Florida Journal of International Law

Volume 2 | Issue 1 Article 4

January 1986

Multinational Business Enterprises in Lesser Developed Countries: The Role of the United States Legal System

Asifa Skeikh

Note

MULTINATIONAL BUSINESS ENTERPRISES IN LESSER DEVELOPED COUNTRIES: THE ROLE OF THE UNITED STATES LEGAL SYSTEM

I. INTRODUCTION

On December 3, 1984, methylisocyanate, a deadly chemical used to make pesticides, escaped from a Union Carbide Corporation plant into the air of Bhopal, India.[1] Approximately 2,000 people died and another 250,000 were injured.[2] The long-term effects of the incident

1. Iyer, *India's Night of Death*, TIME, Dec. 17, 1984, at 25. The deadly gas escaped from an apparently faulty valve. It then formed a dense fog over the City of Bhopal (pop. 672,000) for over an hour. *Id.* Investigations as to how the gas actually escaped are still continuing. *See generally* N.Y. Times, Jan. 28, 1985, at 1, col. 1. One theory on the cause of the accident is that water leaked into the tank containing the chemical. *Id.* Another hypothesis is that water reacted with another chemical, phosgene, resulting in a chain reaction that released highly corrosive chloride ions. *Id.* So far investigators have found evidence of at least five contaminants in the tank that leaked. Among them were water, iron and lye. *Id.*

2. N.Y. Times, Jan. 30, 1985, at 1, col. 1. The disaster in Bhopal was the worst industrial accident in history. *Id. See generally* Iyer, *supra* note 1, at 23, where he explains that

> [most] of the dead had succumbed because their lungs had filled with fluid, causing the equivalent of death by drowning. Others had suffered heart attacks. The disaster

on the residents of Bhopal[3] and on the multinational business community are certain to be substantial. Since World War II multinational business enterprises (MNEs) have flourished throughout the world,[4] becoming one of the most controversial economic and political institutions of recent times.[5] MNEs are especially vital to lesser developed countries (LDCs) because they provide technology, create employment opportunities and supply capital. The MNEs' activities in these LDCs have been the subject of continuous strict scrutiny. The Bhopal disaster is evidence that such scrutiny is not only justifiable but necessary.

This note examines the issues raised by the presence of MNEs in lesser-developed countries, such as the delicate relationship with host governments, the effects of industrialization on lesser developed countries and the regulation of MNEs. The note then discusses the

---

struck hardest at children and old people, whose lungs were either too small or too weak to withstand the poison. A number of the survivors were permanently blinded, others suffered serious lesions in their nasal and bronchial passages. Doctors also noticed concussions, paralysis and signs of epilepsy.

Id.

3. *See* Iyer, *supra* note 1, at 31. Although there is no evidence that the gas causes cancer, there is a fear that many of the survivors may suffer from emphysema, asthma or bronchitis. Some medical authorities also suspect that the chemical could cause liver or kidney damage and possibly damage to the central nervous system. Some hope was provided, however, by doctors who explained that the effects of low-level exposure would go away. *Id.*

4. *See generally* Solomon, *The Impact of Multinational Corporations on the Western World*, 45 UMKC L. REV. 169 (1976). Solomon explains the development of MNEs in this way:

> After World War II, the United States led the way in establishing a political, economic and military framework for a world system based on the dollar as the standard of value for all currencies, and on the free flow of investments and goods, pursuant to market principles among nations. Under the hegemony of the United States, American businessmen gradually came to view the world as a single economic unit. In the quest for optimal efficiency, multinational corporations attempted to create a world economy in which various business functions—production, finance and distribution—could take place without regard to the barriers, regulations or the institutions of nation-states. The most efficient allocation would require ever greater specialization based on the location of resources and economies of scale. The separate operations in different countries would serve the totality.

Id. at 169.

5. *See generally* C. BERGSTEN, T. HORST & T. MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTERESTS (1978) [hereinafter cited as C. BERGSTEN]; R. GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION (1975); THE CASE FOR THE MULTINATIONAL CORPORATION (C. Madden ed. 1977). The contrasting points of view with regard to MNEs are a result of opposite views on the desirability of direct foreign investment. To some, foreign investment promotes American interests because it enhances the efficiency of world production, increases American exports, augments the quantity and quality of employment and increases American access to raw materials at reasonable prices. C. BERGSTEN, *supra*, at 3. According to the contrary view, however, foreign direct investment hurts American interests by exporting American jobs, by undermining domestic economic growth by transferring technology overseas and by eroding labor's bargaining position by supporting nonunion operations overseas. *Id.* at 3-4.

various issues that will arise in multinational litigation. The various issues are then analyzed in light of the Bhopal disaster, discussing whether the United States is an appropriate forum in which to determine liability, whether American or Indian law should be applied and whether a judgment rendered will be enforceable in the United States and in India. Based on the resolutions of these issues, this note suggests stricter regulation of MNEs by the host countries and by the United States.

II. MNEs IN LESSER DEVELOPED COUNTRIES

MNEs play an enigmatic role in lesser developed countries. The host nations desperately need the foreign investment to continue their development, yet they also desperately seek to maintain their identities. The host nations harbor a fear that by allowing foreign investment they are also allowing themselves to be dominated by the industrialized countries.[6] As a consequence of these conflicting forces, MNEs have generated substantially greater controversy in lesser developed countries than they have in industrialized nations.

Despite this controversy, the lesser developed countries have generally welcomed the MNEs. By conducting business in lesser developed countries, the MNEs provide much needed jobs for the people of these countries.[7] They also establish ties with foreign markets that may eventually enable the host countries to increase their exports.[8] In addition, MNEs inject cash into LDCs' economies and more importantly, MNEs transfer technology to LDCs.[9] The presence of foreign-owned enterprises has also generated benefits for local businessmen. These benefits include opportunities to act as contractors, suppliers and distributors, opportunities to become junior partners and opportunities to eventually take over the local subsidiary.[10]

---

6. R. VERNON, STORM OVER THE MULTINATIONALS 140 (1977). Vernon explains that most of the countries of the developing world think of themselves as new nations. They are, of course, ancient nations, but the governments are conscious of the fact that their ancient achievements were dimmed during the nineteenth century by the hegemony of Europe and the United States over Africa, Asia and Latin America. Thus, many of these countries see themselves as having emerged again only within the past decade or two. *Id.* at 140-41.

7. *Id.* at 144.

8. L. WELLS, *More or Less Poverty? The Economic Effects of the Multinational Corporation at Home and in the Developing Countries*, in THE CASE FOR THE MULTINATIONAL CORPORATION, *supra* note 5, at 71.

9. *See generally* M. GORDON, *The Impact of the Multinational Corporation in the Third World*, in LEGAL PROBLEMS OF MULTINATIONAL CORPORATIONS 20 (1977); R. VERNON, *supra* note 6; R. VERNON, *The Power of Multinational Enterprises in Developing Countries*, in THE CASE FOR THE MULTINATIONAL CORPORATIONS, *supra* note 5, at 151; L. WELLS, *supra* note 8.

10. R. VERNON, *supra* note 6, at 142.

Although these benefits render MNEs desirable in lesser developed countries, the MNEs are often perceived as a destabilizing force. The influx of MNEs brings industrialization with its problems of pollution and corruption.[11] Because MNEs are generally much larger than national enterprises, public opinion links the ill-effects of the industrialization process to the operations of MNEs.[12] Along with the social costs associated with industrialization, there are also the economic costs of schools, roads, power plants, police protection and other facilities necessary to serve the MNEs.[13] Direct foreign investment can also cause a decline in local production because the MNEs often appear too formidable a competitor to a potential local entrepreneur.[14] Finally, foreign investment may reduce the host government's revenue because the host government normally has trouble taxing foreign business enterprises.[15]

Where the MNEs are producing hazardous substances in the lesser developed countries, as was the case in Bhopal, the problems are even more acute. The developing countries often do not put the same premium on safety as Americans.[16] Consequently, the safety regulations are usually inadequate,[17] with the likelihood of corruption

---

11. *Id.* at 144. Vernon explains:

> Industrialization has been accompanied by a sharp increase in the visible rich, all the more striking because of the concurrent existence of urban and rural poverty. Other concomitants are apparent: unremitting huckstering of trivial wares by billboard, radio and television, insouciant pollution of air and water by some industrial producers,. . .and the endemic use of influence, bribes and extortion by public figures and private sellers.

Id. at 144-45.

12. *Id.* at 145. Aside from the burden of being big, the MNEs additionally bear the special burden of being foreigners. Consequently, MNEs are commonly perceived of as "epitomizing the disconcerting ills that seem constantly to dilute the gains from industrialization." *Id.*

13. L. WELLS, *supra* note 8, at 75. Another disadvantage to direct foreign investment is that the investor is left free to set extremely high prices because the host country normally provides protection from import competition through tariffs or quotas. *Id.* at 73. *See* General Agreement on Tariffs and Trade (GATT), June 30, 1967, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194. GATT cleared the ground for MNEs to pursue their goals unhindered by traditional trade restraints imposed at national boundaries. *See also* Vagts, *The Multinational Enterprises: A New Challenge for Transnational Law*, 83 HARV. L. REV. 737, 765 (1970).

14. L. WELLS, *supra* note 8, at 74.

15. *Id.* at 75. Even if the host government had the capability to collect the taxes, this problem would not be solved since the host governments commonly allow the investor to conduct his business tax-free. *Id.*

16. Wall St. J., Dec. 13, 1984, at 1, col. 6. No developing nation's industry comes close to having the elaborate system of safety regulations and inspections of the United States. *Id.* Although American executives insist they apply the same safety standards abroad as at home, this often is not the case. The companies complain that they face many problems in attempting to reach those standards. The difficulties cited range from finding commercial waste disposal incinerators to acquiring gear to test workers' pulmonary functions. *Id.*

17. *See* Wall St. J., Dec. 21, 1984, at 1, col. 6. "Third world countries have a patchwork of environment rules and their enforcement is often patchwork, too." *Id.* Often the problem is

further exacerbating the problem.[18] Moreover, since the literacy rate is often low, the citizens do not understand the safety procedures or even why they are required.[19] Finally, in the case of an emergency, the primitive level of the transportation and communications systems means almost certain disaster.[20]

Recognition of these problems has led to attempts to regulate the activities of MNEs. Regulating MNEs, however, is not an easy task. Although the host nations hold physical jurisdictional powers, they generally have been reluctant to exercise them.[21] If a host nation attempts to overregulate a local subsidiary, it risks removal of the subsidiary by the parent. Nationalizing the subsidiary is equally ineffective because international law requires that the parent be compensated.[22] More importantly, the host nation may lose the MNEs' vital capital and technological imports and may discourage other MNEs from investing in their country.[23] Furthermore, even if developing nations fully respected international law,[24] a legally binding international control system that takes into account the various aims and interests of both the host nations and the MNEs would be

---

that the number of safety inspectors is inadequate. *Id.*

18. *See* Wall St. J., Dec. 13, 1984, at 1, col. 6. Often companies say that their biggest problem is inspectors "who arrive with their hands out and say, 'This could take weeks, why not just settle it today?' " *Id. See also* Wall St. J., Dec. 21, 1984, at 1, col. 6. Health inspectors can be persuaded not to inspect for the price of a lunch and a couple of beers. *Id.*

19. *See* N.Y. Times, Dec. 16, 1984, at 1, col. 2.

