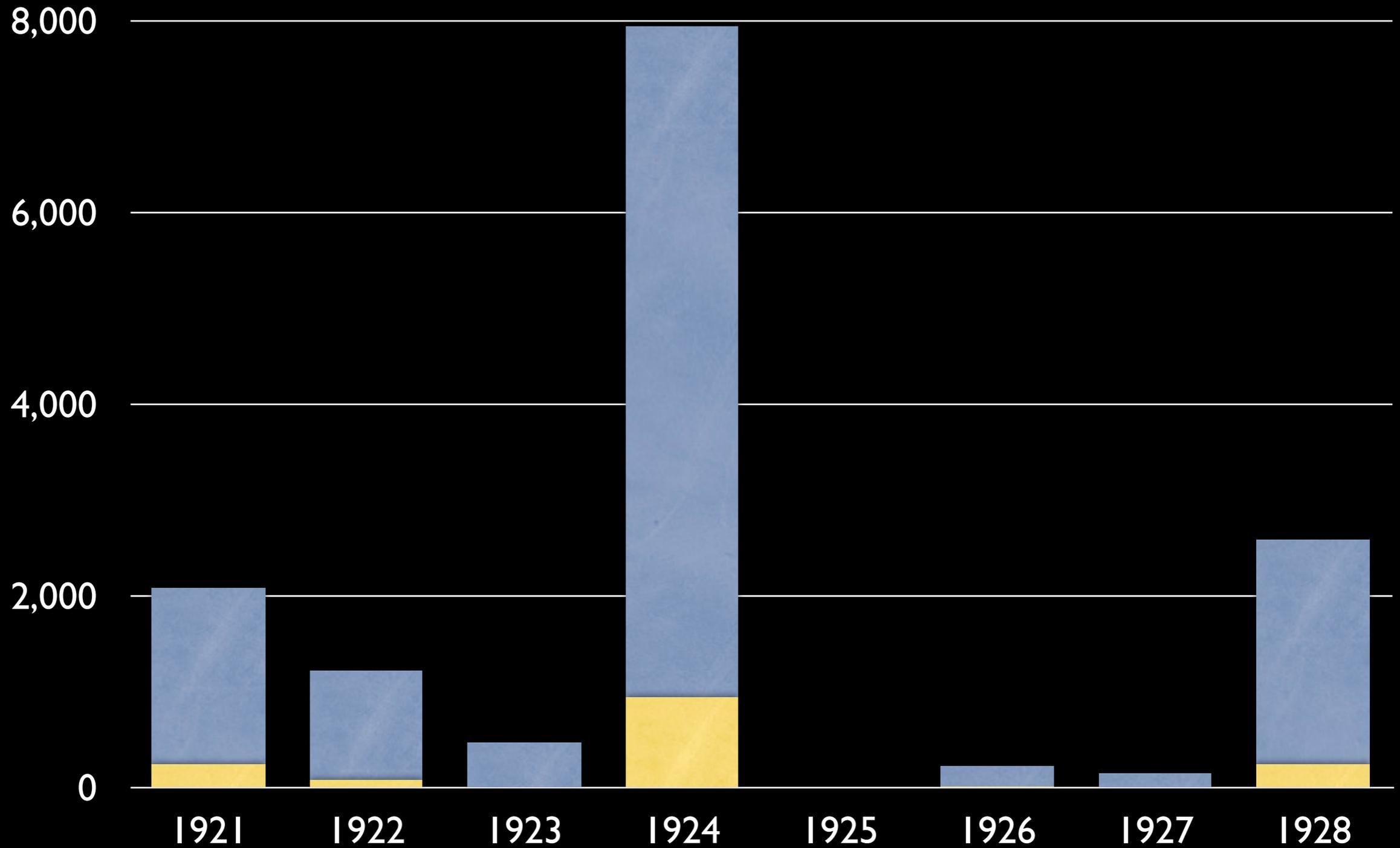


## Tennessee Copper Smelter



# CLAIMS AND AWARDS BY ARBITRAL TRIBUNAL 1921-1928

Amount Awarded in \$    Amount Claimed in \$



# Nevada, 1957





Above Ground Nuclear Testing at Nevada Test Site

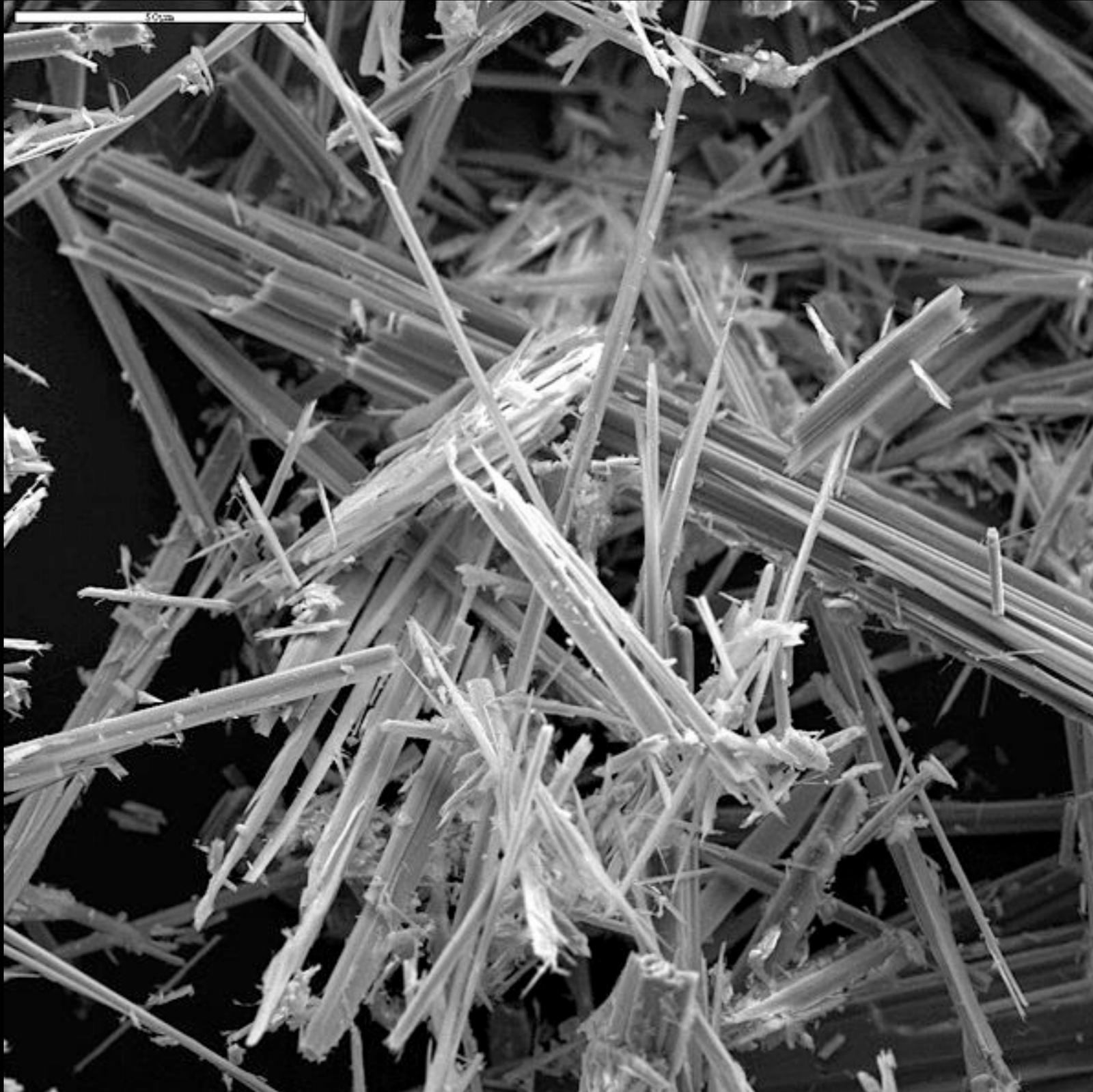


Blast Visible from Las Vegas Casinos

# Efforts to Overcome the “Causation Conundrum”

- Allen v. United States, 588 F.Supp. 247 (D. Utah), reversed on other grounds 816 F.2d 1417 (10th Cir. 1987)
- Veterans Dioxin and Radiation Exposure Compensation Standards Act (1984)
- Radiation Exposure Compensation Act (1990)
- Minnesota Harmful Substances Compensation Program

# Asbestos Litigation



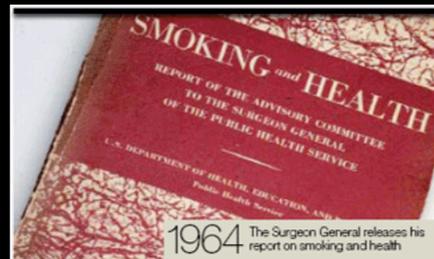
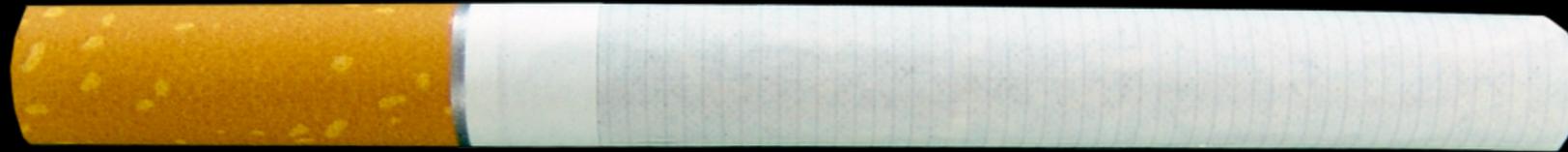


(Revised Aug 24, 2010)

**National Asbestos Bans:**<sup>1</sup>

Argentina	Denmark	Ireland	Mozambique	Singapore
Australia	Egypt	Israel <sup>3</sup>	Netherlands	Slovakia*
Austria	Estonia*	Italy	New Caledonia	Slovenia
Bahrain	Finland	Japan	Norway	South Africa
