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For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Reflections on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute

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I. INTRODUCTION

Over two years after the occurrence of the worst industrial accident in history at a pesticide plant in Bhopal, India,[1] thousands of Bhopal residents still suffer from lingering effects.[2] A lawsuit brought by the Government of India against Union Carbide is pending in the Bhopal district court.[3] As litigation drags on, the death toll continues to rise[4] and legal fees obviously keep mounting; but those suffering—the injured and the families of the deceased alike— are without compensation. This comment discusses two selected issues: (1) the decision of the federal district court for the Southern District of New York to dismiss on the ground of forum non conveniens, which was affirmed by the U.S. Court of Appeals for the Second Circuit, and (2) the need to explore other means, besides adjudication, to settle the Bhopal conflict. A brief factual setting precedes this discussion to provide the necessary context for it.

II. THE SETTING[5]

A massive leak of toxic methyl isocyanate (MIC) gas occurred during

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1. *See generally Bhopal: What Really Happened?*, Bus. India, Feb. 25-March 10, 1985, at 102; *Bhopal: City of Death*, India Today, Dec. 31, 1984, at 6; Hazarika, *Gas Leak in India Kills at Least 410 in City of Bhopal*, N.Y. Times, Dec. 4, 1984, at A1, col. 6; Diamond, *The Bhopal Disaster: How It Happened*, N.Y. Times, Jan. 28, 1985, at A1, col. 1.

2. *See* Miller, *Two Years After Bhopal's Gas Disaster, Lingering Effects Still Plague Its People*, Wall St. J., Dec. 5, 1986, at 30, col. 2.

3. For a recent report on the case, *see* Weisman, *India Hopes to Speed Verdict on Bhopal*, N.Y. Times, Jan. 20, 1987, at 31, col. 1.

4. *See, e.g.*, Hazarika, *India to Seek at Least $3 Billion From Union Carbide for Bhopal*, N.Y. Times, Nov. 23, 1986, at 10, col. 6; Meir & Miller, *India Plans to Seek at Least $3 billion From Union Carbide for Bhopal Claims*, Wall St. J., Nov. 24, 1986, at 3, col. 1.

5. *See generally supra* note 1. In writing this section I have drawn on two of my earlier works —Remarks at the 79th annual meeting of the American society of International Law in April 1985 in New York City, and Nanda & Bailey, *Nature and Scope of the Problem*, in THE TRANSFER OF HAZARDOUS TECHNOLOGY: THE INTERNATIONAL LEGAL CHALLENGE (G. Handl & R. Lutz eds. 1987).

the night of December 2-3, 1984, at the Bhopal plant of Union Carbide, India, Ltd. (UCIL), a subsidiary of Union Carbide Corporation, A New York corporation with headquarters in Danbury, Connecticut.[6] Union Carbide owns 50.9 percent of the stock of its Indian subsidiary. The Indian government's reports put the death toll at 2,347, over 1,600 of whom were killed as a direct result of the deadly gas leak, while the remaining hundreds died because of its fatal effects over the next several months.[7] Those seriously injured number between 30,000 and 40,000 and the Indian Government received 500,000 leak-related claims.[8] Lingering effects include shortness of breath, eye irritation, and depression.[9]

In the proceedings before the Bhopal district court, the Indian government claimed that inadequate safety equipment at the plant and the defective plant design Union Carbide supplied to UCIL were responsible for the release of the lethal gas.[10] It asserted that although Union Carbide knew that safety equipment at the plant was inadequate, it did not take remedial measures.[11] The Indian government's assertion of defective plant design is reportedly based on documents submitted to it by UCIL between 1975 and 1981 requesting the extension of the employment of a Union Carbide engineer, L.J. Couvaras, who served as project manager during the construction of the Bhopal plant.[12] According to these documents, Couvaras was responsible for "the design, development, planning and construction work" at the Bhopal plant, and for "detailed engineering" at the facility.[13] Earlier, the Indian government had blamed Union Carbide for errors in the design, management and oversight of the Bhopal plant, resulting in unreasonable and "highly dangerous and defective plant conditions."[14] It enumerated among defective conditions inadequate safety measures, faulty alarm systems, storage of huge quantities of toxic chemicals and lack of cooling facilities.[15]

In a memorandum presented to the federal district court for the Southern District of New York, plaintiffs, including the Government of India, had similarly claimed that Union Carbide was not only the creator of the design used in the Bhopal plant but also had supervised and maintained the detailing phase during which no substantive change was made

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6. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

7. *See, e.g.*, Kramer, *For Bhopal Survivors, Recovery is Agonizing, Illnesses are Insidious*, Wall St. J., April 1, 1985, at 14, col. 2; Lewin, *Carbide is Sued in U.S. by India in Gas Disaster*, N.Y. Times, April 9, 1985, at D2, col. 2.

8. *See* Miller, *supra* note 2.

9. *See id.*

10. *See* Meier, *India Says a Union Carbide Engineer Was Responsible for Bhopal Site Design*, Wall St. J., Jan. 8, 1987, at 8, col. 1.

11. *See id.*

12. *See id.*

13. *See id.* at cols. 1-2.

14. *See* Miller, *supra* note 2, at col. 3; Int'l Env't. Rptr. (BNA) 3 (Jan. 8, 1986); *id.*, 343 (Oct. 8, 1986).

