



UNC
SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF
INTERNATIONAL LAW AND
COMMERCIAL REGULATION

Volume 16 | Number 3

Article 14

Fall 1991

Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations

Eileen N. Wagner

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

Recommended Citation

Eileen N. Wagner, *Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations*, 16 N.C. J. INT'L L. & COM. REG. 541 (1991).

Available at: <http://scholarship.law.unc.edu/ncilj/vol16/iss3/14>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations

Cover Page Footnote

International Law; Commercial Law; Law

Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations

Eileen N. Wagner*

I. Introduction

Third world countries, out of a desperate need for hard currency, are trying hard to attract multinational chemical corporations to enter joint ventures. Romania is an example of one such country that has put out the invitation for joint ventures.¹ With chemicals comprising more than 16% of Romania's commodity output, the joint venture invitations the Romanians are most interested in having answered are those directed towards multinational chemical corporations, including the American-based Dow Chemical Corporation.²

Romania is not alone in trying to attract multinational chemical corporations to enter joint ventures. Chemical production is the single largest and fastest growing candidate for joint ventures in third world countries.³ From the standpoint of the multinationals, the attractiveness of such ventures is not isolated to answering the hard currency and employment needs of struggling third world economies. Rather, the multinationals find enticing the prospect of manufacturing chemical commodities in a friendly regulatory atmosphere at a time when the United States and other advanced industrial nations are becoming more and more aggressive in legislating and enforcing environmental and occupational protections.⁴ Upsetting the convenient balance of these needs is the fact that chemical manufacturing is especially prone to accident with "the number of innocent

* Editor, *Lex Claudia*, Journal of the Virginia Women Attorneys Association; B.S., Virginia Commonwealth, 1969; M.Ed., Ed.D., University of Virginia, 1970, 1975; J.D., University of Richmond, 1991.

¹ See *Romania Seeks Foreign Partners for Chemical Joint-Ventures*, Int'l Petrochemical Rep., June 28, 1990, vol. 9, no. 26 (changes), at 7.

² *Id.*

³ See generally W. BOGARD, *THE BHOPAL TRAGEDY: LANGUAGE, LOGIC, & POLITICS IN PRODUCTION OF A HAZARD* 25-26 (1989)(stating that the international chemicals market has experienced tremendous growth over the last two decades).

⁴ See generally McGarity, *Bhopal & the Export of Hazardous Technologies*, 20 TEX. INT'L L. J. 333 (1985) (exploring methods of preventing the exportation of hazardous technologies).

bystanders being killed on the increase."⁵

Environmental critics in the 1970's pointed to the tendency of industry to take the course of least resistance (i.e., build chemical plants in countries with minimal environmental standards) when domestic governments instituted stringent controls on manufacturing and sales of potentially hazardous materials.⁶ Pressure on the home front simply encouraged manufacturers to "dump" banned or restricted products onto the third world market. In the 1980's, the response to complaints about this practice was essentially "caveat emptor."⁷ Third world markets, according to the Reagan administration, could decide for themselves if they wanted to purchase products which were banned in the United States.⁸ Protecting the rest of the world from potentially hazardous products took a low priority in relation to allowing the free flow of world trade.⁹

If the United States (U.S.) has taken a disinterested view of the export of potentially hazardous products to the third world,¹⁰ it has taken even less interest in what hazardous manufacturing processes may be exported.¹¹ In contrast, the development of occupational and environmental standards for manufacturing operations within the U.S. has proceeded at a rapid pace. The cost of complying with stringent U.S. regulations creates an incentive for manufacturers to move their operations to countries where no such regulations exist.¹²

Manufacturers are eager to set up their plants in relatively unregulated third world countries. These third world countries, delighted to have large multinational manufacturers located within their borders, are often willing to turn a blind regulatory eye to the multinationals' activities. Everyone is happy until tragedy strikes in the form of a deadly accident. The leak of methyl isocyanate from

⁵ W. BOGARD, *supra* note 3, at 106.

⁶ See generally THE EXPORT OF HAZARD: TRANSNATIONAL CORPORATIONS & ENVIRONMENTAL CONTROL ISSUES (J. Ives ed. 1985).

⁷ W. BOGARD, *supra* note 3, at 111.

⁸ See McGarity, *supra* note 4, at 334.

⁹ See generally King, *Hazardous Exports: A Consumer Perspective*, in THE EXPORT OF HAZARD: TRANSNATIONAL CORPORATIONS & ENVIRONMENTAL CONTROL ISSUES (J. Ives ed. 1985)(barrier to creation and implementation of export notification system rooted in governmental reluctance to inhibit trade).

¹⁰ Where national security may be directly affected, the United States takes a very keen interest in exports. See 50 U.S.C. app. §§ 2401-2405 (1988). See also *Chemical & Biological Weapons Threat: The Urgent Need for Remedies: Hearings before the Senate Comm. on Foreign Relations*, 101st Cong., 1st Sess., 29-45 (1989)(discussing use of governmental sanctions to discourage development and use of biological and chemical weapons by other countries).

¹¹ See generally Levenstein & Eller, *Exporting Hazardous Industries*, in THE EXPORT OF HAZARD: TRANSNATIONAL CORPORATIONS & ENVIRONMENTAL CONTROL ISSUES (J. Ives ed. 1985)(arguing that "international solidarity," not concern for loss of American jobs, should be the basis for criticism of exportation of hazardous chemicals).

¹² See generally McGarity, *supra* note 4 (discussing the high cost of doing business in a highly regulated environment).

the Union Carbide India Limited (UCIL) plant in Bhopal, India, on December 3, 1984 was such a tragic accident. The entire world stood aghast¹³ at the news that a cloud of poisonous gas used to make the pesticide Sevin had escaped from storage, by-passing two fail-safe systems, to kill between 2000 and 8000 people and permanently injure more than 200,000.¹⁴ The incident smeared the idealistic tableau that depicted Union Carbide Corporation (UCC) as an American-based multinational chemical corporation working hand-in-hand with India to advance its "green revolution" and to solve its vast economic problems.

For several years after the disaster at Bhopal, it appeared that UCC, the parent company, would lose its corporate life on the altar of revenge and remorse.¹⁵ Yet, by 1987, UCC emerged from the tragedy stronger than ever.¹⁶ By 1989, UCC had closed the Bhopal chapter of its corporate history and had created a way for future multinational corporations to substantially limit their liability, at least in tort. The decision of the Southern District of New York and of the Second Circuit¹⁷ serve as useful guidelines that ought to be followed in negotiating joint venture agreements between third world countries and multinational chemical corporations.

This Article examines the legacy of the gas leak disaster in Bhopal and its profound, though ironic, effect on the terms a multinational corporation will wish to include in agreements allocating liability for loss resulting from the operation of processes necessary to produce hazardous chemicals. Surprisingly, the complex multinational corporate structure which separates a subsidiary located in host countries from the corporate parent located in the U.S. does not emerge as the focus for limiting liability. Rather, by applying the doctrine of *forum non conveniens*, the federal courts placed greater emphasis on the interests of the host government than on the corporate relationship of the subsidiary to the parent. This Article explains why American-based multinational corporations, when structuring joint-ventures with third-world host countries, must resist the temp-

¹³ For a listing of the measures taken by a shocked world-wide chemical industry, see P. SHRIVASTAVA, *BHOPAL: ANATOMY OF A CRISIS* 83-84 (1987).

¹⁴ Death and injury figures vary widely; lower figures were estimates of the Indian government which wishes to minimize the extent of the damage in the press. See P. SHRIVASTAVA, *supra* note 13, at 64-67.

¹⁵ See Barr, *Why India's Awkward Strategy Forced the Settlement*, AM. LAW., May 1989, at 99.

¹⁶ After his retirement, announced in November, 1986, Chief Executive Officer Warren B. Anderson said about Union Carbide: "[W]e developed competence and capability . . . that we never had before . . . Union Carbide is a \$7 billion, very viable organization that will grow faster than the economy. I don't feel we're in any way a struggling company . . . Earnings per share will go up." D. KURZMAN, *A KILLING WIND: INSIDE UNION CARBIDE & THE BHOPAL CATASTROPHE* 232 (1987).

¹⁷ *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part, rev'd in part*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

tation to take advantage of governments which are unsophisticated or permissive, characteristics often regarded as prime attractions for locating hazardous chemical manufacturing plants in those countries.

II. Complaint and Memoranda of the Parties

If litigation of the Bhopal incident were to have taken place in an U.S. court, the closeness of UCC's relationship with UCIL would have been a central issue. Accordingly, the Union of India and the individual plaintiffs attempted to convince the court that the relationship between the Indian subsidiary and the American parent should be the basis for granting trial in an U.S. court.¹⁸

A. Union of India's Complaint¹⁹

The Union of India, typical of tort plaintiffs, sought relief from the parent company, Union Carbide Corporation, the entity with the deepest pockets. In its complaint to the United States District Court for the Southern District of New York, the Union of India presented seven counts based on different theories of liability.

1. Multinational Enterprise Liability

The Indian government argued that because the multinational corporation is not subject to any specific international law which holds it liable for the harm it causes, it assumes "a primary, absolute and non-delegable duty to the persons and country in which it has in any manner caused to be undertaken any ultrahazardous or inherently dangerous activity."²⁰ Had UCC sought to dispute the imposition of this duty, the Union of India would have been hard pressed to point to law supporting it.²¹ The law to be applied in the case of tort must be the law of a jurisdiction, either the law of India or of the

¹⁸ Cases on behalf of individual Indian victims filed in various federal courts were consolidated in the Southern District of New York in February 1985 with the consolidated complaint superseding earlier complaints in June 1985. The Union of India filed its complaint in April 1985. Later that month, the Plaintiffs' Executive Committee was appointed consisting of F. Lee Bailey and Stanley Chesley, representing counsel for the individual plaintiffs, and Michael Ciresi, counsel for the Union of India.

¹⁹ See U. BAXI & T. PAUL, *MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* (1986). Under the auspices of The Indian Law Institute, briefs submitted to United States District Court for the Southern District of New York were compiled in this book, published by N. M. Tripathi of Bombay. Pagination for (1) Union of India's Complaint, (2) Memorandum of Law in Support of Union Carbide Corporation's Motion to Dismiss [hereinafter Union Carbide's Motion to Dismiss], and (3) Memorandum of Law in Opposition to Union Carbide's Motion to Dismiss [hereinafter Plaintiffs' Motion in Opposition] will be the pagination in the Baxi & Paul compilation.

²⁰ Union of India's Complaint, *supra* note 19, at 5.

²¹ Multinational codes setting "a duty to manage responsibly" were still evolving. See Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321, 323 (1985).

United States.²² Because India had no codified tort law and very limited precedent with the common law of tort, the Union of India sought to bring its complaint before an American court where experience with complex tort litigation was extensive and where it would benefit from the more liberal standards of proof afforded by the strict liability theory of products liability.

UCC's duty of care, necessary for a products liability cause of action, to the safety of employees and residents of Bhopal need not have rested upon a dubious foundation of "multinational enterprise liability" as outlined in the Union of India's complaint.²³ Rather, UCC could be said to have assumed the duty to protect the employees and residents by their conduct. The design of the plant, the training of the employees in following safety standards and procedures, and the decision to build the plant in an unpopulated area would all be indicators that UCC had assumed the duty to protect employees and residents. Likewise, UCC's promotional and stockholder materials touted the company's world-wide safety record and would have given evidence of their assumption of a common-law duty. The very appearance of Warren B. Anderson in Bhopal just days after the accident should be taken as evidence that the parent company assumed some level of the duty of care.²⁴

2. Products Liability

In five counts of its complaint against UCC, the Union of India set out a standard panoply of products liability theories. The highest in the hierarchy of liability, absolute liability, requires no assignment of fault, nor any examination of the nature of the breach in the duty of care. If a substance is deemed ultrahazardous, the one who keeps such a thing is absolutely liable for its escape and any subsequent harm.²⁵

Strict liability requires a defect that renders the product "unreasonably dangerous." Recognized in all but four American jurisdic-

²² Hofstetter, *Multinational Enterprise Parent Liability: Efficient Legal Regimes in the Modern Market Environment*, 15 N.C.J. INT'L L. & COM. REC. 299, 325 (1990).

²³ Michael Ciresi of Robins, Zelle represented the Union of India and drafted the complaint.

²⁴ See A. DE GRANIZA, *A CLOUD OVER BHOPAL: CAUSES, CONSEQUENCES & CONSTRUCTIVE SOLUTIONS* 18-19 (1985). For a poignant narrative of Anderson's arrest in Bhopal and period of detention, see D. KURZMAN, *supra* note 16, at 116-19, 124-27. For a discussion of the "assumption of duty," see BLUMBERG, *THE LAW OF CORPORATE GROUPS: TORT, CONTRACT & OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 318 (1987).