Belgium	France	Jordan <sup>4</sup>	Oman	Spain
Brunei	Gabon	Korea (South)	Poland	Sweden
Bulgaria	Germany	Kuwait	Portugal*	Switzerland
Chile	Greece*	Latvia	Qatar	Taiwan
Croatia <sup>2</sup>	Honduras	Lithuania*	Romania	United Kingdom
Cyprus*	Hungary*	Luxembourg	Saudi Arabia	Uruguay
Czech Republic*	Iceland	Malta*	Seychelles	

# Tobacco Master Settlement Agreement



1964 The Surgeon General releases his report on smoking and health



1994 U.S. tobacco company chiefs testify at a senate subcommittee hearing

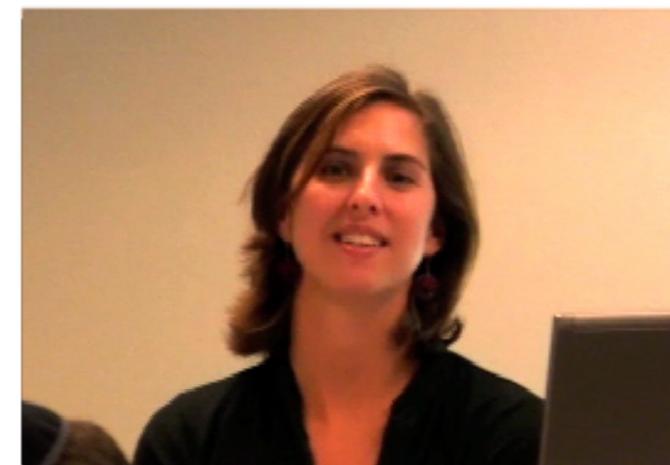


2009 President Obama signs the Family Smoking Prevention and Tobacco Control Act



**FCTC**

WHO FRAMEWORK CONVENTION  
ON TOBACCO CONTROL



# The Minamata Tragedy



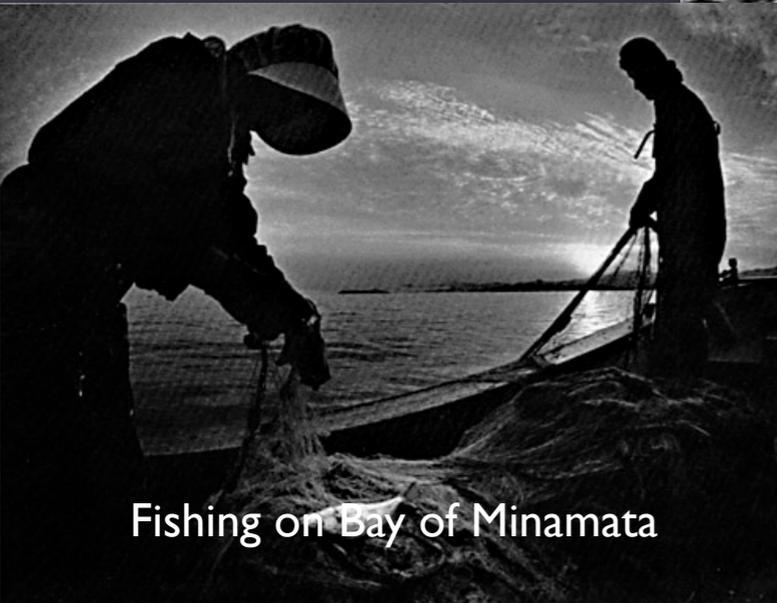
Yae Sato lame from mercury poisoning



Fetal Poisoned 16-year old girl



Chisso President Shimada



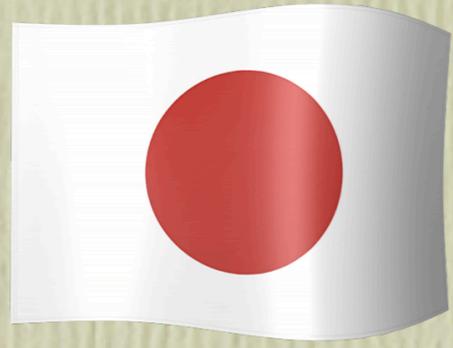
Fishing on Bay of Minamata



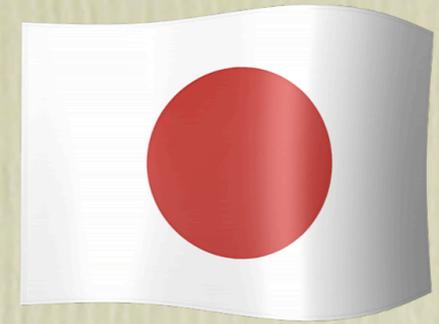
Plaintiffs demonstrate with photos of dead