15. *See* Int'l Env. Rptr., Oct. 8, 1986, at 343.

from Union Carbide's design.[16]

Union Carbide, on the other hand, has contended that the responsibility for the Bhopal tragedy lay with UCIL and the Government of India and the state of Madhya Pravesh where the plant was located, for they had the key role in operating and overseeing the plant.[17] At the Bhopal proceedings, the company asserted that while it had sold general design drawings to UCIL it was the latter which had hired other companies to do detailed design and construction.[18] Acknowledging that although it had trained some of the plant managers, the company claimed that it was unable to dictate the plant's daily operations, for the government of India had barred it from running the plant.[19]

In support of its assertion that the Government of India and Madhya Pravesh must share the responsibility for the accident, Union Carbide has contended:

> [T]he Indian government had approved and inspected the plant, knew about the dangers of MIC and refused to allow American employees from Carbide to remain in India to provide technical assistance requested by its subsidiary to the Indians running the plant. . . . [T]he state government in Bhopal had allowed people to move close to the plant fence knowing the dangers they would face in an accident.[20]

Earlier, in New York proceedings, Union Carbide presented several affidavits designed to refute the contention that it was responsible for the design and construction of the plant.[21] According to the affidavit of Ranjit K. Dutta, who was employed as General Manager of the Agricultural Products Division of UCIL from 1973 to 1976, "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."[22]

The Bhopal court will have to sort out questions regarding the safety of the plant design and the adequacy of the key safety equipment and operating systems at the Bhopal plant. While the issues of responsibility and liability remain to be resolved and uncertainty still surrounds the causes for malfunctioning of some of the safety devices,[23] this much is certain—that all emergency safety devices failed and there was no early

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16. *See* Memo at 17-20, cited in *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp 842, 855 (S.D.N.Y. 1986).

17. *See* Miller, *supra* note 2, at col. 3; Diamond, *Carbide Gives Details on Its Sabotage Claim*, N.Y. Times, Nov. 18, 1986, at 29, col. 1.

18. *See In re* Union Carbide Corp. at 856-57.

19. *See* Diamond, *supra* note 1, at 43, col. 1.

20. *Id.* at 29, col. 2.

21. *See In re* Union Carbide Corp. at 856-58.

22. Cited in *id.* at 857.

23. *See, e.g.*, Union Carbide's assertion that a disgruntled UCIL worker or group of workers caused the leak. *See* Diamond, *supra* note 17.

warning of impending trouble.[24] Because of instrumentation faults, the monitoring gauges did not work and mechanical valves which were to act as a backup measure were apparently dysfunctional. The vent gas scrubber (VGS), designed to neutralize any leaking MIC by automatically "washing" it with caustic soda and rendering it harmless, was shut off when the escape occurred, and the flare tower which was supposed to burn escaping gas was also shut down. But, according to one report, "because of faulty design, both the VGS and flame tower together could not have prevented the MIC from escaping into the atmosphere."[25]

As evidence of a faulty plant design, it was reported that no backup system was provided to prevent the kind of gas escape that occurred at the Bhopal plant, that safety measures used elsewhere by Union Carbide, such as a computerized pressure/temperature sensing system, and other effective alternatives, were nonexistent.[26] A reporter concluded after a study of the design analysis of the MIC storage area:

> First, that a short-sighted design modification made in the pipeline connections, less than a year ago, along with the dysfunctioning of some valves, was primarily responsible for water ingress in the MIC tank. And second, the original design of the MIC storage area did not provide for even a single safe route for a toxic gas at a very high temperature and pressure to be neutralized before escaping into the atmosphere. In other words, the safety features were grossly underdesigned.[27]

In addition to questions raised about fault in plant design and storage of excessive amounts of MIC at the plant,[28] other issues still to be resolved include whether negligence on the part of the employees or management was responsible for the accident, whether sabotage was involved, whether employees' training measures and plant operating and maintenance procedures were adequate, and whether existing government regulations on occupation, and of safety and health issues which were applicable to the Bhopal operation are adequate and were followed. Other pertinent questions relate to the management's role in educating the public on the risks of MIC leak and the use of safety procedures were such a leak to occur, and in providing adequate warning systems to those in the vicinity of the plant and prompt medical assistance to victims.

Litigation began both in U.S. and Indian courts in the wake of the Bhopal tragedy.[29] The Indian government adopted the Bhopal Gas Leak

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24. *See generally Bhopal: What Really Happened?*, *supra* note 1.

25. *Id.* at 105.

26. *See generally id.* at 104-105.

27. *Id.* at 103.

28. *See, e.g.*, claim by plaintiffs that it was Union Carbide's fault to authorize excessive storage of MIC at the plant. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842, 857 (S.D.N.Y. 1986).

29. *See, e.g.*, Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEXAS INT'L L. J. 273, 290 (1985); Stevens, *U.S. Lawyers Are Arriving*

Disaster Ordinance on February 20, 1985, and a month later, on March 29, enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act,[30] under which the government of India assumed responsibility as the sole representative of all the victims of the gas leak to bring a single action against Union Carbide. Subsequently, in April 1985, the Indian government, on behalf of the victims, filed as *parens patriae* a lawsuit against Union Carbide in the federal district court for the Southern District of New York, seeking both compensatory and punitive damages in an unspecified amount,[31] invoking six separate theories of liability on the part of Union Carbide—absolute liability, strict liability, negligence, breach of warranty, misrepresentation, and the multinational enterprise liability theory.[32] Earlier, the government of India had rejected a Union Carbide offer to settle the controversy for $200 million dollars.[33]

The U.S. lawyers filed a lawsuit in India challenging the Indian government's action of filing a lawsuit on behalf of all the victims in the United States,[34] alleging that the Bhopal Act violated the right of Indian citizens under the Constitution of India to choose their own counsel, and alleging a conflict of interest by the Indian government, for it could not represent the victims because of its shared responsibility for the disaster by failing to enforce safety regulations.[35]

The Judicial Panel of Multidistrict Litigation consolidated all the lawsuits brought in the United States in federal district court in the Southern District of New York.[36] On May 12, 1986, District Judge Keenan dismissed the case on the grounds of *forum non conveniens* under three conditions: first, that Union Carbide consent to submit to the jurisdiction of the courts of India and continue to waive defense based upon the statute of limitations; second, that Union Carbide agree to satisfy any judgment rendered against it by an Indian court, provided that the minimal requirements of due process are met; and third, that Union Carbide comply with U.S. rules of discovery under the U.S. Federal Rules of Civil Procedure.[37]

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to Prepare Big Damage Suits, N.Y. Times, Dec. 12, 1984, at 10, col. 1.

