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The Marlboro Man in Asia: U.S. Tobacco and Human Rights

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The Marlboro Man in Asia: U.S. Tobacco and Human Rights

ABSTRACT

In recent years, U.S. tobacco manufacturers have responded to declining domestic consumption by aggressively promoting their products in Asia and other foreign markets. Their efforts have resulted in increased tobacco use and increased health risks in Asia. This Note discusses the legal implications of U.S. tobacco marketing in Asia, particularly the disadvantages faced by Asians who might wish to challenge U.S. tobacco manufacturers in court. The author first describes tobacco promotion in Asia and the limited potential for recovery against U.S. tobacco companies by Asian plaintiffs in their domestic courts. The Note then contrasts the limitations Asian plaintiffs face in their own courts with the increasingly bright picture for U.S. plaintiffs in United States courts. The author also acknowledges the likelihood that access to United States courts would be denied potential Asian plaintiffs. The Note concludes by exploring the human rights dimension in the aggressive promotion of U.S. tobacco overseas, particularly the threat it poses to the rights to health and to a healthy environment.

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I. INTRODUCTION

The opening of Asian tobacco markets to U.S. imports, aided by United States trade policies and the accompanying rise in cigarette consumption in Asia, pose an enormous threat to the environmental, personal, and social health of Asians. This kind of harm calls for legal redress, but legal remedies are largely unavailable to Asian plaintiffs, either because they cannot gain access to U.S. courts or because local domestic law ineffectively addresses products liability claims. For these reasons, it is essential to redefine the harm caused to Asian communities by

tobacco promotion as a human rights issue, a step that would do justice to the moral dimension of tobacco promotion and properly recognize the role of the nations involved. The redefinition of tobacco promotion as a human rights issue, or the identification of a human rights component in this activity, can have the same effect as that experienced with similar changes in public awareness in the United States, even in the absence of legal action.¹ It can serve to tip the scales against the tobacco companies, possibly discouraging them from pursuing and further exploiting vulnerable markets, and perhaps giving some impetus to local reforms in regulation and civil law.

Tobacco companies once enjoyed almost total approval in the United States. As recently as the 1950s, the U.S. population not only accepted tobacco consumption with little hesitation, but considered it glamorous.² Smoking was widespread, thanks in part to pervasive tobacco advertising and what is now recognized as an addictive ingredient: nicotine.³

More recently, makers of tobacco products have encountered adverse pressure from a variety of sources in the United States. Efforts to publicize the hazards of smoking⁴ have come from the office of the U.S. Surgeon General and a number of government and private institutions.⁵ Legislatures in the United States have

1. The topic of this Note does not extend to the formidable issue of enforcement. Admittedly, direct enforcement in an international legal forum of the human rights violations implicit in U.S. promotion of tobacco in overseas markets is a very remote possibility. See W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85, 111-112 (1990) (discussing difficulties in enforcing the right to life). The principal aim of this Note is to achieve a more useful and accurate legal definition of the harm caused by U.S. tobacco overseas and to propose a human rights formulation as part of the debate surrounding United States trade policy and Asian responses to it.

2. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 855 (1992).

3. See Carl E. Bartecchi et al., *The Global Tobacco Epidemic*, SCI. AM., May 1995, at 44, 44-51.

4. The tobacco industry continues to maintain that nicotine is not addictive. When Brown & Williamson executives considered entering the nicotine patch business in 1992, they soon dropped the idea because it might imply that they had reached the opposite conclusion. See Gail Appleton, *Tobacco Execs Considered Patch Business*, Reuter Economics News, Oct. 12, 1995, available in Westlaw INT-NEWS Database.

For a brief discussion of the history of tobacco use and of the health concerns it raises, see Bartecchi, *supra* note 3, at 44. Although tobacco has been used for many centuries, it was not until the late nineteenth century, when the cigarette rolling machine and the match appeared, that tobacco consumption began its modern assault on consumer markets and on large numbers of people. *Id.*

5. For an outline of anti-tobacco efforts in the United States, see Joan C. Courtless, *Trends in Tobacco Use*, 7 FAM. ECON. REV. 28, 35 (1994).

responded to these campaigns with laws limiting smoking in public places and tobacco advertising.⁶ While attacks on tobacco companies in U.S. courts thus far have been generally unsuccessful, litigation has played an important role in the overall battle against tobacco companies.⁷

United States tobacco companies have responded to these threats and the likely loss of U.S. consumers by aggressively marketing their products abroad, especially in Asia.⁸ United States trade policies have supported manufacturers in these efforts.⁹ Tobacco poses the same health risks to the many consumers of tobacco products in these new markets as it does to U.S. consumers.¹⁰ But, unlike their U.S. counterparts, Asian plaintiffs face more significant legal obstacles in bringing successful litigation against tobacco companies.

Promotion of tobacco use in vulnerable foreign markets constitutes a tremendous threat to the health and well-being of those who live there. Because of the otherwise limited legal remedies for tobacco use violations, the actions of U.S. tobacco companies should be viewed and treated as human rights abuses. The promotion of tobacco and smoking overseas threatens the rights to health and to a healthy environment, which international human rights documents and customary norms agree all human beings should enjoy.¹¹

This Note, in Part II, examines opportunities for foreign plaintiffs, especially in Asia, to litigate against U.S. tobacco companies under their own domestic laws. In Part III, this Note will analyze the options available to foreign plaintiffs in similar litigation in United States courts. Part IV will consider alternatives to traditional products liability theories for such plaintiffs and will also analyze the human rights dimensions of international promotion of tobacco products.

6. *Id.*

7. *See infra* Part III.A.1.

8. *See infra* Part II.A.2. However, Asia by no means marks the limit of the tobacco companies' ambitions. The most significant new expansion of tobacco promotion since the late 1980s has been in the formerly communist countries of Eastern Europe. Whatever one says about the social and legal problems that tobacco causes in Asia, therefore, applies to similar problems in Eastern Europe and elsewhere. William Beaver, *The Marlboro Man Rides into the Eastern Bloc*, BUS. & SOC'Y REV., Winter 1994, at 19, 19-23.

9. *See infra* Part II.A.2.

10. These risks are too numerous to list. *See Bartecchi et al., supra* note 3, at 49.

11. *See infra* Part IV.B.

II. THREATS TO HEALTH IN ASIA AND REMEDIES IN ASIAN COURTS

A. U.S. Tobacco Companies' Move into Asian Markets

1. Tobacco's Decline in U.S. Markets

Antismoking campaigns have profoundly affected consumption of tobacco products in the United States. Since the 1960s, when these campaigns began in earnest, tobacco use has declined dramatically.¹² This is not to say, however, that tobacco no longer exacts a huge toll in the United States. Smoking accounts for approximately 400,000 deaths in the United States every year and smoking-related illnesses cost the United States around \$50 billion per year in medical costs.¹³

Still, U.S. tobacco manufacturers now find the domestic market a changed one. People in the United States are not only less likely to buy tobacco products than they once were, they are also more likely to take a hostile view of tobacco companies. Efforts of tobacco companies to counteract the downward trend in domestic consumption by targeting particular groups in their advertising have only served to further tarnish tobacco's image.¹⁴ Especially when the targeted groups are young people, now understood to be some of the principal victims of nicotine's addictive powers, these campaigns have made the companies appear increasingly cynical and exploitative.¹⁵

Efforts to reduce smoking and to curb actions by tobacco manufacturers have accompanied a significant U.S. trend toward viewing tobacco as a societal problem, which exacts high social

12. Courtless, *supra* note 5, at 28-39. From a peak of 41%, the percentage of the U.S. population that smokes has fallen to about 25% and is expected to drop to approximately 15% by the year 2000. Beaver, *supra* note 8, at 19.