Chisso chemical complex, Minamata, Japan



# Japanese Pollution Liability



- 1969: Law on Special Measures Concerning Redress for Pollution-Related Health Damage - designates polluted areas and provides government-paid health benefits to residents certified as having pollution-induced health damage. Yokkaichi Air Pollution Lawsuit filed in 1969.
- 1972: Yokkaichi plaintiffs win which helps lead to enactment of Absolute Liability Law.
- 1973: Pollution-Related Health Damage Compensation Law enacted.

# Tokyo Air Pollution Lawsuits

- Between 1996 & 2006 - Six groups of asthma victims sue, Japanese government, Tokyo government, and all seven major Japanese automakers.
- After plaintiffs and government agencies both appeal, government settles without admitting liability. Court proposes 1.2 billion yen settlement to 522 people, most to be paid by automakers, which is accepted in July 2007.









# CLIMATE CHANGE LITIGATION



**LIVE**  
10:33 a PT  
**FOX**  
BUSINESS

**KATRINA VICTIMS SUING BIG OIL,  
CLAIMING GLOBAL WARMING**

**NYSE GAINERS**

**NYSE LOSERS**

**TECHNOLOGY**

**MAGNETEK INC (MAG)**

**1.36 ▲ 0.14**

**DOW 10456.99 ▲ 23.28**

**GOLD 1187.30 ▲ 19.90**

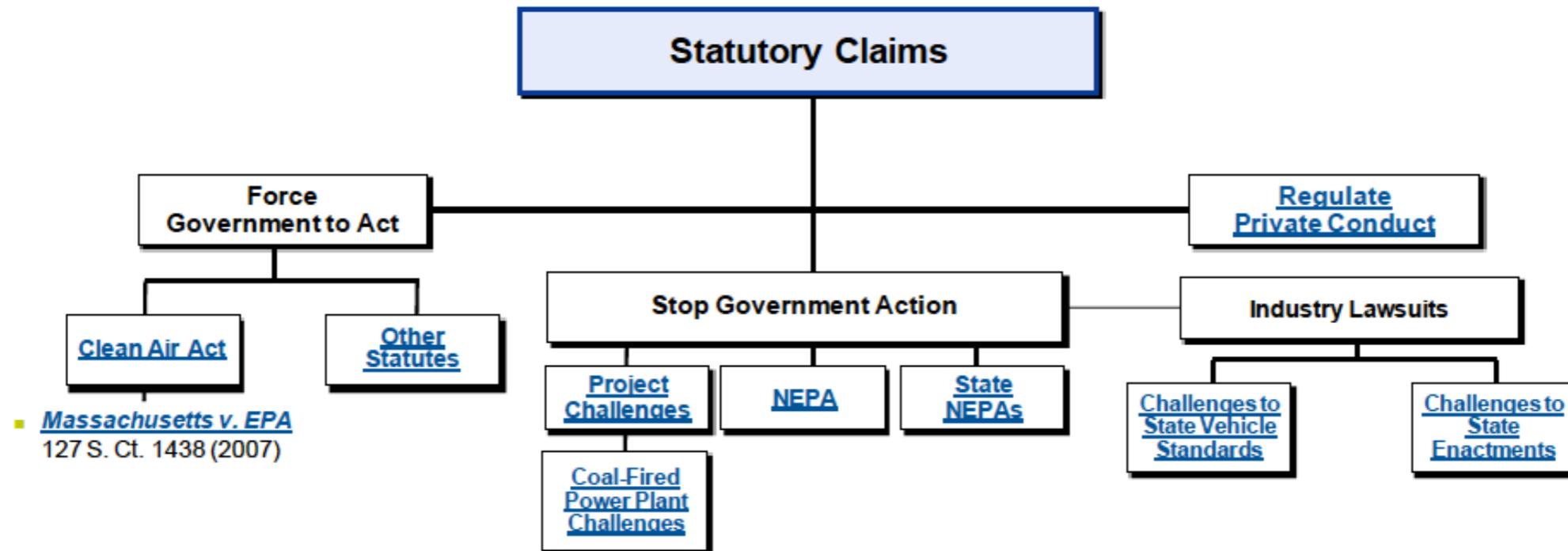
**OIL 77.37 ▲ 1.35**

# CLIMATE CHANGE LITIGATION

URL: [www.climatecasechart.com](http://www.climatecasechart.com)

To receive email updates to this chart, send a request to [cullen.howe@aporter.com](mailto:cullen.howe@aporter.com)

## CLIMATE CHANGE LITIGATION IN THE U.S.



[Climate Legislation Resource Center](#)  
(texts of climate bills pending in Congress plus hearings, markups and other material )

[Non-U.S. Climate Litigation Chart](#)



For detailed legal analysis, see [Global Climate Change and U.S. Law \(ABA 2007\)](#)

Created by:  
[Michael B. Gerrard](#) and [J. Cullen Howe](#)

Date last updated:  
February 10, 2010

Please send updates to:  
[michael.gerrard@law.columbia.edu](mailto:michael.gerrard@law.columbia.edu)

# Connecticut v. American Electric Power (2d Cir. Sept. 21, 2009)

## States Can Sue Utilities Over Emissions

By MATTHEW L. WALD  
Published: September 21, 2009

A two-judge panel of a federal appeals court has ruled that big power companies can be sued by states and land trusts for emitting carbon dioxide. The decision, issued Monday, overturns a 2005 District Court decision that the question was political, not judicial.

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### Related

Refitted to Bury Emissions, Plant Draws Attention (September 22, 2009)

A panel of the United States Court of Appeals for the Second Circuit, in New York, ruled that eight states — California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin — as well as New York City and

three land trusts could proceed with a suit against [American Electric Power](#), Southern Corporation, the Tennessee Valley Authority, [Xcel Energy](#) and Cinergy Corporation, all large coal-burning utilities.

The case, brought in 2004, said the defendants were creating a “public nuisance” and sought reductions in emissions that scientists say are changing the climate. The states cited studies from the [United Nations](#) and the [National Academy of Sciences](#) that predicted damage and said in fact that their environments had already been damaged. The land trusts said that an increase in sea level would inundate their properties, among other problems.