20. Wall St. J., Dec. 13, 1984, at 1, col. 6. Organizing an orderly evacuation is a daunting task in the best of circumstances. It becomes nearly impossible, though, when a slum has sprung up around the plant or when the phones do not work half the time. These problems are common in many developing lands. *Id.*

21. Note, *Control of Multinational Corporations' Foreign Activities*, 15 WASHBURN L.J. 435, 438 (1976).

22. *Id.* Whether compensation is actually required by international law is a question open to debate. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (which enunciated the Act of State doctrine: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1963) (in which the Court held "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling principles, even if the complaint alleges that the taking violates customary international law."). *But see* 22 U.S.C. § 2370(e)(2) (1961) (speedy compensation is required in order for the taking state to discharge its obligations under international law). *Compare* G.A. Res. 1803, 14 U.N. GAOR Supp. (No. 17), U.N.Doc. A/5217 (1963) (the owner of property taken shall be paid appropriate compensation) *with* G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31), 50 U.N. Doc. A/9631 (1975) (appropriate compensation should be paid by the taking state).

23. *See* Note, *supra* note 21, at 438.

24. C. WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 303 (1983).

difficult to draft and enforce.[25]

III. The Bhopal Disaster

The Bhopal situation illustrates the typical role of MNEs in lesser developed countries. Often these nations have laws requiring the foreign investor to transfer control of the operation to local interests.[26] Under India's Foreign Exchange Regulation Act,[27] foreign equity is limited to forty percent. The Indian government, however, granted an exception to Union Carbide based on its significant export volume and its technological sophistication.[28] Consequently, Union Carbide was allowed to own 50.9 percent while nationals owned the remaining 49.1 percent.[29] The requirement of the presence of locals on the Board of Directors is also common[30] and officials of the Indian subsidiary were in fact present on Union Carbide's Board.[31]

Union Carbide also had the typical problems in its daily operations that MNEs commonly encounter in lesser-developed countries. For example, the lesser-developed countries do not have the elaborate system of safety regulations and inspections present in the United States.[32] Furthermore, enforcement of what regulations they do have is often inadequate.[33] In the Bhopal area India had fifteen safety inspectors to monitor over 8,000 plants scattered across a large geographic area.[34] The Bhopal office itself had only two inspectors, neither of whom had expertise in handling chemical hazards.[35] Moreover, short of going to court, the inspectors had little authority to

---

25. *Id.* at 301.

26. *See generally* W. Friedmann & J. Beguin, Joint International Business Ventures in Developing Countries (1971); W. Friedmann & G. Kalmanoff, Joint International Business Ventures (1961). A joint venture is an enterprise in which two or more parties, representing one or several developed and one or several developing countries, share the financial risks and the decision-making through joint equity participation in a common enterprise. *Id.* at 3.

27. Foreign Exchange Regulation Act (1973). Foreign equity participation has to be justified having regard to factors such as priority of industry, nature of technology promotion of exports, which may not otherwise take place, and alternative terms available for securing the same or similar technological transfer. *Id.*

28. Wall St. J., Jan. 16, 1985, at 28.

29. *Id.*

30. *See generally* W. Friedmann & J. Beguin, *supra* note 26.

31. N.Y. Times, Jan. 28, 1985, at 1, col. 1.

32. *See supra* note 16 and accompanying text.

33. *See supra* note 17 and accompanying text.

34. N.Y. Times, Jan. 31, 1985, at 1, col. 4. The inspectors who are employed lack the most basic instruments such as typewriters and telephones. Most must travel by public bus and train to make their inspections. *Id.* Each inspector had responsibility for more than 150 factories—triple the standard recommended by the International Labour Organization and each was given a quota of 400 inspections a year to be done in only 200 days. *Id.*

35. *Id.*

order unsafe conditions remedied.[36] A further problem with enforcement is that corruption among officials is often prevalent throughout a developing nation's government.[37] Although specific charges of corruption have not been made against Indian officials regarding the Bhopal plant, companies operating in the lesser-developed countries have often complained that corruption is one of their biggest problems.[38]

The greatest problem regarding safety regulations and inspections stems from the fact that the majority of the citizens of these LDCs are not aware of the importance of ecology and have a limited understanding of the nature or effects of hazardous chemicals.[39] Because most of the citizens of Bhopal are illiterate,[40] training at the Union Carbide plant consisted of rote memorization without a basic understanding of procedures.[41] Many of the workers did not even realize that the gas was lethal,[42] believing instead that it only caused skin and eye irritation.[43] Aside from the employees of the plant, neither the other citizens of Bhopal[44] nor the city officials[45] and doctors[46] suf-

---

36. *Id.* The process of going to court often takes years and the fines are often minimal. For example, in one case, the factory managers were fined twenty cents for each infraction. *Id.*

37. *See supra* note 18 and accompanying text.

38. *Id.*

39. N.Y. Times, Dec. 16, 1984, at 1, col. 2. There is no continuum of intelligence in India as in the United States. "There are only two layers: a thin veneer of highly skilled people at the top and hundreds of millions of people who don't have a basic understanding of industrialization at the bottom." *Id.* Preventive maintenance, experts say, is a concept with which much of the developing world is unfamiliar. *Id.*

40. N.Y. Times, Dec. 31, 1984, at 4, col. 1.

41. N.Y. Times, Dec. 16, 1984, at 1, col. 2. Union Carbide's 1982 audit of the plant recognized the problem. For example, the audit said the safety valve testing program did not seem to be well understood. Furthermore, maintenance people signed work permits they could not read. *Id.*

42. N.Y. Times, Jan. 30, 1985, at 1, col. 1. The workers at the plant were not aware of the risks despite the fact that the Union Carbide manual explicitly stated that the chemical could cause fatal pulmonary edema. The manual was distributed to managers that handled methylisocyanate and was seen by some of the workers, but most of the employees had not read or understood it. *Id.*

43. *Id.*

44. N.Y. Times, Jan. 31, 1985, at 1, col. 4. Many of the residents have said they were never told that the chemical was poisonous. Some thought the plant was producing "some kind of powder." Others thought the plant made "medicine for plants." *Id.*

45. *Id.* The city officials knew the plant produced pesticides, but did not know of the chemical's characteristics. Both Bhopal's part-time mayor and the chief administrative officer claimed they did not know much about what the Union Carbide plant produced. *Id.*

46. *Id.* Not even the director of public health for the state knew anything about the poison gas.

> Indeed, even with the first bodies piling up at Hamidia Hospital, he said a factory doctor told him that the gas was not lethal and that it caused only eye and lung irritation. "They said it's not so toxic to create any problem," [the doctor] said. [He then said], "What are you talking about—people are coming in dying."

ficiently understood the dangers inherent in the chemical.[47] As a result of this lack of understanding, city officials allowed slums to develop close to the plant thus preventing the formation of an unpopulated "green belt" around the plant.[48] Consequently, when the accident occurred, a large number of people residing near the plant were injured.[49]

IV. Litigation Issues

Since the accident, several multibillion dollar class action suits have been filed in the United States.[50] Eighteen suits have been combined in the Federal District Court for the Southern District of New York,[51] and at least twenty more suits are pending which are also expected to be combined in the same court.[52] Additionally, several cases have been filed against Union Carbide in state courts.[53] The company will probably attempt to have them removed to federal court[54] and then transferred to New York.[55] The Indian state of

---

Id.

47. *Id.*

48. *Id.* The local government granted construction permits in 1976 for a housing project near the plant and other housing also sprung up near the plant with government sanction. Simultaneously, unauthorized slums also sprang up closer to the plant housing approximately 3,000 people. *Id.* The development of slums such as the one in Bhopal is commonplace in India. It is the

> product of human and social forces that have altered the face of India over the last decade or two. Impoverished villagers have migrated by the millions into cities like Bhopal, seeking opportunity and work. Finding no housing and scant work, they have been forced to live illegally on whatever unoccupied land they could find. Increasingly, local governments have yielded to political pressures and authorized them to stay.

Id.

49. *See supra* note 20 and accompanying text. *See also* N.Y. Times, Jan. 30, 1985, at 1, col. 1. After the leak was discovered at the plant, the workers began to run away. Four buses were parked by the road on which workers ran to escape. "There was a provision for drivers to man the vehicles and drive them to the nearby neighborhood, loading some residents aboard and having the rest follow,. . .but the buses stood idle. . . ." *Id.*

50. N.Y. Times, Dec. 14, 1984, at 6, col. 4. At least three class actions had been filed: a $15 billion suit in Charleston, West Virginia, a $20 billion suit in New York and a $50 billion suit in Chicago. *Id.*

51. N.Y. Times, Feb. 7, 1985, at 29, col. 3. The suits were combined in New York because it was the most convenient place because of the proximity of Union Carbide's headquarters at Danbury, Connecticut. *Id.* Some lawyers had urged for consolidation in West Virginia where Union Carbide operates a facility similar to the one located in Bhopal. *Id.*

52. *Id.*

53. *Id.*

54. *See* 28 U.S.C. § 1441(a) (1948) which provides one method by which Union Carbide could have the suit removed to a federal court. Section 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdic-

Madhya Pradesh, where Bhopal is located, also plans to file suit in the United States on behalf of the victims.[56] *Forum non conveniens*, choice of law and recognition of foreign judgments are certain to be prominent issues in the resolution of these suits.

A. *Forum Non Conveniens*

1. Evolution of *Forum Non Conveniens* Doctrine

The doctrine of *forum non conveniens* allows a court to decline to hear a case even though venue and jurisdiction are proper.[57] Although MNEs are primarily a product of recent post-World War II large-scale overseas investment,[58] the doctrine of *forum non conveniens* has long been in existence.[59] In fact, admiralty courts had long since been applying the doctrine to disputes arising from international maritime commerce.[60] In 1947 the Supreme Court extended the doctrine beyond the admiralty context to the federal courts in *Gulf Oil Corp. v. Gilbert*.[61] In *Gilbert*, the plaintiff, a Virginia resident, brought suit in New York for an accident which occurred in Virginia. The defendant-corporation did business in both New York

---

tion, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.

55. Union Carbide could accomplish transfer through 28 U.S.C. § 1404(a) (1948) which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

56. N.Y. Times, Dec. 31, 1984, at 4, col. 1.

57. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 259-60 (1983). The doctrine of *forum non conveniens* has largely been superseded in federal courts by 28 U.S.C. § 1404(a) (1948). Thus, only in rare instances where the alternative forum is a state court or the court of a foreign country may the federal court now dismiss on grounds of *forum non conveniens*. C. WRIGHT, *supra*, at 260.

58. *See supra* note 4 and accompanying text. *See also* Note, *supra* note 21, at 436.

59. *See* Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257 (1981). The doctrine of *forum non conveniens*, itself, originated in the common law of Scotland as an equitable remedy. *Id.* at 1259. *See also* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

60. Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 755 (1977). *See generally* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949).

61. 330 U.S. 501 (1947). In *Gilbert*, the plaintiff operated a public warehouse in Virginia. He alleged that the defendant so carelessly handled a delivery of gasoline in the warehouse as to cause an explosion and fire which consumed the warehouse. *Id.* at 502-03.

and Virginia.[62] The *Gilbert* court held that whether *forum non conveniens* dismissal would be granted depended on the balancing of public[63] and private interests.[64] The court granted dismissal in *Gilbert* because neither the plaintiff nor any of the witnesses were New York residents and none of the events connected with the case occurred in New York.[65] The court determined that the balance was strongly in favor of the defendant, thereby justifying disregard of the plaintiff's choice of forum.[66]

In *Koster v. Lumberman's Mutual Casualty Co.*,[67] decided the same day as *Gilbert*, the Supreme Court explained that the ultimate inquiry in applying the *Gilbert* test was determining where the trial would best serve the convenience of the parties and the ends of justice.[68] In *Koster*, the plaintiff, a New York citizen, brought a derivative action in New York against two Illinois corporations and an Illinois defendant.[69] The Court granted dismissal because all of the directors of the defendant-corporations lived in Illinois, all of the witnesses lived in Illinois and Illinois law would apply.[70] In addition, the Court emphasized the fact that the plaintiff would have to make his case from information located in Illinois.[71] Thus, the court concluded

---

62. *Id.* at 503.