These reports indicate that tobacco consumption *was* dropping. However, a recent study shows that tobacco consumption is no longer declining in the United States, but instead is leveling off, thanks in part to price wars among the tobacco brands. See Bartecchi et al., *supra* note 3, at 44, 46.

13. *Recent Legislation*, 108 HARV. L. REV. 525, 530 nn. 1 & 5 (1994).

14. Two of the most important groups targeted by manufacturers have been women and the young. Specialized products, such as Virginia Slims, aimed at women, and advertising campaigns, such as the Joe Camel cartoon character, aimed at the young, have exemplified this tactic. See Richard L. Worsnop, *Teens and Tobacco*, CQ RESEARCHER, Dec. 1, 1995, at 1065, 1065-72.

15. *Id.*

and personal costs.¹⁶ Considering the role that tort law has played in driving social and commercial reform in the United States, it is natural that the U.S. population should see lawsuits against tobacco companies as legitimate and socially beneficial. This attitude differentiates U.S. consumers from their counterparts in foreign countries, such as in Asia, where reform is less likely to be sought through litigation.¹⁷

2. Tobacco's Move Overseas

Recognizing the implications of these domestic trends, tobacco manufacturers have naturally looked to other markets. Since the 1980s, probably the most important of these new markets has been Asia. The problems faced by individuals and communities there typify those faced in all areas outside the United States and other Western countries where tobacco companies have sought to expand. Attempting to return to an era when tobacco use was attractive and its effects unquestioned, U.S. companies have found a fertile field for establishing large markets with aggressive advertising.¹⁸ Through heavy lobbying,¹⁹

16. Tobacco drains society economically. The University of California and the Centers for Disease Control and Prevention (CDC) have calculated that the total health care cost to society of smoking-related diseases in 1993 was at least \$50 billion, or \$2.06 per pack of cigarettes—nearly the actual price of a pack in the [United States]. That price greatly exceeds the average total tax on a pack of cigarettes in the [United States], now currently about 56 cents. Although a 1989 study suggested that smokers “pay their own way” at the current level of excise taxes (because they live long enough to contribute to their pensions and to Social Security but die before they enjoy the benefits), more recent estimates show otherwise. These newer calculations, which incorporate the effects of passive smoking, indicate that smokers take from society much more than they pay in tobacco taxes.

Moreover, because tobacco kills so many people between the ages of 35 and 64, the cost of lost productivity must be accounted for in the analysis. With this factor in mind, the average annual expense to an employer for a worker who smokes has been pegged at \$960 a year. The total toll of tobacco consumption for the country may exceed \$100 billion annually.

Bartecchi et al., *supra* note 3, at 46.

17. See *infra* Part II.B.

18. “Capitalizing on the worldwide fascination with U.S. culture and mythology, U.S. tobacco companies are aggressively hawking their cigarettes in the economically fast-growing region of Southeast Asia.” Robert Weissman, *Promoting the Tobacco Myth*, MULTINAT’L MONITOR, Nov. 1993, at 7, 7-8.

19. Ted T.L. Chen & Alvin E. Winder, *The Optum Wars Revisited as US Forces Tobacco Exports in Asia*, AM. J. PUB. HEALTH, June 1990, at 659, 659-661.

they have gained the diplomatic and financial aid²⁰ of the United States government,²¹ most notably in breaking the hold of local tobacco monopolies.²² For example, threats of trade retaliation against Japan opened up that market for U.S. business.²³

The U.S. government, at the prompting of the tobacco manufacturers, has invoked Section 301 of the Trade Act of 1974²⁴ to force Asian governments to allow imports of U.S. tobacco products.²⁵ This legislation allows the President of the United States to impose duties on, or otherwise restrict, the imports of a country whose protectionist trade policies are considered unreasonable by the United States.²⁶ The United States can thus pressure foreign governments into opening their domestic markets to U.S. products, which is exactly what has happened with tobacco.

The United States first targeted Japan in 1979.²⁷ After Section 301 was invoked, U.S. cigarette exports to Japan rose from a little less than four million to over sixty million

20. Tobacco farmers have received financial assistance for overseas promotion from the Department of Agriculture. The 1992 financial assistance figure was \$3.5 million. Beaver, *supra* note 8, at 19.

21. See Stan Sesser, *Optium War Redux*, NEW YORKER, Sept. 13, 1993, at 78, 78-89; see also *Trade Liberalisation's Dark Shadow*, ECONOMIST, Mar. 26, 1988, at 70, 70-71; Peter Schmeisser, *Pushing Cigarettes Overseas*, N.Y. TIMES, July 10, 1988, (Magazine) at 16, 16-22.

One major justification for the U.S. government's interest in promoting tobacco in Asia is the generally unfavorable balance of trade with Asian countries, particularly Japan, South Korea, and Taiwan. See Chen & Winder, *supra* note 19, at 659.

Another reason may be the government's desire for tobacco industry money. In 1988, *The Economist* described how industry donations had paid for redecorating at the State Department: "The Treaty Room in [the U.S.] State Department in Washington has been redecorated with wall-panels and moulded carvings of tobacco leaves, seed pods and blossom; the vast mauve carpet has a tobacco motif. Of the \$2.2 [million] cost of the face lift, \$1.2 [million] was donated by the tobacco industry." *Trade Liberalisation's Dark Shadow*, *supra* at 70.

22. The tobacco companies themselves contend that campaigns against smoking in Asia are motivated solely by a desire to preserve local monopolies. Pete Engardio, *Asia: A New Front in the War on Smoking*, BUS. WK., Feb. 25, 1991, at 66, 66. It is indeed likely that the biggest challenge to U.S. manufacturers in Asia has been the local tobacco monopolies. Carl Goldstein, *Drags to Riches*, FAR E. ECON. REV., Mar. 29, 1990, at 62, 62-63.

23. This tactic immediately resulted in a five-fold increase in the U.S. share of Japan's tobacco market. Gale Eisenstodt & Hiroko Katayama, *A Trade Threat That Worked*, FORBES, Apr. 3, 1989, at 38, 38-39.

24. 19 U.S.C. § 2411 (1994).

25. Andrea J. Hageman, Note, *U.S. Tobacco Exports: The Dichotomy Between Trade and Health Policies*, 1 MINN. J. GLOBAL TRADE, 175, 178 (1992).