The power companies said that the federal courts had never recognized an argument in common law that greenhouse gas emissions contribute to [global warming](#), and that if action were to be taken, Congress would have to do it.

The lower court agreed that the issues demonstrated the “transcendently legislative nature of this litigation,” and that if they found in favor of the states and the land trusts, the courts would have to figure out how to cap emissions, set reduction goals and a schedule for achieving them, and take other steps that would seem to require legislation.

The appeal was heard by a three-judge panel, but one of the judges, [Sonia Sotomayor](#), was elevated to the [Supreme Court](#) in August. The case was decided by Joseph M. McLaughlin, who was appointed to the court in 1990 by the first President George Bush, and Peter W.

05-5104-cv, 05-5119-cv

State of Connecticut, et al. v. American Electric Power Company Inc., et al.

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: June 7, 2006)

Decided: September 21, 2009)

Docket Nos. 05-5104-cv, 05-5119-cv

STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA EX REL. ATTORNEY GENERAL BILL LOCKYER, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN, AND CITY OF NEW YORK,

*Plaintiffs-Appellants,*

-v.-

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., AND CINERGY CORPORATION,

*Defendants-Appellees.*

OPEN SPACE INSTITUTE, INC., OPEN SPACE CONSERVANCY, INC., AUDUBON SOCIETY OF NEW HAMPSHIRE,

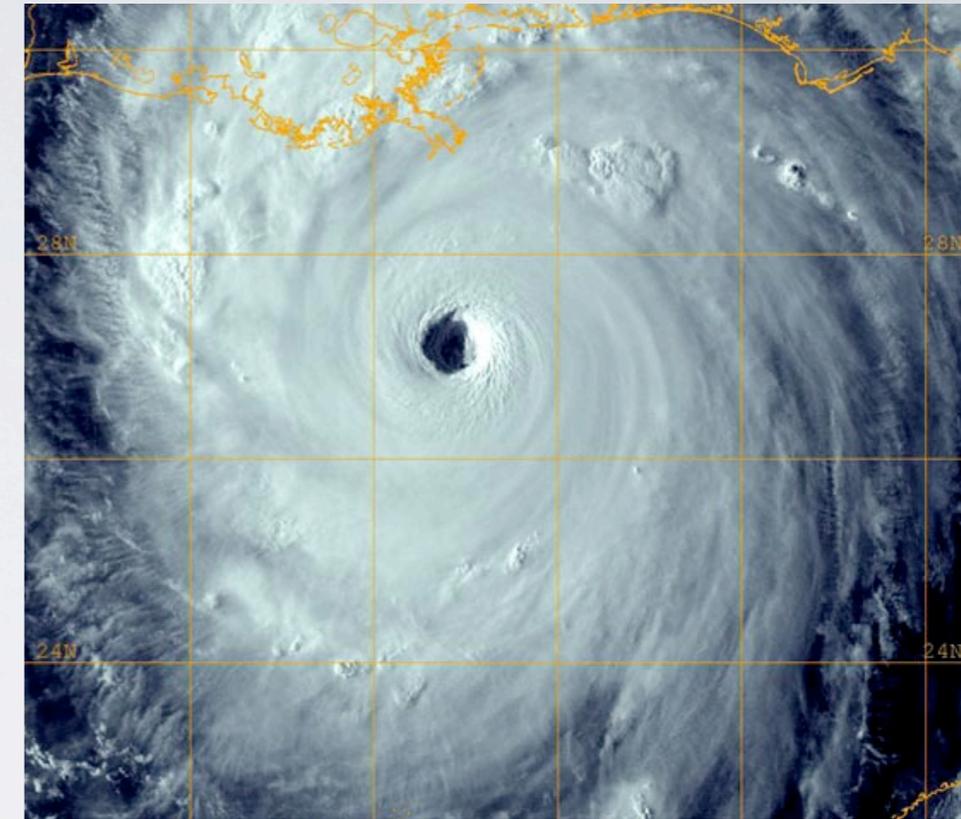
*Plaintiffs-Appellants,*

-v.-

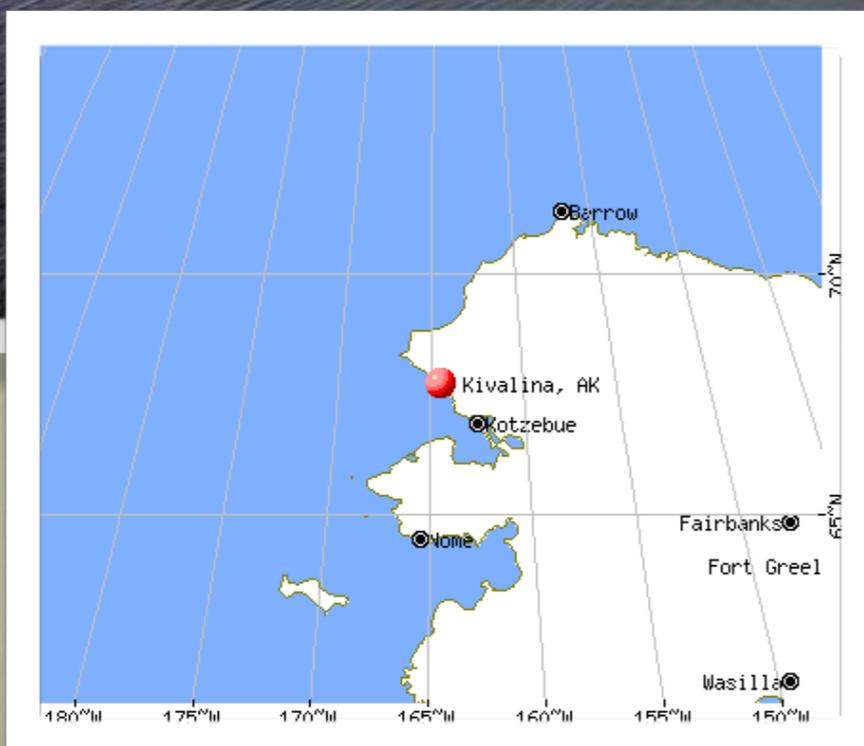
AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., AND CINERGY CORPORATION,