30. Bhopal Gas Leak Disaster Ordinance, No. 1 of 1985, Feb. 20, 1985. The text of the March 19, 1985, Act is reproduced in 25 I.L.M. 884 (1986). For an insightful comment, *see* Deshpande, *The Bhopal Gas Leak Disaster (Processing of Claims) Act 1985*, 27 J. INDIAN L. INST. 23 (1985).

31. *See In re Union Carbide Corp.*, 634 F. Supp. at 844; Galanter, *supra* note 29, at 286; Riley, *Bhopal: The Legal Escalation Begins in Earnest*, Nat'l L. J., April 22, 1985, at 8, col. 1; Lewin, *Carbide Is Sued in U.S. by India in Gas Disaster*, N.Y. Times, April 9, 1985, at 1, col. 5.

32. *See* Riley, *supra* note 31.

33. *See* Galanter, *supra* note 29, at 285.

34. *See* Riley, *supra* note 31, at 8, col. 3.

35. *See* Lewin, *supra* note 31, at D2, col 4.

36. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

37. *See id.* at 867.

Efforts at a negotiated settlement did not succeed as the Indian government rejected a Union Carbide offer of 350 million dollars, an offer accepted by lawyers representing private plaintiffs in litigation.[38] Attorneys for the individual plaintiffs in the Bhopal case appealed the ruling by Judge Keenan that sent the proceedings to India.[39] Union Carbide cross-appealed the judge's ruling contending that the Indian government must also be bound by U.S.-style discovery rules, and that Judge Keenan should retain authority to monitor the Indian court proceedings and be available to rectify any possible abuses of Union Carbide's right to due process in India.[40] Subsequently, on September 5, 1986, the Indian government sued Union Carbide in the Bhopal district court in India for damages arising out of the gas leak,[41] seeking at least 3 billion dollars.[42]

In January 1987, the second circuit court of appeals reversed the federal district court and held that both Union Carbide and the Indian government must have equal access to evidence, thus granting Union Carbide U.S.-style discovery powers as well.[43] However, it rejected Union Carbide's proposed remedy regarding supervision of the Indian court proceedings by Judge Keenan as "impractical" and evidencing "an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous."[44] Otherwise, it affirmed the district court.[45]

III. THE APPLICATION OF FORUM NON CONVENIENS[46]

A. *Gilbert and Piper Standards*

The district court dismissed the actions, applying the standards enunciated earlier by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*[47] and *Piper Aircraft Co. v. Reyno*.[48] In *Gilbert* and its companion case, *Koster v. Lumbermens Mutual Casualty Co.*,[49] decided in 1947, the Supreme Court established the parameters for the application of the doctrine of *forum non conveniens*, which it subsequently reviewed in *Piper* in 1981. *Piper* added two distinct principles to the *Gilbert* balancing test of private and public interest factors.[50]

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38. *See* Int'l Env't. Rptr. (BNA) 107 (April 9, 1986).

39. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 809 F.2d 195 (2d Cir. 1987)[hereinafter Gas Plant Disaster].

40. *See id.* at 202.

41. *See* Int'l En'tv. Rptr. (BNA) 343 (Oct. 8, 1986).

42. *See* Hazarika, *supra* note 4, Meir & Miller, *supra* note 4.

43. *See* Gas Plant Disaster, 809 F.2d at 206.

44. *Id.* at 205.

45. *Id.*

46. For a discussion of forum non conveniens, *see generally The Doctrine of Forum Non Conveniens*, in V. Nanda & D. Pansius, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS ch. IV (1986).

47. 330 U.S. 501 (1947).

48. 454 U.S. 235 (1981).

49. 330 U.S. 518 (1947).

50. *See* notes 60, 62-64 *infra*.

At the outset it is useful to recall the Supreme Court's articulation of what it considered the "ultimate inquiry" in the application of the doctrine of *forum non conveniens*, that is, "where trial will best serve the convenience of the parties and the ends of justice."[51] Thus the basic policies underlying the doctrine as a touchstone were the parties' convenience and justice. In *Gilbert* the court said that "the plaintiff's choice of forum should rarely be disturbed," unless the balance is strongly in favor of the defendant.[52] The district court may, however, dismiss the case in its sound discretion when an alternative forum has jurisdiction to hear the case. The Court enumerated certain private and public factors to be considered in exercising its jurisdiction.[53]

Piper, which was a wrongful death action, involved an airplane crash in Scotland. All decedents and beneficiaries were foreigners. Applying the balancing test of *Gilbert*, the district court dismissed the case on forum non conveniens grounds.[54] Acknowledging that a plaintiff's choice of forum ordinarily deserves substantial deference, the court observed that "the courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly, when the foreign citizens seek to benefit from the more liberal test rules provided for the protection of citizens and residents of the United States."[55] Rejecting the plaintiffs' contention that Scottish law was less favorable and hence dismissal would be unfair, the court said that change in the substantive law because of the dismissal deserves no significant weight, for any deficiency in the forum law was a "matter to be dealt with in the foreign forum."[56]

On appeal, the third circuit court of appeals reversed and remanded for trial[57] on the ground that the district court abused its discretion in its application of the balancing factors set forth in Gilbert,[58] and on the alternative ground that dismissal under the doctrine of forum non conveniens is not permissible where the law of the alternative forum is less favorable to the plaintiff.[59]

On certiorari, the U.S. Supreme court upheld the district court, stating that, "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."[60] Earlier, the Second Circuit, sitting *en banc*, had held in a 1981 case[61] that the plaintiff's citizenship was not a proper factor in a forum non conveniens inquiry.

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51. 330 U.S. at 527.
52. 330 U.S. at 508.
53. *See id.*
54. Reyno v Piper Aircraft Co., 479 F. Supp. 729 (M.D. Pa. 1979).
55. *Id.* at 731.
56. *Id.* at 738.
57. Piper Aircraft v. Reyno, 630 F.2d 149 (3d Cir. 1980).
58. *See id.* at 162-63.
59. *See id.* at 164.
60. Piper Aircraft v. Reyno, 454 U.S. 235, 256 (1981).
61. Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1981).