²⁵ See *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (H.L. 1868). "[W]here defendant exercises a measure of control over a hazard, and the hazard escapes, with resultant damage to the plaintiff, there is liability without a need to show fault." Weinberg, *Insights & Ironies: The American Bhopal Cases*, 20 TEX. INT'L L.J. 307, 309 (1985)(quoting *Rylands v. Fletcher*, 3 L.R.-E. & App. 330 (H.L. 1868)).

tions,²⁶ strict liability sets aside the issue of fault for commercial sellers by requiring that the defect be present when the commodity left the hands of the manufacturer. The Union of India's strongest case rested on the relatively new tenets of strict liability developed by the American courts in products liability cases.²⁷ The principal allegation against UCC was one of design defect. The Union of India alleged that UCC knew that the design of the tanks holding the methyl isocyanate was inadequate and that fail-safe devices were inadequately maintained. Furthermore, the Union of India alleged that UCC had issued an internal report describing the potential for exactly the sort of runaway reaction which occurred in Bhopal, thereby establishing the accident's foreseeability. Given that the nature of the accident was foreseeable, the Union of India alleged that UCC provided no information concerning protection against a leak or medical treatment in the event of a leak.

Under a negligence theory of liability, the Union of India maintained that UCC had a duty of reasonable care to warn of dangers and risks inherent in the methyl isocyanate manufacturing process. Its failure to warn of these dangers constituted a breach of a duty of reasonable care, thus bringing the actions of UCC within the common-law tenets of negligence, a theory of liability recognized in every American jurisdiction. Rather than identifying the source of the required fault, the Union of India alleged that UCC's exclusive control plus the nature of the gas leak presented what would ordinarily be called a "res ipsa loquitur" allegation of liability; i.e., the accident, more probably than not, could not have occurred without the fault of some individual or group within Union Carbide Corporation.

The Union of India also alleged breach of warranty and misrepresentation, two theories of liability in contract. Under breach of warranty, the Union of India alleged that UCC had warranted its Bhopal plant safe during the design and construction stage.²⁸ Under

²⁶ Four American jurisdictions still do not recognize strict liability in product liability cases: Delaware, Massachusetts, North Carolina, and Virginia.

²⁷ RESTATEMENT (SECOND) OF TORTS, § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

²⁸ Hofstetter explained the breach of contract theory:

Union Carbide was accused of having breached its promise to the Indian government that it would use state of the art technology at its Indian plant. In-

misrepresentation, the Union of India alleged that UCC had represented the plant as designed in accordance with the best information available and that it would be maintained with current and up-to-date knowledge.²⁹

3. *Liability for Malicious Conduct*

Because UCC knew of the extreme danger posed by methyl isocyanate, the Union of India alleged the chemical company's actions to be "unlawful, wilful, malicious and reprehensible . . . in deliberate, conscious and wanton disregard of the rights and safety of the citizens of the Union of India."³⁰ If the Union of India could prove UCC's actions to be wilful and malicious, it could ask the court to impose punitive as well as compensatory damages for the tort counts.

4. *Damages*

The scope of compensatory damages alone was wide including not only compensation for death and injury to humans but to livestock and crops as well.³¹ Estimates of the actual damages ran from a low of \$350 million, the figure comprising the aborted 1986 settlement attempt between UCC and individual victims represented by an executive committee of American attorneys, to a high of \$2.04 billion, a 1986 estimate made by Morehouse and Subramaniam.³²

B. *Union Carbide's Motion to Dismiss*

Citing *Piper Aircraft Co. v. Reyno*,³³ and *Gulf Oil Corp. v. Gilbert*,³⁴ UCC side-stepped all the allegations presented in the Union of India's complaint by insisting that India was the appropriate forum of the litigation, not the Southern District of New York.

1. *Plaintiffs' Choice of Forum*

Under the tenets of *forum non conveniens*, a court may use its discretion to decide whether it or another forum is more convenient for the defendant. Normally, the plaintiffs' choice of forum is given deference, unless the plaintiff is foreign.³⁵ Moreover, the mere fact that

stead of solving this issue under the inflexible concept of piercing the corporate veil it could be more readily tackled as a problem of international law or host country contract or tort law.

Hofstetter, *supra* note 22, at 319-20. However, Hofstetter fails to cite any specific law under which this might be done.

²⁹ Union of India's Complaint, *supra* note 19, at 8.

³⁰ *Id.* at 8.

³¹ *Id.* at 8-9.

³² P. SHRIVASTAVA, *supra* note 13, at 82.

³³ 454 U.S. 235 (1981).

³⁴ 330 U.S. 501 (1947).

³⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

the law in the alternative forum is less favorable to the plaintiff is not enough, by itself, to overturn an assertion by a defendant that the alternative forum is more convenient for trial.³⁶ Thus, the Union of India could not force a court in the United States to hear its complaint against UCC merely on the grounds that the award of damages in India would likely be significantly less than under the liberal products liability law of the United States.

The objective of policing products made in the United States which cause injury to foreign users was likewise set aside as inadequate motive for allowing foreign citizens to bring a cause of action against U.S. citizens in U.S. courts. In *Piper*, a products liability action stemming from a commuter aircraft accident in Scotland, the U.S. Supreme Court wrote:

[E]nsuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if [defendants] were tried in the United States where they could be sued on the basis of both negligence and strict liability [is one suggested interest]. However, the incremental deterrence that would be gained if their trial were held in an American court is likely to be insignificant. The 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 tried here.³⁷

UCC turned to its advantage the element of low U.S. interest cited by the *Piper* Court by contrasting the low U.S. interest with the enormity of the Indian interest in the litigation, which in the earliest stages involved 100 separate cases in the United States and over 1200 cases in India.³⁸ In short, if there existed a more convenient alternative forum in India, there was no incentive for an American court to take on litigation of such size and complexity as the Bhopal case.

2. *Private Interest*

In applying the balancing of interests test outlined in *Gilbert* and applied in *Piper*, the U.S. Supreme Court listed certain private interests to be taken into consideration, including access to proof, availability of compulsory process, cost of bringing in witnesses, need to view the premises, and whatever elements make a trial expeditious and inexpensive.

a. *Access to Proof*

The Motion to Dismiss filed by UCC listed the following factors

³⁶ *Id.* at 247, 251.

³⁷ 454 U.S. at 260-61.

³⁸ Union Carbide's Motion to Dismiss, *supra* note 19, at 33.

in support of its contention that an Indian forum would afford much greater access to proof than would an U.S. forum:

- (1) The incident occurred in India;
- (2) Tens of thousands of plaintiffs suing for personal injuries were Indian citizens residing in India;
- (3) All of the decedents were Indian citizens residing in India;
- (4) Management and employees of the Bhopal plant were all Indian citizens residing in India;
- (5) Virtually all the physicians and nurses who treated the patients are Indian citizens residing in India;
- (6) All medical records are located in India;
- (7) The incident was investigated by authorities in India;
- (8) Blueprints and design drawings were made in India as required by the Indian government;
- (9) The plant was constructed by Indian companies in India;
- (10) All the records of the day-to-day management, operations, and maintenance of the plant were in India;
- (11) UCIL was governed by Indian laws and regulations concerning chemical manufacturing, safety and environment.³⁹

In addition, after the accident the Indian government took control of the plant and its records.

b. Compulsory Process

UCC argued that an American court could not obtain jurisdiction over unwilling third party witnesses to the accident who reside in India. This would significantly damage Union Carbide Corporation's defense because those persons who may have caused the accident would likely be unwilling to appear without compulsory process. Moreover, should the trial proceed without compulsory process, UCC argued its fifth amendment rights would be violated.⁴⁰ More importantly, UCIL itself would not be subject to suit in the United States because Indian law prohibits a majority shareholder from consenting to jurisdiction in another forum.⁴¹

c. Cost of Transporting Witnesses

Because of the large numbers of third party witnesses necessary to advance the trial, UCC argued that the cost of transportation and lodging would be prohibitive. In *Bouvy-Loggers v. Pan American World Airways, Inc.*,⁴² the New York federal district court dismissed a suit by

³⁹ *Id.* at 34-37.

⁴⁰ "Due Process requires that there be an opportunity to present every available defense . . ." *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932).

⁴¹ Indian Companies Act of 1956.

⁴² 15 Av. Cas. (CCH) 17,153 (S.D.N.Y. 1978).

a citizen from the Netherlands, stating:

The witnesses and documents with regard to this issue were located in the Netherlands. To bring these witnesses and documents to New York for trial as opposed to conducting the trial in the Netherlands would clearly have been inconsistent with the goal of making the disposition of cases "easy, expeditious and inexpensive."⁴³

d. View of the Premises

UCC further argued that the court would need a view of the actual Bhopal plant and its environs in order to deal with the issues of fact surrounding the allegation of sabotage. Additionally, the trier of fact would need to see the location of shantytown population centers in relation to the plant itself in order make accurate assessments concerning damages.

3. Public Interests

The second prong of the balancing test for *forum non conveniens* analysis is the weight of the public interest.⁴⁴ A primary concern is the imposition of unnecessary burden on the American court. Issues of pressure on the court docket can be off-set by local interest in the litigation, especially since local citizens might be burdened with jury duty. Moreover, the conversance of the forum with the law to be applied and the possibility of avoidance of conflict of laws issues are factors that enter the public interest equation.

a. Unnecessary Burden on the American Court

In the absence of a strong public interest in the litigation, the availability of a more convenient forum elsewhere cannot be ignored. The principal interest that the United States might take in the Bhopal litigation is that of holding its own corporate citizens accountable for their actions outside the jurisdiction. However, this interest was found to be inadequate in *Gilbert and Piper*.⁴⁵ American courts are not "world" courts, argued UCC, citing the U.S. Supreme Court's opinion in *Gilbert*: "Administrative difficulties follow courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation."⁴⁶ Repeatedly, American courts have found the assumption of administrative burdens for foreign litigation to be inappropriate.⁴⁷

⁴³ *Id.* at 17,154.

⁴⁴ See *Gilbert*, 330 U.S. at 508-09; *Piper*, 454 U.S. at 259-61.

⁴⁵ *Id.*

⁴⁶ *Gilbert*, 330 U.S. at 508-09.

⁴⁷ See, e.g., *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 (11th Cir. 1985); *Schertenleib v. Traum*, 589 F.2d 1156, 1163 (2d Cir. 1978); *Domingo v. States Marine Line*, 340 F. Supp. 811, 816 (S.D.N.Y. 1972).

UCC argued that language would be an additional burden since English is spoken only by the educated classes in India. While Hindi is spoken by most people in the Bhopal area, India has a total of fifteen different languages and as many as 1500 regional dialects.⁴⁸ Utilization of a wide range of languages in the U.S. forum would make the cost of translation burdensome.

UCC pointed to the decision of a New York state court which found the U.S. forum inconvenient for foreign litigation because of the administrative burdens associated with such litigation. In *Islamic Republic of Iran v. Mohammed Reza Pahlavi*,⁴⁹ the New York State Court of Appeals dismissed a suit against the Shah of Iran for breach of fiduciary duty, concluding: "[T]axpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter . . . is so ephemeral."⁵⁰

b. Application and Conflict of Law

Because the Union of India sought to bring its cause of action in federal court on an issue not arising under a federal question, the court was forced to turn to the law of the state in which it sits to make its choice of law determination.⁵¹ Each state has its own system for determining when and if the law of another jurisdiction should be applied. In New York, under the interchangeable labels of "center of gravity," "grouping of contacts," or "governmental interest," the law of the jurisdiction with the greatest interest applies.⁵² India was the jurisdiction with the most significant relationship to the accident and as such, the jurisdiction with the greatest interest. Quoting Judge Friendly in *Conte v. Flota Mercante Del Estado*,⁵³ UCC argued for application of Indian law: "[Applying foreign law], where we have no clear guides, our labors, moulded by our own habits of mind as they necessarily must be, may produce a result whose conformity with that of the foreign court may be greater in theory than in fact."⁵⁴

4. Enforceability of an American Judgment

UCC argued that the Indian Code of Civil Procedure and Indian

⁴⁸ Union Carbide's Motion to Dismiss, *supra* note 19, at 47.

⁴⁹ 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985).

⁵⁰ *Id.* at 483, 467 N.E.2d at 250, 478 N.Y.S.2d at 602.

⁵¹ See *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

⁵² See Union Carbide's Motion to Dismiss, *supra* note 19, at 41 (citing *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963)).

⁵³ 277 F.2d 664 (2d Cir. 1960).

⁵⁴ *Id.* at 667.

High Court decisions⁵⁵ suggest that India might not recognize and enforce an American judgment unfavorable to Indian plaintiffs.⁵⁶ Conversely, the validity of an Indian judgment against UCC would be upheld in the United States under the rule of *Hilton v. Guyot*.⁵⁷

[If] a foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against, and its proceedings are according to the course of a *civilized* jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.⁵⁸

5. *India as an Adequate Forum*

The entire *forum non conveniens* argument actually turns on the issue of whether the Union of India could indeed provide an adequate forum for litigating the injuries resulting from the Bhopal Gas Leak Disaster. In *Piper*, the U.S. Supreme Court set this single test as the gate for the rest of the analysis: "At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."⁵⁹ UCC had high praise for the Indian judiciary. India is a civilized country, they argued, "operating under democratic principles with a common law legal system adopted, like our own, from the British legal system."⁶⁰ Additionally, the state of Madhya Pradesh, where the Bhopal plant was located, had waived court filing fees and had provided free legal assistance to ease the route of injured Indians through the system. The political system in India was stable enough for the Indian Minister of Law to tell the Indian Parliament that "the judicial system in India had reached a standard which could be considered 'as a model' for other country [sic] which boast a free judiciary."⁶¹

6. *Standing*

UCC challenged the Union of India's standing to sue in an American court by arguing that India's self-imposed status of *parens patriae* does not give it the requisite standing.