26. *Id.*

27. *Id.* at 177 n. 12.

cigarettes.²⁸ Taiwan was next, in 1986, with South Korea following in 1987, and then Thailand in 1990.²⁹ In each of these countries, manufacturers have used the persuasive and coercive power of the U.S. government to gain a foothold in the local tobacco market.³⁰ The vast market offered to U.S. tobacco by China, which already consumes an enormous number of cigarettes,³¹ began to open in 1995.

United States tobacco firms by no means have complete control of Asian markets. They typically share these markets with the local tobacco monopolies.³² However, the marketing strategies employed by U.S. companies have worked to make their share, even though a fairly small percentage of the total, as lucrative as possible, at the expense of the health and well-being of the Asian population.³³ While men and women consume tobacco to an almost equal degree in the United States, consumption rates in Asia have traditionally been much higher among men and quite low among women.³⁴ In addition, Asian tobacco monopolies, such as those in Japan, have been fairly restrained in promoting tobacco use among the young.³⁵ In other words, the pattern of tobacco use in Asia before U.S. firms began their invasion resembled that of an earlier stage of U.S. history, when society discouraged smoking by women and children and before overall declines in consumption forced tobacco manufacturers to begin targeting women and youth.³⁶

However, just as they have done in the United States, U.S. tobacco companies have deliberately changed older patterns of

28. *Id.*

29. *Id.*

30. Thailand's reaction to the pressure exerted by the U.S. government differed from that of other nations in the region. Tobacco consumption was not as widespread there, and local officials turned out to be as much concerned with their citizens' health as with trade. See Chen & Winder, *supra* note 19, at 659. Facing § 301 action, Thailand responded by imposing high tariffs and restrictions on tobacco. The U.S. tobacco companies' interests, however, seem to have won out in the end. To counter the Thai move, the United States took the matter before the General Agreement on Tariffs and Trade (GATT), and it won several concessions. GATT ruled that Thailand must allow cigarette imports, though it could restrict advertising and require warning labels. Kate Nagy, *Farming Tobacco Overseas: International Trade of U.S. Tobacco*, J. NAT'L CANCER INST., Mar. 16, 1994, at 417, 417-418.

31. In 1990 it was reported that the Chinese consumed over 1.5 trillion cigarettes each year. Goldstein, *supra* note 22, at 62.

32. See Engardio, *supra* note 22, at 66.

33. See generally Sesser, *supra* note 21, at 78-89.

34. Goldstein, *supra* note 22, at 62.

35. *Trade Liberalization's Dark Shadow*, *supra* note 21, at 71.

36. In Taiwan, for example, U.S. firms have hired street peddlers to hand out free samples of cigarettes at discos. Barbara Rudolph, *Fuming over a Hazardous Export*, TIME, Oct. 2, 1989, at 82, 82.

smoking through targeted advertising and promotion in Asia. Advertising for U.S. cigarette brands, which aims at women and the young, has become ubiquitous in Asia.³⁷ United States manufacturers found Asia in some ways an under-cultivated market in which their advertising campaigns simply overwhelmed the local monopoly's mild competition.³⁸ They have particularly played on the local fascination with U.S. popular culture³⁹ to attract young Asians. As a result, overall smoking has increased in Asia,⁴⁰ with dramatic rises in consumption among women and young people. United States tobacco companies now have a share⁴¹ in a growing tobacco market—a market they have developed.⁴²

An important and unfortunate by-product of the tobacco companies' shift to new markets is that the U.S. pro-tobacco policy has tarnished the reputation of the United States as a moral leader.⁴³ Since the United States has been a world leader

37. See Weissman, *supra* note 18, at 7-8.

38. The local monopolies, having previously experienced no competition, considered advertising unnecessary. Chen & Winder, *supra* note 19, at 660.

39. See Weissman, *supra* note 18, at 7-8. United States tobacco advertising in Asia has particularly focused on rock music and sports, which will presumably inspire young Asians to view smoking U.S. cigarettes as a way to partake of U.S. affluence and chic.

40. See Chen & Winder, *supra* note 19, at 659, reporting that in 1990, as a result of U.S. tobacco companies' advertising campaigns, smoking had increased in Japan and Taiwan. "[S]ince the opening of the Japanese market [in 1988], Japanese cigarette sales have increased 2 percent, reversing a 20-year downward trend. . . . In response [to threats of Section 301 retaliation in 1987], Taiwan dropped its strict quotas and tariffs on imported cigarettes. . . . As a result, the average Taiwanese smoked 80 more cigarettes in 1987 than in 1986." *Id.*

41. In many cases, the U.S. share of the local market is in fact fairly small, but even a small share translates into a large return. The fact that U.S. tobacco does not yet dominate Asian markets should not be misleading. Tobacco use in Asia is growing along with rising affluence, and U.S. products and marketing are superior to the local competition. Goldstein, *supra* note 22, at 62-63.

42. Chen and Winder cite a study of a pattern that is similar to what Asia has recently experienced:

The change from monopoly to open markets and its effects on smoking rates has been analyzed by Shepherd in a study of Latin America in the 1960s. He has ascribed the low rates of smoking in the region to the domination of noncompetitive state tobacco monopolies. Shepherd further observed that these countries responded with a liberalization of advertising and promotion as the multinational companies entered the market: smoking rates rose sharply throughout the region as measured by total cigarette output as well as by per capita consumption.

Chen & Winder, *supra* note 19, at 660 (footnote omitted).

43. *Id.* at 661.

in promoting health care and environmental reforms,⁴⁴ this manipulation of U.S. trade policy⁴⁵ to promote tobacco use abroad has created an awkward contradiction.⁴⁶ The United States government seems to speak out of both sides of its mouth. For example, former Vice President Dan Quayle said that "[t]obacco exports should be expanded aggressively because [U.S. consumers] are smoking less,"⁴⁷ while former Surgeon General C. Everett Koop called U.S. tobacco's move into Asia "unconscionable, deplorable, and the height of hypocrisy."⁴⁸

In sum, while consumption of tobacco products has experienced a long-term decline in the United States, it is increasing in Asia⁴⁹ and other parts of the world⁵⁰ due to the U.S. invasion. Along with this increase in consumption has come an increase in the incidence of disease and mortality associated with tobacco use.⁵¹

B. Inadequacy of Asian Products Liability Law

United States manufacturers have had a second incentive for moving into markets in Asia and elsewhere. While these countries offer millions of new customers, the availability of legal remedies against the manufacturers under local products liability law lags far behind what is possible in the United States.⁵²

44. For a discussion of the contradictions that are now obvious in U.S. health and trade policies, see generally Hageman, *supra* note 25, at 175-200. See also Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U. L. REV. 1 (1991).

45. A Tobacco Export Reform Act, which would have limited the use of § 301 to force open tobacco markets, came before Congress in 1990. It did not become law. For an argument in favor of this legislation, see Hageman, *supra* note 25, at 194-97.

