UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re:

"AGENT ORANGE" MDL 381
PRODUCT LIABILITY LITIGATION

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THE VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE/DIOXIN; PHAN THI PHI PHI; NGUYEN VAN QUY and VU THI LOAN, Individually and as Parents and Natural Guardians of NGUYEN QUANG TRUNG and NGUYEN THI THUY NGA, Their Children; DUONG QUYNH HOA, Individually and as Administratrix of the Estate of Her Deceased Child, HUYNH TRUNG SON; HO KAN HAI, Individually and as Parent and Natural Guardian of NGUYEN VAN HOANG, Her Child; HO THI LE, Individually and as Administratrix of the Estate of Her Deceased Husband, HO XUAN BAT; NGUYEN MUOI; NGUYEN DINH THANH; DANG THI HONG NHUT; NGUYEN THI THU, Individually and as Parent and Natural Guardian of NGUYEN SON LINH and NGUYEN SON TRA, Her Children; VO THANH HAI, NGUYEN THI HOA, Individually and as Parents and Natural Guardians of VO THANH TUAN ANH, Their Child; LE THI VINH; NGUYEN THI NHAM; NGUYEN MINH CHAU; NGUYEN THI THOI; NGUYEN LONG VAN; TONG THI TU and NGUYEN THANG LOI; On Behalf of Themselves and Others Similarly Situated,

04 CV 0400 (JBW)

Plaintiffs,

- against -

THE DOW CHEMICAL COMPANY, MONSANTO COMPANY, MONSANTO CHEMICAL COMPANY, PHARMACIA CORPORATION, HERCULES INCORPORATED, OCCIDENTAL CHEMICAL CORPORATION, ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORPORATION, THOMPSON HAYWARD CHEMICAL COMPANY, HARCROS CHEMICALS INC., UNIROYAL, INC., UNIROYAL CHEMICAL, INC., UNIROYAL CHEMICAL

HOLDING COMPANY, UNIROYAL CHEMICAL ACQUISITION CORPORATION, C.D.U. HOLDING, INC., DIAMOND SHAMROCK AGRICULTURAL CHEMICALS, INC., DIAMOND SHAMROCK CHEMICALS, DIAMOND SHAMROCK CHEMICALS COMPANY, DIAMOND SHAMROCK CORPORATION, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, OCCIDENTAL ELECTROCHEMICALS CORPORATION, DIAMOND ALKALI COMPANY, ANSUL, INCORPORATED, HOOKER CHEMICAL CORPORATION, HOOKER CHEMICAL FAR EAST CORPORATION, HOOKER CHEMICALS & PLASTICS CORP., HOFFMAN-TAFF CHEMICALS, INC., CHEMICAL LAND HOLDINGS, INC., T-H AGRICULTURE & NUTRITION COMPANY, INC., THOMPSON CHEMICAL CORPORATION, RIVERDALE CHEMICAL COMPANY, ELEMENTIS CHEMICALS INC., UNITED STATES RUBBER COMPANY, INC., SYNTEX AGRIBUSINESS INC., SYNTEX LABORATORIES, INC. and "ABC CHEMICAL COMPANIES 1-100",

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CLAIMS FOR INJUNCTIVE RELIEF IN PLAINTIFFS' AMENDED CLASS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants, by and through their undersigned attorneys, hereby submit this Memorandum of Law in Support of Defendants' Motion to Dismiss the Claims for Injunctive Relief in Plaintiffs' Amended Class Action Complaint for failure to state a claim upon which relief may be granted.

I. INTRODUCTION

As discussed in detail in Defendants' Memorandum of Law in Support of Motion Defendants' Motion to Dismiss to Dismiss All Claims,[1] Plaintiffs in this case are Vietnam Association for Victims of Agent Orange/Dioxin ("VAVAO"), a "Vietnamese not-for-profit, non-governmental organization," Am. Compl. ¶ 5, and individual "nationals and residents of Vietnam," *id*. ¶¶ 6, 118-229.[2] Plaintiffs seek to hold Defendants liable, *inter alia*, for "aiding and abetting" the United States' use of herbicides, including Agent Orange, in the Vietnam War. Among other remedies, their Amended Complaint seeks injunctive relief compelling Defendants to abate and remediate ongoing health hazards allegedly caused by the U.S. military's environmental contamination of the soil and food chains in vast and unspecified regions of central and southern Vietnam. *Id*. ¶¶ 1, 248, 328. This request for mandatory injunctive relief should be dismissed because it is wholly impracticable and could compromise Vietnam's sovereignty.