63. *Id.* at 508-09. The public interest factors enunciated by the Court were: court congestion, the burden of jury duty upon the people of a community which has no relation to the litigation, the desirability of holding a trial in the view and reach of the people who are most concerned with it and the appropriateness of having the trial in a forum familiar with the applicable law. *Id.*

64. *Id.* at 508. The private interest factors a court must take into account are: the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses, the possibility of viewing the premises, the ease and expense of trial and the enforceability of a judgment if one is obtained. *Id.*

65. *Id.* at 511.

66. *Id.* at 508. The court must weigh relative advantages and obstacles to fair trial. Although the plaintiff's choice of forum should rarely be disturbed, the plaintiff should not be allowed to vex, harass or oppress the defendant by inflicting upon him unnecessary expense or trouble by choosing an inconvenient forum. *Id.* The Court added that the doctrine leaves much to the discretion of the court. *Id.* at 507-09. *See* Canada Malting Co. v. Paterson S.S., 285 U.S. 413 (1932) (courts can decline to exercise jurisdiction where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal).

67. 330 U.S. 518 (1947). The plaintiffs in *Koster* brought a derivative action against the officer of the corporation alleging a breach of trust. The defendant allegedly entered into transactions by which he, his family and his friends had profited. The plaintiff, therefore, asked that the defendants account for damages to the corporation and for profits they had realized. *Id.* at 519-20.

68. *Id.* at 527.

69. *Id.* at 519.

70. *Id.* at 520-21.

71. *Id.* at 521. The *Koster* Court cautioned that it was not holding that any time an action involved inquiry into the internal affairs of a defendant-corporation, the defendant would

that the balance of interests weighed substantially in favor of the defendant and it dismissed the action on the grounds of *forum non conveniens*.

In the aftermath of *Gilbert* and *Koster*, the lower courts unsuccessfully attempted to develop reliable standards with which to balance the conflicting private and public interests.[72] In 1981 the Supreme Court attempted to provide some guidance in *Piper Aircraft Co. v. Reyno*.[73] In *Piper*, the plaintiffs brought a wrongful death action in the United States arising from an airplane crash in Scotland. All of the victims were Scottish, but the defendants were American manufacturing companies.[74] The *Piper* Court found that the situation warranted a dismissal.

In granting the dismissal, the Court identified several factors that weighed heavily in the defendant's favor. If trial were held in the United States, for example, the defendants would not be able to implead a potential third party defendant who, if found negligent, would relieve the existing defendants of liability.[75] Additionally, Pennsylvania law would have applied to one of the defendants and Scottish law to the other thereby resulting in jury confusion.[76] Fur-

---

be entitled to a *forum non conveniens* dismissal. That is only one factor which the courts should take into account as it relates to the convenience of the parties. *Id.* at 527. In fact, in some circumstances, the Court explained, place of corporate domicile might be entitled to little consideration since corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements. *Id.* at 527-28. Consequently, the doctrine of *forum non conveniens* is a doctrine "which resists formalization and look[s] to the realities that make for doing justice." *Id.* at 528.

72. *See generally* A. EHRENZWEIG, CONFLICT OF LAWS (1959); Schlesinger, *Methods of Progress in Conflicts of Law: Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. PUB. L. 313 (1960); *Symposium: Products Liability—International*, 8 GA. J. INT'L & COMP. L. 233 (1978); Note, *supra* note 59; Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57 (1967).

73. 454 U.S. 235 (1981). The suit was brought by the administratrix of the estates of the five passengers. The suit was originally filed in a California state court. It was then removed to federal court and ultimately transferred to a federal district court in Pennsylvania where the airplane had been manufactured by Piper Aircraft Co. *Id.* at 239-40.

74. *Id.*

75. *Id.* at 259. Piper sought to implead the pilot, the plane's owners and the charter company. If Piper could have shown that the accident was caused not by a design defect, but rather by the negligence of these other parties, it would have relieved itself of all liability. *Id.*

76. *Id.* at 260. Relying on Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1948) (a court must apply the choice of law rules of the state in which it sits) and on Van Dusen v. Barrack, 376 U.S. 612 (1946) (under 28 U.S.C. § 1404(a), the transferee court must apply the choice of law rules of the transferor court), the district court found that California choice of law rules would apply to Piper, and Pennsylvania choice of law rules would apply to Hartzell. Furthermore, since California applied a "governmental interests" analysis, Pennsylvania law applied to Piper. Since Pennsylvania employed the "significant contact" analysis, Scottish rules applied to Hartzell. *Id.* at 243 n.8. Aside from jury confusion, the court noted its own lack of familiarity with Scottish law. *Id.* at 260.

thermore, the Court believed Scotland had a very strong interest in the litigation.[77] Although the Court held that the above considerations could appropriately be taken into account in applying the *Gilbert* test,[78] the Court rejected the notion that a possible change in the law of the alternative jurisdiction could bar *forum non conveniens* dismissal.[79] Instead, the Court dismissed for *forum non conveniens* despite the fact that the plaintiffs would be denied the benefit of the doctrine of strict liability under Scottish law.[80]

Rather than simplifying the doctrine, the *Piper* decision only

---

77. *Id.* Scotland had an interest in the litigation since the accident occurred in its airspace and since all of the defendants were Scottish. Furthermore, nearly all the other potential plaintiffs and defendants were either Scottish or English. *Id.*

78. *See supra* notes 63 & 64 and accompanying text.

79. *Piper*, 454 U.S. at 247. The Court held the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry. *Id.* To hold otherwise, the Court explained, would render the doctrine virtually useless. *Id.* at 250. The Court explained:

> If a possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice of law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions. First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. Dismissal would be appropriate only if the court concluded that the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum. The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law.

Id. at 251.

80. *Id.* at 258. The plaintiffs admitted that the action was filed in the United States because its laws regarding liability, capacity to sue and damages were more favorable to their position than those of Scotland. Not only did Scottish law not recognize the doctrine of strict liability in tort, but it also only permitted wrongful death actions when brought by a decedent's relatives. (In *Piper*, the suit was brought by the administratrix of the estates of the decedents.) *Id.* See *id.* at 252 where the *Piper* Court explained that it was afraid that by refusing dismissal in this case, American courts would become even more attractive to foreign plaintiffs. *Id.* This would be true, first, because the doctrine of strict liability has not gained wide acceptance throughout the world. Second, the plaintiff would be able to choose a jurisdiction which had choice of law rules favorable to him. Third, jury trials are almost always available in the United States but not in other countries. Fourth, unlike most foreign jurisdictions, American courts allow attorneys to work on a contingent fee basis. Finally, discovery is more extensive in American courts. *Id.* at 252 n.18. *See generally* R. SCHLESINGER, COMPARATIVE LAW: CASES, TEXT, MATERIALS (3d ed. 1970); THE INDIAN LAW INST., THE INDIAN LEGAL SYSTEM 622 (1978). The doctrine of strict liability is recognized under Indian law. However, it is rarely applied. The Indian courts recognize an exception to the doctrine of strict liability where the land was used for "natural purposes." *Id.* This is a very broad exception as evidenced by Dhanal Sourma v. Rangoon Indian Tel. Ass'n, 1935 A.I.R. 401. In that case, an employee of the company died of electrocution caused by a defect in electric installation. The court did not apply strict liability because the time had come to consider the bringing of electricity upon land as reasonable because of its domestic and other uses. *Id.*

served to complicate it.[81] The Court did not give adequate weight to a change in law. This factor affects the treatment the plaintiff will receive in the alternative jurisdiction if the case is dismissed on *forum non conveniens*. Furthermore, the doctrine is never supposed to be applied where it would result in injustice to the plaintiff.[82] The effect of the *Piper* holding has been to encourage reverse forum shopping thus eliminating the advantage inherent in the plaintiff's ability to choose the forum and applicable law.[83] This threat is even greater in international litigation because, in contrast to the federal system, the transferee forum is not required to apply the law of the transferor forum.[84]

More importantly, the *Piper* Court underestimated American in-

---

81. *See, e.g.*, Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984) (court said that when a regulated industry such as pharmaceuticals is involved, the country where the injury occurs has a particularly strong interest in the litigation); Holmes v. Syntex Laboratories, Inc., 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984) (court held that under California law of *forum non conveniens*, the suitability of the alternative forum, including factors such as differing conflict of law rules and substantial disadvantage from litigation in the alternative forum must be considered). *But see* Hodson v. A.H. Robins, Co., Inc., 715 F.2d 142 (4th Cir. 1981) (court refused to dismiss for *forum non conveniens* although a regulated industry was involved).

82. Southern Ry. v. Painter, 314 U.S. 155, 156 (1941). *See generally* Comment, *The Foreign Plaintiff Is Entitled to Less Deference in His Choice of Forum Than Is a Citizen or Resident Plaintiff, A Change of Law Resulting From Dismissal Is Not a Substantial Factor in the Forum Non Conveniens Analysis*, 15 VAND. J. TRANSNAT'L L. 583 (1982). "[S]anctioning dismissal which in effect denies the plaintiff recovery possibly due him under United States legal principles for the purpose of easing the court's burden subordinates justice to convenience and contradicts the underlying principles of *forum non conveniens*. . . ." *Id.* at 583.

83. *See* Comment, *The Likelihood of a Change in Substantive Law Will Not Defeat a Motion for a Forum Non Conveniens Dismissal Nor Is It to Be Given Substantial Weight in the Balancing of Relevant Factors*, 17 TEX. INT'L L.J. 242, 250 (1982). As a result of the *Piper* holding, defense attorneys may use *forum non conveniens* motions more frequently. The defendant would be encouraged to move for a *forum non conveniens* dismissal in any case in which a choice of law analysis revealed that the alternative forum would apply a law more favorable to him. *Id. See generally* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (1976); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Note, *The Proper Rule of the Residence Factor in Forum Non Conveniens Motions*, 45 S. CAL. L. REV. 249 (1972).