46. The government's role in promoting tobacco use in Asia has been instructively compared to the Opium Wars of the nineteenth century, which resulted from the attempts of another Western power, Great Britain, to redress an imbalance of trade with an Asian country, China, by forcing the importation of another addictive substance, opium. See Chen & Winder, *supra* note 19, at 660.

47. Beaver, *supra* note 8, at 19.

48. *Id.*

49. Malcolm Macalister Hall, *The Big Cigarette Scramble*, WORLD PRESS REV., Apr. 1993, at 38, 38.

50. In Eastern Europe and Russia, the newest scene of tobacco's expansion, tobacco use outstrips that of the United States and that of Western Europe. *Tobacco in Eastern Europe: Gasping*, ECONOMIST, Aug. 21, 1993, at 52, 52-53. In these countries, privatization means a boom for U.S. tobacco companies. Nagy, *supra* note 30, at 417-18.

51. In India, for example, there are between 600,000 and one million smoking-related deaths per year. Prakash C. Gupta & Keith Ball, *News and Comment—Round the World*, 335 LANCET 594, 594-95 (1990).

52. See *infra* Part III.A.

Because of differences between the legal systems in the United States and other nations, the new foreign markets developed by the tobacco manufacturers are vulnerable, if not defenseless. United States plaintiffs may eventually find a successful product liability theory on which to recover against U.S. companies in United States courts,⁵³ but U.S. law has a well-established tradition of products liability tort law. That crucial foundation is either weak or totally lacking in Asian countries.

Japanese law, probably the most advanced in dealing with products liability in Asia, does not even include a separate products liability law.⁵⁴ Suits against manufacturers of defective products must rely on either tort or contract law, neither of which is entirely satisfactory.⁵⁵ This is not to suggest that Japanese law is entirely hostile to the types of claims that arise in modern industrial society; indeed, Japanese courts have heard pollution cases and what are, in effect, products liability cases brought against large companies.⁵⁶ Thus, although products liability law in Japan is in a state of transition and is not nearly as well developed as in the United States, Japan probably offers the most favorable forum of all Asian countries to local plaintiffs in products liability actions.⁵⁷

Thailand's products liability laws, which typify those in Asia, greatly contrast with the Japanese system.⁵⁸ Information on Thai law is sparse, but as of 1988, there was no substantive law on

53. See *infra* Part III.A.2.

54. HIROSHI ODA, JAPANESE LAW 229 (1992). In 1994, Japan enacted a new products liability statute based on Western models. Because of differences in legal traditions and national cultures, however, there is some doubt whether this statute can lead to a strict liability regime like that in the United States. Anita Bernstein & Paul Fanning, "Weightier Than a Mountain": Duty, Hierarchy, and the Consumer in Japan, 29 VAND. J. TRANSNAT'L L. 45, 45-53 (1996).

55. Under Japanese tort law, the buyer must show fault on the part of the manufacturer; under Japanese contract law, recovery is only possible against the seller, not the manufacturer. ODA, *supra* note 54, at 230.

56. *Id.* at 207.

57. The Philippines also has a fairly well-developed law of products liability, one that offers plaintiffs a breach of warranty theory (though this focuses on defects), as well as a more promising strict liability in tort theory: "Manufacturers and processors of foodstuffs, drinks, toilet articles and similar goods shall be liable for death or injuries caused by any noxious or harmful substances used, although no contractual relation exists between them and the consumers." Art. 2187, Civil Code of the Philippines, reprinted in Amelito R. Mutuc, *Philippines*, in PRODUCTS LIABILITY: AN INTERNATIONAL MANUAL OF PRACTICE 6, 23 (Warren Freedman, ed. 1988). Whether this language would be applied when the noxious substance is the product itself, however, is unclear.

58. Tilleke & Gibbins, *Thailand*, in PRODUCTS LIABILITY: AN INTERNATIONAL MANUAL OF PRACTICE 1 (Warren Freedman ed., 1988).

products liability in Thailand.⁵⁹ Moreover, while few cases have come before the Thai Supreme Court, personal injury cases are particularly rare.⁶⁰

China represents the largest market opened to U.S. tobacco.⁶¹ The deficiency of Chinese products liability law spells difficulty for any potential Chinese plaintiff attempting to sue the tobacco companies. Chinese law contains a basic fault-based tort provision⁶² and a specific provision for products liability,⁶³ but plaintiffs under these two provisions face two problems. First, plaintiffs must prove causation to a certainty: "The standard used to judge the cause-and-effect relationship between the violation of right and damage is objective and said to be not mere 'possibility' but 'precision.'"⁶⁴ An old and difficult obstacle in tobacco litigation, this standard of proof for causation alone demonstrates that Chinese law is ill-designed for suits claiming harm as a result of smoking.⁶⁵ Second, Chinese products liability law, unlike that of the United States, is a law of standards,⁶⁶ such that it focuses not on the defectiveness of the type of product in general, but on the failure of the particular goods to measure up to standards for the type of product. Thus, a cigarette is not a defective product because all cigarettes cause cancer, but only in the event that a particular cigarette is substandard.⁶⁷

59. *Id.*

60. *Id.* Very little information is available concerning tort law in South Korea or Taiwan, two countries important in the overseas push of U.S. tobacco. The products liability picture in those countries probably more closely resembles that in Thailand than that in Japan.

61. Sessler, *supra* note 21, at 78.

62. "Where a citizen or legal person through fault interferes with and causes damage to state or collective property, or to the property or person of another, [that citizen or person] must bear civil liability." Zhonghua Minguo Minfa Tongze (General Principles of the Civil Law of China), art. 106, reprinted in Edward J. Epstein, *Tortious Liability for Defective Products in the People's Republic of China*, 2 J. CHINESE L. 284, 295 (1988).

63. "Where because of the substandard quality of goods damage is caused to the property or person of another, the manufacturer or seller of the goods must bear civil liability according to law." *Id.* at 295, art. 122.

64. *Id.* at 300.

65. See *infra* Part III.A.1.

66. Frederick R. Burke, Note, *The Administrative Law of Standardization in the PRC*, 1 J. CHINESE L. 271, 301-04 (1987).

67. Epstein describes the situation as follows:

[L]iability for a defective product is not based on some inherent, objective defect in the product, such as a flaw in its design or production, but on its failure to meet any of the quality requirements. . . . [C]ivil liability only arises when the end-user's losses are caused by the failure of the product to meet the stated requirements so that the end-user will still have to prove some deficiency or defect in the product's quality. . . . It must not be

Damage awards in China also tend to be much lower than those in the United States.⁶⁸ Successful plaintiffs rarely receive an award beyond medical and other expenses.⁶⁹ Consequently, plaintiffs have little incentive to take on tobacco companies, which are willing simply to spend opponents out of contention. Potential plaintiffs in China also face the difficulty posed by the overall ineffectiveness of the Chinese courts.⁷⁰ In a legal atmosphere in which courts are likely to be corrupt and incompetent, and enforcement is haphazard and incomplete, social reform through litigation is problematic at best.⁷¹

III. REMEDIES IN UNITED STATES COURTS

A. Recent Developments in United States Tobacco Litigation and Legislation

1. The First Two Waves

The following section reviews efforts in the United States to attach some degree of liability to U.S. tobacco companies. From this review it should become clear that Asian plaintiffs who might attempt to bring litigation against U.S. tobacco companies face formidable barriers. United States tort law, for all its develop-

forgotten that the damage must be *caused* by the fact that the quality of a good is substandard.