⁵⁵ See *Moloji Nar Singh Rao v. Shanker Sara*, 1962 AIR S.C. 1737.

⁵⁶ Union Carbide's Motion to Dismiss, *supra* note 19, at 55.

⁵⁷ 159 U.S. 113 (1895).

⁵⁸ *Id.* at 205-06 (emphasis added).

⁵⁹ *Piper*, 454 U.S. at 254.

⁶⁰ Union Carbide's Motion to Dismiss, *supra* note 19, at 53.

⁶¹ *Id.* at 54.

C. Plaintiffs' Motion in Opposition

In its effort to overcome the rationale laid out by UCC in its Motion to Dismiss, the plaintiffs⁶² reasserted the close kinship between UCC and its Indian subsidiary, UCIL. The plaintiffs followed with an attack aimed at the heart of the *forum non conveniens* analysis. The Union of India argued that its judiciary was inadequate to resolve the disputes arising from the Bhopal incident. In the wake of this frontal attack on UCC's Motion to Dismiss, the plaintiffs argued for the balancing of private and public interests along a different distribution.

1. Adequacy of Indian Courts

The plaintiffs contended that "[i]f dismissal of an action on *forum non conveniens* grounds were not conditioned on the availability of another forum, the plaintiff might find himself with a valid claim but nowhere to assert it."⁶³ Moreover, the burden to prove the existence of an adequate alternative forum rests with the defendant.⁶⁴ According to Dan Kurzman, in his description of the Bhopal litigation, "[t]his unprecedented admission by a government that its judicial system offered less justice than did a foreign judicial system provoked cries of shock and embarrassment in India."⁶⁵

The plaintiffs argued that the issue of adequacy of an alternative forum is not addressed by simply asserting that courts were "available" in India. Citing *Manu International S.A. v. Avon Products, Inc.*,⁶⁶ the Union of India, along with the individual plaintiffs, asserted that the "comparative efficacy and efficiency of trying a case in one forum as opposed to another"⁶⁷ had to be considered as well. The shortcomings of the Indian courts in relation to the U.S. courts were supported by the plaintiffs with expert opinion as well as examples. Professor Marc Galanter of the University of Wisconsin-Madison supported the contention that Indian courts were plagued by delay, that discovery under the Indian Code of Civil Procedure was inade-

⁶² A Plaintiffs' Executive Committee was formed to represent the Union of India and individual plaintiffs in federal court. See *In re Union Carbide Corp. Gas Plant Disaster*, 601 F. Supp. 1035 (J.P.M.L. 1985). The alliance would be an uneasy one with the individual plaintiffs' attorneys attempting to settle with Union Carbide unilaterally but finally being blocked by the Union of India. See D. KURZMAN, *supra* note 16, at 217-22. When the case was appealed to the Second Circuit, the plaintiffs broke ranks again. See *infra* notes 175-91 and accompanying text. Finally, the individual plaintiffs did not join the suit in Indian courts and their attorneys were left without a means to collect their "reasonable expenses" from the eventual settlement. See *infra* notes 196-211 and accompanying text.

⁶³ *Farman Farmaian v. Gulf Oil Corp.*, 437 F. Supp. 910, 915 (S.D.N.Y.), *aff'd*, 588 F.2d 880 (2d Cir. 1977).

⁶⁴ *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983).

⁶⁵ D. KURZMAN, *supra* note 16, at 204.

⁶⁶ 641 F.2d 62 (2d Cir. 1981).

⁶⁷ *Id.* at 65.

quate, that the procedural mechanisms necessary for resolving complex litigation were non-existent, and that neither the bench nor the bar had the kind of experience necessary to handle mass tort litigation.⁶⁸

a. Problem of Delay in Indian Courts

Plaintiffs argued that “[a]s of July, 1985, more than 40,000 civil cases were pending in the Supreme Court of India alone.”⁶⁹ Half of these cases had been pending for four years with one eighth pending for at least ten years.⁷⁰ One case, *Shanker Das v. Union of India*,⁷¹ came up for a hearing in 1984 even though it was first filed in 1966. In fact, argued the plaintiffs, this very delay was the basis for the denial of a *forum non conveniens* motion in the case of *In re Air Crash Disaster Near Bombay*,⁷² one of the few instances in which an American court deemed itself the more convenient forum for a foreign citizen to sue an American defendant for an injury which happened outside the United States.

While recognizing the ill effects of the delays in their courts, the Union of India expressed its helplessness to remedy the current situation. Indian society, plaintiffs explained, is growing while services cannot keep up with the demands of citizens for their rights.⁷³ Legal tradition requires many allegations to be “over-proved” and the courts have no mechanism for grouping cases or giving priority to older cases.⁷⁴ By recognition of the Indian Law Commission, much of the delay in the Indian courts is procedural. The gist of the shortcomings of the Indian judiciary as outlined in the affidavit of the plaintiffs’ expert presented a picture of a court system not likely to make a special effort for these special and pressing disputes arising from the Bhopal gas leak.⁷⁵

b. Inadequate Procedure

The Union of India contended that even if the cases surrounding Bhopal could be expedited through the Indian courts, the forum was nevertheless inadequate. In *Mobil Tankers Co. v. Mene Grande Oil Co.*,⁷⁶ the Venezuelan judicial system was found inadequate because it “lacked pretrial procedures and placed extraordinary limitations

⁶⁸ See Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273 (1985).

⁶⁹ Plaintiffs’ Motion in Opposition, *supra* note 19, at 85.

⁷⁰ *Id.*

⁷¹ 2 S.C.C. 358 (1985).

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

⁷³ Plaintiffs’ Motion in Opposition, *supra* note 19, at 86-87.

⁷⁴ *Id.* at 86.

⁷⁵ *Id.* at 87.

⁷⁶ 363 F.2d 611 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966).

on expert testimony."⁷⁷ The absence of pretrial discovery procedures was enough for the Seventh Circuit to find the alternative forum inadequate in *Macedo v. Boeing Co.*⁷⁸ Because the system of Indian courts is based more on oral argument than on factual inquiry, "[t]he only forms of permissible discovery are written interrogatories, inspection of documents and requests for admissions."⁷⁹ Moreover, "[d]iscovery is limited to parties only; third-party witnesses cannot be required to submit to the discovery process."⁸⁰

No pre-trial conference is available in the Indian forum for the management of complex cases.⁸¹ Moreover, third-party practice in India is a matter of state option.⁸² Madhya Pradesh, the ultimate location of any Indian litigation, was not one of the states allowing impleader.⁸³ Finally, India offered no means to consolidate multiple-party suits.⁸⁴

c. *Inexperience with Tort Law*

That the case against UCC must be made in tort law was widely accepted by all the parties. India had no codified tort law and it had very little common-law experience with tort law. Kurzman observed in *A Killing Wind*:

Indian lawyers were largely ignorant of tort law; in fact, this is one of the few major fields of law that has never even been codified in India. Nor do tort cases usually yield large awards—or lawyers' fees. Since there are no civil juries in India, judges determine liability and damages, and they are not overly impressed by calamities that kill thousands and simply punctuate the rough rhythm of survival in India.⁸⁵

2. *Enforcing an Indian Judgment*

The plaintiffs were not impressed with the high-minded language of *Hilton v. Guyot*⁸⁶ quoted by UCC in its Motion to Dismiss. They contended that "[a]ny judgment against Union Carbide in India would be uncollectible since Union Carbide apparently has no assets subject to attachment."⁸⁷ In fact, the only asset in India which UCC showed on its balance sheet was its ownership equity in UCIL. The net assets of UCIL amounted to \$95.3 million, not enough to

⁷⁷ *Id.* at 614.

⁷⁸ 693 F.2d 683, 690 (7th Cir. 1982).

⁷⁹ Plaintiffs' Motion in Opposition, *supra* note 19, at 89.

⁸⁰ *Id.*

⁸¹ *Id.* at 89.

⁸² *Id.*

⁸³ *Id.* at 89.

⁸⁴ *Id.*

⁸⁵ D. KURZMAN, *supra* note 16, at 195.

⁸⁶ 159 U.S. 113, 205 (1895).

⁸⁷ Plaintiffs' Motion in Opposition, *supra* note 19, at 90.

satisfy any realistic judgment.⁸⁸

The plaintiffs further were not impressed with UCC's assertions, that it would submit to the jurisdiction of an Indian court when those assertions were not accompanied with promises to accept the judgment of an Indian court.⁸⁹ If UCC did challenge an Indian judgment, the jurisdiction of an American court would have to be invoked, pursuant the logic of *Hilton v. Guyot*, in order to determine if the due process conditions were in fact met.⁹⁰ The Union of India was willing to admit that its judicial system had enough shortcomings to give Union Carbide Corporation plenty of fuel to challenge the due process it is afforded under Indian law.

"Stripped to its essentials," the plaintiffs argued, "the attempt by Union Carbide to escape justice in the courts of its home forum is nothing more than forum shopping."⁹¹ By taking advantage of the delay, inexperience, and procedural inadequacies of the Indian judicial system, "the ultimate cost to the company is substantially diminished."⁹² The plaintiffs pointed to the climate created by the GAF (formerly General Aniline and Film) hostile takeover bid⁹³ as a reason for UCC's desperate attempt to seek an alternative forum: "In the face of recurrent Wall Street speculation . . . the company has found the enormous contingent liability of the Bhopal litigations to be of significant value. [It is] the 'ultimate poison pill.'"⁹⁴

3. *Private and Public Interests*

Even if UCC could successfully demonstrate that India's courts offered an adequate alternative forum, the plaintiffs argued that the private and public interests still did not balance in favor of moving the litigation back to India.

a. *Union Carbide Corporation is Ultimately Liable*

Returning to its initial complaint, the plaintiffs emphasized that it was suing UCC because the parent corporation was the ultimate seat of liability.⁹⁵ To subject UCC to adequate discovery required the application of the Federal Rules of Civil Procedure under the oversight of an American court.⁹⁶ Without the force of the rules of

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 91.

⁹¹ *Id.*

⁹² *Id.* at 90.

⁹³ The GAF hostile takeover bid ended in 1986 with GAF being frustrated in its takeover attempt but walking away \$81 million richer. "[N]o potential suitor could arrange the financing to acquire a company facing so much contingent liability." Wall St. J., Nov. 26, 1985, at 24, col. 3.

⁹⁴ Plaintiffs' Motion in Opposition, *supra* note 19, at 92.

⁹⁵ See *id.* at 62, 105.

⁹⁶ *Id.* at 89.

discovery under the Federal Rules of Civil Procedure the plaintiffs could not hope to find evidence to support their counts of absolute liability, strict liability, negligence, breach of warranty, and misrepresentation.

During forum discovery, the plaintiffs were able to glimpse the vast expanse of evidence under the control of Union Carbide Corporation.⁹⁷ Moreover, the plaintiffs asserted that all relevant documents were within the control of the parent company and not necessarily in the subsidiary's possession in India,⁹⁸ even after the documents were sealed by the Indian government. Whether tried in the United States or in India, UCC would be forced to make a "transnational endeavor."⁹⁹

b. Witness Logistics

The Union of India contended that "Union Carbide's claim of insurmountable hardship is disingenuous in view of the multinational's operations in more than 120 countries around the world carried on through a world-wide management system and communications network."¹⁰⁰ Indispensable witnesses, argued the plaintiffs, were located in the United States. With respect to the victims, it was stipulated early in the litigation that the victims had suffered and died as a result of the gas leak. Thus, "[a]s a practical matter, all of the victims will not be witnesses regardless of where these cases are tried."¹⁰¹

The matters to be examined in litigation surrounding design defect should not require witnesses from India, since the designs were executed in the United States. In regard to UCC's need to proffer witnesses to prove sabotage,¹⁰² the plaintiffs argued that sabotage was a concocted defense from which Warren Anderson, UCC's Chief Executive Officer, had distanced himself in Congressional hearings in 1985.¹⁰³ Moreover, the plaintiffs attacked UCC's need to prove

⁹⁷ *Id.* at 95.

⁹⁸ *Id.* at 93.

⁹⁹ *Id.* at 97.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 100.

¹⁰² Sabotage was Union Carbide Corporation's single most reliable defense to charges of strict liability and negligence. In strict liability, the plaintiff must show that the defective product left the control of the defendant in a defective condition. If the defendant can prove that the defect was introduced after the product was out of his control, the causation chain is broken. Likewise, in negligence the plaintiff must prove that the chain of causation was not broken. If the defendant can prove that there was an unforeseeable intervening cause between his negligent act and the harm to the plaintiff, the causation chain is also broken. Union Carbide Corporation continued to assert sabotage, though without identifying the exact source, up to the ultimate settlement in February 1989.