84. *See* Van Dusen v. Barrack, 376 U.S. 612 (1964). In *Van Dusen*, the personal representative of deceased persons brought a wrongful death action arising out of an airplane crash. The crash occurred in Massachusetts, and suits were brought in Massachusetts and in Pennsylvania. The defendant moved to transfer the cases from Pennsylvania to Massachusetts under 28 U.S.C. § 1404(a) (1948). 376 U.S. at 614. The plaintiffs in *Van Dusen* argued that transfer was precluded because it would be accompanied by a highly prejudicial change in the applicable state law. *Id.* at 626. The Court relied on the policy behind Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which is that suit for the same transaction in a federal court should not lead to a substantially different result from a suit brought in state court. *Van Dusen*, 376 U.S. at 638-39. Thus, the Court held the transferee forum must apply the law of the transferor forum. *Id.* at 639. See also Comment, *supra* note 82, which states that the threat of reverse forum shopping is greater in international litigation because of the wide disparity among the laws of foreign legal systems. *Id.* at 251. *See generally supra* note 80 and accompanying text.

terests in the safety of products manufactured and distributed abroad.[85] By establishing a strong presumption in favor of the plaintiffs, the Court would have ensured that defendants would always be held to the highest possible standard of accountability for their purported wrongdoings.[86] Accountability under American law would have enhanced the value of the products and services offered abroad, while also indicating that the United States will not promote or allow its citizens to dump inferior or dangerous products in other countries.[87] The *Piper* decision will have its most significant impact on international products liability litigation because American defendants will now be able to easily avoid international disputes.[88]

---

85. *See Piper*, 454 U.S. at 260-61. The plaintiffs in *Piper* argued that the suit should not be dismissed for *forum non conveniens* because American citizens have an interest in ensuring that American manaufacturers are deterred from producing defective products. The Court, however, dismissed that argument claiming that any deterrence that would be gained if the trial were held in the United States would be insignificant. The Court said, "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.*

86. Comment, *Change in Substantive Law Does Not Per Se Preclude Dismissal on Forum Non Conveniens Grounds*, 23 S. TEX. L.J. 490, 495-96 (1982).

87. Comment, *supra* note 82, at 595 n.68. *See, e.g.*, Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984) (action by British citizens against an American drug manufacturer. Ingestion of the drug during pregnancy caused serious birth defects in the infants.); Hodson v. A.H. Robins, Co., Inc., 715 F.2d 142 (4th Cir. 1981) (action by English citizens against an American manufacturer of intrauterine contraceptive devices which caused pelvic inflammatory disease, peritonities and severe shock to nerves and to the nervous system). *But see* Harrison v. Wyeth Laboratories, Etc., 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982). In *Harrison*, the plaintiffs brought a products liability action for injuries incurred as a result of ingestion of oral contraceptives manufactured by an American drug company. The court dismissed for *forum non conveniens* saying that questions as to the safety of drugs marketed in a foreign country are properly the concern of that country, and the courts of the United States are ill-equipped to set a standard of product safety for drugs sold in other countries. *Id.* at 4. The court illustrated the inappropriateness of the contrary view with an example:

> The impropriety of such an approach would be even more clearly seen if the foreign country involved was, for example, India, a country with a vastly different standard of living, wealth, resources, level of health care services, values, morals and beliefs than our own. Most significantly, our two societies must deal with entirely different and highly complex problems of population growth and control. Faced with different needs, problems and resources in our example India may, in balancing the pros and cons of a drug's use, give different weight to various factors than would our society, and more easily conclude that any risks associated with the use of a particular oral contraceptive are far outweighed by its overall benefits to India and its people. Should we impose our standards upon them in spite of such differences? We think not.

Id. at 4-5. *See generally* Comment, *Consumer Safety Abroad: Dumping of Dangerous American Products Overseas*, 12 TEX. TECH. L. REV. 435 (1981).

88. Comment, *supra* note 86, at 496.

2. *Forum Non Conveniens* in the Bhopal Suit

Union Carbide is certain to file a motion to dismiss on grounds of *forum non conveniens*. In examining the private interest factors, [89] the court should consider the accessibility of proof. Since the plant itself is in India, the determination of what actually caused the accident may be easily made in India. For example, inspecting the premises, a determinative factor in *Dahl v. United Technologies Corp.*,[90] will be impractical if the trial is held in the United States. In *Dahl*, the plaintiffs brought an action in the United States against American manufacturing companies for damages arising from a helicopter crash off the coast of Norway.[91] The court granted dismissal emphasizing the fact that all of the documentary and demonstrative evidence, such as the wreckage of the helicopter and the flight and operational records, was located in Norway.[92] This factor, however, will not be as important in the Bhopal situation because much of the information regarding safety procedures and inspections is located in the United States at the Union Carbide headquarters.[93]

Another private interest the court should examine is the availability and cost of obtaining witnesses. All of the witnesses to the actual event as well as most of the witnesses on the issue of damages will be from India. Bringing these witnesses to the United States will not only be extremely expensive, but many of them may not wish to come to the United States for the trial.[94] Several courts have placed great emphasis on this factor and have consequently denied dismissal.[95] However, this factor was not determinative in *In Re Air Crash*

---

89. *See supra* note 64 and accompanying text.

90. 632 F.2d 1027 (3d Cir. 1980).

91. *Id.* at 1028.

92. *Id.* at 1030.

93. *See* N.Y. Times, Jan. 28, 1985, at 1, col. 1. The Bhopal plant was in regular communication with the corporation's headquarters in Connecticut, and with another Union Carbide plant in West Virginia. The Bhopal plant often corresponded directly with the plant in West Virginia. In addition, any major safety issue, financial commitment or problem had to be cleared by the parent. Thus, reports from Bhopal were normally sent to the headquarters every month, with broader reports every three to six months. *Id.*

94. *See* N.Y. Times, Dec. 14, 1984, at 6, col. 4. A further problem with regard to attendance of witnesses is that Union Carbide probably will not be able to compel their attendance by subpoena. *See* 28 U.S.C. § 1783(a) (1948) which provides:

> A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, of a *national or resident* of the United States who is in a foreign country, . . . if the court finds that particular testimony . . . is necessary in the interest of justice, and, . . . if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance . . . .

Id. (emphasis added).

95. *See, e.g.*, Overseas Nat'l Airways v. Cargolox Airlines Int'l, 712 F.2d 11 (2d Cir. 1983) (court dismissed because two essential witnesses were in Luxembourg); Pain v. United Technol-

Disaster Near Bombay, Etc.[96] In that case, an airplane crashed near Bombay and the plaintiffs brought suit in the United States. The court recognized the problems with the availability and cost of obtaining witnesses, but denied the motion to dismiss because the statute of limitations would have prohibited the plaintiffs from bringing suit in India.[97]

Not only will witnesses be difficult and expensive to obtain if trial is held in the United States, but discovery will also be difficult and expensive to conduct, especially if depositions must be taken. In *Mobil Tankers Co. v. Mene Grande Oil Co.*,[98] Mobil brought suit in Delaware for damages sustained in Venezuela. The *Mobil* court refused to grant a *forum non conveniens* dismissal because it found that the mode of trial, the lack of adequate pretrial procedures and the limitation on the manner in which expert testimony may be offered did not comport with American concepts of fairness.[99] The specific problems in *Mobil* probably will not be present in India since the Indian legal system was derived from the British legal system.[100] However, conducting discovery will still be a problem if the trial is held in the United States.

From the foregoing, it is apparent that the private interests do not overwhelmingly favor trial in either the United States or in India. The public interests, however, favor trial in India. Although court congestion is a problem both in the United States[101] and in India,[102] local juries in the United States will be burdened if forced to decide a

---

ogies Corp., 637 F.2d 775 (D.C. Cir. 1980) (court dismissed because most of the witnesses on health and future earning capacity would be in Norway); Dahl v. United Technologies Corp., 632 F.2d 1027 (3d Cir. 1980) (court dismissed because essential witnesses were in Norway).

96. 531 F. Supp. 1175 (W.D. Wash. 1982).

97. *Id.* at 1182. The court recognized all of the evidentiary problems that would be involved if the case were tried in the United States and admitted that the case should be tried in India if possible. *Id.* at 1178. The court found, however, that plaintiffs would not have been able to bring suit in India which had a statute of limitations of two years on such actions. The court determined that the statute had not been tolled by the filing of complaints in the United States, and even a waiver by the defendant of the statute of limitations defense would not solve the problem. Even if waived, the party or the court could take the defense up again under Indian law. *Id.* at 1180-81. Thus, the court found there was no alternative forum in which to try the claims. *Id.* at 1182.

98. 363 F.2d 611 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966). *Mobil* was a suit in admiralty to recover for vessel and cargo damage sustained as a result of an explosion and fire. 363 F.2d at 612.

99. 363 F.2d at 614.

100. *See generally* THE INDIAN LAW INST., THE INDIAN LEGAL SYSTEM (1978).

101. *See generally* Friesen, *Cures for Court Congestion*, 23 JUDGES 5 (1984); Gage, *How to Reduce the Docket*, 23 JUDGES 12 (1984); Williams, *Court Delays and the High Cost of Civil Litigation: Causes, Alternatives, Solutions*, 71 ILL. B.J. 84 (1982).

102. *See infra* text accompanying notes 110-19.

case having no connection with the community.[103] Not only is jury duty itself a burden, but in the Bhopal case the jury will need to hear evidence regarding the earnings of people in India, their lifestyle and their culture, most of which evidence will be unfamiliar to the jury.[104] Furthermore, the victims of the Bhopal incident will not have access to the trial if it is held in the United States.[105] Finally, the courts have been reluctant to retain suits in which they are unfamiliar with the governing law.[106] Since there is a distinct possibility that Indian law will apply,[107] the court may be reluctant to hear the merits of the case.

After examining the public and private interests, the court should grant dismissal for *forum non conveniens*. The United States courts are nevertheless likely to hear the suit. The courts have recognized that in order to grant a dismissal for *forum non conveniens*, the alternative forum must be one in which the plaintiff can adequately obtain relief.[108] Even the *Piper* Court, in rejecting the notion that a change in substantive law was determinative, recognized that if the

---

103. *See Gilbert*, 330 U.S. at 508-09. The Court said:

> In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Id. at 509.

104. The problem with an uneducated jury is not unique to the Bhopal situation. *See generally* P. DI PERNA, JURIES ON TRIAL 3-4 (1984). Di Perna explains:

> Long, complicated, technical cases—involving antitrust, or scientific issues, for example—which are increasing in this technological age, may be decided more and more by judges alone, because it is felt that juries aren't up to understanding the complexities involved, and because of the time expended in trying to make those complexities clear to them.

Id. at 3.

105. *But see Bombay*, 531 F. Supp. at 1176. This court recognized this benefit but still refused to dismiss on the basis of *forum non conveniens*. *Id.*

106. *See, e.g.*, Piper Aircraft v. Reyno, 454 U.S. 235, 259 (1981) (Scottish law applied to one of the defendants because Scotland had greater significant contacts with the litigation); Calavo Growers v. Belgium, 632 F.2d 963, 967 (2d Cir. 1980) (Belgian law would apply because it had a greater interest in the litigation. The suit involved its residents and involved a contract negotiated and allegedly breached in Belgium), *cert. denied*, 449 U.S. 1084, *reh'g denied*, 451 U.S. 934 (1981); Schertenlieb v. Traum, 589 F.2d 1156 (2d Cir. 1978) (Swiss law applied because Switzerland was where the tort took place). *But see, e.g.*, Founding Church of Scientology v. Verlag, 536 F.2d 429, 435 (D.C. Cir. 1976) (court denied dismissal even though German law might apply); *Bombay*, 531 F. Supp. at 1191 (Indian law applied, but the court retained jurisdiction).

107. *See infra* text accompanying notes 151-73.