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[1] The detailed summary of facts contained in the Memorandum of Law in Support of Defendants' Motion to Dismiss All Claims is incorporated by reference but will not be repeated here.

[2] Plaintiffs intend to represent a putative class of "up to four million" Vietnamese civilians and enemy combatants, who allegedly were injured as a result of exposure to herbicides that the U.S. armed forces sprayed during wartime military operations targeted against the jungle cover and crops of the Viet Cong and North Vietnamese soldiers. Am. Compl. ¶ 81; *see also id.* ¶ 239 (estimating the putative class at "two to four million Vietnamese people"); *id.* ¶ 253 (estimating the putative class at "not less than three million persons").

II. ARGUMENT

Injunctive relief is granted "not as a matter of right, but in the exercise of a sound judicial discretion." *Morrison v. Work*, 266 U.S. 481, 490 (1925). It is well established that, in the exercise of that discretion, district courts may properly refuse to grant injunctive relief that is impracticable or otherwise contrary to the public interest. *See, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."); *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) ("A federal court should not intervene to establish the basis for future intervention that would be . . . intrusive and unworkable."). In particular, requests for extraterritorial injunctive often raise serious concerns for sovereignty and enforceability, which compel dismissal. *See generally Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956).

Injunctive relief also should be denied where it threatens interference with the political branches' constitutional authority to set U.S. foreign policy or with the sovereignty of another nation. Ordering a litigant to perform an act in a foreign country "does not per se involve any invasion of the sovereignty of that country." *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962). However, the power to enjoin activities on foreign soil "should be exercised with great reluctance when it [would] be difficult to secure compliance . . . or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." *Vanity Fair Mills, Inc.*, 234 F.2d at 647; *see also McKusick v. City of Melbourne*, 96 F.3d 478, 488 (11th Cir. 1996) ("'There is not an absolute right to an injunction in a case in which it would impair or affront the sovereign powers or dignity of a state or a foreign nation.'" (quoting *Hoover v. Wagner*, 47 F.3d 845, 850 (7th Cir. 1995))).

Plaintiffs' request for injunctive relief fails on both grounds. The mandatory injunction they seek would affect vast and indeterminate tracts of land more than 10,000 miles away, and under the control of communist Vietnam. Such an injunction is entirely infeasible. *See, e.g.*, *Bethlehem Eng'g Exp. Co v. Christie*, 105 F.2d 933, 935 (2d Cir. 1939) (Hand, J.) (denying injunctive relief as impracticable); *United States v. Am. Cyanamid Co.,* 556 F. Supp. 361, 373 (S.D.N.Y. 1983) (denying equitable relief that "appears to be impossible or impracticable." (citation omitted)), *rev'd in part on other grounds,* 719 F.2d 558 (2d Cir. 1983). Moreover, the requested injunctive relief risks interference both with the Executive's constitutional authority over U.S. foreign policy and with Vietnam's sovereignty.

The Second Circuit recently came to the same conclusions in *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716-17 (2d Cir. 2004), where the plaintiffs sought environmental remediation of the former Union Carbide India Limited plant site in Bhopal, India. Expressing grave concerns about the feasibility and propriety of the injunctive relief sought, the Court of Appeals affirmed the district court's dismissal of the plaintiffs' request for injunctive relief. The injunctive relief Plaintiffs seek in this case is even less practicable, and this case poses a far greater potential for interference with both U.S. foreign relations and Vietnam's sovereignty. Accordingly, Plaintiffs' claims for injunctive relief should likewise be dismissed.

In *Bano*, an individual and three organizations sued Union Carbide and its former president, alleging personal injuries from pollution to groundwater allegedly caused by toxic chemicals and by-products that were dumped or stored at the plant site. The district court denied their request for an injunction to remediate soil and groundwater contamination as "[i]nfeasible and [i]nappropriate." *Bano v. Union Carbide Corp.*, Civ. No. 99-11329, 2003 WL 1344884, at *8 (S.D.N.Y. Mar. 18, 2003), *aff'd in part, rev'd in part*, 361 F.3d 696 (2d Cir. 2004). The court

observed that the former plant site is "located over 8,000 miles away from the United States" and now is owned and controlled by the Indian State of Madhya Pradesh, and concluded that "[o]rdering remediation . . . would be ineffectual as [defendants] have no means or authority to carry it out." *Id.* Moreover, although the Indian government apparently was willing to "cooperate with any measures imposed," the court nonetheless was sensitive to the effects of the requested relief on India's sovereignty, explaining that it did not wish "to direct a foreign government as to how that state should address its own environmental issues." *Id.*