The Supreme Court approved the district court's application of the private and public interest factors in accordance with *Gilbert's* balancing test. It also upheld the district court in stating that the impact of a change in substantive law because of dismissal on the ground of *forum non conveniens* should ordinarily not be given "conclusive or even substantial weight in the forum non conveniens inquiry."[62] In the Court's words, "if conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless."[63] However, it left the door open for taking into consideration an unfavorable change in law, for"if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice."[64]

At the outset, the district court followed the *Piper* rationale in concluding that, because plaintiffs were not United States residents, their choice of the United States forum would be given " 'less deference' than would be accorded a United States citizen's choice."[65] It then turned to the question of the effect on plaintiffs' claims of a change in law if the case were transferred to India. Following *Piper*, however, the court focused its inquiry on the question whether the remedy provided to the plaintiffs in India would be "so clearly inadequate or unsatisfactory" that it would be "no remedy at all."

The court noted that Union Carbide was "definitely amenable to process in India"[66], because it had unequivocally accepted the jurisdiction of Indian courts. Next, the court discussed the alleged inadequacy of the Indian legal system to handle the Bhopal litigation and conducted a review of affidavits by plaintiffs' and defendants' experts on the Indian legal system.[67] The court specifically addressed the alleged delays and backlogs in Indian courts, the state of tort law in India, and procedural and practical capacity of Indian courts. The court concluded:

> [T]he courts of India appear to be well up to the task of handling this case. Any unfavorable change in law for plaintiffs which might be suffered upon transfer to the Indian courts, will, by the rule of *Piper*, not be given "substantial weight." Differences between the two legal systems, even if they inure to plaintiffs' detriment, do not suggest that India is not an adequate alternative forum.[68]

However, the court imposed two conditions as prerequisites to dis-

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62. 454 U.S. at 247.
63. *Id.* at 250.
64. *Id.* at 254.
65. *See in re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842, 845 (S.D.N.Y. 1986), citing Piper Aircraft v. Reyno, 454 U.S. at 256, 261.
66. *Id.* at 847.
67. *See id.* at 847-52.
68. *Id.* at 852.

missal; one, that Union Carbide submit to discovery on the American model.[69], and, two, that it agree to be bound by and to satisfy the judgment of the Indian tribunal.[70]

The court then determined that the private interest factors "weigh[ed] greatly in favor of dismissal on grounds of forum non conveniens."[71] It found that relative ease of access to sources of proof bearing on liability favored dismissal, for most of the documentary evidence concerning design, manufacture and operation of the Bhopal plant, training of employees, and issues of safety, was to be found in India.[72] Similarly, the court found that consideration of the other two factors articulated in *Gilbert*, ease of access to witnesses,[73] and the ease of arranging a view of the premises should one be required,[74] also favored dismissal.

Finally, the court considered three factors under the public interest concerns: administrative difficulties of hearing the case in New York;[75] the relative concerns of India and the United States;[76] and the relative capability of an Indian versus a U.S. court in applying Indian law to the case which the court found to be the applicable choice of law.[77] Here again it concluded, as it did earlier after a review of the private interest concerns, that public interest factors weighed heavily in favor of dismissal, for the plant was heavily regulated by the Indian government, and "[n]o American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case."[78]

Responding to the plaintiffs' assertion that the Indian justice system had "not yet cast off the burden of colonialism to meet the emerging needs of a democratic people,"[79] the court said that, in its view,

> to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the inde-

69. *See id.* at 850.
70. *See id.* at 852.
71. *Id.* at 860.
72. *See id.* at 853-59.
73. *See id.* at 859-60.
74. *See id.* at 860.
75. *See id.* at 861-62.
76. *See id.* at 862-66.
77. *See id* at 866.
78. *Id.* at 867.
79. *Id.*

> pendent and legitimate judiciary created there since the Independence of 1947.[80]

On appeal, the Second Circuit affirmed the district court, but, after reviewing the conditions imposed by the district court on Union Carbide, it struck the condition that the company consent to the enforcement of a final Indian judgment and modified the other, that it consent to broad discovery under American rules, ordering that it

> be deleted without prejudice to the right of the parties to have reciprocal discovery of each other on equal terms under the Federal Rules, subject to such approval as may be required of the Indian court in which the case will be pending. If, for instance, Indian authorities will permit mutual discovery pursuant to the Federal Rules, the district court's order, as modified in accordance with this option, should not be construed to bar such procedure. In the absence of such a court-sanctioned agreement, however, the parties will be limited by the applicable discovery rules of the Indian court in which the claims will be pending.[81]

Even though the courts said that they were simply applying pertinent standards and balancing factors on a *forum non conveniens* inquiry as articulated by the United States Supreme Court, I consider these opinions deserving of special attention, at least on three counts, and will consequently discuss these three issues: (1) the courts' observations on the Indian legal system; (2) the courts' treatment of the citizenship factor in *forum non conveniens* inquiry; and (3) the courts' discussion of U.S. versus Indian interests in its consideration of the public interest factors.

B. The Courts' Observations on the Indian Legal System

In their comments on the impact of differences between American and foreign legal systems to determine whether the foreign forum meets the standard of being "an adequate alternative" forum under the *Piper* articulation, the courts show appropriate regard for and sensitivity to foreign legal systems. The district court "defer[red] to the adequacy and ability of the courts of India,"[82] and cited with approval the statement of an expert on the Indian legal system from his affidavit that "[d]ifference is not to be equated with deficiency."[83]

On appeal, the Second Circuit responded to Union Carbide's plea that it be protected against a possible denial of due process in Indian courts by the U.S. district court retaining the authority "to monitor the Indian court proceedings and [to] be available on call to rectify in some undefined way any abuses to [Union Carbide's] right to due process as

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80. *Id.*
81. Gas Plant Disaster, 809 F.2d 195, 206 (2d Cir 1987).
82. *In re* Union Carbide Corp., 634 F. Supp. at 867.
83. *Id.* at 853.