¹⁰³ *Release of Poison Gases & Other Hazardous Air Pollutants from Chemical Plants: Joint Hearing Before the Subcommittee on Health & the Environment & the Subcomm. on Commerce, Transportation, & Tourism of the Committee on Energy & Commerce, 99th Cong., 1st Sess. 299-300 (1985).*

the negligent involvement of the government of India. Here, the plaintiffs raised the contradiction that UCC claimed to adhere "to safety and environmental standards imposed by the United States government and Union Carbide itself rather than any lesser standard of a host government."¹⁰⁴

Generally, the plaintiffs painted those issues of proof for which UCC insisted it must have easy access to Indian witnesses and documents as being hollow. The issue of the seized documents in Bhopal was an example of a situation strained to the point of making it seem hypothetical. The plaintiffs insisted that UCC had complete access to those documents at all times. When UCC countered that it did not have access, the attorneys for the Union of India petitioned the Indian court to order those documents made available to UCC.¹⁰⁵

c. Public Interest in the United States

The plaintiffs argued that the events in Bhopal are of interest to the United States, if for no other reason than that the UCC plant at Institute, West Virginia is practically identical to the Bhopal plant. Though UCC officials insisted that a Bhopal type accident could not happen at the United States facility, toxic gas did escape the West Virginia plant injuring 100 persons in August 1985.¹⁰⁶

The United States, moreover, has an interest in preventing breaches of safety for its own domestic chemical industry and has an interest in maintaining the trustworthy reputation of multinational corporations based in the United States. The plaintiffs stated: "As the leading industrialized nation in the world, the United States recognized that it was necessary to encourage American multinationals to protect the health and well-being of peoples throughout the world."¹⁰⁷ The plaintiffs argued that the stakes involved in the crash of a commuter aircraft in Scotland, the facts behind the precedent setting *Piper* decision, were very different from an industrial accident resulting in the deaths of thousands and in injuries to thousands more. "More than ever it was understood," the plaintiffs argued referring to congressional hearings,¹⁰⁸ "that only the responsible behavior of U.S. corporations will protect the American image abroad and promote exports of American technology."¹⁰⁹ The justice meted out in American courts for breaches of that trust would have an "enormous potential for the benefits of deterrence, both nation-

¹⁰⁴ Plaintiffs' Motion in Opposition, *supra* note 19, at 102.

¹⁰⁵ *Id.* at 104.

¹⁰⁶ *Id.* at 105.

¹⁰⁷ *Id.*

¹⁰⁸ *The Implications of the Industrial Disaster in Bhopal, India: Hearing Before the Subcomm. on Asian and Pacific Affairs of the Comm. on Foreign Affairs, House of Representatives, 98th Cong., 2d Sess. 23 (1984)*(statement of Rep. Torricelli).

¹⁰⁹ Plaintiffs' Motion in Opposition, *supra* note 19, at 105.

ally and worldwide."¹¹⁰

d. Public Interest of India

Plaintiffs argued that the Indian government's act of placing the cause of action in a foreign forum is testimony that India's public interest would be best served in a U.S. forum. Specifically, they asserted:

The Union of India, by filing its complaint with this Court, made clear its position that justice for the Bhopal victims can only be secured in the United States. This extraordinary act of a foreign sovereign seeking justice in an American court leaves *no question* as to the public interest of India.¹¹¹

In a footnote, the plaintiffs cited *Panama Processes, S.A. v. Cities Services Co.*,¹¹² for the proposition that a court ordinarily must balance the competing stakes of two countries each asserting the interests of their own jurisdiction. The plaintiffs asserted: "Obviously, the present case presents no such conflict since the Union of India chose to litigate in the United States. Comity requires that this Court accord that decision due respect."¹¹³ The Union of India's argument that it knew what its own best interests were turned out to be a serious miscalculation because UCC would argue successfully that the Union of India did not know what were in its own best interests.

III. *Forum Non Conveniens* Analysis in the District Court

In a long and detailed opinion, Judge John F. Keenan examined each argument presented by the parties and several raised in an *amicus curiae* brief.¹¹⁴ With three important exceptions, Judge Keenan embraced the reasoning of Union Carbide Corporation emphasizing the adequacy of the Indian courts and the involvement of the Indian government in the entire history of the Bhopal facility as the key elements in support of a *forum non conveniens* dismissal of the plaintiffs' cause of action.¹¹⁵

¹¹⁰ *Id.*

¹¹¹ *Id.* at 106-07.

¹¹² 650 F.2d 408, 414-15 (2d Cir. 1981).

¹¹³ Plaintiffs' Motion in Opposition, *supra* note 19, at 107 n. 25.

¹¹⁴ Memorandum of Individual Plaintiffs in Opposition to Union Carbide Corporation's Motion to Dismiss on the Grounds of *Forum Non Conveniens* may be found in the compilation by U. BAXI & T. PAUL, *supra* note 19, at 112-37. Supplemental Memorandum of Law in Further Support of Union Carbide Corporation's Motion to Dismiss These Actions on the Grounds of *Forum Non Conveniens* may be found in the same source. *Id.* at 140-48. The same source includes the Amended Consolidated Complaint and Jury Demand, *id.* at 149-60, and Affidavit of Marc S. Galanter, *id.* at 165-221.

¹¹⁵ *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part, rev'd in part*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

A. Adequacy of India's Courts

If two available forums are presupposed, the simple fact that the defendant is "amenable to process in the other forum" should be enough to show that the alternative forum is adequate.¹¹⁶ Having established "amenability to process"¹¹⁷ as the one element which clearly counts in the weighing of an alternative forum's adequacy, Judge Keenan listed the elements which do not count.¹¹⁸ Though neither party asserted that relief to plaintiffs would be more justly accorded under American tort law than under Indian law, Judge Keenan nevertheless repeated the stricture of the *Piper* court that the favorability of substantive law was not to be considered: "[I]f conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless."¹¹⁹

One by one, Judge Keenan dispatched the shortcomings alleged by the Union of India and the other plaintiffs of the Indian court system. Judge Keenan was unimpressed by the allegation that Indian courts were "colonial" in nature.¹²⁰ Neither was he perturbed by plaintiffs' contention that Indian courts were ridden by delay. "This Court acknowledges that delays and backlog exist in Indian courts, but United States courts are subject to delays and backlog, too."¹²¹ Moreover, Judge Keenan argued, the Indian government had attempted to remedy the situation for the special cases of Bhopal litigation by enactment of the Bhopal Act which gave the Union of India its *parens patriae* status.¹²²

Judge Keenan found no merit in the allegation that the Indian bar was inexperienced in handling complex litigation. Merely because Indian attorneys did not practice in large law firms did not render them incapable of handling complex litigation especially in view of the fact that the principal legal officers of the government would be involved in the litigation.¹²³ Nor did Judge Keenan find the inexperience of the Indian bench in handling complex litigation convincing. Professor Galanter, the plaintiffs' expert witness, sug-

¹¹⁶ *Id.* at 845 (quoting *Piper*, 454 U.S. at 254 n.22).

¹¹⁷ The Indian Civil Procedure Code, 2 INDIA CODE part II § 9 (1970), grants jurisdiction to Indian courts for "all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred." Jurisdiction over UCIL in Madhya Pradesh was assured but jurisdiction over Union Carbide Corporation itself was not so certain without the parent's consent. Note, *The Razor's Edge: The Doctrine of Forum non Conveniens and the Union Carbide Methyl Isocyanate Disaster at Bhopal, India*, 10 N.C.J. INT'L L. & COM. REG. 743, 750 (1985).

¹¹⁸ 634 F. Supp. at 846.

¹¹⁹ *Id.* (quoting *Piper*, 454 U.S. at 250).

¹²⁰ 634 F. Supp. at 847-48.

¹²¹ *Id.* at 848 (citing Remarks of the Honorable Warren E. Burger, Chief Justice, Supreme Court of the United States, 100 F.R.D. 499, 534 (1983)).

¹²² *Id.* at 848.

¹²³ *Id.* at 849.

gested that Indian judges were disinclined to promote settlements. Judge Keenan not only found the allegation irrelevant, but took the opportunity to point out that he was unable to promote a settlement himself after having "labored hard and long."¹²⁴ Concerning the absence of class action suits and impleader, Judge Keenan suggested that the Indian legislature was willing to consider innovations by evidence of their passing the Bhopal Act.¹²⁵ Judge Keenan likewise swept aside as insignificant matters concerning the unavailability of juries and contingent fees for attorneys.¹²⁶

Finally, with respect to the adequacy of Indian courts, Judge Keenan did not find the absence of codified tort law a hindrance to justice. He stated: "With the groundwork of tort doctrine adopted from the common law and the precedential weight awarded British cases, as well as Indian ones, it is obvious that a well-developed base of tort doctrine exists to provide a guide to Indian courts presiding over the Bhopal litigation."¹²⁷

B. Critical Shortcomings

Judge Keenan, despite his belief that the Indian courts were adequate to resolve the Bhopal dispute, was concerned about two shortcomings of the Indian court system. He found the limited discovery rules of the Indian judicial system to be a true obstacle to the plaintiffs' efforts to prove their case:

[T]he only forms of discovery available in India are written interrogatories, inspection of documents, and requests for admissions. Parties alone are subject to discovery. Third-party witnesses need not submit to discovery. Discovery may be directed to admissible evidence only, not material likely to lead to relevant and admissible materials. . . . Parties are not compelled to provide what will be actual proof at trial as part of discovery.¹²⁸

Judge Keenan agreed these limitations would be burdensome.¹²⁹ He therefore invoked his power to "condition transfer under the doctrine of *forum non conveniens*" by requiring the consent of the defendant to submit to Federal Rules of Civil Procedure.¹³⁰

The second shortcoming foreseen by Judge Keenan was the enforceability of an Indian judgment against UCC. Judge Keenan found the ironic insistence by each party that a foreign forum was more sophisticated to hear the case to indicate "a willingness to abide by a judgment of the foreign nation whose forum each seeks to

¹²⁴ *Id.* at 851.

¹²⁵ *Id.*

¹²⁶ *Id.* at 851-52.

¹²⁷ *Id.* at 849.

¹²⁸ *Id.* at 850.

¹²⁹ *Id.*

¹³⁰ *Id.*

visit."¹³¹ Nevertheless, to be on the safe side, Judge Keenan conditioned the granting of the motion to dismiss:

on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court, and affirmed on appeal in India. Absent such consent to abide by and "make good" on a foreign judgment, without challenge except for concerns relating to minimal due process, the motion to dismiss now under consideration will not be granted.¹³²

At the very end of his opinion, Judge Keenan added a third condition for the granting of the motion to dismiss. This third condition, included as a safety measure, would require UCC to submit to the jurisdiction of the Indian courts once the cause of action against it was dismissed in the American court.¹³³ This last condition would be the only one to survive on appeal.

Judge Keenan concluded that Indian courts were adequate to serve the needs of justice¹³⁴ and that "differences between the two legal systems, even if they inure to plaintiffs' detriment, do not suggest that India is not an adequate alternative forum."¹³⁵

C. *Balance of Private Interests*

In his analysis of the private interests which *Gilbert* and *Piper* require be addressed, Judge Keenan struck the second blow to the plaintiffs' bid to have their day in an American court. Judge Keenan found that India, her government and her citizens, had been intimately involved in and had exerted a large measure of control over the Bhopal operation throughout its history.

1. *Access to Safety Data*

Judge Keenan was particularly impressed with the comparison of the number of Indians versus Americans working at the Bhopal plant throughout its history. He found it significant that the Agricultural Products Division of UCIL, the division under which the Bhopal plant was placed, was in operation for fifteen years with little American contact.¹³⁶ He found it significant that the last American to be associated with the Bhopal facility had left more than one year before the accident.¹³⁷ He further found it significant that every division within the Bhopal plant was headed by an Indian national and that in every department the head count of Indian nationals who were employees exceeded 400. Judge Keenan performed the same

¹³¹ *Id.* at 852.

¹³² *Id.*

¹³³ *Id.* at 867.

¹³⁴ *Id.* at 852.

¹³⁵ *Id.*

¹³⁶ *Id.* at 853.