Observing that "'[t]he practicality of drafting and enforcing an order or judgment for an injunction is one of the factors to be considered in determining the appropriateness of injunction against tort,'" and that "injunctive relief may properly be refused when it would interfere with the other nation's sovereignty," the Second Circuit affirmed the dismissal by the district court. *Bano*, 361 F.3d at 716 (quoting Restatement (Second) of Torts § 943 (1979)). Like the district court, the Second Circuit was troubled that administration of the injunction would require the cooperation of the State of Madhya Pradesh, which, although apparently willing to cooperate, "had neither been made a party to th[e] lawsuit nor sought to intervene" and therefore would not "be subject to the district court's injunction." *Id.* at 716-17. For that reason, and in light of the "difficulty that a United States court would have in controlling and overseeing the progress of remediation in India," the Court of Appeals concluded that the district court reasonably and appropriately had denied the plaintiffs' claim for injunctive relief. *Id.*

Each of the factors counseling dismissal in *Bano* is present in this case. As in *Bano*, ordering remediation would be "ineffectual," because Defendants here have no means or authority to remediate lands that are located thousands of miles away in a foreign nation, over which Defendants have no control. Here, as well, judicial enforcement would require the

ongoing cooperation of a foreign sovereign that is not a party to, and has not sought to intervene in, the lawsuit. This Court, like that in *Bano*, would have "no control over any remediation process ordered," so effective administration and oversight of the injunctive relief sought would be impossible. *Bano*, 2003 WL 1344884, at *8. And even if this Court assumed, as did the district court in *Bano*, that the foreign state would cooperate with any remediation orders imposed, ordering injunctive relief inappropriately would put the Court in the position of directing a foreign government as to how it should address its environmental issues.

Indeed, ordering abatement and remediation in this case would be far more "[i]nfeasible and [i]nappropriate" than in *Bano*. *Id.* Defendants in this case never exercised any authority or control over the lands at issue. The alleged contamination from Agent Orange and other herbicides occurred much longer ago, beginning more than two decades before the contamination at issue in *Bano*. The remediation sought involves areas far more vast and indeterminate than the discrete plant site and surrounding property in *Bano*. This Court would be required to oversee vast environmental studies and make conclusive findings about contamination caused by chemicals used many decades ago in large and unspecified regions of a foreign country. And enforcement would necessitate the administration of standards and procedures for the cleanup of lands over which the Court has no jurisdiction. These difficulties make injunctive relief wholly impracticable here. *See, e.g.*, *USAchem, Inc. v. Goldstein*, 512 F.2d 163, 168-69 (2d Cir. 1975) (affirming the denial of an injunction, because passage of time and intervening circumstances rendered injunctive relief impracticable); *Bethlehem*, 105 F.2d at 935 (finding the grant of an injunction to be impracticable, "[i]n spite of the apparent justice" of granting injunctive relief).

Further, Vietnam is not democratic India, a long-time friend and ally of the United States. Rather, Vietnam is a communist nation, with which we fought a terrible war, and whose diplomatic relations with the United States remain tentative and fragile. *See, e.g.*, Cong. Research Serv., Report IB98033, *The Vietnam-U.S. Normalization Process* (updated Nov. 28, 2003). In an effort to improve the nations' diplomatic relationship, scientists sponsored by both countries are jointly engaged in efforts to study the environmental effects of Agent Orange and explore potential methods of remediation.[3] The effort is a humanitarian one, however, not a matter of wartime reparations. Requiring U.S. military contractors to remediate damages in Vietnam under orders from a United States court could compromise that diplomatic relationship. As such, a grant of injunctive relief would unnecessarily complicate the Executive's conduct of foreign relations.

III. CONCLUSION

Granting the injunctive relief requested here would thrust this Court into the untenable role of overseeing the remediation of vast tracts of land located thousands of miles away, allegedly contaminated decades ago in a foreign country that has not asked for this Court's assistance, and over which the Court could maintain no control. Indeed, it would place this Court in the position of developing and supervising a compulsory remediation program in a nation ruled by a communist regime with which the United States maintains only fragile diplomatic relations The scope of the relief sought, combined with practical difficulty and political risks of seeking to control a remediation effort on Vietnamese soil, make the issuance of

[3] *See* Memorandum of Understanding Between the Nat'l Inst. of Envtl. Health Scis. of the U.S. Dep't of Health & Human Servs., and the Nat'l Envtl. Agency of the Vietnamese Ministry of Sci., Tech. & the Env't (Mar. 10, 2002), *available at* www.niehs.nih.gov/external/usvcrp/mou31002.pdf.

the injunction requested here wholly impracticable. In prudence, Plaintiffs' claim for injunctive relief should be dismissed.

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