they might occur in India."[84] In emphatically rejecting Union Carbide's proposed remedy as bordering "on the frivolous," the court added: "Nor could we, even if we attempted to retain some sort of supervisory jurisdiction, impose our due process requirements upon Indian courts, which are governed by their laws, not ours."[85]

It is certainly appropriate for U.S. courts to inquire into the procedural and substantive aspects of a foreign legal system to determine whether the basic due process protections will be available to a defendant in a foreign forum. However, the criteria applied to determine the outcome of such inquiry are not to be a carbon copy of U.S. standards, for dissimilarity is not to be associated with incompetence, inadequacy or inability. In such an inquiry international standards should be applied, which is a routine practice by many courts in conflict of laws cases involving enforcement of a foreign state's money judgment.[86] This necessitates a review by the forum of the foreign state's jurisdictional principles and notice requirements, in addition to a preliminary determination that the foreign tribunals are available and are fair and competent, and that the foreign legal system does provide procedures compatible with due process of law. Following such an inquiry the court should defer to the foreign forum in a spirit of cooperation rather than judicial parochialism.

The District Court opinion could be read as having opted for judicial comity over judicial parochialism. For Judge Keenan pays a compliment to the Indian Legal system by observing that "the courts of India appear to be well up to the task of handling the case."[87] However, Judge Keenan's review of the plaintiffs' assertion that the Indian legal system is incapable of handling the Bhopal litigation leaves many questions unanswered. For example, he fails to address the plaintiffs' contention contained in Professor Marc Galanter's affadavit that "Indian legal institutions still reflect their colonial origins," suffering from a lack of broad-based legislative activity, inaccessability to legal information and legal services, burdensome court filing fees and limited innovativeness pertaining to legal practice and education.[88]

Relying on the affidavits of defendant's experts for the suffestion that a developed and independent judiciary exists in India, Judge Keenan

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84. Gas Plant Disaster, 809 F.2d at 205.

85. *Id.*

86. *See, e.g.*, The Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263 (1962); 78 N.Y. Cir. Prac. L.R. §§ 5301-09 (McKinney 1978); Hilton v. Guyot, 159 U.S. 113 (1895); Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). *See* Gene, Valley, Birnbaum & Wrubel, *Foreign Plaintiffs and the American Manufacturer: Is a Court in the United States a Forum Non Conveniens?*, 20 FORUM 59 (1984); Rosato, *Restoring Justice to the Doctrine of Forum Non Conveniens for Foreign Plaintiffs Who Sue U.S. Corporations in the Federal Courts*, 8 J. COMP. BUS. & CAPITAL MARKET L. 169 (1986); Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373 (1980).

87. *In re* Union Carbide Corp., 634 F. Supp. at 852.

88. *See* Galanter Affadavit at 11-12, cited in *In re* Union Carbide Corp., 634 F. Supp at 847.

concluded that "[p]laintiffs present no evidence to bolster their contention that the Indian legal system has not sufficiently emerged from its colonial heritage to display the innovativeness which the Bhopal litigation would demand. Their claim in this regard is not compelling."[89]

India's claim on this issue merited careful scrutiny, no a summary rejection, especially since the defendant's experts had not rebutted the precise contention that India's colonial legacy impeded the innovative potential of its judiciary.[90]

On the related issue of endemic delays in the Indian legal system, Judge Keenan remarked that "United States courts are subject to delays and backlogs too,"[91] and concluded, again in reliance on the affidavits of the defendant's experts, that through judicial accommodation the Indian judiciary could handle the Bhopal litigation. the court failed to acknowledge the conclusion reached by another district court in 1982 in *In re Air Crash Disaster Near Bombay*,[92] that "an early decision in the courts of India would be improbable."[93] The court in that case took judicial notice of the extensive delays that are a routine part of the Indian judicial system.[94] And the pace of litigation in Bhopal thus far does not bear out the promise of a speedy and effective trial. The transfer of the presiding judge, G.S. Patel, in February, 1987, the third such judge to be transferred from Bhopal district court since the trial began there, adds further uncertainty and likely delay in the proceedings.[95]

Finally, on the issue of "procedural and practical capacity of Indian courts," the plaintiffs' contention was that the Indian legal system lacks the wherewithal "to deal effectively and expeditiously with the issues raised in the lawsuit."[96] Judge Keenan discussed the Indian bar's ability to handle the Bhopal litigation, the state of tort law in India, the alleged lack of procedural devices, such as discovery, third-party impleader, organization of complex litigation, class action procedure, and unavailability of juries or contingent fee arrangements in India, which are essential to the adjudication of complex issues, and concluded that the Indian legal system provides an adequate alternative forum. He said, "Differences between the two legal systems even if they inure to plaintiffs' detriment, do not suggest that India is not an adequate alternative forum."[97]

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89. *In re* Union Carbide Corp., 634 F. Supp at 848.

90. *See generally* Baxi, *Introduction: Towards the Revictimization of the Bhopal Victims*, in INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE 1 (Indian Law Institute, New Delhi 1986).

91. *In re* Union Carbide Corp., 634 F. Supp. at 848.

92. 531 F. Supp. 1175 (1982).

93. *Id.* at 1181.

94. *Id.* at 1181, n. 7

95. *See* Weisman, *Bhopal Judge Taken Off Case*, N.Y. Times, Feb 26, 1987, at 29, col. 3; Int'l Env't. Rep. (BNA) 97 (Mar. 11, 1987.).

96. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842, 848 (S.D.N.Y. 1986)

97. *Id.* at 852.