¹³⁷ *Id.*

head-count analysis for the division headquarters and came to the same conclusion, i.e. the operation of the division was firmly in the hands of the Indian nationals.¹³⁸

Judge Keenan found it especially noteworthy that most of the safety audits of the Bhopal facility were conducted by Indian nationals under the authority of UCIL. Only three times (1979, 1980, and mid-1982) did employees from UCC conduct safety audits. Judge Keenan agreed that "these three events constitute a very small fraction of the thousands of safety audits conducted at the Bhopal facility."¹³⁹ In fact, in an instance of a phosgene leak that occurred at a UCC plant in the United States, information regarding safety measures was obtained from the UCIL plant in India.¹⁴⁰

2. *Design and Construction*

Judge Keenan was unimpressed by plaintiffs' allegation that the responsibility for all events occurring at the Bhopal plant must be shouldered by UCC because the design "package" came from the parent company. Beginning with the Union of India's initial Letter of Intent issued in March, 1972, Judge Keenan found clear evidence of the close involvement of not only the Indian government but many Indian nationals. Judge Keenan also found that UCC and UCIL were separate and distinct entities: "The Court is struck by the assertion that the two agreements were negotiated at 'arms-length' pursuant to Union Carbide corporate policy, and the Union of India mandated that the Government retain specific control over the terms of any agreements UCIL made with foreign companies such as Union Carbide Corporation."¹⁴¹ Judge Keenan apparently accepted the notion that "Union Carbide related with UCIL much as it would have with an unaffiliated, or even competing company."¹⁴²

Once the Union of India issued the Letter of Intent in March, 1972, UCC, in Judge Keenan's view, was relegated to the status of provider of the initial design package and the entire operation was taken over by UCIL. Judge Keenan wrote: "The Design Transfer Agreement indicates that Union Carbide's duty under the Agreement was to provide process design packages, and that UCIL, not

¹³⁸ *Id.* at 854.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 854-55.

¹⁴¹ *Id.* at 856. Judge Keenan appended a section from the Union Carbide Corporate Policy Manual stating:

The "arms-length principle" is a central consideration in transfer and pricing of all technology transactions with affiliates. "Arms-length" is defined as: The principle whereby inter-company transactions between Union Carbide and its affiliates, or between affiliates, will reflect the cost to unrelated parties of the same or similar technology under similar circumstances.

Id.

¹⁴² *Id.* at n. 16.

Union Carbide, would be responsible to 'detail design, erect and commission the plant.'"¹⁴³ Judge Keenan also found UCC's issuance of "limiting warranties with respect to the design packages" to be additional evidence of UCIL's independent status in the Bhopal plant's construction and commissioning.¹⁴⁴

Judge Keenan gave great weight to affidavits submitted by UCC that supported the narrowness of its role in the project. Quoting from one of the affidavits, Judge Keenan said:

[T]he process design packages which Union Carbide Corporation provided are nothing more than summary design starting points They set forth only the general parameters A plant cannot be constructed from a process design package. The detail design comprises approximately 80 percent of the sum of the man hours involved in the design of any project and transposes the general process design parameters into an actual design which can be used for purchasing equipment and actual construction.¹⁴⁵

As further evidence of UCC's limited involvement in the construction of the Bhopal plant, Judge Keenan pointed out that the parent company's design engineers made only four visits to the Bhopal plant prior to its start-up.¹⁴⁶

Judge Keenan contrasted UCC's narrow involvement in the actual design and construction of the Bhopal plant with the massive detail of the actual work done by a local Indian engineering firm, Humphreys and Glasgow. With respect to drawings from the parent company that were translated to detail design, Judge Keenan accepted testimony that "at no time were Union Carbide Corporation engineering personnel from the United States involved in approving the detail design or drawings prepared upon which construction was based. Nor did they receive notices of changes made."¹⁴⁷ Moreover, the tanks which held the lethal methyl isocyanate were "fabricated or supplied by two named Indian sub-contractors" and the vent gas scrubber, one of the fail-safe devices, was "fabricated in the Bhopal plant shop."¹⁴⁸

3. *Documentation and Witnesses*

The nearly exclusive control of the Indian subsidiary, UCIL, over the actual construction of the Bhopal plant had resulted in vast quantities of records being located in India under the control of Indian authorities. Judge Keenan found that questions of fact generated by many of these documents could only be resolved by the testimony of two witnesses, one of whom lived in Bhopal and the

¹⁴³ *Id.* at 856.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 857.

¹⁴⁸ *Id.*

other assumed to be able to travel to either forum.¹⁴⁹ In addition, Judge Keenan found the difficulty of language translation to tip the balance in favor of trial in India since no translations would be necessary in India where both English and Hindi are understood whereas translations of all Hindi documents would be required in an American forum.¹⁵⁰

Judge Keenan also took into account the authority of the two forums to compel witnesses to testify. He found that an American court could not subpoena foreign nationals but that an Indian court "probably" could subpoena employees of UCC on the basis of the relationship of the parent company with its subsidiary.¹⁵¹ Even if an American court could bring Indian witnesses under its jurisdiction, officials of the Indian government would probably be immune to process under the Foreign Sovereign Immunities Act.¹⁵² Moreover, transportation of Indian witnesses to the United States, especially in large numbers, would certainly be expensive.¹⁵³ Though Judge Keenan admitted that a viewing of the accident site may not be necessary, he maintained that it "conceivably could be called for later in the litigation."¹⁵⁴

4. *On-going American Involvement*

Judge Keenan found evidence of the "arms length" relationship between UCC, the parent company, and UCIL, the subsidiary, even in matters of training. Only forty Bhopal employees ever received training at the sister plant in Institute, West Virginia; more than a thousand employees were trained exclusively in India. Judge Keenan noted: "[T]he manual regarding start-up was prepared by Indian nationals employed by UCIL [and] most of the documentary evidence concerning design, training, safety and start-up, in other words, matters bearing on liability, is to be found in India."¹⁵⁵ Based on these facts, the on-going American involvement in UCIL was found to be minimal.

5. *Role of the Indian Government*

In contrast to the minimal American involvement in the affairs of UCIL, Judge Keenan found that the Indian Government was deeply "involved in safety, licensing and other matters related to liability."¹⁵⁶ Because of this involvement of the Indian Government

¹⁴⁹ *Id.* at 858.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 859.

¹⁵² *Id.* See also 28 U.S.C. § 1602 (1990).

¹⁵³ 634 F. Supp. at 859.

¹⁵⁴ *Id.* at 860.

¹⁵⁵ *Id.* at 858.

¹⁵⁶ *Id.* at 858-59.

and its possession of most of the documents surrounding the commissioning of the Bhopal facility, Judge Keenan thought that the Indian government's interests were served best by having the trial in India.

D. Balance of Public Interests

The public interest taken into account by Judge Keenan in his *forum non conveniens* analysis were: court burdens, the national interests of the United States, the national interests of the Union of India, and the specter of imperialism.

1. Classic Court Burdens

Judge Keenan recapped the logistical problems of conducting a trial at a great distance from the scene of the accident, enumerating the costs of translation, administrative costs, and the burdens on the time and patience of jurors.¹⁵⁷ He saw "no reason why this Court, with its heavy burdens and responsibilities, should be burdened with cases like these which, from every point of view, should be tried in the courts of the nation where all the relevant events occurred and whose citizens are primarily involved."¹⁵⁸

2. American Interest in Deterrence

Judge Keenan showed little sympathy for the argument that American-based multinational corporations enjoyed a "double standard" of liability. Whether American multinational corporations must be judged by American standards for injuries "occurring on foreign soil," appeared to Judge Keenan a moral question with which he did not wish to tangle. He gave voice to the specifics of allegations, however, before dismissing them:

The specific American interests allegedly to be served by this Court's retention of the case include the opportunity of creating precedent which will "bind all American multinationals henceforward," . . . promotion of "international cooperation," . . . avoidance of an asserted "double standard" of liability, and the prevention of "economic blackmail of hazardous industries which would extract concessions on health and environmental standards as the price of continuing operations in the United States."¹⁵⁹

Though Judge Keenan did not frontally attack the above-quoted public interests,¹⁶⁰ he did attack the method of accomplishing them.

¹⁵⁷ *Id.* at 861.

¹⁵⁸ *Id.* at 861 (quoting *Domingo v. States Marine Lines*, 340 F. Supp. 811, 816 (S.D.N.Y. 1972)).

¹⁵⁹ 634 F. Supp. 862.

¹⁶⁰ Later in his opinion, Judge Keenan considered the other motivations of multinational corporations:

The supposed "blackmail" effect of dismissal by which plaintiffs are troubled is not a significant interest of the American population, either. Surely, there

Echoing the reasoning of the *Piper* Court, he maintained that whatever deterrence "gained if their trial were held in an American court is likely to be insignificant."¹⁶¹

3. *Powerful Indian Interests*

Whatever the American interest served by conducting the Bhopal litigation in an American court, that interest was out-weighted by the interest of the Indian government having the litigation heard in its own courts. Judge Keenan found that the program of "indianization" of industry¹⁶² indicated that the Indian government understood that its interests were best served by maintaining close control over the activities of a foreign corporation operating within the country.¹⁶³ He recounted numerous ways in which the Indian government exerted its control over UCIL, including indirect regulation under a series of environmental laws.¹⁶⁴

The recital . . . demonstrates the immense interest of various Indian governmental agencies in the creation, operation, licensing and regulation, and investigation of the plant. Thus, *regardless of the extent of Union Carbide's own involvement in the UCIL plant in Bhopal, or even in its asserted "control" over the plant, the facility was within the sphere of regulation of Indian laws and agencies, at all levels.*¹⁶⁵

To drive home the significance of the Indian involvement, Judge Keenan prefaced his recitation of those interests with the caveat from *Dowling v. Richardson-Merrell, Inc.*:¹⁶⁶ "Though no single factor should be determinative in ruling on a *forum non conveniens* motion, the nature of the product and its status as regulated or not must be considered."¹⁶⁷ Clearly, the Indian regulation of UCIL's activities was determinative in Judge Keenan's final decision:

As regulators, the Indian government and individual citizens even have an interest in knowing whether extant regulations are adequate. This Court, sitting in a foreign country, has considered the extent of regulation by Indian agencies of the Bhopal plant. It finds that this is not the appropriate tribunal to determine whether the Indian regulations were breached, or whether the laws themselves

will be relaxing of regulatory standards by the responsible legislators of the United States as a response to lower standards abroad. Other concerns than bald fear of potential liability, such as convenience or tax benefits, bear on decisions regarding where to locate a plant.

Id. at 865.

¹⁶¹ *Piper*, 454 U.S. at 260-61.

¹⁶² For a detailed description of the Indian government's policy on "foreign collaboration" see Note, *Foreign Investment in India*, COLUM. J. TRANSNAT'L L. 609 (1988).

¹⁶³ *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. at 863.

¹⁶⁴ *Id.* Emissions were monitored by a state water pollution board. State officials periodically inspected the plant. Detailed inquiries were conducted by the government following earlier accidents. Many agencies of the Indian government investigated the December 1984 gas leak. *Id.*

¹⁶⁵ *Id.* at 863-64 (emphasis added).

¹⁶⁶ 727 F.2d 608 (6th Cir. 1984).

¹⁶⁷ *Id.* at 616.

were sufficient to protect Indian citizens from harm. It would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country.¹⁶⁸

In even stronger language, Judge Keenan inferred that India was mature enough to make its own choices¹⁶⁹ and should therefore be willing to remedy a situation when those choices backfired. "India no doubt evaluated its need for a pesticide plant against the risks inherent in such development."¹⁷⁰ The danger of the double standard of liability while evaluating the acts of a multinational appears less ominous where a government, such as India, is able to protect its citizens through close regulation of industry.

4. *Specter of Imperialism*

Not only should India take control of its own affairs by litigating the liability of foreign corporations within its own jurisdiction, counseled the court, but the United States should resist stepping into Indian affairs. Judge Keenan quoted *Harrison v. Wyeth Laboratories*¹⁷¹ with approval:

The impropriety of [applying American standards of product safety and care] 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 and services, values, morals and beliefs than our own. . . . Should we impose our standards upon them in spite of such differences? We think not.¹⁷²

By essentially telling the Indian government that he knew better what was good for India than the Indian government itself knew, Judge Keenan adopted a paternalistic stance in decrying the evils of paternalism:

This Court, too, thinks that it should avoid imposing characteristically American values on Indian concerns. The Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens from ill-use is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology.¹⁷³

Judge Keenan suggested that the Union of India might grow stronger for taking on the difficulties of guiding the Bhopal litigation through its own courts. He stated: "This litigation offers a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system."¹⁷⁴

¹⁶⁸ 634 F. Supp. at 864.

¹⁶⁹ *Id.* at 867. Judge Keenan noted that "the Union of India is a world power in 1986." *Id.*

¹⁷⁰ *Id.* at 865.

¹⁷¹ 510 F. Supp. 1 (E.D. Pa. 1980).

¹⁷² *Id.* at 4-5.

¹⁷³ 634 F. Supp. at 865.

¹⁷⁴ *Id.* at 865-66.

IV. Appellate Rejection of Conditions

Although UCC accepted the three conditions—submission to India's jurisdiction, observance of the Federal Rules of Civil Procedure for pre-trial discovery, and acceptance of the Indian court's judgment—associated with Judge Keenan's order to dismiss the plaintiffs' cause of action, UCC reserved the right of appeal. At the appellate level,¹⁷⁵ the plaintiffs splintered into two groups: the Union of India which had been the chief spokesman at the trial court level and a confederation of individual plaintiffs represented by an executive committee of American attorneys. While the individual plaintiffs opposed the dismissal of the suit on grounds of *forum non conveniens*, the Union of India accepted the decision. UCC, while satisfied with the dismissal, appealed two of the conditions which Judge Keenan had set on the dismissal, namely, consent to discovery under the Federal Rules of Civil Procedure and acceptance of the judgment of the Indian court.¹⁷⁶

The Second Circuit not only approved Judge Keenan's dismissal on grounds of *forum non conveniens* as within his sound discretion, but stated "it might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal."¹⁷⁷ Even the settlement of \$350 million dollars between UCC and the individual plaintiffs was not viewed as incentive to reconsider.¹⁷⁸

The real issues before the Court of Appeals were the conditions which Judge Keenan had placed on the dismissal. Had UCC waived its right to appeal those conditions by accepting the dismissal? Were those conditions within the sound discretion of Judge Keenan? The Second Circuit answered both questions in the negative.