Epstein, *supra* note 62, at 303-04 (emphasis in original).

68. Robert Force & Xia Chen, *An Introduction to Personal Injury and Death Claims in the People's Republic of China*, 15 TUL. MAR. L. J. 245, 257 (1991).

69. Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1, 16 n.40 (1987).

70. "Any incentive structure premised on protection of rights and enforcement of law by Chinese courts as currently constituted is problematic. The ability of Chinese courts to enforce legal standards is severely limited for several reasons." Among these are judges' lack of education, corruption, and vulnerability to outside pressures. Donald C. Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L. J. 1, 57-69 (1991).

71. The inadequacies of Indian tort law figured prominently in the litigation that arose out of the Bhopal disaster. In particular, India lacked a codified tort law, and plaintiffs could refer to little in the way of precedent. Hilmy Ismail, Note, *Forum Non Conveniens: United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?* 11 B.C. THIRD WORLD L.J. 249, 263 (1991). For discussion of the effect of the *forum non conveniens* doctrine, see *infra* Part III.B.

ment in the area of products liability, now stands only at the threshold of allowing any recovery by U.S. plaintiffs for harm caused by U.S.-made cigarettes. As Part II.B. of this Note relates, Asian legal systems do not show comparable development in products liability. In addition, as this Part will address, the U.S. legal doctrine of *forum non conveniens* blocks foreign access to U.S. courts in many areas of litigation, leaving foreign plaintiffs with the more limited chances for recovery offered by their domestic legal systems.

United States tobacco manufacturers have been under attack for many years in the United States, both in the legislatures and in the courts. Each new round of tobacco litigation seems to offer new promise, yet each is stymied by the resourcefulness of the manufacturers.⁷² Pursuit of remedies against tobacco manufacturers on a products liability basis has paralleled a broader trend away from fault-based liability toward strict liability in U.S. tort law, which has itself created and been created by changes in public attitudes about manufacturers' responsibility.⁷³

The first two waves of tobacco litigation met with total failure, at least in the sense that no theory of recovery against the tobacco companies has prevailed in the courts. Because these lawsuits drew from and added to the national debate on the dangers of tobacco, they may have had some positive effects. Tobacco companies used a variety of means, including burdensome discovery tactics and sheer attrition, to defeat these claims.⁷⁴ They have cleverly turned the plaintiff's theory of liability to their own advantage, "steadfastly denying that cigarettes are health hazards, but adding that even if they are,

72. The fact that the legal fight against makers of tobacco products has not been as successful as similar campaigns against makers of other dangerous products is due in large part to the enormous political clout and financial resources of the tobacco industry.

With a \$47 billion-a-year business at stake, tobacco companies have never hesitated to spend to protect their interests. Industry leaders Phillip Morris and R. J. Reynolds spent a combined \$235 million on advertising from January 1993 through March 1994 to keep current customers and attract new ones, according to Competitive Media Reporting. The industry gave \$5.6 million to political candidates for federal office in 1992, according to the Center for Responsive Politics, and it has spent more than \$600 million [in 1994] in legal fees, according to the advocacy group Public Citizen.

Mark Curriden, *The Heat Is On: Facing High-Powered Plaintiffs' Lawyers and Damaging Revelations, the Once Invincible Tobacco Industry May No Longer Be Able to Snuff Out Its Opponents*, 80 A.B.A. J. 58, 59 (1994).

73. Rabin, *supra* note 2, at 853.

74. *Id.*

the smoker should have known about it."⁷⁵ And they have forced plaintiffs to prove causation to an almost impossible degree of certainty. In addition, tobacco companies ironically benefited from legislative efforts to change public attitudes toward smoking. The most striking instance of this is the defense raised in *Cipollone v. Liggett Group, Inc.*⁷⁶ that state law failure-to-warn claims were in part preempted by federal labeling requirements.⁷⁷

2. The New Wave

The history of the first two waves of tobacco litigation presents a set of plaintiffs nearly overwhelmed by the legal might and ingenuity of the defendant tobacco companies.⁷⁸ By 1994, a new wave of litigation had begun, however, with an important new display of legal muscle in pursuing mass tort litigation against the tobacco companies.⁷⁹ In early 1995, fifty-nine law firms banded together to form the Castano Tobacco Plaintiffs' Legal Committee to pursue a class action suit against sixteen tobacco companies.⁸⁰ The sheer ability of the tobacco companies

75. *Id.*

76. 505 U.S. 504 (1992).

77. *Id.* at 522-25. The first wave of litigation was based on a theory of implied warranty of merchantability; it failed because of plaintiffs' difficulties in establishing foreseeability of harm and therefore negligence. See Alex J. Grant, Note, *New Theories of Cigarette Liability: The Restatement (Third) of Torts and the Viability of a Design Defect Cause of Action*, 3 CORNELL J. L. & PUB. POL'Y 343, 348-50 (1994). In the second wave of cases, a failure-to-warn theory also met with disappointment in the courts. Hopes for the failure-to-warn approach were settled, albeit ambiguously, by the Supreme Court's holding in *Cipollone v. Liggett Group, Inc.*, that the Public Health Cigarette Smoking Act of 1969 preempted tort theories based on failure to warn. See Peter F. Riley, Note, *The Product Liability of the Tobacco Industry: Has Cipollone v. Liggett Group Finally Pierced the Cigarette Manufacturers' Aura of Invincibility?*, 30 B.C. L. REV. 1103, 1106 (1989); Grant, *supra* at 343.

Although *Cipollone* left the possibility of failure-to-warn recovery open, such a theory has yet to prevail. After *Cipollone*, tobacco plaintiffs still awaited the new and improved theory of manufacturer liability. Generally, speaking, the second wave of tobacco litigation failed as much as the first because plaintiffs were unable to frame an effective theory of recovery, despite a shift in focus and despite success with other types of products. Rabin, *supra* note 2, at 866-67.

78. Rabin, *supra* note 2, at 867.

79. Said one of many prominent lawyers who have recently taken on the tobacco companies, "The fact that so many of the important plaintiffs' firms nationally have now joined the fight in my opinion tips the scales in favor of the plaintiffs in cigarette litigation." Andrew Blum, *Tobacco Fight Grows Hotter: An Alliance of Plaintiffs' Firms Tries New Tactics to Battle Big Tobacco*, NAT'L L.J., Apr. 18, 1994, at A6, A7.