It is noteworthy that the government of India was alleging institutional inadequacy of the the Indian legal system, coupled with the absence of a well developed doctrine of tort law in India to expeditiously and equitably cope with the issues of multinational liability involving high technology, complex manufacturing processes, and mass disaster. As Professor Upendera Baxi reminds us, "[I]t was not a mere claim favouring plaintiff with the choice of American law as in *Piper*."[98]

C. *Treatment of the Citizenship Factor*

On the second issue, the plaintiff's citizenship, the district court did not consider foreign citizenship of the plaintiffs as the determining factor in ordering dismissal. Relying on the *Piper* teaching that "a foreign plaintiff's choice deserves less deference,"[99] the court stated that "the assumption that this forum is convenient is not completely reasonable," and hence decided to "apply the presumption in favor of plaintiffs' choice of forum with less than maximum force."[100] In the same vein, the Second Circuit said that "[l]ittle or no deference can be paid to the plaintiffs' choice of a United States forum when all but a few of the 200,000 plaintiffs are Indian citizens."[101]

Perhaps the district court treated the issue of plaintiff's citizenship summarily because of its findings that both the private and public interest factors weighed heavily in favor of dismissal. However, its observation, correlating convenience with citizenship, invites comment. In support of its position, the court relied on *Koster*, which had suggested that a plaintiff's choice of a home forum should be given greater deference, [102] and on *Piper* which, citing *Koster* with approval, further stated in a summary fashion that in the converse situation, where a foreign plaintiff chooses a U.S. court, that choice deserves "less deference."[103]

A careful reading of *Piper* shows that while it did approve of the Koster formulation of the presumption in question, it cited *Pain v. United Technologies Corp.*[104] for the proposition that "citizenship and residence are proxies for convenience."[105] However, *Pain* explicitly rejected according presumptive weight to an American citizen's choice of a U.S. forum, stating instead that, "[a]t best, citizenship serves as an inadequate proxy for the American *residence* of plaintiff, which in turn is only one indicator of how *inconvenient* it may be for the plaintiff to litigate his case in a foreign forum, as measured by the *Gilbert* factors of private

98. Baxi, *supra* note 90, at 16.
99. Piper Aircraft Co. v. Reyno, 454 U.S. 235, at 256 n. 24 (1981).
100. *In re* Union Carbide Corp., 634 F. Supp. at 845.
101. Gas Plant Disaster, 809 F.2d 195 (2d Cir. 1987).
102. Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 524.
103. *See Piper*, 454 U.S. at 255-56.
104. 637 F.2d 775, 796-97 (D.C. Cir. 1980).
105. *Piper*, 454 U.S. at 256 n. 24.

interest.[106]

Also, while citing *Koster*, *Piper* did acknowledge in a footnote that

> [a] citizen's forum choice should not be given dispositive wight, however. . . Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.[107]

Pain, in fact, had explicitly stated that, "[u]pon examination the factor of American citizenship *per se* proves largely *irrelevant* to the factors which *Gilbert-Koster* required courts to consider when making *forum non conveniens* determinations."[108]

Also, while *Piper* cited to a comment in the *University of Chicago Law Review* for its proposition that "a foreign plaintiff's choice deserves less defense," the comment in fact cautioned that while "it is entirely proper that characteristic [that make foreign litigation inconvenient for American citizens] be weighed in a court's balancing of the parties' inconveniences [,] . . . American citizenship, as such correlates imperfectly with those characteristics, and therefore should not be used a a facile proxy of the plaintiff's convenience."[109]

On the question of appropriate weight to be given to a plaintiff's citizenship in the forum non conveniens inquiry, two earlier opinions of the Second Circuit, *Farmanfarmain v. Gulf Oil Corp.*,[110] decided in 1978, and *Alcoa S.S. Co., Inc., v. M/V Nordic Agent*,[111] decided two years later, provide a more reasoned approach. In the former, the court held that under a bilateral treaty a foreign plaintiff had to be treated like an American plaintiff, when the treaty, like other Treaties of Friendship, Commerce and Navigation, granted the foreign national "access to [this] country's courts on terms no less favorable than those applicable to nationals of the court's country."[112] In the latter case, the court urged a uniform standard for determining forum non conveniences motions, after noting that "[t]he trend of both the common law and admiralty law in particular has been away from according a talismanic significance to the citizenship or residence of the parties."[113]

Assume that UCIL was still employing U.S. engineers and supervisors who lived in a compound next to the Bhopal plant, and that the leak which was soon plugged caused injuries to fifteen U.S. citizens and two

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106. *Pain*, 637 F.2d at 797 (footnote omitted; emphasis in original).
107. *Piper*, 454 U.S. at 256 n. 23.
108. *Pain*, 637 F.2d at 775 (footnote omitted; emphasis in original).
109. Note, *supra* note 86, at 383 (footnote omitted).
110. 588 F.2d 880 (2d Cir. 1978).
111. 654 F.2d 147 (2d Cir. 1980).
112. *Farmanfarmain*, 588 F.2d at 882, citing 8 U.S.T. 900, 902-903 (1957).
113. *Alcoa*, 654 F2d at 154. *See generally, id.* at 154-56.

Indian citizens. All seventeen of them brought an action in a U.S. court alleging negligence on the part of Union Carbide. Should the citizenship of the plaintiffs determine the outcome of a motion for dismissal on the ground of *forum non conveniens* by the defendant? This hypothetical suggests that in a modern world of shrinking distance and where corporations choose residences and citizenships to suit corporate needs, the factor of citizenship in the calculus of *forum non conveniens* needs reappraisal.

Since the district court was not prepared to undertake such an appraisal, and since there is no necessary correlation between citizenship or residence on the one hand and convenience or justice on the other, why elevate this factor in a forum non conveniens inquiry and why even refer to it in the case?

D. Private and Public Interest Concerns

Judge Keenan's discussion of private interest concerns is quite detailed.[114] I would submit that if Judge Keenan had addressed with specificity India's contention that Union Carbide was responsible and hence liable for defective plant design at Bhopal and that as a multinational enterprise it engaged in a complex, interlocking control system over all its subsidiaries, he might have reached different conclusions on questions pertaining to sources of proof and access to witnesses.[115]

In the balancing of U.S. versus Indian interests in the public interest calculus, the court properly inquired into the relative interest of each country. How much weight should the district court have given to the choice of a U.S. forum by the government of India? Should the court take into account comity as a factor? As Professor Baxi observes, this unprecedented decision to bring the action in the United States was "by itself the highest affirmation of the Indian public interest. And that determination signified that while the Indian vision of development is tolerant of importation of hazardous technology, it does not and will not tolerate a 'lower standard abroad' in designing of plan and safety relief systems by an American multinational. In altogether ignoring this affirmation of the public interest by the sovereign state of India, Judge Keenan has in fact been grossly paternalistic."[116] Also, the court brushed off the plaintiff's argument that the trial in a U.S. court would have a deterrent effect on a U.S. company exporting hazardous industry abroad by again citing from *Piper* that:

> [T]he incremental deterrence that would be gained if this 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 enor-

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114. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984, 634 F. Supp. 842, 852-60 (S.D.N.Y. 1986).