A. Enough Prejudice to Preserve Appeal

The Second Circuit, citing *United States v. Bedford Associates*,¹⁷⁹ found UCC's position to be "comparable to that of a prevailing party which, upon being granted injunctive relief, is permitted to challenge by appeal conditions attaching to the injunction that are found to be objectionable."¹⁸⁰ The entire decision was deemed reviewable because the plaintiffs had appealed and UCC had cross-appealed. "We therefore have jurisdiction over the entire case and may in the interests of justice modify the district court's order."¹⁸¹ The appeals panel found the first condition—UCC's consent to the Indian court's

¹⁷⁵ *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

¹⁷⁶ 809 F.2d at 202.

¹⁷⁷ *Id.* at 202.

¹⁷⁸ *Id.* at 202-03.

¹⁷⁹ 618 F.2d 904, 913-16 (2d Cir. 1980).

¹⁸⁰ 809 F.2d at 203.

¹⁸¹ *Id.*

personal jurisdiction—appropriate and well founded in law.¹⁸²

B. Consent to Enforceability of the Judgment

The court found the imposition of consent to enforceability of an Indian judgment in the United States to be erroneously based in the notion that the Indian judgment might not otherwise be enforceable. In *Island Territory of Curacao v. Solitron Devices, Inc.*,¹⁸³ the Second Circuit deemed any foreign judgment to be final and enforceable in New York unless one of two exceptions applies: (1) the tribunal was not impartial and due process was denied;¹⁸⁴ or (2) the foreign court did not have personal jurisdiction over the defendant.¹⁸⁵

The court found that because New York law already addressed the concern of the enforceability of the Indian judgment and because the terms used by Judge Keenan in his conditional order might not be construed with as much predictability as the terms of the statute, the condition was unnecessary.¹⁸⁶

Fearing that its due process rights would be infringed by the Union of India,¹⁸⁷ UCC asked the court to monitor the proceedings in India. The Second Circuit chastised UCC's bid to have it both ways, that is, to have its cause dismissed in favor of the Indian tribunal, yet retain the protection of American courts just in case events went awry. The proposal "evidences an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous,"

¹⁸² *Id.* at 203-04.

¹⁸³ 489 F.2d 1313, 1318-20 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

¹⁸⁴ If the Indian court had reached final judgment before Union Carbide Corporation agreed to settle, the case probably would have reappeared in the New York federal district court for an order to enforce the judgment. Both *Hilton v. Guyot*, 159 U.S. 113 (1895), and the New York statute, art. 53, Recognition of Foreign Country Money Judgments, 7B N.Y. CIV. PRAC. L. & R. §§ 5301-5309 (McKinney 1978), provide a basis upon which Union Carbide could reasonably contest the enforceability of the judgment. Specifically, Union Carbide could have argued that the Union of India was both plaintiff and sovereign, and may have held the third role of defendant if impleaded for negligence. Therefore, Union Carbide could have argued that the tribunal in India was not impartial.

¹⁸⁵ See 7B N.Y. CIV. PRAC. L. & R. § 5304. The New York statute provides for other exceptions to recognition of a foreign judgment which the Second Circuit did not think germane in this case:

1. The foreign court did not have subject matter jurisdiction.
2. The defendant did not receive adequate notice of proceedings.
3. The judgment was obtained by fraud.
4. The underlying cause of action was repugnant to public policy of the state.
5. The judgment conflicts with another final and conclusive judgment.
6. The proceeding in a foreign court was contrary to agreement between the parties.
7. Where based exclusively on personal service, the foreign court was a "seriously inconvenient forum."

¹⁸⁶ 809 F.2d at 205.

¹⁸⁷ Union Carbide Corporation was distressed by the Union of India's attempt to freeze its assets world-wide and by the Indian government's role as both plaintiff and defendant in the suit in Indian courts. *Id.* at 204.

wrote the Second Circuit.¹⁸⁸ The court emphatically stated that once the cause of action is dismissed, no judicial supervision is allowable until the issue comes back to the court for the purpose of enforcing the judgment.

C. Consent to Federal Rules Discovery

The Second Circuit found the requirement of making the defendant observe the Federal Rules of Civil Procedure in discovery without an equal requirement on the plaintiff to be unfair.¹⁸⁹ Moreover, where one party is a sovereign government, held the Second Circuit, the imbalance is even more obvious.¹⁹⁰ Because the court did not elaborate, two possible conclusions may be drawn regarding the effect of the plaintiff's sovereign status: one, because of the government's sovereign status, it must be limited by its own laws, which in this case allow only limited discovery; or two, the Indian government, by its sovereign status, is immune to any conditions an American court may seek to impose upon it outside that American court's jurisdiction. Whatever the reason, by not allowing the use of the liberal discovery rules of the United States, the court dashed any hopes that the plaintiffs had of pursuing product liability claims. The U.S. Supreme Court denied certiorari on October 5, 1987.¹⁹¹

D. After the Dismissal

The litigation would follow a course of many twists and turns in the years following the *forum non conveniens* dismissal.

1. Route to Settlement

On September 5, 1986, according to an unreported opinion for the Southern District of New York,¹⁹² "the Union of India commenced an action on behalf of all claimants in the Bhopal District Court against Union Carbide. Some 5,500 earlier filed private suits had been stayed. . . . [T]he government's action against Union Carbide was then litigated for some two and a half years."¹⁹³ In December of 1987, formal homicide charges were filed against Chief Executive Officer Warren B. Anderson and eight other UCC officials. Indian courts ordered UCC to pay \$270 million in interim relief.

In May of 1988, the Union of India had UCC formally served with charges of criminal wrongdoing. In November of 1988, the city

¹⁸⁸ *Id.* at 205.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 484 U.S. 871 (1987).

¹⁹² *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, in December, 1984, No. 626, 1989 WL 66673 (S.D.N.Y. June 14, 1989).

¹⁹³ *Id.* at 2.

of Bhopal issued an arrest warrant for Anderson. Finally, in January of 1989, the Indian government set up a special court to hear the Bhopal case. That court declared Anderson a fugitive from justice in February of 1989. Four days later, the Supreme Court of India announced a settlement of "all litigations, claims, rights, and liabilities related to and arising out of the Bhopal Gas Disaster."¹⁹⁴ Union Carbide agreed to pay \$470 million dollars to the Registrar of the Supreme Court of India as compensation to 525,000 claimants,¹⁹⁵ effectively closing the books on the Bhopal episode for Union Carbide Corporation.

In June of 1989, the matter was back in Judge Keenan's court.¹⁹⁶ American attorneys representing individual Indian plaintiffs had not been paid. F. Lee Bailey and Stanley M. Chesley, on behalf of themselves and as members of the Plaintiffs' Executive Committee, wanted Judge Keenan to order that "legitimate costs and expenses related to the Bhopal litigation in the United States" be reimbursed from the \$470 million settlement.¹⁹⁷ Repeating the Second Circuit's emphatic rejection of any exceptions, Judge Keenan flatly refused: "Once [the district court] dismisses [the United States] proceedings on grounds of forum non conveniens it ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to enforce here a final and conclusive money judgment."¹⁹⁸ While Judge Keenan had nothing but kind words for the efforts of the American attorneys saying "they demonstrated professionalism and a genuine concern for the victims and their families [insuring] that those who suffered loss receive[d] fair and careful representation here in the United States,"¹⁹⁹ there was nothing he could do to help them collect their fees from the settlement.

2. Ancillary Jurisdiction — Aborted End-Run

The matter of unpaid attorney fees was then appealed to the Second Circuit.²⁰⁰ In the face of an argument asserting ancillary jurisdiction for the purpose of collecting attorneys' fees, the Second

¹⁹⁴ *Id.*

¹⁹⁵ *Bhopal Payments by Union Carbide Set at \$470 Million*, N.Y. Times, Feb. 15, 1989, at A1, col. 6.

¹⁹⁶ 1989 WL 66673 (S.D.N.Y. June 14, 1989).

¹⁹⁷ *Id.* at 1.

¹⁹⁸ *Id.* at 5.

¹⁹⁹ *Id.* Throughout the Bhopal litigation, harsh words were published in the world press and were uttered from the bench about the number of opportunistic American attorneys who rushed to Bhopal to enlist victims and survivors to file lawsuits in the United States. John P. Coale of Washington, D.C., seemed to represent in the collective mind these attorneys mainly because he was the first American attorney to arrive in Bhopal after the leak. For a detailed description of Coale's experiences and of the subsequent animosity directed toward him by Judge Keenan, see D. KURZMAN, *supra* note 16, at 108-11, 127-35, 175-79, 183, 195, 202-03, 213-20, 222-24.

²⁰⁰ *Chelsey v. Union Carbide*, 927 F.2d 60 (2d Cir. 1991).

Circuit retreated from its earlier hard-line on the finality of a *forum non conveniens* dismissal stating:

In view of the general rule that ancillary jurisdiction to resolve fee disputes continues after the initial litigation is no longer before the court, and the wide array of situations in which that principle has been applied, we decline to announce any general rule that a *forum non conveniens* dismissal, without more, bars any subsequent exercise of ancillary jurisdiction with respect to attorney's fees in the dismissed case.²⁰¹

To establish ancillary jurisdiction, the court must have had subject matter jurisdiction originally.²⁰² Since a court must have had jurisdiction before dismissing a case on the grounds of *forum non conveniens*, it was still within the court's discretion to allow the assertion of ancillary jurisdiction.²⁰³ *Forum non conveniens* apparently had not permanently closed the door to the American court.

Before the appellant attorneys could celebrate a reinstatement of American jurisdiction, the Second Circuit blocked the entrance. The attorneys had made no application for payment from the settlement fund held by the Registrar of the Indian Supreme Court.²⁰⁴ Moreover, the distribution of the settlement funds was within the jurisdiction of the Indian courts. "It is hard to imagine any more direct affront to comity than the relief sought," admonished the Second Circuit.²⁰⁵ The court went on to hold that "it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity."²⁰⁶

Furthermore, common law prohibits one court "assuming in rem jurisdiction over a res that is already under the in rem jurisdiction of another court."²⁰⁷ The rule, the Second Circuit maintained, is no different when the other court is foreign. The court stated:

[A]lthough the prior *forum non conveniens* dismissal did not automatically preclude any invocation of ancillary jurisdiction to consider appellants' application for attorney's fees and disbursements, that jurisdiction may not be exercised, directly or indirectly, with respect to the settlement fund on deposit in India under the supervision of the Supreme Court of India.²⁰⁸

²⁰¹ *Id.* at 65.

²⁰² *Id.* at 64.

²⁰³ *Id.* at 65.

²⁰⁴ *Id.* at 66-67.

²⁰⁵ *Id.* at 66.

²⁰⁶ *Id.* (citing *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976)).

²⁰⁷ *Id.* (citing *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989)).

²⁰⁸ *Id.* at 67 (emphasis omitted). A more complex argument asserting that a lien existed for attorneys' fees on the settlement fund was discounted because the settlement monies were not paid directly to the victims, who were the individual clients of the attorney claiming the lien. Because "petitioners never appeared in behalf of any party in the

In a concurrence, Judge Frank X. Altamari expressed his concern that the Second Circuit's holding might create "the potential for the 'shared jurisdiction' we deemed 'illusory and unrealistic' in our prior decision."²⁰⁹ The dismissal of the attorneys' fee applications should have been affirmed, in Judge Altamari's opinion, because of "lack of subject matter jurisdiction."²¹⁰

The Second Circuit may appear to have reopened the door of the jurisdiction it seemed to close so tightly in its affirmation of Judge Keenan's first decision in the Bhopal litigation.²¹¹ Nonetheless, the *forum non conveniens* dismissal appears to be final, at least as far as the merits of the case are concerned.

IV. Bhopal's Lessons for Parties to Joint-Venture Negotiations

What lessons can negotiators on both sides of a hazardous joint-venture learn from the Bhopal experience? Multinational corporations will wish to do everything possible at the inception of a joint-venture to limit their potential liability in the event of a serious toxic spill. Likewise, third world host nations will want to do everything possible to ensure the burden of loss will not unfairly shift back to them in the event of a disaster. The Bhopal litigation suggests that negotiators' give-and-take should be focussed on the following critical factors.

A. Ensuring Adequacy of the Forum

An adequate alternate forum is the threshold consideration for dismissing a suit against an American citizen in an American court. Because the burden for proving the existence of such a forum rests with the party moving for dismissal, multinational negotiators must assure themselves that the host country has what an American court would deem an "adequate" alternative forum. A third world host nation, on the other hand, will find itself in an embarrassingly ironic position if it attempts to deny the adequacy of its own forum. As India's attempt to rebut UCC's assertion of an adequate Indian fo-

Indian litigation or made any application for fees therein," the Second Circuit refused to apply any lien analysis. *Id.* at 8.