108. *See Gilbert*, 330 U.S. at 506-07. "In all cases in which the doctrine [of *forum non conveniens*] comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Id.*

remedy provided by the alternative forum was so clearly inadequate or unsatisfactory that it was no remedy at all, then dismissal would not be in the interests of justice and the court should not grant it.[109]

Union Carbide will have a very difficult time showing that India is an adequate forum. Presently, the Indian court system is in a state of chaos with a backlog of a million cases, many of which will remain unresolved into the next decade.[110] One reason for the delay in resolving a case is that under the Indian system an unlimited number of issues may be appealed at almost any point in the proceedings.[111] This stems from India's fear of denying the litigants due process.[112] Another reason cited for the delays is the poor quality of the judiciary at the lower levels.[113] Appeals are normally taken from every case.[114]

The American courts may also consider India to be an inadequate forum because gaining access to the court system is nearly impossible for the citizens of Bhopal. The courts require a nonrefundable filing

---

109. *Piper*, 454 U.S. at 254. "We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry." *Id.* (emphasis added). *See* Manu Int'l, S.A. v. Avon Prods., Inc., 641 F.2d 62 (2d Cir. 1981) (dismissal denied because of plaintiff's practical inability to sue in the alternative forum); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611 (3d Cir. 1966) (*forum non conveniens* dismissal denied because foreign procedural rules were inadequate), *cert. denied*, 385 U.S. 945 (1966); *Bombay*, 531 F. Supp. 1175 (*forum non conveniens* dismissal denied because suit would take ten years to resolve in India and was also probably barred by the statute of limitations). *But see* Schertenleib v. Traum, 589 F.2d 1156 (2d Cir. 1978) (a court can, and commonly does, grant a *forum non conveniens* motion where conditioned on defendant waiving any statute of limitations defense and submitting itself to jurisdiction); Jones v. Searle Laboratories, 93 Ill. 2d 366, 444 N.E.2d 157 (1982) (*forum non conveniens* motion granted because limited discovery and unavailability of jury trial did not eliminate England as a forum).

110. Wall St. J., Jan. 23, 1985, at 1, col. 1. Despite that statistic, most tort disasters in India do not provoke a suit. India has an abundance of calamities that would spawn suits in the United States, yet almost no wrongful death actions are filed. For example, no suits were filed in India after an airplane crash in 1978. In 1982, 365 people died after drinking contaminated liquor, but no suits were filed. Furthermore, deaths from scaffolding collapses, train wrecks, fires and explosions are common, but suits are rarely filed. *Id. See* Wall St. J., Dec. 19, 1984, at 1, col. 4. One reason most Indians do not file suit is that many of the common people accept death and do not expect to receive any compensation for loss of loved ones. Calamity is commonplace in India, thus the capacity to cope is well-developed. "Indians don't expect a payoff for death. The certainty of reincarnation satisfies the Hindu; for the Moslem what God wills, God wills." *Id. See also* Wall St. J., Jan. 23, 1985, at 1, col. 1. In one case in India, a German citizen dove into the swimming pool of a New Delhi hotel and hit his head on the bottom, rendering him a quadriplegic. He sued for $420,000. In the ten years since the complaint was filed, he has spent $16,800 and nearly no progress has been made on the suit. *Id.*

111. Wall St. J., Jan. 23, 1985, at 1, col. 1.

112. *Id.*

113. *Id.*

114. *Id.* One Indian lawyer said, "I've had cases where, after so many reversals and remands because of error, the supreme court has just thrown up their hands in exasperation and directed an acquittal. They said fifteen or twenty years of trial is punishment enough." *Id.*

fee of up to five percent of the total damages sought.[115] Few of the citizens of Bhopal can afford such a fee.[116] In addition, since India does not permit its attorneys to practice on a contingency fee basis,[117] lawyers' fees must be paid in advance.[118] These factors and the requirement of a number of other fees place the legal system out of reach for most of the citizens of India. Even if the citizens did gain access to the courts, bribery is common in the lower courts.[119] Given the problems in the Indian court system, it is very likely that the United States courts will decide to adjudicate the merits of the case.

B. Choice of Law

If the American courts decide to hear the case, the next question will be whether United States or Indian law should apply. Choice of law issues arise naturally in the United States as a consequence of the domestic political organization.[120] These issues extend into the international arena as more and more American companies begin to do business abroad. In the international arena the complexity of these issues increases.[121] Frequently, the considerations taken into

---

115. *Id. See* Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445 (D. Del. 1978) (*forum non conveniens* dismissal denied because requiring Canadian plaintiff to sue in Ecuador would impose serious financial burdens); Fiorenza v. United States Steel Int'l, Ltd., 311 F. Supp. 117, 120 (S.D.N.Y. 1969) (*forum non conveniens* dismissal denied because of plaintiff's inability to pre-pay retainer and advance costs required in country prohibiting contingent fee arrangements).

116. *See* N.Y. Times, Dec. 12, 1984, at 7, col. 1. The fact that most of the citizens of Bhopal are illiterate and poor has also raised ethical questions about the tactics of American attorneys. *See* N.Y. Times, Dec. 14, 1984, at 6, col. 3 (less than a week after the incident, American personal injury lawyers flocked to Bhopal to sign up clients); N.Y. Times, Dec. 12, 1984, at 7, col. 1 (the lawyers were seen by some as ambulance chasers and by others as champions of the individual against the corporation and of industrial safety and consumer protection); *The Great Ambulance Chase*, TIME, Dec. 24, 1984, at 27 ("The tarnished image of American attorneys could get even blacker as a result of the Bhopal gold rush."). *See also* N.Y. Times, Dec. 31, 1984, at 4, col. 1 (Some lawyers offered potential clients eight dollars to sign up. They also demanded full power of attorney, and some have asked for contingency fees of fifty percent.); Wall St. J., Dec. 19, 1984, at 1, col. 4 (San Francisco lawyer, Melvin Belli, held a formal reception for prominent citizens in Bhopal to encourage the citizens to file suit). *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 1 & 2, EC 1-1, EC 1-5, EC 2-1, EC 2-2, EC 2-3, EC 2-4, EC 2-20 (1980).

117. Wall St. J., Jan. 23, 1985, at 1, col. 1.

118. *Id. See* Odita v. Elder Dempster Lines, Ltd., 286 F. Supp. 547, 549 (S.D.N.Y. 1968) (*forum non conveniens* dismissal denied because plaintiff unable to obtain counsel on contingent fee basis).

119. Wall St. J., Jan. 23, 1985, at 1, col. 1.

120. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 441 (1984). The United States is a natural setting for conflict of laws issues because the nation's organization is decentralized. As the states exercised their legislative power and the case law began to diverge, choice of law issues naturally arose. *Id.* at 441-42.

121. *See generally* Scoles, *Interstate and International Distinctions in Conflict of Laws*

account depend specifically upon what foreign country is involved.[122]

1. Historical Perspective

While choice of law has been a distinct area of law for quite some time,[123] the law of conflicts is neither definite nor exact. During the first one-third of this century, choice of law rules were based on the territorialist theory of Professor Joseph H. Beale.[124] Also known as the vested rights approach, the theory provides that the location of the most significant factor in a transaction identified the forum whose law should govern.[125] For example, land questions were governed by the law of the land's situs, contract questions by the law of the place where the contract was made and tort questions by the law of the place of harmful impact. In *Alabama G.S.R. Co. v. Carroll*,[126] for instance, the plaintiff sustained his injury in Mississippi, but brought suit in Alabama because Alabama was where the plaintiff was a citizen, where the contract was made and where the defendant-corporation was organized. Since the harmful impact occurred in Mississippi, the court held that Mississippi law controlled.[127]

Although Professor Beale's theory formed the basis of the First Restatement of Conflict of Laws,[128] and although it was influential,

---

in the United States, 54 CALIF. L. REV. 1599 (1966) (Professor Scoles explained, "[t]o apply mechanically a rule developed in interstate cases to an international situation without a consideration of its policy relevance is both wrong and dangerous."); R. LEFLAR, AMERICAN CONFLICTS LAW 8 (1977) (In the international context, "[m]aintenance of international order and comity may be a more delicate concern, governmental interests may be more sharply distinguishable, and the contrast between competing rules of law . . . may be more striking.").

122. R. LEFLAR, *supra* note 121, at 9.

123. *See generally* Juenger, *supra* note 120. Juenger explains that the first strides toward the elaboration of choice of law rules were made in the Middle Ages when the Germanic tribes that destroyed the Roman Empire brought along their own laws. *Id.* at 423-24. The true beginning of conflict of laws, though, occurred in the 12th century when Roman law was revived. *Id.* at 424. The next major phase of development came in the 16th century in France. *Id.* at 430. In the 17th century, the Dutch became the leaders in the development of conflict of laws rules. *Id.* at 433. English ideas on conflict of laws developed separately and not through borrowing ideas from continental Europe, *id.* at 436, and early American courts looked to the English authorities for guidance. *Id.* at 442.

124. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1584 (1966). *See generally* J. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

125. R. LEFLAR, *supra* note 121, at 205. Designation of the key factor was calculated to lead to a choice of governing law that would serve the main interests of justice and efficiency. *Id.* at 206. Generally these interests were expressed in terms of an ideal of uniformity and predictability of results. *Id.* "Rights and obligations were said to have vested at the vital time and place so selected, in accordance with the law of that place." *Id.*

126. 11 So. 803 (Ala. 1892).

127. *Id.* at 806. The plaintiff sought to recover under the employer's liability act of Alabama. Mississippi had no such act in force. *Id.* at 805.

128. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934) [hereinafter cited as RE-

the theory was never so widely accepted as to be considered "the law."[129] In fact, the Bealian theory was attacked from the outset. The major criticism of his vested rights approach is that it presents a deceptively simple analysis in that once the court characterizes the question as a tort or contract action, the applicable law is determined.[130] This simplistic analysis has led to arbitrary results. For example, in *Dyke v. Erie Ry.*,[131] the plaintiff was injured in Pennsylvania while travelling on the defendant's railway on a ticket purchased in New York. If the plaintiff had sued in tort, Pennsylvania law would have applied and a Pennsylvania statute limited recovery to $3,000. Instead, he sued on the New York contract and recovered $35,000.[132]

Because of dissatisfaction with the territorialist approach, other theories have developed, such as the forum preference theory of Professor Albert A. Ehrenzweig.[133] Professor Ehrenzweig contends that the forum court often has a natural preference for its own substantive law, and, therefore, it will apply that law unless the law is contrary to the intentions of the parties or otherwise would cause hardship.[134] This *lex fori* approach is based on the principle that the law of the forum should not be displaced without valid reasons.[135] Although controversial, it is true that courts do tend to use their own law rather than that of some other state whenever it is constitution-

---

STATEMENT (FIRST)] provides: "The law of the place of the wrong determines whether a person has sustained a legal injury." *Id.* Section 377 provides: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." *Id.* § 377. Note 1 to § 377 says: "Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body." *Id.* § 377, note 1. Under § 379, the law of the place of wrong determines whether a person is responsible for the harm he has caused. *Id.* § 379.

129. *See generally* R. LEFLAR, *supra* note 121, at 206-16; J. MARTIN, CONFLICT OF LAWS CASES AND MATERIALS 98-99 (2d ed. 1984); Reese, *Conflict of Laws and the Restatement Second*, in PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 42 (1980).

130. *See* R. LEFLAR, *supra* note 121, at 206-16.

131. 45 N.Y. 113 (1871).

132. *Id.*

133. *See* Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960). Under Professor Ehrenzweig's thesis, first, American courts have in fact nearly always given preference to their own laws in conflicts cases. *Id.* at 643. Second, the treatment of the *lex fori* approach as an exception is the "heritage of academic aberrations in the history of conflicts law." *Id.* at 644. Third, conscious recognition of this principle would enable the concentration of efforts to search for "a scheme of international and interstate jurisdiction which would secure a *lex fori* properly applicable in view of a substantial contact of the court with parties or facts." *Id.* Finally, once the ascertainment of a convenient forum had become the primary object of conflict of laws rules, then the laws would only come into play "in determining whether the defendant would be unfairly dealt with under the law of the forum, and where governmental interests otherwise require displacement of that law." *Id.* at 644-45.