80. Mark Curriden, *Hurdle Cleared for Tobacco Suit; With Class Action OK, Plaintiffs' Lawyers Promise Massive Effort, Cooperation*, 81 A.B.A. J., May 1995, at

to outgun their opponents is now threatened.⁸¹ Recent developments both in legislation and in litigation strategy also suggest that the days of immunity from liability for the companies may soon end.⁸² These developments stem from adaptations in theories of recovery and in changes in public understanding of the harmful effects of smoking.

Particularly important is a shift in emphasis from personal harm to social cost. The disproportionate costs incurred in treating smokers have put severe burdens on health care providers.⁸³ These costs are passed on to insurers, to other patients, and eventually to taxpayers.⁸⁴ In general, the social costs caused by tobacco consumption are unfairly distributed among the population as a whole.⁸⁵ Tobacco litigation and legislation increasingly stem from the notion that these costs should be borne by the makers of the products themselves.⁸⁶

Furthermore, previous thinking about the harmful effects of smoking focused on the smoker alone, and any detriment to the larger community was thought to result from some harm to the smoker, such as through health care costs or lost productivity. Increasingly, however, governments and courts see tobacco smoke as an environmental hazard, a form of air pollution that begins to have harmful consequences for persons other than the smoker as soon as the smoker "lights up." The health costs to nonsmokers through second-hand smoke are substantial.⁸⁷ Certain groups,

22, 22. The authors predict that "if the plaintiffs win, the damage awards will be astronomical, enough to potentially destroy the tobacco industry as we know it today. . . . But if the plaintiffs lose after spending this amount of money and resources, the tobacco companies are home free forever." *Id.* at 23.

81. "Legal analysts give two reasons for tobacco's perfect win-loss record: the industry's history of hiring the best lawyers and keeping them busy, and its ability to dictate the standards by which it is judged." Curriden, *supra* note 72, at 59.

82. Shortly before this Note went to press, the Liggett Group agreed to a settlement in the huge class-action suit, thus ending the tobacco industry's absolute invulnerability in United States litigation. Barnaby J. Feder, *United Front by Big Tobacco Starts to Crack*, N.Y. TIMES NEWS SERV., March 14, 1996, available in Westlaw, NPMJ Database.

83. See Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 81-83 (1994).

84. *Id.*

85. But see generally ROBERT D. TOLLISON & RICHARD E. WAGNER, *THE ECONOMICS OF SMOKING* (1992) (suggesting that society at large does not bear an unfair or disproportionate burden).

86. See Gangarosa et al., *supra* note 83, at 85.

87. Second-hand, or "[p]assive smoke costs nonsmokers some \$1.5 to \$3 billion in earnings and health costs each year. The economic value of the death risk to nonsmokers is between \$22 billion and \$43 billion per year." Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and*

especially children, are put at particular risk by second-hand smoke. A common characteristic of these groups is that they have no part in the choice presumably made by the smoker.⁸⁸

The U.S. Surgeon General and the National Research Council have warned of the risk of smoking-related diseases,⁸⁹ such as lung cancer, faced by nonsmokers as a result of environmental tobacco smoke (ETS).⁹⁰ This new phase in society's awareness of tobacco's dangers has led to a spurt of legislation at all levels regulating the consumption of tobacco, especially by restricting smoking in public places.⁹¹ In addition, this use of tobacco by state and federal governments as a source of tax revenue suggests not only an awareness of tobacco's great money-making power but also a growing recognition that tobacco itself causes economic losses.⁹²

Even more dramatically, ETS has been declared a "potential occupational carcinogen" by the National Institute for Occupational Safety, a "known human carcinogen" by the Environmental Protection Agency, and a "major preventable cause of cardiovascular disease and death" by the U.S. Heart Association.⁹³ Lawsuits over the effects of ETS have made their way into U.S. courts. The plaintiffs in *Broin v. Phillip Morris Companies*,⁹⁴ for example, brought a class action suit against the tobacco companies for flight attendants' exposure to second-hand smoke.⁹⁵ The U.S. Supreme Court has even cleared the way⁹⁶ for

Alternative Feasible Designs in the Third Restatement, 61 TENN. L. REV. 1429, 1454 (1994).

88. See David B. Ezra, *Sticks and Stones Can Break My Bones, but Tobacco Smoke Can Kill Me: Can We Protect Children From Parents That Smoke?*, 13 ST. LOUIS U. PUB. L. REV. 547 (1994) (examining the personal and legal problems that environmental tobacco smoke (ETS) causes for children).

89. Second-hand smoke causes as many as 53,000 deaths per year in the United States. *Recent Legislation*, *supra* note 13, at 525 n.1.

90. James L. Repace, *Risk Management of Passive Smoking at Work and at Home*, 13 ST. LOUIS U. PUB. L. REV. 763, 763-64 (1994). Second-hand smoking is the third leading preventable cause of death in the United States. Active smoking is the first. Courtless, *supra* note 5, at 34.

91. Courtless, *supra* note 5, at 35.

92. *Id.* at 32.

93. Repace, *supra* note 90, at 763.

94. 641 So.2d 888 (Fla. Dist. Ct. App. 1994).

95. See Cindy L. Pressman, Note, "No Smoking Please": A Proposal for Recognition of Non-Smokers' Rights Through Tort Law, 10 N.Y.L. SCH. J. HUM. RTS. 595, 617-19 (1993) (advocating further pursuit of nonsmokers' claims through tort litigation).

96. *Helling v. McKinney*, 509 U.S. 25 (1993) (prisoner's Eighth Amendment claim could be based on present and possible future harm to health caused by ETS).

a claim that a prisoner's exposure to ETS constitutes cruel and unusual punishment under the Eighth Amendment.⁹⁷

These categorizations illustrate the virtual elimination of the manufacturers' original main defense, that tobacco was not a demonstrably harmful substance. More importantly, they force society and the government to acknowledge that tobacco only differs from other pollutants⁹⁸ in its traditional acceptance by the public. The substances in tobacco identified by the Environmental Protection Agency, such as carbon monoxide, had already come under federal government regulation when found in sources other than cigarettes.⁹⁹ The identification of these substances in cigarette smoke represents a breakthrough against the manufacturers in revealing the truth about tobacco's effects. No longer does the mystique or the familiarity of the cigarette obscure its often deadly contents.¹⁰⁰

States have also mounted significant attacks on tobacco companies. In 1994, the state of Mississippi brought a suit in equity for unlawful enrichment and indemnity against thirteen tobacco companies on behalf of the taxpayers of that state.¹⁰¹ This novel approach sidesteps the problems of proving causation that plaintiffs have faced in the past by basing causation on statistical probability alone.¹⁰² In an effort to force tobacco companies to help pay for the staggering toll exacted in Medicaid costs, the state of Florida passed the Medicaid Third-Party

97. U.S. CONST. amend. VIII; see Cornish F. Hitchcock, *Environmental Tobacco Smoke as Cruel and Unusual Punishment*, 13 ST. LOUIS U. PUB. L. REV. 661, 662-72 (1994); Lauren I. Ginestra, Comment, *Environmental Tobacco Smoke: Cruel and Unusual Punishment?*, 42 U. KAN. L. REV. 169, 183-94 (1993).