115. For a comprehensive analysis on these issues, see Baxi, *supra* not 90, at 22-27.

116. *Id.* at 30.

> mous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.[117]

It also rejected the argument that a U.S. proceeding would avoid creating "double standard" of liability and would prevent possible "blackmail effect of dismissal." In response, the court said that "it should avoid imposing characteristically American values on Indian concerns."[118] While conceding the moral danger of creating a "double standards," the court said: "however, when an industry is as regulated as the chemical industry is in India, the failure to acknowledge inherent differences in the aims and concerns of Indian, as compared to American citizens would be naive, and unfair to defendant."[119]

The court found the Indian interest in creating, enforcing or even extending standards of care and protecting its citizens from ill-use as "significantly stronger" than the U.S. interest in deterring multinational corporations from exporting allegedly dangerous technology.[120] Finally, the court said that "the purported public interest of seizing this chance to create new law is no real interest at all,"[121] and that it would exceed its authority were it to rule otherwise.[122]

As to what kind of regulations should apply to multinationals engaged in the export of hazardous technologies or products and as to who should prescribe and enforce them — self regulation, host state's laws, home state's laws, international environmental standards — are questions beyond the scope of this comment.[123] The courts are not legislators, nor were they asked to act as one by the plaintiffs in the Bhopal case. Also, since there is no U.S. statute as yet which mandates that a foreign plaintiff injured by a U.S. multinational's activities abroad have access to U.S. courts, a desirable step in my estimation, the issue before the court simply was to balance U.S. and Indian interest.

The court correctly identified India's interest in setting and enforcing standards in an industry it invited into the country in the first place and now regulates. However, it gave a short shrift to the U.S. interest as the home country, both for the deterrent value of a U.S. proceeding and also to ensure that double standards are not set. There is certainly support in earlier decisions, mostly related to pharmaceutical industries, for the court's insistence that it was attempting to avoid the imposition of what it called "characteristically American values on Indian concerns."[124]

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117. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260-61 (1981), cited in *In re Union Carbide Corp.*, 634 F. Supp. at 862.

118. *In re* Union Carbide Corp., 634 F. Supp. at 865.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *See generally* Nanda & Bailey, *supra* note 5.

124. *See, e.g.*, Harrison v. Wyeth Laboratories, 510 F. Supp. 1 (E.D. Pa, 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *In re* Richardson-Merrell, Inc., 545 F. Supp. 1130 (S.D.

However, this attitude, seemingly noble, of not appearing to be paternalistic, shields defendant U.S. companies and smacks of benign neglect. Taken to its logical extreme, it implies that a host country without the necessary technical ability or wherewithal to regulate hazardous industries it invites from abroad has to fend for itself, for otherwise U.S. courts might be criticized from imposing U.S. values on their concerns.

These concerns regarding safety and the value of human life, I submit, are in many instances identical for both the host and the home country, and the courts must undertake a contextual analysis to determine whether it would be convenient to the parties and just in outcome for the court to dismiss the case in favor of a foreign forum, for these are the basic policy considerations underlying a forum non conveniens inquiry. Such analysis will include a consideration of several factors such as the nexus of the litigation with the forum and special characteristics of the lawsuit which might have a bearing on the issues of convenience and justice.

The court mechanically applied the *Gilbert* public interest factors and concluded that, on balance, India's interests weighed more heavily than those of the United States. It did not consider comity as a factor in the equation. The pharmaceutical cases Judge Keenan cited to support his conclusion are clearly distinguishable from the Bhopal case, and the language he used on the respective values of the two countries was inapposite. To reiterate, it would be desirable for the courts to focus their inquiry on *forum non conveniens* motions squarely on convenience and justice. If Judge Keenan had done so, the answer would not have been as clear-cut as his opinion makes it out to be.

IV. WHY NOT SETTLEMENT?

The adjudication drags on with no end in sight. As of mid-January there were no negotiations underway between Union Carbide and the government of India to reach an out-of-court settlement.[125] The latest salvo in the litigation battle was fired in January 1987 by the plaintiffs' lawyers at the Bhopal proceedings. They outlined their strategy to invoke "multinational enterprise liability" theory for imposition of liability on Union Carbide.[126] Under this theory a multinational corporation which controls a majority interest in a hazardous enterprise has a "knowledgeable duty to assure that the activity does not cause harm.[127]

The theory was apparently accepted by a panel of the Indian Supreme Court decided in December 1986 to impose liability on the top

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Ohio 1982), *modified sub nom.* Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984).

125. *See* Weisman, *India Hopes to Speed Verdict on Bhopal*, N.Y. Times, Jan. 20, 1987, at 31, cols. 1-2.

126. *See Id.* at cols. 2-4.

127. *Id.* at col. 2.

management of a company in a chemical leak case, holding that the management "had an absolute and non-delegate authority" to ensure that its hazardous facilities are safe,[128] and that "no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken."[129] The court found it "necessary to construct a new principle of liability to deal with an unusual situation which has arisen. . .on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy. . . ."[130]

This theory is an extension of *Rylands v. Fletcher*[131] into a new principle of "strict and absolute" liability as to the measure of compensation in such cases, the court held that it "must be correlated tot he magnitude and capacity of the enterprise because such compensation must have a deterrent effect."[132] In reliance on the holding of that case, a U.S. lawyer assisting the government of India suggested that to win its case before the Bhopal court the government did not have to prove even negligence but simply that the activity was ultrahazardous and that it caused damage.[133]

It is yet to be seen if the Bhopal court would accept this or any of the several other theories under which the United States parent company could be held liable.[134] The major concerns with litigation, however, are among others, its cost, a lengthy process, a hardening of positions, and the outcome which invariably is a zero-sum game with winners and losers. And the process takes its toll on the victims and their families who patiently keep waiting for compensation.