134. *Id.* at 644.

135. J. MARTIN, *supra* note 129, at 277.

ally permissible to do so.[136]

Though forum preference may be the result of a choice of law analysis, it is not actually a theory deliberately employed by the courts. Indeed if it were, the courts would effectively be minimizing the interests of other states.[137] Moreover, the courts would be failing to take into account the international and interstate concerns that may be present.[138] In recognition of these factors, courts do not baldly adhere to the forum preference theory and instead condition forum preference on the lack of any significant interest on the part of another state.[139]

Another analytical approach examines the governmental interests. This analysis is one of the most influential and accepted theories of choice of law. According to this approach, proposed by Professor Brainerd Currie,[140] the court first determines the governmental policy behind the law of the forum. It then ascertains the policy behind a foreign law to determine if the foreign state has a legitimate interest in the application of that policy to the case at bar. If the forum state has no interest, but the foreign state does, then the foreign law will apply. In all other situations, the court applies the law of its own

---

136. R. LEFLAR, *supra* note 121, at 218.

137. *Id.*

138. *Id.*

139. *Id.* at 219. *See also* J. MARTIN, *supra* note 129, at 279.

140. *See* Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958). Professor Currie explains his theory as follows:

> (1) Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision. (2) When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy—perhaps it is helpful to say the social, economic, or administrative policy-whic-h is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state of the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance. (3) If necessary, the court should similarly determine the policy expressed in the proffered foreign law, and whether the foreign state has a legitimate interest in the application of that policy to the case at bar. (4) If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law. (5) If the court finds that the forum state has an interest in the application of its law and policy, it should apply the law of the forum even though the foreign state also has such an interest, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

Id. at 9-10. *See also* Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961). *But see* Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984); Martin, *An Approach to the Choice of Law Problem*, 35 MERCER L. REV. 583 (1984).

forum.[141] Professor Currie's theory is thus a combination of interest analysis and forum preference. Only in the rare situation of no forum interest and a significant foreign interest, would the foreign law apply.[142]

Although Professor Currie's theory has been enormously influential, it has also been widely criticized. One criticism is that unarticulated biases are present in determining state interests such as pro-resident, pro-forum law and pro-recovery.[143] In some cases courts have justified the results reached by finding rather attenuated interests.[144] For example, in *Milkovich v. Saari*,[145] two residents of Ontario were involved in a car accident in Minnesota. The issue was whether the court should apply the Ontario guest statute or the Minnesota rule favoring recovery. The court applied the Minnesota rule and identified one of the interests as the desire to see the plaintiff compensated so that the doctors and hospitals would in turn be compensated.[146]

As a result of inconsistent decisions, in 1971 the American Law Institute attempted to provide some uniformity through the Second Restatement of Conflict of Laws.[147] The Second Restatement employed a test whereby the court would apply the law of the state with

---

141. R. LEFLAR, *supra* note 121, at 224.

142. *Id.*

143. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398-99 (1980). Brilmayer explains that the pro-resident bias results from the assumption that protective policies of the forum state can only be invoked by residents of the forum. Thus, residents have the best of both worlds because they can claim the benefits of these policies in multistate cases without incurring correspondent costs. The pro-recovery and pro-forum-law biases, Brilmayer says, "stem from the assumption that when a statute embodies several policies, any one of them may trigger the finding of an 'interest.'" *Id.*

144. *See* J. MARTIN, *supra* note 129, at 206-11.

145. 295 Minn. 155, 157, 203 N.W.2d 408, 413 (1973). The court in *Milkovich* actually applied the "better law" approach to the conflicts issue, but that approach also takes interests into account. *See generally* Leflar, *supra* note 124, at 193-95 (Under the better law approach there are five choice-influencing considerations: (1) predictability of results; (2) maintenance of international and interstate order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law.); McDougal, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 MERCER L. REV. 483 (1984) (McDougal recognized the courts try to apply the better law in a case, but should be trying to apply the *best* law).

146. *Milkovich*, 295 Minn. at 170-71, 203 N.W.2d at 417. The court said:

> We might also note that persons injured in automobile accidents occurring within our borders can reasonably be expected to require treatment in our medical facilities, both public and private . . . . We recognize that medical costs are likely to be incurred with a consequent governmental interest that injured persons not be denied recovery on the basis of doctrines foreign to Minnesota.

Id.

147. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) [hereinafter cited as RESTATEMENT (SECOND)] provides:

the most significant relationship to the occurrence.[148] That state was the state whose law would apply. However, only thirteen states have adopted the Second Restatement's approach.[149] Since the significance of a relationship can encompass almost all policy considerations and interests, the test is often conceived of as merely another interest weighing approach.[150]

2. Choice of Law in the Bhopal Suit

The choice of law issue in the Bhopal case will be difficult to resolve. Suits have been filed in several state and federal courts.[151] Even the federal district courts must, under *Erie* principles,[152] apply the choice of law rules of the state in which the court sits.[153] Conse-

---

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

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

Id. Section 6 provides that the factors relevant to choice of the applicable law include:

(a) [T]he needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id. § 6.

148. *Id.* § 145(1).

149. J. MARTIN, *supra* note 129, at 261.

150. *See* RESTATEMENT (SECOND), *supra* note 147, § 6. *See also* J. MARTIN, *supra* note 129, at 260-61.

151. *See supra* text accompanying notes 50-56.

152. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In *Erie*, plaintiff filed an action for personal injuries sustained while he was walking along a railroad right of way. Plaintiff brought the action in a New York federal court, where the defendant argued that Pennsylvania law should be applied, and not federal common law. The *Erie* Court held that a federal court must apply the law of the state in which it sits. *Id.* at 78. The Court said: "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . ." *Id.*

153. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). In *Klaxon*, the plaintiff brought an action in the Delaware district court alleging that the defendant had violated an agreement. The issue before the Supreme Court was whether Delaware law or New York law applied. The *Klaxon* Court held in cases in which jurisdiction depends upon diversity of citizenship, federal courts must follow conflict of laws rules prevailing in the states in which they

quently, which law will apply will depend on which of the choice of law theories the state has adopted.

Despite its drawbacks, several states still employ the vested rights approach. Under that approach, Indian law would apply. Since India was where the gas leaked and injured the people,[154] it was the place where the last event necessary to make an actor liable for an alleged tort took place.[155]

Most states, however, have rejected the territorialist approach, and instead adhere to a combination of forum preference and interest analysis approach.[156] For instance, in *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandens*[157] the plaintiff brought an action in federal court in Washington, D.C., for damages sustained when her husband died in a plane crash over Brazil. The plaintiff sought recovery under forum law because Brazilian law limited recovery to only $170.[158] The court held Brazilian law applied because of Brazil's concern for the financial integrity of its national airline, the lack of any prior relationship between the decedent and the defendant,[159] the decedent's and plaintiff's nonresidence in the forum,[160] the 600% depreciation in Brazilian currency since the accident, and the impact of a possible recovery on international economic, political and legal attitudes.[161] After thorough consideration of the alternatives, the court

---

sit. *Id.* at 496.

154. N.Y. Times, Jan. 28, 1985, at 1, col. 1. *See* RESTATEMENT (FIRST), *supra* note 128, § 377, note 1.

155. *See* RESTATEMENT (FIRST), *supra* note 128, § 377.

156. *See, e.g.*, Ramsay v. Boeing, 432 F.2d 592 (5th Cir. 1970) (court used a center of gravity test); Ramirez v. Wilshire Ins. Co., 13 Cal. App. 3d 622, 91 Cal. Rptr. 895 (1970) (court looked at California's interest and compared it to Mexico's interest); Branyan v. Alpena Flying Serv., 65 Mich. App. 1, 256 N.W.2d 742 (1975) (court used an interest approach). *But see* In re Air Crash Disaster at Washington, D.C., 559 F. Supp. 333 (D.D.C. 1983) (court used interest analysis but applied foreign law); Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 313, 236 So. 2d 224, 216 (1970) (court used territorialist approach).

157. 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966).

158. 350 F.2d at 469. Brazilian law limited liability for injury or death in aviation accidents to 100,000 Brazilian cruzeiros which equaled 170 American dollars. *Id.*

159. *Id.* at 472. The decedent was not a passenger on the defendant's plane. The defendant was traveling on a United States Navy airplane which collided with the defendant's plane over Rio de Janeiro. *Id.* at 469. Thus, the decedent's relationship with the defendant "commenced and ended in Brazil in one shattering moment." *Id.* at 472.

160. *Id.* at 473. Neither the plaintiff nor the decedent were residents of the District of Columbia. Both were residents of Maryland. *Id.* The defendant was amenable to jurisdiction in the District of Columbia only because of its international operations. *Id.*

161. *Id.* at 477. The court declined to disregard Brazil's limitation on the basis of the value of Brazilian currency. The court explained this factor did not diminish Brazil's interest in the protection of the financial integrity of its most important means of domestic transportation. *Id.* Furthermore, to consider that factor would import an unpredictable and immeasurable factor into the decision of international conflict of laws cases. *Id.* The court also took into account considerations of comity.

decided no significant forum existed and applied Brazilian law.

In contrast to *Tramontana*, the court in *In re Air Crash Disaster Near Saigon*[162] had no problem finding sufficient American interests. In *Saigon*, the guardians of infants killed in an airplane crash sued the United States for wrongful death. The infants were Vietnamese orphans on their way to live in the United States. Employing an interest analysis, the court found American national interests were at stake in this case primarily because the victims were being taken to new parents in the United States on a United States Air Force plane specially detailed for this mission.[163] The court reasoned the transportation of the orphans was incident to carrying out foreign and military policies of the Vietnam War.[164] Thus, since the United States had a paramount interest in providing a just and reasonable resolution of these claims, its law should apply.

Tramontana and *Saigon* illustrate that courts, when faced with a choice of law issue in the international context, will not hesitate to take into account policies behind maintenance of international order and comity. There are several underlying policy values that come into play in cases such as the Bhopal incident.[165] Among the relevant policy considerations are the needs of the international system. Just as the court in *Tramontana* took into account the effect of its holding on international balance of payments,[166] the court in the Bhopal case should take into consideration the effect its holding may have on the international business community. The proliferation of American-based MNEs throughout the world has led to confrontations and probably will lead to many more. Due to the unlikelihood of the pro-

---

> If the courts of one country make the applicability of the law of another turn on the way the exchange balance happens to be inclined at the moment, a speculative and highly artificial element would be intruded into those considerations normally recognized by civilized nations as germane in the choice of applicable law.

Id.

162. 476 F. Supp. 521 (D.D.C. 1979).

163. *Id.* at 526.

164. *Id.* at 527.

165. *See* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). Cheatham and Reese explain that there are nine underlying policy values: (1) the needs of the interstate and international systems; (2) a court should apply its own local law unless there is good reason for not doing so; (3) a court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law; (4) certainty, predictability, uniformity of result; (5) protection of justified expectations; (6) application of the law of the state of dominant interest; (7) ease in determination of applicable law, convenience of the court; (8) the fundamental policy underlying the broad local law field involved; and (9) justice in the individual case. *See generally id. Compare id. with* RESTATEMENT (SECOND), § 6 *and* Leflar, *supra* note 124.

166. *See supra* note 161 and accompanying text.

mulgation of effective national and international guidelines,[167] the international community needs to know that there will be a way to hold American companies accountable for their actions. Consequently, the international system needs the assurance that United States courts will apply American law.