²⁰⁹ *Id.* at 69 (citing *In re Union Carbide*, 809 F.2d 195, 205 (2d Cir. 1987)).

²¹⁰ *Id.*

²¹¹ A rivalry between the Second Circuit and Judge Keenan becomes apparent on close examination of the four opinions regarding Bhopal. Judge Keenan's first opinion—a detailed and thoroughly reasoned example of judicial analysis—granted a *forum non conveniens* dismissal with some reservations. It was upheld but modified by the Second Circuit in shorter but sharply worded opinion stating that Judge Keenan's reservations were unwarranted. When Judge Keenan was faced with the application of the attorneys, he dismissed the cause of action without reservations in a short opinion using the same sharp wording of the Second Circuit. The Second Circuit then upheld Judge Keenan again but insisted on a different analysis—a detailed and thorough judicial analysis offering some reservations.

rum illustrates, such a defense is not only unlikely to move an American court to sympathy but is very likely to elicit a storm of domestic criticism.

1. *Lesson to Multinationals: Be Amenable to Process*

The Bhopal decisions technically require little more than the defendant should be "amenable to process" within the foreign country's court. Other considerations, such as the efficiency, the sophistication, or the experience of that court were deemed of no consideration by the district court in the Bhopal litigation. The appeals court maintained that as long as a foreign judgment was enforceable under American law and as long as procedural rules were equal for both parties, the fact that the defendant was willing to submit to the jurisdiction of the foreign court was enough to legitimize the alternative forum. Apparently, the mere declaration of willingness to submit to the jurisdiction of a host nation's courts meets the threshold requirement which will allow an American court to apply the *forum non conveniens* doctrine in favor of the multinational.

2. *Lesson to Host Nations: Make a Judicial Inventory*

Across the negotiating table, the third world host nation should be sure its forum actually is capable of handling the sort of complex litigation a mass toxic tort will produce. If a third world host nation finds its judicial system may falter under the weight of a complex, multi-million dollar lawsuit for mass toxic tort damages, it would do well to name the forum of another agreeable experienced nation. While multinational negotiators might balk at the selection of the United States or the World Court at the Hague, agreement on another third world nation with a tradition of English common law might be palatable to both parties. The best solution may be agreement to submit all disputes to binding arbitration. The multinational corporation and the host nation would each select an arbitrator and the two selected would choose a third.

3. *Lesson to Host Nations: Make a Substantive Law Inventory*

Before third world governments enthusiastically sign up for hazardous joint-ventures, they should take a hard look not only at the overall capacity of their court systems but also at the substantive law which undergirds that system. India's British colonial experience provided it with some of the common law upon which products liability litigation must be based. But many third world nations have little statutory or traditional law to enable them or their citizens to file a claim of relief for damages resulting from Bhopal-like incidents.

It is not practical to expect third world nations to legislate the

necessary substantive law before embarking on hazardous joint-ventures. The very absence of such substantive law is a strong motivation to multinationals for investing in hazardous joint-ventures in third world countries. Additionally, legislating wholesale the law of another country such as the *Restatement (Second) of Torts* or the *Uniform Commercial Code* would certainly get needed statutes on the country's books, but without the case law which interprets them, a third world host nation would be walking in ill-fitting shoes.

4. *Lesson to Host Nations: Make a Procedural Rules Inventory*

Naming the alternative forum in the initial agreement suggests a way third world host nations may overcome deficiencies in discovery rules. No other nation maintains procedural rules for pre-trial discovery as liberal as those the United States employs in federal courts. The Second Circuit did hold that a federal judge may not impose the Federal Rules of Civil Procedure outside his jurisdiction. However, this does not prevent parties to an agreement from voluntarily adopting those rules at the time they select the forum for their disputes.

5. *Lesson to Host Nations: Ensure Judgment Enforcement*

"A defeat for the whole Third World" is the way Indian attorney, Vibhuti Jha of Bhopal, characterized the UCC settlement.²¹² Had the case gone to judgment in the Indian court, "it would have been a test case. We would have come to know whether an order of the Indian judiciary would have been upheld by an American court," lamented Jha.²¹³ The astute observer notes that even though the case did not go to judgment, the Second Circuit did express its thinking on the enforceability of foreign judgments when it left the door open for UCC to challenge the judgment of the Indian court on due process grounds.

The Bhopal experience suggests that even if a third world host nation has a court system grounded on adequate substantive law and supported by liberal procedural rules, that nation remains vulnerable if it cannot collect a judgment in its favor. Binding arbitration likewise must be founded on the underlying clout of the winning party to prevent the loser from repudiating the outcome and retreating to a judgment-proof sanctuary. Even where a jurisdiction has statutes supporting the enforcement of judgments, loopholes such as a due process challenge can subvert the judgments.

Judge Keenan ruled that if an American-based multinational wishes to avoid liability in an American court in favor of adjudication

²¹² Barr, *supra* note 15, at 105.

²¹³ *Id.*

in an alternate forum, then that multinational must affirmatively consent to accept the judgment of the alternate forum. Although the Second Circuit would not allow Judge Keenan's ruling to hold the force of law, nothing prevents parties to a joint-venture from stipulating exactly that arrangement in their initial agreement. A third world host nation should insist that a multinational joint-venture partner give prior consent to be bound by any impartial judgment which the agreed upon forum might hand down.

B. Significant Stake in Regulation

In negotiating a joint-venture arrangement with a third world country, multinational corporations may find the reduced level of regulation in that country to be an attractive feature of the arrangement.²¹⁴ Yet, a dearth of such regulation may undermine the multinational corporation's reliance on the protection afforded by *forum non conveniens*. A conclusion inherent in the Bhopal decisions is that the greater the level of government regulation at every stage of the development of the joint-venture, the more likely an American court will be to use that government interest to overrule a long list of other interests that support adjudication in an American jurisdiction.²¹⁵ The Bhopal decisions clearly indicate that the multinational may protect its own interests best by encouraging host nations to pass regulation if that regulation is not forthcoming.

1. Lesson to Multinationals: Invite Regulation

Even if merely on paper, the host government should be invited to set limits on the involvement of the parent company and invited to exercise control over the subsidiary located within its borders.²¹⁶ The host government should be invited to inspect plans, designs, and drawings for plants and manufacturing processes from the earliest stages of the project's development. Contractors and sub-contractors should be employed from the host country to build the plant. Wherever possible the physical presence of American citizens

²¹⁴ Neither American court addressed the fact that while "India claims to follow a tough environmental policy, . . . the statutes that have been passed are weak and are mismanaged by poorly funded, poorly staffed, and badly trained bureaucracies." Dhavan, *For Whom? And for What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L.J. 295, 306 (1985).

²¹⁵ "Ironically," wrote Allin C. Seward, III, associate general counsel of Upjohn International, Inc. the existence of pervasive and intrusive regulation by a foreign jurisdiction may have the effect of reinforcing a district court's willingness to dismiss a case brought by foreign plaintiffs. This type of regulation, while bothersome as a compliance matter, may have the unintended benefit of reinforcing the local interest in the controversy. Seward, *After Bhopal: Implications for Parent Company Liability*, 21 INT'L LAW. 695, 706 (1987).

²¹⁶ See Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested By U.S. Multinational Corporations—The Bhopal Case*, 22 GEO. WASH. J. INT'L L. & ECON. 215, 247 (1988).

within the host country should be kept to a minimum number and to a short duration. Moreover, the number of nationals who are trained outside of the host country, especially in the United States, should be kept under ten percent.

Multinational negotiators should urge host nations to make regular safety inspections of the manufacturing facility and its processes. All records relating to the process and facility should be maintained on the premises or at least within the host country. The multinational should invite the host government to participate in long-range planning as well as enact regulations pertaining to the operation of the joint-venture.

A close reading of the Southern District of New York's *forum non conveniens* dismissal of the Bhopal case and the Second Circuit's affirmation of that dismissal suggests that it is unnecessary to provide proof that any involvement of the host government was in fact efficacious. The opportunity available for the host government to further its own interests seems to be enough. The Bhopal decisions indicate that whether the host government chooses to make its influence felt is the business of the host government and not of the American courts.

2. *Lesson to Host Nations: Flex Regulatory Muscle*

The host nation, on the other hand, should seize the opportunity to flex its regulatory muscle at every stage of the joint-venture. If the host nation cannot produce expertise locally to review plans, to supervise construction and to conduct on-going inspections, it would do well to bring in foreign consulting firms such as subcontractors to accomplish this oversight. Because of their aversion to imperialism, third world nations sometimes bristle at the suggestion that they should depend on the services offered by more advanced nations. Yet, when an accident does happen, these same host nation plaintiffs turn without hesitation to the work done by foreign experts to establish the multinational's negligence. To protect their citizens, these host nations should be willing to employ foreign expertise as preventive regulators.

3. *Lesson to Host Nations: Counter "Imperialism" Cautiously*

"At some point," wrote Karl Hofstetter, "advantage for regulating [multinational enterprises] shifts to the home country."²¹⁷ The Bhopal opinions suggest that not only the "advantage" but also the "obligation" shifts to the host country the moment that country is shown competent to regulate its own affairs. India made a determined point that in its joint-ventures with multinational corporations

²¹⁷ Hofstetter, *supra* note 22, at 325.

it held the status of equal, if not superior, partner. Judge Keenan was more than willing to accept India's status as a "major power" but went on to opine that with this prestige also came the responsibility to take care of itself.

If host nations allow internal political concerns, lack of sophistication, or corrupt indifference to subvert that obligation to regulate, they cannot expect sympathy from American courts when the unsupervised negligence of a multinational partner results in disaster. Judge Keenan demonstrated that the imperialism accusation is a two-edged sword. If third world host nations loudly announce their status and stubbornly resist interference from more advanced nations during the planning and implementation of a hazardous enterprise, they cannot plead their vulnerability and demand redress from advanced nations when the hazardous enterprise backfires.

C. Parent/Subsidiary Relationship

Since the Bhopal disaster in 1984, many observers have expressed concern about multinational corporations' tactics to limit their liability by spawning complex webs of independent subsidiaries. Judge Keenan and the Second Circuit seemed unimpressed with such allegations of corporate "blackmail." They set a precedent of taking joint-venture partners at their word, rather than probing into the realities behind those words. Neither American court in the Bhopal litigation required that multinational corporations demonstrate by direct evidence that their subsidiaries are actually independent.²¹⁸ Testimony to that goal appears adequate. Therefore, a multinational corporation, even when forming an *ad hoc* subsidiary to serve a single isolated contract, would do well to publish protestations of the subsidiary's independence.

1. Lesson to Multinationals: Declare Subsidiary Independence

The courts in the Bhopal litigation did not require that a subsidiary in a host country be at "arms length" with the parent company, but in the weighing of the host government's interest, some importance was attached to the host government being able to control the actions of the subsidiary without having to exert control over the parent corporation. For this reason, from the multinational corporation's viewpoint, a structure with a free-standing subsidiary would be desirable.²¹⁹

²¹⁸ The invitation for the host government to regulate the industry seems to contradict the natural inclination of the corporation to limit liability and the host government to allow that limitation. "Both the developed and developing nations routinely permit large corporations to do business through subsidiaries and thus limit their liability, subject to rules which are designed to ensure that at least a reasonable amount of capital is exposed within each debt-incurring, risk-creating activity." Westbrook, *supra* note 21, at 325.

²¹⁹ See Seward, *supra* note 215, at 706-07.

The relationship of UCIL to the parent company, UCC, was never squarely addressed by the courts throughout the litigation. While the two entities were presented as functioning at some distance from one another during the *forum non conveniens* stage of the litigation, neither UCC nor the Union of India behaved as though they believed the myth of UCIL's independent status. If UCIL had been truly independent of UCC, the simple abandoning of the entire subsidiary to the Indian government might have made more sense than a protracted settlement.

2. *Lesson to Host Nations: Ensure a Collateral Stake*

A host nation can do little to affect the corporate inter-relationships of parents and subsidiaries with whom they make joint-venture agreements. The host nation, however, can require the subsidiary to maintain a significant stake within the boundaries of the host nation. Requiring land and equipment to be titled in the subsidiary's name or requiring the maintenance of a certain cash reserve in host nation banks could discourage multinationals from maintaining such an under-capitalized presence that walking away from a mass toxic tort would be attractive. Requiring extensive liability insurance might also provide the necessary stake.

D. *Hard Settlement Lessons*

The less liquid the multinational's financial stake in the host nation, the greater the motive for an offending multinational corporation to settle rather than fight or flee. The unfolding of the settlement negotiations which followed the Bhopal disaster offers important lessons to both partners in a hazardous joint-venture.