*Defendants-Appellees.*

# Comer v. Murphy Oil



# Native Village of Kivalina v. ExxonMobil Corp.

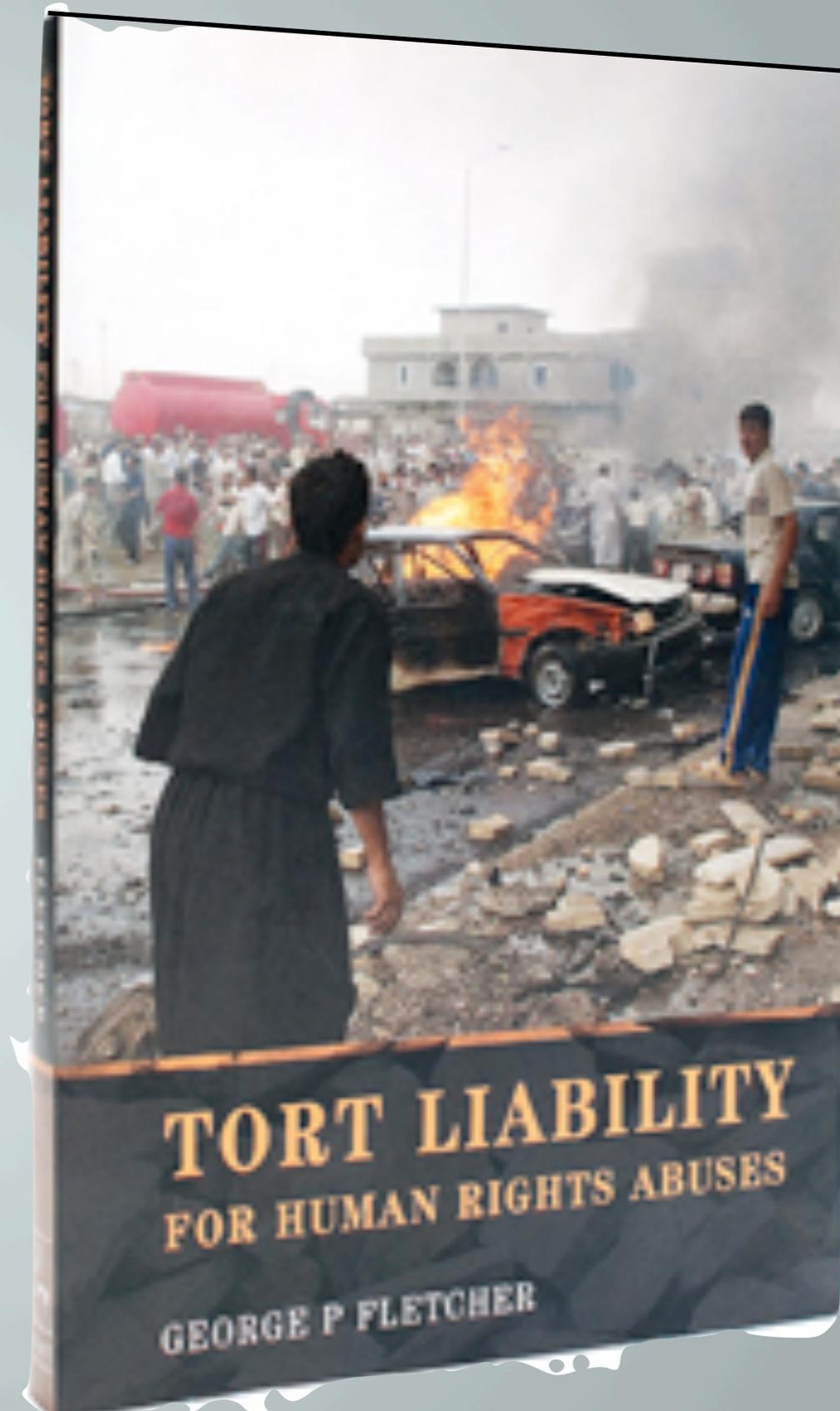


# Alien Tort Statute Cases

- *Filartiga v. Pena-Irala* (2d Cir. 1980)
- *Jota v. Texaco* (CA2 1998) & *Aguinda v. Texaco* (CA2 2002)
- *Beanal v. Freeport McMoran* (CA5 1999)
- *Doe v. Unocal* (CA9 2002)
- *Flores v. Southern Peru Copper Corp.* (2d Cir. 2003)
- *Sosa v. Alvarez-Machain* (2004) - ATA a jurisdictional statute, claims must be founded on claims familiar when ATA enacted in 1789.



Professor  
George P.  
Fletcher





ORIGINAL

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14 Attorneys for Defendants  
15 UNOCAL CORPORATION,  
16 UNION OIL COMPANY OF CALIFORNIA

FILED  
LOS ANGELES SUPERIOR COURT  
SEP 10 2001  
JOHNA CLARKE, CLERK  
BY F. ROJAS, DEPUTY

FILED  
LOS ANGELES SUPERIOR COURT  
SEP 10 2001  
JOHNA CLARKE, CLERK  
BY F. ROJAS, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

15 JOHN ROE III, JOHN ROE VII, JOHN ROE  
16 VIII AND JOHN ROE X,  
17 Plaintiffs,

18 vs.

19 UNOCAL CORPORATION AND UNION  
20 OIL COMPANY OF CALIFORNIA, DOES  
21 1 through 50, inclusive,  
22 Defendants.

Case No. BC 237679

ANSWER OF UNOCAL CORPORATION  
AND UNION OIL COMPANY OF  
CALIFORNIA TO PLAINTIFFS'  
COMPLAINT

Complaint Filed: October 04, 2000  
Discovery Cut-off: None Set  
Trial Date: None Set

ANSWER OF UNOCAL DEFENDANTS TO PLAINTIFFS' COMPLAINT

### Unocal Corporation Can Be Liable for Human Rights Abuses in Burma

by Carlyn Carey\*

In early 1993, Unocal Corporation (Unocal), a U.S. multinational corporation, joined as a co-venturer in the Yadana gas pipeline project, located off the southern coast of Burma in the Andaman Sea. Total, S.A. (Total), a multinational petrochemicals corporation based in France, and the Myanmar Ministry for Oil and Gas Enterprises (MOGE), previously had established the Yadana natural gas exploration, development, and production project in July 1992. MOGE is a petroleum company that is wholly owned and operated by the State Law and Order Restoration Council (SLORC), the military government of Burma. In 1993, just prior to Unocal joining the venture, Total and MOGE discovered a giant natural gas field. This discovery made the production and exportation of gas a profitable possibility for Burma and its corporate co-venturers.



These people seeking refuge, near the Thai border, after displaced by the pipeline construction.

EarthRights International

By 1997, however, Unocal, along with Total, SLORC and MOGE, were facing civil liability in U.S. federal court under the Alien Tort Claims Act for violating the human rights of Burmese citizens (because MOGE is owned by SLORC, SLORC will be used in this article for the purposes of identifying MOGE with the project). The Burmese plaintiffs alleged that SLORC committed such acts as torture, rape, and slavery in connection with the Yadana pipeline project. The resulting case, *John Doe I, et al. v. Unocal Corporation, et al. (Unocal)*, is

...breaking because it marks the first time that a U.S. federal district court has held that private corporations based in the United States can be liable for violations of international law committed abroad. The court ruled that the Alien Tort Claims Act provided jurisdiction over the plaintiff's

# Shell pays out \$15.5m over Saro-Wiwa killing

Ed Pilkington in New York

guardian.co.uk, Tuesday 9 June 2009 00.07 BST

[Article history](#)



Ken Saro-Wiwa in 1993. Photograph: Greenpeace/AFP

The oil giant Shell has agreed to pay \$15.5m (£9.6m) in settlement of a legal action in which it was accused of having collaborated in the execution of the writer Ken Saro-Wiwa and eight other leaders of the Ogoni tribe of southern Nigeria.