Similarly, in order to promote certainty, predictability and uniformity in multinational litigation, the court should apply American law. Thus far, most cases arising in the international context have been airplane crashes[168] and maritime accidents.[169] For maritime accidents, the courts have developed one particular test to determine which law applies.[170] For airplaine crashes, however, the courts have no particular test and, consequently, there has been no element of predictability.[171] In order to avoid this uncertainty in suits regarding MNEs, the court should apply United States law to American-based MNEs.

The final factor the court should consider is the desirability of applying the law of the country possessing the dominant interest. In

---

167. *See infra* text accompanying notes 194-205.

168. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (airplane crash in Scotland); In re Air Crash Disaster Near Bombay, 531 F. Supp. 1175 (W.D. Wash. 1982) (airplane crash near Bombay, India); In re Air Crash Disaster Near Saigon, 476 F. Supp. 521 (D.D.C. 1979) (airplane crash near Saigon, South Vietnam).

169. *See, e.g.*, Dracos v. Hellenic Lines Ltd., 705 F.2d 1392 (4th Cir. 1983) (employee died on board ship berthed in Norfolk, Virginia); Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82 (9th Cir. 1980) (accident occurred in course of drilling operations in Trinidad's territorial waters), *cert. denied*, 451 U.S. 920 (1981); Merren v. Borgestad, 519 F.2d 82 (5th Cir. 1975) (seaman died in a shipboard accident off coast of Japan).

170. *See* Lauritzen v. Larsen, 345 U.S. 571 (1953). In *Lauritzen*, a Danish seaman was injured aboard a ship while the ship was in Havana harbor. *Id.* at 573. The plaintiff brought his action under the Jones Act, 46 U.S.C. § 688 (1920) which provides: "Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law, . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . ." The defendant in *Lauritzen* argued that Danish law applied and thereby excluded the application of the United States statute. *Lauritzen*, 345 U.S. at 575. The Court analogized maritime law to municipal law and concluded that in the United States both attempted to resolve conflicts between competing laws by ascertaining and evaluating points of contact between the transaction and the states or governments whose competing laws are involved." *Id.* at 582. The Court then established seven factors a court should take into account when faced with a maritime tort claim: (1) place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of the contract, (6) inaccessibility of foreign forum, and (7) the law of the forum. *Id.* at 583-91. *Compare id. with* Cheatham & Reese, *supra* note 165.

171. *See, e.g.*, Ramsay v. Boeing, 432 F.2d 592 (5th Cir. 1970) (court applied Belgian law); Browne v. McDonnell Douglas, 504 F. Supp. 514 (N.D. Cal. 1980) (court applied California law to two issues and Yugoslavian law to the remaining issue), *aff'd*, 698 F.2d 370 (9th Cir. 1982); In re Air Crash Disaster Near Saigon, 476 F. Supp. 521 (D.D.C. 1979) (court applied United States law); In re Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975) (court applied United States law).

Saigon, the court determined United States law should apply because significant national interests were at stake.[172] Similarly, national interests are at stake in the Bhopal situation. Problems with American-based MNEs conducting business abroad have become national problems. The integrity of the United States is at stake because the United States comes under scrutiny when the actions of the MNEs come under scrutiny. Since the actions of these MNEs reflect on the United States, the United States has a paramount interest in ensuring that the MNEs operate in a safe manner.[173] The most effective method of ensuring this is to hold the MNEs accountable under United States law.

C. *Enforcement of Judgments*

If the plaintiffs eventually obtain a judgement in either American or Indian courts, the next issue will be whether the judgment can be enforced. In the United States, the full faith and credit clause of the Constitution[174] guarantees that courts of one state will honor a judgment rendered in another state.[175] The clause, however, does not apply in the international setting.

1. Historical Background

The area of law regarding enforcement of foreign judgments has historically been plagued with doubt and contradiction.[176] As early as 1895, American courts established that a judgment rendered in another country would not be enforced in the United States unless a judgment rendered in the United States would be enforced in that country.[177] This requirement of reciprocity meant that every judg-

172. *Saigon*, 476 F. Supp. at 526-27.

173. *See supra* text accompanying notes 85-88.

174. U.S. CONST. art. IV, § 1. This section provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State . . . ." *Id.*

175. *See* J. LANDERS & J. MARTIN, CIVIL PROCEDURE 61 (1981). The full faith and credit clause requires one state to enforce the judgment of a sister state. The state where enforcement is sought is not permitted to reexamine the merits of the case. The court, however, is allowed to reinspect the jurisdiction of the court to render a judgment. *But see* Durfee v. Duke, 375 U.S. 106 (1963). *See generally* 28 U.S.C. § 1738 (1948) which requires federal courts to give the same full faith and credit to state court judgments as those states would give themselves. *Id.* A well-recognized exception to the requirement of full faith and credit is that one state may not decree title to land located in another state. *See* J. LANDERS & J. MARTIN, *supra*, at 958.

176. Scoles, *supra* note 121, at 1605.

177. *See* Hilton v. Guyot, 159 U.S. 113 (1895). In *Hilton*, the plaintiff brought an action on a judgment rendered in a French court against the plaintiff. The French court had jurisdic-

ment had to be reexamined on its merits. Consequently, previously unsuccessful parties could harass successful ones, resulting in a duplication of efforts and a waste of time and money. The requirement of reciprocity, therefore, was contrary to an attitude that fosters stability and uniformity in the international sphere.[178]

Dissatisfied with the comity doctrine, the American Law Institute promulgated the Uniform Money-Judgments Recognition Act.[179] The Act is basically a codification of recognized standards used by the individual states.[180] Although it has not been adopted by all the states,[181] the Act does delineate the factors that courts will take into account. Under the Act there are two types of attack on a judgment. Among the "mandatory" grounds, under which the court will automatically refuse to enforce the judgment, are lack of jurisdiction and the rendering of the judgment under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process.[182] The court may exercise discretion, however, if it finds *forum non conveniens*, lack of adequate notice, fraud in procuring the judgment, repugnancy of the foreign claim to the requested court's public policy or a conflict between the foreign judgment and another conclusive judgment.[183]

2. Enforcing a Judgment in the Bhopal Suit

If the plaintiffs obtain a judgment against Union Carbide in India and seek to enforce it in the United States, Union Carbide probably

---

tion and the plaintiffs appeared by their attorneys in the suits. *Id.* at 114-15. The Court found that the rule of reciprocity had firmly worked itself into the structure of international jurisprudence and held "judgments rendered in France, or in any other foreign country by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim." *Id.* at 227.

178. Note, *Foreign Nation Judgments: Recognition and Enforcement of Foreign Judgments in Florida and the Status of Florida Judgments Abroad*, 31 U. FLA. L. REV. 588, 601 (1979).

179. Unif. Money-Judgements Recognition Act (U.M.J.R.A.), 13 U.L.A. 269 (1975). *Compare id. with* RESTATEMENT (SECOND), *supra* note 147, § 98 which provides: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned." *Id.*

180. *See generally* Homburger, *Recognition and Enforcement of Foreign Judgments*, 18 AM. J. COMP. L. 367 (1970); Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act*, 18 BUFFALO L. REV. 1 (1969).

181. *See* Note, *supra* note 178, at 596 n.67. As of 1979 only eleven states had adopted the Act. They are Alaska, California, Georgia, Illinois, Maryland, Massachusetts, Michigan, New York, Oklahoma, Oregon and Washington. *Id.*

182. U.M.J.R.A., § 4(a), 13 U.L.A. 269 (1975).

183. *Id.* § 4(b).

will not be able to rely on any of the mandatory grounds. The Indian courts clearly have jurisdiction since Union Carbide was doing business in India.[184] Furthermore, unless Union Carbide can show the judgment was procured by fraud or other wrongdoing, the court will presume the tribunal was impartial and accorded due process.[185] India has a very high regard for the due process rights of defendants.[186]

Union Carbide probably also will not be able to avail itself of any of the discretionary grounds of attack. As demonstrated by *Tahan v. Hodgson*,[187] the challenging party has an extremely heavy burden of proof. In *Tahan*, the Israeli courts rendered a default judgment against the defendant and the plaintiff sought to enforce the judgment in the United States. The defendant challenged the judgment on grounds of insufficient service of process and violation of public policy.[188] The court held service was effective despite the fact the papers were drawn in Hebrew and the defendant did not read Hebrew. The court, in effect, imputed notice to the defendant because of the circumstances. The parties had been involved in the dispute for some time and the papers were delivered by someone claiming to be an attorney.[189] Finally, the court held a foreign nation's failure to follow the Federal Rules of Civil Procedure did not, by itself, constitute a violation of American public policy.[190]

---

184. *See* INDIA CODE CIV. PROC. V § 19 (1908) which provides that suits for compensation for torts may be instituted, at the option of the plaintiff, either in the court within whose local limits the wrong occurred or the court within whose jurisdiction the defendant resides or carries on business. *Id. See also id.* § 21. A corporation is deemed to carry on business at its sole or principal office in India. *Id.*

185. *See, e.g.*, John Sanderson & Co. (Wool) Pty. v. Ludlow Jute, 569 F.2d 696 (1st Cir. 1978) (court enforced a judgment rendered in Australia because there was insufficient evidence of fraud in obtaining it); Sangiovanni Hernandez v. Dominicana de Aviacion, 556 F.2d 611 (1st Cir. 1977) (settlement agreement in the Dominican Republic did not violate public policy despite differences between American and Dominican Republic methods of approving settlement agreements); Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir.) (court enforced a Zambian decree because the legal system of Zambia was similar to that of Britain), *cert. denied*, 409 U.S. 874 (1972).

186. *See supra* text accompanying notes 110-12.

187. 662 F.2d 862 (D.C. Cir. 1981).

188. *Id.* at 864.

189. *Id.* at 865. The court said:

> Even if the defendant were unable to read Hebrew, he should have surmised that the papers being served upon him were legal in nature, and that he could ignore them only at his peril. In fact, it is certain that he *was* cognizant of the fact that the papers served upon him were legal in nature. The parties had, after all, been involved in a heated legal dispute for several months . . . . Defendant acknowledges . . . that when he was served these legal papers . . . the gentleman presenting him the papers "claim[ed] to be an attorney."

Id. (emphasis added).

190. *Id.* at 866. The court explained requiring all foreign nations to adhere to the Federal

Prediction of the manner the proceeding will take in India is difficult. Clearly from *Tahan*, though, Union Carbide will have to have substantial evidence in order to successfully challenge a judgment in the United States. A mere showing that it did not receive exactly the same treatment it would have received in the United States will surely be insufficient.

Likewise, the Indian courts probably will enforce a judgment rendered in the United States, especially since the Indian state itself is seeking compensation for its citizens.[191] Although there is little case law interpreting the statute, the Indian statute on enforcement of judgments basically adopts the same factors enumerated by the Foreign Money-Judgments Act.[192] Since the American courts clearly can exercise jurisdiction,[193] and since the judgment probably will not have been obtained by fraud or by means contrary to natural justice, the Indian courts probably will enforce a United States judgment.

Rules of Civil Procedure would be unrealistic. "Obviously, all foreign judgments will be inconsistent to some extent with the Federal Rules; many state court judgments are, for that matter. Surely a more important discrepancy than this is necessary to create a violation of public policy." *Id.*

191. *See supra* text accompanying note 56.