It is not within the scope of this comment to explore the relative advantages and disadvantages of litigation versus alternative dispute resolution (ADR) techniques. Voluminous literature, which keeps growing, exists on ADR.[135] In the resolution of the United States environmental disputes especially, the use of negotiation and mediation techniques has advanced far beyond the experimental stage.[136]

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128. *See id.* at col. 3.

129. *See* Mehta v. Union of India, Writ Petition (Civil) No. 12739 of 1985, 20 Dec. 1986, at 30. A copy of the memorandum opinion is on file at the office of the Denver Journal of International Law & Policy.

130. *Id.*

131. [1868] 2 H.L. 330.

132. Mehta v. Union of India, *supra* note 129, at 32. For an analysis, *see* Baxi & Dias, *Shriram Judgement—Companies 'Absolutely Liable' for Industrial Hazards*, Bus. India, Jan. 12-25, 1987, at 40.

133. *See* Weisman, *supra* note 125; at cols. 4-5.

134. *See, e.g.*, Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEXAS INT'L L.J. 321 (1985).

135. *See, e.g.*, S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985), and *id.* at 577-88 for a bibliography.

136. *See, e.g.*, L. BACOW & M. WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (1984); T. SULLIVAN, RESOLVING DEVELOPMENT DISPUTES THROUGH NEGOTIATIONS (1984); RESOLVING ENVIRONMENTAL REGULATORY DISPUTES (L. Susskind, L. Bacow & M. Wheeler eds, 1984); Anderson, *Negotiation and Informal Agency Action*, 1985 DUKE L.J. 261; Barnes, *Environmental Mediation: A Tool for Resolving International Environmental disputes in the "Pa-*

The continuing delay in resolving the Bhopal case adds to the immensity of the Bhopal tragedy. It seems imperative that the immensity of the ADR techniques such as mediation and conciliation be tried to resolve the Bhopal conflict without further delay. For the real losers thus far have been the victims and their families who desperately need the aid. Similarly, authorities in Bhopal urgently need financial resources to provide medical and social services to the needy and to undertake community development projects. The immediate needs include proper medical facilities and jobs because the shutting down of the Union Carbide plant, which was the main source of employment in Bhopal, has caused severe hardship. Ample resources are needed for bringing cottage industries to Bhopal, for providing vocational training to the unemployed workers, and for social services, including day care and educational facilities.

Perhaps it will be helpful to the parties and mediators or facilitators (if they were used) to know why prior attempts at negotiation in the Bhopal dispute failed. In a recent commentary on dispute resolution, as many as 11 factors were identified as responsible for such failures, including constituency pressures, different perceptions of alternatives to agreement, emotionalism, and failure of effective communication.[137]

The undisputed fact is that Union Carbide owns 50.9 percent of the stock of UCIL, and the real dispute concerns the extent of the parent company's financial responsibility to the victims. The parties will be much better served by resolving this dispute in a flexible, non-adversarial private, equitable and expeditious way. ADR techniques are eminently suited to provide a setting for this to happen.

V. CONCLUSION

Who is to blame here? Certainly there is plenty of blame to go around and the recipients include Union Carbide, UCIL. and the governments of India and Madhya Pradesh. And while the issues of liability, adequate amount of compensation, and strategies to resolve the Bhopal controversy are of great significance and ought to concern us, the issues often ignored relate to the Bhopal victims for whom the bell continues to toll.

Consequently, what is of utmost concern is to devise ways to ensure justice for the Bhopal victims in the long run and to make certain that

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cific Way" (Working Draft Paper for Multidisciplinary Symposium at the Hague Academy of International Law, Nov. 1984); Patton, *Settling Environmental Disputes: The Experience with and Future of Environmental Mediation*, 14 ENVTL. L. 547 (1984); Stein, *The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settlement*, 12 SYR. J. INT'L L. & COM. 283 (1985); Susskind & Weinstein, *Toward a Theory of Environmental Dispute Resolution*, 9 B.C ENVTL. AFF. L. REV. 311 (1981); and Wald, *Negotiations of Environmental Disputes: A New Role for the Courts*, 10 COLUM. J. ENVTL. L. 1 (1985).

137. *See* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 135, at 88-89. I am grateful to me colleague John Barkai for his helpful suggestions in my study of ADR techniques to resolve the Bhopal controversy.

their immediate relief and rehabilitation needs are appropriately met. Notwithstanding haphazard efforts thus far, the Bhopal victims have not received substantial aid. It is imperative that to provide them the needed assistance a special Bhopal fund be established, which is efficiently administered by nongovernmental agencies, and is funded principally by Union Carbide.[138]

Thus, while international efforts at seeking long-range solutions to intricate problems, such as, transfer of hazardous technologies and products, especially to developing states, are essential, the immediate and urgent problem in the Bhopal case concerns the wellbeing of the victims and their families. Similarly, while the courts further refine the doctrine of *forum non conveniens* and find expeditious adjudicatory procedures to resolve complex tort litigation, I consider it a massive disservice to the victims of the Bhopal catastrophe if the parties do not make good faith efforts to find an out-of-court settlement. And, the sooner, the better.

138. On April 2, 1987, the new Judge hearing the Bhopal case, Judge M. W. Deo, asked Union Carbide and the Indian government to agree to interim compensation for the Bhopal victims. He said that after having gone through the records he had been left with "a strong impression that there is in store a grand, long-drawn battle for the poor gas victim who is gasping with his already gas-afftected respiratory system." Majpuria, *Judge Asks Interim Bhopal Payment*, India Abroad, April 10, 1987, at 1, col. 1,2.