The settlement, reached on the eve of the trial in a federal court in New York, was one of the largest payouts agreed by a multinational corporation charged with human rights violations.

The scale of the payment was being seen by experts in human rights





The Galapagos Islands



- Map Legend**
- Quito City
  - ★ Province Capital
  - Tourist attractions
  - ▲ Volcanoes
  - Sierra region
  - Amazon region
  - Galapagos region

# An Amazonian publicity battle

By Sheila McNulty

Published: January 18 2010 21:59 | Last updated: January 18 2010 21:59



In 2003, Silvia Garrigo, then a US lawyer for **Chevron**, was preparing to go into the Ecuadorian rainforest to collect soil samples for testing. She was accompanied by plaintiffs accusing the US's second biggest oil company of having left a swathe of environmental destruction when it left the country in 1992.

"The plaintiffs' entire technical team showed up in moon suits, with gas masks, put up red tape and said it was a dangerous zone," recalls Ms Garrigo, now Chevron's manager for global issues and policy.

"It was comical. The rest of the people who were in the 'toxic zone' did not have masks, including the judge. This was when we realised this was about theatrics, trying the case in the press."

That day marked a turning point in Chevron's strategy. It decided to come out fighting – in effect deploying similar tactics to the plaintiffs. In pursuing such an unusual strategy it hopes to harness public opinion.

Because the lawsuit is a class action, or a popular action, as it is called in Ecuador, anyone affected by the contamination is a plaintiff. So it has been in the plaintiffs' interest to galvanise as much support as possible.

The battle for popular support has gained momentum in the last year as a decision is likely in the next few months. With each passing month, the fight has grown only more theatrical, including protesters burning effigies of Chevron's legal team on top of one of the contaminated pits.

## ▼ EDITOR'S CHOICE

[In depth: Oil](#) - Sep-02

[Chevron's production grows as profits fall](#) - Oct-30

[Chevron chief executive to step down](#) - Sep-30

[Chevron 'very bullish' on Gorgon expansion](#) - Sep-14

[Chevron steps up Ecuador legal fight](#) - Sep-01

[Chevron expected to come under fire over lawsuit in Ecuador](#) - May-26

The stakes are high. The plaintiffs are seeking \$27bn (€19bn, £17bn), making it the biggest environmental lawsuit in history, with potential damages representing roughly one-fifth of Chevron's market capitalisation of \$159bn.

"If it were \$27m, this thing would have gone away a long time ago," says Robin West, chairman of PFC Energy, the consultancy.

Instead of reserving comment for the courtroom, Chevron has taken the unusual step of elevating the case on the world stage by hiring a former CNN reporter to tell its side of the story and creating a dedicated **YouTube channel**.

Chevron's strategy is in sharp contrast to BP's defence against charges of failings across its US operations following a major leak in Alaska, a fatal refinery explosion in Texas and a propane trading scandal. While BP shunned public attention, Chevron has sought it.

In fact, this is the first time a major company has been so aggressive in defending itself. While other companies have taken to the internet in the past, none has gone to these lengths.

Gene Randall, the former CNN reporter who founded GRE public relations after leaving the news business seven years ago, explains his role: "They felt the internet was so saturated with anti-Chevron stories, they hired me to get out their story."

So he spent six months with a camera crew, producers, video editors and translators, travelling to the region and shooting dozens of hours of material, which he pulled into a **14-minute documentary**, along with a series of shorter pieces, which Chevron put out in April on YouTube and its website. A search for key words "Chevron Ecuador" points users to the film.

The plaintiffs claim viewers could be misled into believing the film is an independent piece of journalism. Mr Randall denies he has misrepresented himself as a reporter and points to the Chevron tagline on the site.

Amy Myers Jaffe, energy expert at the James A. Baker III Institute for Public Policy, says Chevron has had no choice but to fight back. "In the court of public opinion, proliferation wins. People tend to believe something if they read it on 17 blogs."

Meanwhile, the Amazon Defense Coalition, representing the indigenous groups on behalf of the plaintiffs, has employed its own publicist to **hit back at the oil company's claims**: Karen Hinton, of Hinton Communications.

"The only reason the plaintiffs hired me was to respond to Chevron's attacks in the press, not the other way around," Ms Hinton says. "Chevron has six PR firms on the payroll working on the lawsuit defence, and I stay very busy knocking down erroneous and misleading information shopped by these firms to certain reporters and bloggers."

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## The True Cost of Chevron

An Alternative Annual Report



Chevron's 2008 annual report is a glossy celebration of the company's most profitable year in its history.

What Chevron's annual report does not tell its shareholders is the true cost paid for those financial returns, or the global movement gaining voice and strength against Chevron's abuses.

Thus, we, the communities and their allies who bear the consequences of Chevron's operations, have prepared an alternative annual report of Chevron entitled "The True Cost of Chevron." We will release the report at a press conference on May 26 and a day later at Chevron's Annual Shareholder Meeting in San Ramon, California on May 27.

Never before has one report brought together the information, stories, and struggles of communities from Angola, Burma, Canada, Chad, Cameroon, Ecuador, Iraq, Kazakhstan, Nigeria, the Philippines and across the United States directly impacted by, and in struggle against, Chevron's operations.

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LOS ANGELES, Nov. 16, 2007

# Banana Workers Win \$2.5M In Dole Lawsuit

## U.S. Jury Awards Punitive Damages To Nicaraguans Who Claim Pesticides Made Them Sterile

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PHOTO A former banana worker walks outside of a shack set up by protesters in front of Nicaragua's National Assembly in Managua, Wednesday, July 11, 2007. (AP)



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Banana Workers Get \$3.3M In Pesticide Case

(AP) A jury Thursday found that American food giant Dole should pay \$2.5 million in punitive damages to five workers who claimed they were made sterile by use of a pesticide on Nicaraguan banana plantations in the 1970s.

Last week, the Superior Court jury awarded \$3.3 million in actual damages to six workers, most of it to be paid by California-based Dole Fresh Fruit Co. and the remainder by Dow Chemical Co. of Michigan. The jury's finding that Dole acted maliciously in harming five of the six allowed punitive damages to be considered for the five.

The punitive damages were to be split evenly among the five workers exposed to the pesticide known as DBCP.

Lawyers for both sides called it a win. Duane Miller, the workers' attorney, said it sends a message that multinational corporations such as Dole are accountable for what they do, even overseas.

"This is a tremendous victory for the banana workers who were sterilized by DBCP," Miller said.

Dole attorney Rick McKnight called the verdict a "substantial defeat" for the plaintiffs because the jury did not come back with a much larger award. McKnight said he believed the jury recognized that the Dole of 30 years ago was a very different company than the Dole of today.

"This verdict overall is quite a vindication," he said.

Twelve workers originally filed the lawsuit, but the jury determined that only six had been substantially harmed by the pesticide, DBCP. The six were awarded actual damages ranging from \$311,200 to \$834,000 each.