1. *Lesson to Multinationals: Keep Profit Motive Uppermost*

Was UCC's settlement calculated to maintain control of a lucrative subsidiary which continued to operate at a good profit?²²⁰ UCC settled the Bhopal dispute in 1989 by agreeing to deposit \$470 million with the Indian government. When reduced by insurance recoveries,²²¹ the total settlement liability was \$237 million.²²²

²²⁰ Profit figures available for 1983 suggest a low rate of return on Union Carbide Corporation's investment in Union Carbide India Limited—7.8%. The parent corporation was also suffering from a downturn in profitability in 1983. "In 1984, the company's after-tax profit [\$6.80 per share] amounted to only about 60 percent of the after-tax profits generated by its chief rivals, Dow Chemical [\$10.70], Du Pont [\$12.00], and Monsanto [\$11.80]." P. SHRIVASTAVA, *supra* note 13, at 35 n.1. As profitability for the entire corporation improved in the second half of the decade, a higher rate of return would also be expected from the UCIL subsidiary.

²²¹ Union Carbide Corporation won a decision in the Connecticut Supreme Court allowing it to file claims with the state association set up to pay claims on behalf of failed insurance companies. *Union Carbide Corp. v. Connecticut Ins. Guaranty Assoc.*, No. 13934 (Conn. Feb. 5, 1991). Union Carbide hopes to recover \$32.5 million from the fund

Hints to an understanding of the settlement figure are the assets and the profitability of the total UCIL operation. At the time of the accident, UCIL had assets of \$175 million,²²³ annual sales of \$170 million²²⁴ and profits of \$12.3 million.²²⁵ Some would consider UCIL "expendable" in the light of the parent company's net worth of \$7 billion in 1987.²²⁶

The settlement figure suggests the parent corporation anticipated enough profits from the UCIL operations over the long term to justify increasing the settlement figure from the originally offered \$350 million to \$470 million. In fact, UCC had doubled the company's out-of-pocket liability in the closing days of the settlement bargaining. UCC announced in 1989 that "a one-time charge of 43 cents per share [was enough] to write off the costs of the litigation."²²⁷

2. Lesson to Host Nations: Renege at Your Peril

While UCC's sales and earnings made steady gains during the Bhopal litigation, the parent was not immune to new assaults after the \$470 million settlement was paid to the Registrar of the Indian Supreme Court. UCC stock fell more than seven percent on nearly two million shares traded upon the announcement of India's new prime minister, V.P. Singh, that his government might nullify the settlement and take UCC back to the Indian courts.²²⁸ In addition to refileing the \$3 billion suit against UCC, the new prime minister threatened to refile criminal charges as well.

The refileing of the charges never materialized. Had the Indian government nullified the settlement, it would have faced the continuance of litigation which had been in its courts for more than four years already. If, upon nullification, the Indian government refused to return the \$470 million lump sum, the government would have provided UCC with credible evidence that the parent corporation's due process rights had been violated, exactly the sort of evidence UCC would need to challenge in New York federal court the enforce-

for its liabilities in the Bhopal settlement. If all of Union Carbide Corporation's insurers had made good on their claims, the total bill to Union Carbide for the settlement would have been \$217.5 million. *State Court Says Carbide Can Collect Millions in Insurance*, NAT'L L.J. Feb. 18, 1991, at 44.

²²² Barr, *supra* note 15, at 105 (the figure was reported in the 1988 annual report). Union Carbide Corporation's profits for 1990 were \$720 million. *Id.*

²²³ D. KURZMAN, *supra* note 16, at 181 (the 1983 figure is probably a conservative "book value").

²²⁴ In 1984, Union Carbide India Limited was the twenty-first largest company in India. Besides the parent's holding of more than half the shares in UCIL, there were 24,000 individual shareholders. See SHRIVASTAVA, *supra* note 13, at 36.

²²⁵ D. KURZMAN, *supra* note 16, at 24 (1983 figures).

²²⁶ *Id.* at 181.

²²⁷ Coll, *India Seeks New Bhopal Settlement*, WASH. POST, Jan. 13, 1990, at C1.

²²⁸ Arndt, *India Jolts Carbide on Settlement*, CHI. TRIB., Jan. 23, 1990, § 3, at 1.

ment of whatever judgment the Indian court might have finally handed down. If the Indian government did return the \$470 million, UCC certainly would have weighed carefully a decision to write off the entire Indian subsidiary which UCC continued to assert as fully independent of the parent corporation.

E. Moral Responsibility and Public Opinion

Was the size of the Bhopal settlement designed to assuage UCC's corporate conscience? A sense of moral responsibility may have played a role in the final settlement figure.²²⁹ Warren B. Anderson, the chairman of UCC, seems to have felt a close relationship with the Indian subsidiary, subjecting himself to the humiliation of arrest upon his arrival in Bhopal shortly after the accident. Anderson took the risk of going to India to offer interim aid to Indian authorities, aid which was consistently rebuffed until the matter had officially reached their courts.²³⁰

The long lapse of time between the accident and the final settlement probably muted the intensity of world opprobrium over the disaster at Bhopal. Public outcry at gross corporate negligence does not seem to have a real influence on the mechanics of complicated settlement negotiations. When the Chisso Corporation's methylmercury dumping at Minimata Bay was revealed, for example, a massive demonstration of public anger buffeted the corporation and the Japanese government.²³¹ Thirty years later in 1990, individual settlements were still disputed and unpaid.²³² UCC's corporate health actually improved in the four year period between the accident and the settlement suggesting that public opinion may not have significantly contributed to the reaching of a settlement. The dangerousness of the world works against maintaining the spotlight of world opinion on a disaster such as Bhopal long enough to have significant effect. In 1986, the nuclear accident at Chernobyl swept the suffering of the Indian people off the front pages and out of the world consciousness.²³³ Since the 1989 revolutions in Eastern Europe,

²²⁹ After the retirement of Warren B. Anderson, Union Carbide Corporation did not mention moral responsibility. Rather, the parent corporation insisted right up to the settlement that the leak was caused by the "deliberate act" of a "disgruntled employee." Union Carbide Corporation also insisted that it was not "liable for a mishap at its . . . Indian subsidiary, because the companies were run separately." Barr, *supra* note 15, at 101.

²³⁰ D. KURZMAN, *supra* note 16, at 116-19, 125-27.

²³¹ See Kuriki, *Minimata's Heroes: Industry Poisoned Their Lives, But Not Their Spirits*, CHI. TRIB., Aug. 26, 1990, § 6 at 1.

²³² During the 1950's and 60's, Chisso Corporation dumped methylmercury, a by-product of acetaldehyde production, into the ocean. However, in mid-1989, the corporation paid out \$611 million on a 1973 court settlement. Only 1760 persons had been verified for settlement payment with 8,185 turned down and 2,794 unsettled. *Id.*

²³³ See Mitchell, *Shadow of Chernobyl: Five Years Later, Anger, Disease Mark Radiation Victims*, NEWSDAY, Apr. 26, 1991, at 5.

massive radioactive and chemical contaminations caused by the ineptitude of the ousted socialist governments are now being uncovered. The dissolution of the Soviet Union likewise has revealed a history of environmental disasters which boggles the world's collective mind.

In the 1991 Persian Gulf conflict, toxic damage once experienced only as the result of negligence became a calculated weapon of war. World opinion reacted to columns of smoke rising from deliberately torched oil wells, to vast oil slicks deliberately released for the purpose of contaminating the Persian Gulf, and to lethal chemical weapons deliberately sprayed onto villages of defenseless Kurds. In the face of intentional torts perpetrated by governments on such large scale, the occasional negligence of a multinational corporation participating in a joint-venture with a cash-hungry third world nation may no longer command undivided world attention and censure. That global opprobrium is least likely to be forthcoming where the damage for such negligence remains contained within the borders of the host nation.

F. Self-Insurance is Net Effect

Is it realistic to expect third world host nations to protect themselves from the potential negligence of a multinational manufacturer of hazardous products? With each defensive measure a host nation institutes, the attractiveness of the joint-venture decreases encouraging the multinationals to look elsewhere. Third world host nations are unlikely to tip the balance of power in their own favor.

If a multinational can guarantee that it will not be held liable before an American tribunal under products liability theories and if a multinational can sufficiently structure the relationship of its subsidiary to insulate the parent, then liability can be effectively limited to whatever equity the multinational holds within the borders of the host country. As third world countries become more anxious to garner joint-ventures with American-based multinationals, host governments make available investment-credits and other incentives, thus effectively reducing the amount of equity which would be susceptible to seizure in the event of a mass toxic tort. The total equity which a multinational holds within the borders of the host nation may function as a cap for any settlement negotiations in the event of a mass toxic tort.

World opinion and future good will are the only realistic prophylaxis to allowing the equity in the joint venture to function as a self-insurance cap. UCC demonstrated over the five year period of its Bhopal litigation that even these two factors are quickly discounted especially when a corporation's over-all financial strength is growing.

V. Cautious Look to the Future

With the multinational corporations holding most of the high cards, third world host nations will be hard pressed to even the score, much less win, in the event of a mass toxic tort of the magnitude of Bhopal. Yet, with the increasing numbers of hazardous joint-ventures being struck by these two players, the rest of the world cannot ignore the unevenness of the game. The vulnerable position of third world host nations calls for international standardization through comparative law, international guidelines, or even international minimal standards, according to some observers.²³⁴ Especially with environmental protection and worker safety, the only hope the third world has to both profit from the desire of multinationals to locate potentially hazardous manufacturing in their countries and to protect themselves from the social costs of gradual pollution, as well as dramatic toxic tort, is to join in a cooperative effort to set certain minimal standards which all will enforce in their dealings with the multinationals.²³⁵

As an alternative, ready access to American courts, American tort law, and American procedural rules can enable third world host nations to obtain necessary relief for harm done to its citizens. A statutory cancellation of *forum non conveniens* protection would have to be effected in order to provide this access.

The United States Senate seems willing to impose greater liability on parent corporations for the wrong-doing of their off-shore subsidiaries as evidenced by passage of the controversial Omnibus Export Administration Amendments Act of 1991 over President George Bush's veto.²³⁶ The proposed law would hold parent corporations liable under pain of losing export privileges if one of their off-shore subsidiaries were discovered trading in materials necessary to produce chemical and biological weapons. Senator Jesse Helms vehemently denounced the practice of corporations insulating themselves from such liability and insisted that the American standard was to impute the knowledge of the subsidiaries to the corporate parent.²³⁷ Although the Senate passed the bill over the President's veto by a resounding vote in February, 1991, the bill, at this writing, lan-

²³⁴ Hofstetter, *supra* note 22, at 323. Hofstetter suggests that "mandatory insurance schemes" either public or private along with a list of attractive alternatives for which few third world host nations have the economic clout to enforce. *Id.* at 321. In a note, Hofstetter gives off-hand recognition of the unreality of clout. *Id.* at n. 131. See also Forbes, *Limited Liability & the Development of the Business Corporation*, 2 LAW ECON. & ORG. 163, 165 (1986) (limited liability among consensual parties can substitute for insurance).

²³⁵ HOFSTETTER, *supra* note 22, at 323-24.

²³⁶ S.320, 102d Cong., 1st Sess. (1991).

²³⁷ Senator Jesse Helms declared:

Any clever corporate executive could set up five subsidiaries that sell principally to the United States and another separate subsidiary the sole purpose of which is to sell chemical weapons to Iraq . . . Under the Senate version

guishes in the House Judiciary Committee with odds-makers giving it a low chance of being reported to the House floor.

Considering this legislative experience with expanding the liability of parent corporations for the off-shore misdeeds of their subsidiaries, a statutory cancellation of *forum non conveniens* seems unlikely in the near future. The evolution of efforts to curb the proliferation of hazards in the form of chemical and biological weapons, however, suggests that traditional means of limiting liability by spinning off independent subsidiaries may become the focus of intense scrutiny by Congress. Another accident on the order of Bhopal may be impetus enough for Congress to demand that American courts adjudicate the wrong-doing of American corporations regardless of whether the actual harm occurred inside or outside American borders.

VI. Conclusion

The legacy of the Gas Leak Disaster in Bhopal has been to strengthen the bargaining hand of the multinational corporation in the formation of joint ventures involving hazardous production processes. As major industrial nations become more sensitive to environmental damage and to protection of workers, the pressure for the multinationals to spread their risk by branching out into the environmentally unsophisticated third world will continue to grow. The harder the multinationals are squeezed with regulations at home, the more likely they will move out into an unregulated realm of the third world.

Forum non conveniens as applied in the Bhopal litigation basically supplies American-based multinational corporations with a free hand to export hazardous manufacturing processes to the third world while at the same time significantly limiting their liability for the damage their processes may cause. While host nations may attempt to equalize their positions in the formation of hazardous joint-ventures, the pressure for hard currency and foreign trade is likely to cancel any advantage. Third world host nations must be supported by international efforts to bolster their positions. American lawmakers should examine whether the free hand multinational corporations enjoy in the conduct of hazardous joint-ventures in other countries is in the best interests of the United States and the world.

. . . the parent corporation . . . the five subsidiaries . . . become prohibited corporations because of the poison gas sales of the sixth.
136 CONG. REC. at S17185 (daily ed. Oct. 26, 1990)(statement of Sen. Helms).