192. *See* INDIA CODE OF CIV. PROC. V § 13 (1908) which provides that foreign judgments are conclusive regarding any matter directly adjudicated between the parties except: (1) where the judgment was rendered was not given on the merits, (3) where the judgment was founded on an incorrect view of international law or the court refused to recognize the law of India where applicable, (4) where the proceedings were contrary to natural justice, (5) where the judgment was obtained by fraud and (6) where the judgment sustains a claim founded on the breach of any law in force in India. *Id. See also id.* § 14 which states that Indian courts will presume upon production of any document purporting to be a certified copy of a foreign judgment that it was pronounced by a court of competent jurisdiction. *Id.*

193. *See* J. LANDERS & J. MARTIN, *supra* note 175, at 69-76. A corporation is subject to personal jurisdiction in the state in which it is incorporated and in any state in which it does business. *See, e.g.*, FLA. STAT. § 48.193(1)(a) (1983) (anyone who operates, conducts, engages in, or carries on a business or business venture in Florida or has an office or agency in Florida is subject to personal jurisdiction in Florida); N.Y. STAT. § 302(a) (1978) (a court may exercise personal jurisdiction over any non-domiciliary who in person or through an agent transacts any business within the state); CAL. STAT. § 410.10, Comment-Judicial Council—Bases of Judicial Jurisdiction over Corporations ("A state has power to exercise judicial jurisdiction over a corporation on one or more of the following bases: (1) Incorporation in the State; (2) Consent; (3) Appointment of agent; (4) Appearance in an action; (5) Doing business in the state . . .; (8) Ownership, use or possession of thing in the state; (9) other relationships to the state which make the exercise of judicial jurisdiction reasonable."). *See generally* Wall St. J., Dec. 27, 1984, at 1, col. 6 (Union Carbide Corp. is a sprawling corporate empire with 99,000 employees working in 700 factories, mills, labs and other facilities in 35 countries); Gainesville Sun (Gainesville, Fla.), Feb. 7, 1985, at 8E, col. 1 (Union Carbide is a New York Corporation and is headquartered in Danbury, Connecticut).

V. RECOMMENDATIONS

The world needs effective means to regulate and supervise the activities of MNEs. However, the world cannot afford to paralyze the activities of the MNEs. The goal in constructing control mechanisms, therefore, should be to balance these countervailing objectives.

In the last fifteen years there have been several attempts to formulate international controls on the MNEs. Guidelines have been advanced by the United Nations,[194] the Organization for Economic Cooperation and Development,[195] the International Chamber of Commerce,[196] the United Nations Conference on Trade and Development[197] and the International Labour Organization.[198] The guidelines have addressed a wide variety of areas including foreign investment decisionmaking, regulation of ownership, managerial control and employment, taxation and regulation of financial transactions, administration and supervision, transfer of technology and restrictive business practices.[199] These efforts are certainly influential, and are evidence of the universal concern regarding the activities of MNEs.

Beyond their capacity to exert some influence on the MNEs and the foreign nations involved, the effectiveness of the guidelines is unclear. The major drawback to their effectiveness is that they are not legally binding.[200] Even if the codes were legally binding, other problems would still exist. A primary problem is the construction of a control system which takes into account the various aims and interests of both the governments and the MNEs. The interests of both parties are hardly uniform and nearly all of the lesser developed

---

194. See United Nations (ECOSOC) "Transnational Corporations: Code of Conduct, Formulations by the Chairman," U.N. Doc. E/C.10/AC.s/8 (1978). *See also* Fatouros, *The U.N. Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 103 (N. Horn ed. 1980).

195. *See* Organisation for Co-operation and Development, "Guidelines for Multinational Enterprises," Annex, Organisation for Economic Co-operation and Development (OECD), *Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on International Investment and Multinational Enterprises*, Paris (1976). *See also* Vogelaar, *The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-Up Procedures and Review*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, *supra* note 194, at 127.

196. *See* INT'L CHAMBER OF COMMERCE, GUIDELINES FOR INTERNATIONAL INVESTMENT (ICC Publications, Paris, 1974).

197. *See* "UNCTAD V Ends Session in Manila," UNCTAD Information Unit, U.N. Doc. TAD/INF/1079 (1979).

198. *See* International Labour Organisation, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, *reprinted in* 17 I.L.M. 423-30 (1978).

199. *See generally* LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, *supra* note 194.

200. *See* C. WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 296 (1983).

countries are at divergent levels of industrialization and development.[201] A further problem with international codes is the resistance on the part of the developing world to international law. The developing nations see it as a tool of the industrialized nations. Thus, international controls on MNEs are unlikely to entirely solve the problem.

Regulation of the activities of MNEs is likely to be more effective if it originates at the national level from the host government. Such regulation can be accomplished, for example, at the time of entry of the MNE when the bargaining position of the host is greatest. The host state could prohibit entry altogether, or it could demand facilities be located in particular areas. The host government could also require local equity participation, the presence of nationals on the board of directors, or any other considerations deemed favorable to the host economy.[202] Once the host nation determines to allow entry, it can condition entry on several factors. For example, the host government can negotiate for maximum benefits to the host state.[203] In addition, the host can demand guarantees of the continuing flow of technology.[204] Finally, it can insist on joint ownership and joint

---

201. *Id.* at 301. Wallace explains the problem in this way:

> It is the very lack of uniformity of interests and intrinsic incompatibility of existing economic systems, along with divergent levels or stages of industrialization and development (a) between different economic regions, (b) between individual states within those regions, and (c) even internal to the various stages in their development, that are perhaps the greatest and most obvious obstacles to any legally binding, globally applicable international regulatory agreement.

Id.

202. *Id.* at 43. Wallace explains there are several exclusionary techniques a host government can employ at entry. For example, it can totally exclude the MNE. Japan has actively used the total exclusion approach since the late 1960's when Japan's policy was to keep out virtually all foreign direct investment in order to encourage national growth. Recently, however, Japan has relaxed its restrictions especially since Japan itself is now active in foreign direct investment. *Id.* Another approach is exclusion from "key sectors," whereby foreign investors are excluded or severly limited in their allowable aggregate percentage of share acquisition, from certain categories of activities considered particularly vital to the national interest—particularly those relating to national security and defense matters and cultural identity. *Id.* at 45. Countries that have employed this technique include Sweden, Norway, Switzerland, Japan, Italy, Austria, France and the United States. *Id.* The final technique suggested by Wallace is "discretionary legislation and practice." This can be accomplished in four ways: special legislation with descretionary intent, general legislation with fortuitous deterrent effect and discretionary potential, non-statutory discretionary practice and systematic case-by-case screening. *Id.* at 48-67.

203. *Id.* at 69. The governments of the host nations might require the MNE to help the balance-of-payments by local production, or assume certain responsibilities in such areas as finance, depressed industries, research and development, worker and management training and local participation in equities and direction of the local company. *Id.*

204. *Id.* at 73.

management.[205]

Even at the national level, though, the controls will not be effective unless the MNEs of the world are at least somewhat willing to cooperate. Certainly the MNEs will endure a certain amount of regulation by the host nation because they realize the profitability of the venture. Yet, some nations are so desperate for foreign investment that they will be less restrictive in order to make themselves more attractive to the MNEs. Consequently, the burden of regulating MNEs must be shared by the international agencies, the host nations and in particular by the United States.

Since a majority of the MNEs are headquartered in the United States,[206] the United States is in the best position to control the activities of MNEs. The United States should involve itself in the regulation of MNEs not only because there is an international problem regarding them, but because the United States itself has a significant interest in their regulation.[207] The courts in the United States could further that interest by retaining jurisdiction of suits involving American MNEs by applying United States law and by imposing a moral and social duty on the company to meet American safety standards.[208] The knowledge that they would be held accountable in the United States under United States law would be incentive to the

---

205. There are also some disadvantages to restrictive foreign-investment regulations that mandate significant local participation. *See* Wall St. J., Jan. 16, 1985, at 28, col. 4. When MNEs have been forced to share, the organizations have tended to economize on internal coordination and control.

> When control over an affiliate is diluted, and rewards from the activities of that affiliate are depressed, fewer resources are typically committed by the parent. Intangible assets, such as proprietary technology, are less likely to be shared with the local partner, given the reduced flexibility of the venture and its limited responsiveness to the needs of the larger corporate structure. The multinational is less likely to fully include such a venture in its global information expertise network in the presence of "free-riding" local partners. It is more likely to be held at arm's length.

Id. Where control is diluted, conflicts occur more frequently between local and international perspectives and cultural differences may raise communication obstacles and give rise to disputes over management philosophies and operating procedures. *Id.* Furthermore, joint ventures tend to be somewhat less profitable than wholly owned subsidiaries. *Id. See also* Wall St. J., Dec. 21, 1984, at 1, col. 6. Since the Bhopal disaster, officials at many companies have indicated they will demand clear control of potentially dangerous projects. *Id.*

206. *See* Note, *supra* note 21, at 436. Fully 90 percent of the world's multinational corporations are incorporated and headquartered in the United States. *Id.*

207. *See supra* text accompanying notes 85-88.

208. *See generally* R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION (1976); Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U.L. REV. 157 (1970); Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Henning, *Corporate Social Responsibility: Shell Game for the Seventies?*, in CORPORATE POWER IN AMERICA 151 (1973); Schwartz, *Corporate Responsibility in the Age of Aquarius*, 26 BUS. L. 513 (1970).

MNEs to ensure the safety of their operations. To do so would not result in a significant disincentive to investment nor a decrease in ability to compete with other MNEs because of the high profitability of multinational ventures.[209]

The Bhopal case provides an ideal opportunity for American courts to assume this responsibility. If Union Carbide was at fault in the incident in Bhopal,[210] then by holding it liable according to American law and by imposing a duty to measure up to American safety standards, the United States will be stating that it expects American companies that operate abroad to do so in a safe manner. If they do not, they will be held accountable in the United States and according to United States law for any resulting injuries.

VI. CONCLUSION

The incident in Bhopal, India, forced issues to the forefront that had been smoldering for many years. Litigation ensuing from the incident illuminates the problems in the area of conflict of laws. More importantly, it illuminates the problems involved with the activities of MNEs. Bhopal is not an isolated case, and unless measures are taken now to prevent further incidents such as this, many more people will be injured and killed. The problems are not easy to resolve because there are competing considerations on all sides.

It is clear that the MNEs must be forced to assume a certain degree of social responsibility for their actions. They cannot be allowed to blindly pursue profits without worrying about the costs. The most effective way to force the MNEs to assume this responsibility would be for American courts to make it known loudly and clearly that MNEs which are amenable to suit in the United States will be held to American standards and will be accountable under United States law. The Bhopal incident would be the perfect opportunity for American courts to make this statement. Certainly, as a result, companies will find it more expensive to do business abroad. It seems, however,

---

209. *See* Solomon, *supra* note 4, at 170. According to Solomon, in 1973 the sales of General Motors were larger than the gross national product of Switzerland, Pakistan and South Africa. *Id.* Sales of Royal Dutch Shell surpassed Iran, Venezuela or Turkey. *Id.* Furthermore, multinational corporations generated approximately 30 percent of total United States corporate profits. *Id.*

210. *See* Wall St. J., Dec. 17, 1984, at 37, col. 4. The plaintiffs in the Bhopal suit are suing both the parent company and its Indian subsidiary. Union Carbide is attempting to confine liability to the subsidiary. *See also* 4 H. OLECK, MODERN CORPORATIONS LAW § 1803 (1960). Generally, a parent and a subsidiary are distinct, separate legal entities, despite the ownership of control of the subsidiary. However, a parent can be liable for the acts of the subsidiary in cases in which the parent intervenes in the management of the subsidiary. *Id.*

to be an immensely just trade whereby thousands of lives may be saved in exchange for a tightening of safety standards.

Asifa Sheikh