The case marked the first time a U.S. jury heard a lawsuit involving sterility and DBCP. Legal experts said the case raised the issue of whether multinational companies should be held accountable in the country where they are based or the countries where they employ workers.

The lawsuit named Westlake Village, Calif.-based Dole Food Co., Dole Fresh Fruit Co., Standard Fruit Co., and Standard Fruit and Steamship Co. The Standard companies are now part of Dole. Chemical Co., manufacturers of the pesticide.



# Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits

By STEVE STECKLOW

CHINANDEGA, Nicaragua – After responding to a radio commercial seeking former banana-plantation workers for a lawsuit against Dole Food Co., Marcos Sergio Medrano thought he might be entitled to some money. He says an American law firm convinced him that a pesticide used on the Dole-operated banana plantation where he had worked years ago had made him sterile.

Lawyers for the 49-year-old peasant produced tests that purported to prove it. But DNA testing by Dole revealed that he had fathered three children – something Mr. Medrano says was news to him. "I don't feel good about this," he says now. "I feel I was involved in foul play."

Mr. Medrano is part of the sorry fallout from a group of U.S. personal-injury and other lawyers who descended on this small, impoverished city, seeking to recruit thousands of clients and earn up to 40% of any awards. Emboldened by a developing-world legal system that heavily favored plaintiffs, they filed an avalanche of lawsuits here against California-based Dole and eventually won \$2.1 billion in local judgments.

## Plaintiffs and Plantations



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Steve Stecklow/The Wall Street Journal

Bayardo J. Barrios stands in front of his testing lab in Chinandega, Nicaragua. He says about half of the nearly 1,000 ex-banana workers he tested were sterile, but a California judge ruled the results were faked.

Now a California judge has ruled that plaintiffs and their lawyers deployed fraudulent tactics, which included faking sterility tests and using plaintiffs who never worked on banana plantations. As a result, actual workers who may have been hurt may receive nothing, even though Dole continued using a dangerous pesticide called DBCP after it had been linked definitively to male sterility.

Citing "clear and convincing evidence" of fraud, California Superior Court Judge Victor Chaney in June dismissed two DBCP cases brought by Nicaraguan plaintiffs, one of which involved Mr. Medrano, and raised questions about related cases. There are about 30 such cases in state and federal courts in the U.S. Dole has refused to pay the \$2.1 billion

awarded plaintiffs by courts in Nicaragua, where it no longer does business. Some lawyers have been trying to collect on those judgments through courts in the U.S. and elsewhere.

## Judge can't enforce \$97M judgment against Dole

October 21, 2009 - 2:19pm

By JENNIFER KAY  
Associated Press Writer

MIAMI (AP) - A Florida judge has said a \$97 million judgment against U.S. food giant Dole and Dow Chemical Co. cannot be enforced because the Nicaraguan court that issued it neither had jurisdiction nor met international legal standards.

A trial court in Chinandega, Nicaragua, had awarded the money in 2005 to 150 Nicaraguan citizens who said they worked on Dole banana plantations between 1970 and 1982.

The workers said they had been exposed to a pesticide, dibromochloropropane or DBCP, that was banned in the U.S. after it was linked to sterility in factory workers in 1977. Dow made DBCP from 1957 until 1977, and Dole used it on the banana farms it operated in Nicaragua until 1979.

The court awarded the compensation to the plantation workers for infertility caused by the pesticide under a special law enacted by the Nicaraguan legislature in 2000 specifically to handle their claims.

That law "unfairly discriminates against a handful of foreign defendants with extraordinary procedures and presumptions found nowhere else in Nicaraguan law," U.S. District Judge Paul Huck wrote in his order Tuesday.

Huck's criticism of the special law and the trial court proceedings cited U.S. State Department reports concluding that Nicaragua lacks an effective civil law system, with judges susceptible to corruption and political influence.

"The Nicaraguan trial court found exposure to DBCP simply from the fact that a plaintiff purportedly worked on a banana farm, without regard for the type of work performed (and whether it involved exposure to DBCP) or the duration of the work," Huck wrote.

Phone messages and e-mails to the banana workers' attorneys and Dow's spokesman and lawyers in Miami were not immediately returned Wednesday, nor was a phone message left for a spokesman at the Nicaraguan embassy in Washington.

Huck's ruling will affect numerous verdicts in Nicaragua against Dole that resulted in judgments totaling about \$2 billion, said Theodore Boutros, Dole's Los Angeles-based attorney.

"It's a very strong ruling that makes clear that any judgment emanating from Nicaragua in these cases is unenforceable because of the flaws in that system," he said.

Dole and Dow's appeal of the judgment in Nicaraguan appellate court is still pending. The companies also contended that the judgment was part of a conspiracy by the banana plantation workers' attorneys to make fake DBCP claims in Nicaragua and the U.S. Those allegations were handled as a separate case.

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Los Angeles Superior Court judge Victoria Chaney dismissed the latest cases as tainted by pervasive fraud by lawyers and others in Nicaragua who recruited plaintiffs who had never worked on banana plantations, falsified lab reports, and sought to intimidate witnesses who helped expose the fraud.

Nicaraguan courts have awarded more than \$2.1 billion in damages to plaintiffs, using Special Law 364 enacted in 2001 to make it easy for plaintiffs to recover in DBCP cases. As described by Judge Chaney, under this law “essentially anyone who obtains two required lab reports stating he is sterile and who claims to have been exposed to DBCP on a banana farm is entitled to damages; causation and liability are conclusively presumed”. Under special procedures prescribed by the law, the defendant must post a \$15 million bond and “has just three days to answer the complaint, the parties have just eight days to present evidence, and the court has eight days to issue a judgment.” In light of Judge Chaney’s conclusions concerning pervasive fraud in Nicaragua, it is unlikely these judgments will be enforced by U.S. courts. However, Judge Chaney did specifically state that her conclusions only applied to cases involving Nicaraguan plaintiffs and that no evidence of fraud has been presented involving DBCP plaintiffs from any other country.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-22693-CIV-HUCK

MIGUEL ANGEL SANCHEZ  
OSORIO, et al.,

Plaintiffs,

vs.

DOLE FOOD COMPANY, et al.,

Defendants.

**ORDER DENYING RECOGNITION OF JUDGMENT**

This is an action to enforce a \$97 million Nicaraguan judgment under the Florida Uniform Out-of-country Foreign Money-Judgments Recognition Act (Florida Recognition Act). FLA. STAT. §§ 55.601-55.607 (2009). Plaintiffs are 150 Nicaraguan citizens alleged to have worked on banana plantations in Nicaragua between 1970 and 1982, during which time they were exposed to the chemical compound dibromochloropropane (DBCP). DBCP is an agricultural pesticide that was banned in the United States after it was linked to sterility in factory workers in 1977. Nicaragua banned DBCP in 1993. Defendants are Dole Food Company and The Dow Chemical Company, both Delaware corporations.<sup>1</sup> Dow manufactured DBCP from 1957 until 1977, and Dole used DBCP on its banana farms in Nicaragua until the farms were expropriated by the Sandinista regime that came to power in 1979.

The judgment in this case was rendered by a trial court in Chinandega, Nicaragua. The trial court awarded Plaintiffs approximately \$97 million under “Special Law 364,” enacted by the Nicaraguan legislature in 2000 specifically to handle DBCP claims. The average award was approximately \$647,000 per plaintiff. According to the Nicaraguan trial court, these sums were awarded to compensate Plaintiffs for DBCP-induced

# Trafigura Toxic Waste Dumping in Ivory Coast



# Firm to Pay \$48.7 Million in Ivory Coast Pollution Case

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By GUY CHAZAN

Oil-trading firm Trafigura Beheer BV said it has agreed to pay nearly £30 million (\$48.7 million) compensation to people in Ivory Coast who say they were made ill by waste dumped in the West African country in 2006.



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Agence France-Presse/Getty Images

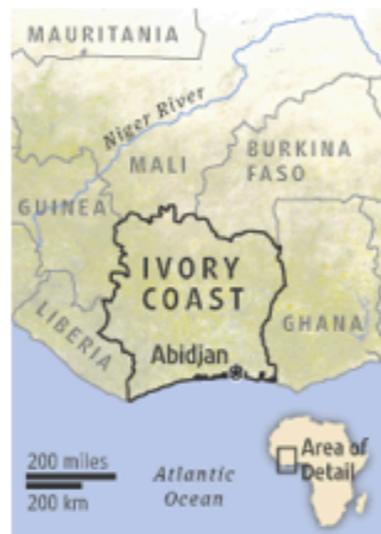
A bulldozer clears a polluted site in Abidjan's Akouedo district Saturday. An outfit contracted by Trafigura dumped waste in Abidjan in 2006.

Trafigura, one of the world's largest independent oil traders by volume, said it will pay £950 per person, but declined to say how many claimants it will pay. British law firm Leigh Day & Co., which filed the lawsuit, said it involves some 31,000 people.

The compensation relates to an incident in 2006 when slops from a cargo ship that Trafigura had chartered were dumped in Abidjan, Ivory Coast's main city. Trafigura and the plaintiffs' lawyers agreed that independent experts had been unable to identify a link between exposure to chemicals

released from the slops and deaths and serious injuries.

A joint statement issued by the company and Leigh Day said "the slops could at worst have caused a range of short-term, low-level flu-like symptoms and anxiety." In a statement, Eric de Turckheim, a director of Trafigura, said the settlement "completely vindicates" the company. The agreement means Trafigura will be spared a class-action case due to be heard in a London court next month.



But a spokesman for some of the victims said the compensation was insufficient. "The cost of medication spent over three years goes much beyond that amount," Outara Aboubabacar, head of the Toxic Waste Victims' Association, told the BBC.

The incident occurred after Trafigura subcontracted a local outfit, Compagnie Tommy, to dispose of the slops contained on a ship it had chartered, the Probo Koala. During August and September 2006, Tommy dumped it at a number of locations around Abidjan. Afterwards, many local residents complained of breathing problems, birth defects and diarrhea.

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### Transboundary Pollution Reciprocal Access

#### SECTION 1. *Definitions*

As used in this [Act]:

(1) "Reciprocating jurisdiction" means a state of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States of America, or a province or territory of Canada, which has enacted this [Act] or provides substantially equivalent access to its courts and administrative agencies.

(2) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government in its private or public capacity, governmental subdivision or agency, or any other legal entity.

#### COMMENT

The definition of "jurisdiction" performs a number of functions. It enables the Act to be applied in interstate and inter-provincial pollution actions, in addition to actions involving pollution spanning the U.S./Canada International boundary. The Act does not apply to U.S./Mexico transboundary pollution or to pollution from any other nation.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: January 12, 2009)

Decided: September 17, 2010)

Docket Nos. 06-4800-cv, 06-4876-cv

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

*Plaintiffs-Appellants-Cross-Appellees,*

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

*Defendants-Appellees-Cross-Appellants,*

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

*Defendant.*

Before: JACOBS, *Chief Judge*, LEVAL, and CABRANES, *Circuit Judges*.

Plaintiffs assert claims for aiding and abetting violations of the law of nations against defendants—all of which are corporations—under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, a statute enacted by the first Congress as part of the Judiciary Act of 1789. We hold, under the precedents of the Supreme Court and our own Court over the past three decades, that in ATS suits alleging violations of customary international law, the scope of liability—who is liable for what—is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and

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## Kiobel's first victim: Flomo v. Firestone

Posted Tue, 10/05/2010 - 17:56 by Marco Simons

The recent decision by the Second Circuit Court of Appeals in *Kiobel v. Royal Dutch Petroleum*, which ruled that corporations cannot be sued for human rights abuses under the Alien Tort Statute (ATS), was adopted today by an Indiana federal court in the *Flomo v. Firestone* case, which alleges forced child labor on rubber plantations in Liberia.



Interestingly, while she agreed that corporations cannot be sued under the ATS, the judge in *Flomo* disagreed with *Kiobel* in one respect: she said that the court does, in fact, have jurisdiction over an ATS case against a corporation. This matters, because a court without jurisdiction usually must dismiss a case without deciding any other issues. In the *Flomo* decision, the judge stated that she would soon issue a subsequent decision that outlines additional reasons for dismissing the case--something she could not do if the court lacked jurisdiction.

The issue of whether the question of jurisdiction also matters for the *Kiobel* case itself. Because *Kiobel* was at the Second Circuit on an "interlocutory" appeal--an appeal in the middle of a case, before a final judgment--the Second Circuit could consider only a limited set of issues in the case. Corporate liability was not considered by the district court judge, was not raised by the defendant, and was not briefed by anyone in *Kiobel*. So the Second Circuit was only able to decide the issue *because* they thought it was a jurisdictional issue. If it wasn't a question of jurisdiction, the court could not have considered it.







# SUPREME COURT OF THE UNITED STATES

Syllabus

## CITIZENS UNITED v. FEDERAL ELECTION COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 08–205. Argued March 24, 2009—Reargued September 9, 2009—  
Decided January 21, 2010

As amended by §203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an “electioneering communication” or for speech that expressly advocates the election or defeat of a candidate. 2 U. S. C. §441b. An electioneering communication is “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary election, §434(f)(3)(A), and that is “publicly distributed,” 11 CFR §100.29(a)(2), which in “the case of a candidate for nomination for President . . . means” that the communication “[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days,” §100.29(b)(3)(ii). Corporations and unions may establish a political action committee (PAC) for express advocacy or electioneering communications purposes. 2 U. S. C. §441b(b)(2). In *McConnell v. Federal Election Comm’n*, 540 U. S. 93, 203–209, this Court upheld limits on electioneering communications in a facial challenge, relying on the holding in *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652, that political speech may be banned based on the speaker’s corporate identity.

In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary (hereinafter *Hillary*) critical of then-Senator Hillary Clinton, a candidate for her party’s Presidential nomination. Anticipating that it would make *Hillary* available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced television ads to run on broadcast