98. "Because of the high number of smokers in the United States, ETS is a ubiquitous air pollutant; smokers expose almost everyone in the United States to ETS at home, work, or in public places." Susan Ross, Comment, *Second-Hand Smoke: The Asbestos and Benzene of the Nineties*, 25 ARIZ. ST. L.J. 713, 715 (1993).

99. *Id.* at 713.

100. The Restatement (Third) of Torts may also offer a new avenue for tobacco plaintiffs. See generally Wertheimer, *supra* note 87, at 1432-54. In the new Restatement of Torts, a reasonable alternative design standard supplants the risk-utility balancing test of *O'Brien v. Musktn Corp.*, 463 A.2d 298 (N.J. 1983). In addition, the new Restatement specifically allows for products liability actions for what were once considered obviously dangerous products such as tobacco. See generally Grant, *supra* note 77, at 343.

101. See generally *Mississippi Medicaid Action to Continue; Judge Dentel Industry Dismissal*, MEALEY'S LITIG. REP., Sept. 15, 1995, available in Westlaw, TP-ALL Database (reporting the case of *In re Mike Moore, Attorney General ex rel., State of Mississippi Tobacco Litigation*, No. 94-1429, Ch. Ct. of Jackson Co., Miss.). As of February 1996, this case was still pending. See *Judge Continues Seal on Wigland Deposition; But It's on the Internet*, MEALEY'S LITIG. REP., Feb. 13, 1996, available in Westlaw, TP-ALL Database.

102. See Gangarosa et al., *supra* note 83, at 135.

Liability Act of 1994 (the Act).¹⁰³ The Act provides an independent cause of action to the state for smoking-related expenditures. Although the Act does not assist private plaintiffs, it may serve as a model¹⁰⁴ for similar legislative changes that will relate to individual causes of action. Specifically, the Act requires that courts liberally construe the evidence code as to causation and allow proof of causation through statistical analysis.¹⁰⁵ In addition, the Act abrogates the defenses that have rescued manufacturers in suit after suit: assumption of risk¹⁰⁶ and comparative negligence.¹⁰⁷ The Act represents the general trend toward recognition of the need to compensate for the disproportionate costs of tobacco consumption.

It has recently come to light that U.S. tobacco companies knew a lot more about the harmful effects and addictive power of tobacco much earlier than they had ever acknowledged.¹⁰⁸ In fact, the history of tobacco promotion and sale in the United States and other countries looks more and more like reckless fostering of addiction to a deadly substance than a legitimate business practice. As a result of these revelations, tobacco litigation increasingly turns, not on theories of liability, but on

103. 1994 Fla. Laws ch. 251.

104. Similar legislation has reached other state legislatures and the U.S. Senate. *Recent Legislation*, *supra* note 13, at 525.

105. *Id.* at 526-27.

106. The state, it is argued, assumed no risk:

Individual smokers may have assumed the risks of smoking, or contributed to their illnesses through their own negligence, but the State assumed no such risk and was not negligent in the transaction between cigarette manufacturers and consumers. Without government health insurance, cigarette companies would not be able to market their products so cheaply, nor would consumers be able to assume the risks of smoking so cheaply. Florida's law creates a mechanism whereby the State can recover the cost of the externalities created by the tobacco market.

Id. at 528.

107. *Id.*

108. Documents from the 1960s portray an industry trying to decide what to do with its research, which showed that smoking causes lung cancer and heart problems. A July 17, 1963, memo from the general counsel's office at tobacco manufacturer Brown & Williamson notes: "We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." Curriden, *supra* note 72, at 60. The disclosure of these documents has turned into a separate but crucial legal battle for the industry. In 1996, the tobacco industry is fighting a series of legal battles caused by revelations of former employees that the tobacco companies knew of tobacco's addictive effects. The companies are attempting to discredit a growing number of whistle-blowers. See *The Heat Was On When One Man Spoke Out, But Now There Are Three*, THE GUARDIAN, March 23, 1996, at 40.

discovery.¹⁰⁹ These findings considerably deflate the assumption of risk defense, and, in light of the new view of tobacco as both a harmful and addictive substance, further diminish the companies' traditional line on personal choice and liability.

If the promise of this new wave of legal efforts against tobacco is fulfilled, the disparity between U.S. and foreign law as a source of recovery will be very pronounced indeed. The inadequacy of local remedies for foreign plaintiffs as well as the desirability of access to United States courts will obviously grow if and when U.S. plaintiffs begin to prevail.

B. *Obstacles for Asian Plaintiffs: Forum Non Conveniens*

Foreign plaintiffs who wish to pursue products liability litigation against U.S. tobacco manufacturers in United States courts face a formidable obstacle in the *forum non conveniens* doctrine. As foreshadowed by *In re Union Carbide Corp. Gas Plant Disaster (Bhopal case)*,¹¹⁰ even though tort law in the foreign forum may be essentially inadequate,¹¹¹ if a U.S. court can point to the potential availability of any form of relief in those foreign courts, it will dismiss the case on the grounds of *forum non conveniens*.

1. Background and Operation of the Doctrine

The doctrine of *forum non conveniens* developed in United States common law in the early part of this century.¹¹² The doctrine allows a court to dismiss a case over which it would have jurisdiction if, in the court's view, the case would be more suitably adjudicated elsewhere.¹¹³ More recently, courts have invoked the doctrine to prevent foreign plaintiffs from litigating in U.S. courts.¹¹⁴ While concerns over political tangles and confusion over choice of law have driven courts to close their doors to persons harmed overseas who bring suit over torts

109. *Haines v. Liggett Group*, 975 F.2d 81 (3d Cir. 1992), a case following *Cipollone*, is an example.

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

111. *Ismail*, *supra* note 71, at 263.

112. For a discussion of the development of the doctrine of *forum non conveniens*, see Molly M. White, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 *LOY. L.A. L. REV.* 491, 494-97 (1993).

113. *Id.*

114. The first such case was *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). See *infra* Part III.B.2.

committed outside the United States, implicit in all *forum non conveniens* questions is the likely discrepancy between United States and foreign law, either in availability of forms of action or in the amount of recovery customarily granted. Since this disparity often creates an incentive for foreign plaintiffs to file suit in United States courts,¹¹⁵ these courts have set high standards for access by persons harmed overseas. A principal reason for this policy may simply be to avoid turning the United States into the world's tort adjudicator (which may eventually be beneficial, for it encourages local legal reform). Still, in many cases, the doctrine benefits U.S. companies that have caused harm outside the United States.¹¹⁶ United States companies have not been held accountable for their actions in the way that they might have been in U.S. courts. This fact, in turn, has influenced corporate policy: "One incentive for U.S. corporations to expand overseas has been their ability to conduct activities in lesser developed countries that would be illegal if conducted in the United States."¹¹⁷

2. Examples of *Forum Non Conveniens*: *Reyno* and *Bhopal*

Two important *forum non conveniens* cases have particular bearing on possible litigation against U.S. tobacco manufacturers

115. There are several reasons why U.S. courts are attractive:

Simply put, compared with foreign courts, United States forums offer a plaintiff both lower costs and higher recovery. Factors reducing the plaintiff's costs are the contingent fee for the plaintiff's attorney and, if the plaintiff loses, no liability for the defendant's attorney's fee. Factors likely to provide the plaintiff with a larger recovery are: (1) more extensive pretrial discovery than is available anywhere else in the world; (2) liability law that is more likely than foreign law to allow recovery and allow it for more elements of harm; (3) choice-of-law rules that are more likely than foreign rules to select the United States law that is favorable to the plaintiff; and (4) trial by jury.

Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323 (1994).

116. For a discussion of the debate over the "chauvinism" issue in *forum non conveniens* doctrine, see David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 371-75 (1994). Robertson responds to Weintraub, who takes the position that the United States does foreign plaintiffs a favor by forcing them to pursue legal reform at home. Weintraub, *supra* note 115, at 352. Robertson argues that chauvinism is a false question and that the real issue is "the extent to which [U.S.] multinational corporations should be liable for negligence or other tortious behavior causing injuries abroad." Robertson, *supra* at 374.

117. White, *supra* note 112, at 492.

by foreign plaintiffs.¹¹⁸ The first case, *Piper Aircraft Co. v. Reyno*,¹¹⁹ was a wrongful death action brought against a U.S. corporation, the makers of an airplane that crashed in Scotland. In *Reyno*, the U.S. Supreme Court distinguished the standards for applying the doctrine in cases involving foreign plaintiffs from those used in United States domestic cases.¹²⁰ Of particular importance to all potential tort liability cases, the Court held that, although local foreign law may be less favorable to the plaintiff, a court may still invoke the doctrine and bar the case.¹²¹ As long as the plaintiff had access to an adequate alternative forum to which the defendant could be brought, the doctrine would apply.¹²² Such a forum would be adequate if the remedy it offered was "clearly satisfactory," a term that the Court left to the lower courts to interpret.¹²³ In cases brought by foreign plaintiffs against U.S. tobacco companies concerning torts committed abroad, the issue of adequacy of the local forum would be troublesome, as it has not been completely settled by the U.S. courts.

If a U.S. court recognizes that much of the tort law in Asia is underdeveloped in the area of products liability, it may indeed find that the alternative forum does not offer an adequate remedy. Very likely, however, the bare existence of at least some form of tort remedy may persuade the court otherwise. In *Reyno*, for example, the fact that Scottish law did not recognize negligence-based, but only fault-based liability, did not bar use of the *forum non conveniens* doctrine to dismiss the case.¹²⁴

The litigation that grew out of the Union Carbide gas disaster in Bhopal, India,¹²⁵ demonstrates the dramatic results that use of the doctrine can produce. In the *Bhopal* case the district court dismissed the suit on the grounds that Indian law provided adequate remedies to the plaintiffs. This dismissal came in the face of considerable argument and evidence that no adequate remedy existed in India.¹²⁶ The Indian courts eventually assessed a very large damage award against Union Carbide, but what the victims of the disaster received from this was delayed and

118. These two cases involve important issues that would be raised in tobacco litigation: product liability and environmental damage.

119. 454 U.S. 235 (1981).

120. See White, *supra* note 112, at 498.

121. 454 U.S. at 247.

122. *Id.* at 254-55.

123. See White, *supra* note 112, at 505.

124. *Id.* at 499.

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

126. White, *supra* note 112, at 512.

diminished considerably.¹²⁷ Whether the victims would have been better off in a United States court is open to debate. Still, the case dramatized the difficulties faced by foreign plaintiffs in a case of clear corporate culpability and obvious weaknesses in local law.

Invocation of *forum non conveniens* to bar access to U.S. courts has prompted a great deal of criticism. In particular, it is argued that in an interdependent global economy, the doctrine inappropriately allows U.S. corporations to pursue exploitative policies free from accountability.¹²⁸ At any rate, given the record of this doctrine in barring access to U.S. courts, it would very likely present a major obstacle to potential tobacco litigation concerning torts committed abroad, and one that the manufacturers would exploit fully.

IV. TOBACCO PROMOTION AS A THREAT TO HUMAN RIGHTS

A. Tobacco as a Threat to Health and to the Environment

While it appears increasingly likely that U.S. tobacco manufacturers will eventually be subjected to some form of accountability in the United States,¹²⁹ it is difficult to foresee a major change in the availability of redress against these companies for foreign plaintiffs.¹³⁰ Foreign plaintiffs must look, therefore, to alternative legal regimes and must be as creative in their legal strategies as the manufacturers have been.

For these reasons, foreign nationals who have suffered harm abroad as a result of tobacco smoke should pursue the argument that, in promoting tobacco consumption in their countries, U.S. tobacco companies have violated accepted norms of human rights, namely the right to health and the right to a healthy environment. Concededly, such an argument would face problems typical of all human rights issues—problems of conflicting economic interests, state sovereignty, paternalism, and enforcement, for example—but it would serve at least to highlight the drastic nature of the problem and the way in which inconsistent national policies aggravate it.

127. Although Union Carbide paid \$470 million to a compensation fund in 1989, legal and bureaucratic problems have kept most of the victims from being compensated. *Id.*

128. *Id.* at 492.

129. See *supra* Part III.A.2.

130. See *supra* Part III.B.

Tobacco poses a general threat to a community's environment. It is a form of air pollution, and, as a harmful and addictive substance,¹³¹ it degrades the quality of life for smokers and nonsmokers alike. In other contexts, these facts would implicate human rights concerns. Human rights avenues, then, should be explored in the search for a way to recover from tobacco manufacturers some of the social costs caused by their products outside the United States.

The world's consciousness of human rights connects most strongly with such issues as genocide, slavery, and apartheid, but other rights, including the rights to health and to a healthy environment, are also worthy of protection against deprivation as norms of international law.¹³² Several international and national documents, including those of Asian countries,¹³³ include health rights.

In addition, because of social or political inequalities and because local tort law provides little assistance,¹³⁴ Asian plaintiffs suffer the effects of the environmental hazard to a greater degree.¹³⁵ The plight of the targets of tobacco promotion in Asia and in the Third World is comparable in many respects to the plight of refugees in various environmental disasters upon which human rights discussions have focused.¹³⁶ The foreign tobacco plaintiffs are caught between harmful policies determined by foreign governments, their own governments, and multinational corporations on the one hand, and their own vulnerable position, perhaps made worse by inadequate information about health risks and inadequate access to health care, on the other.¹³⁷ In other words, exposure to the carcinogens in cigarettes is one thing when one can seek care at research hospitals that lead the world in cancer treatment.¹³⁸ It is something much worse when one's quality of life is already poor due to limited access to doctors or hospitals.

131. See Bartecchi et al., *supra* note 3, at 44-47.

132. See *infra* Part IV.B.

133. *Id.*

134. See *supra* Part II.B.

135. Cf., e.g., Michelle L. Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 375-81 (1993).

136. *Id.* at 361, 375.

137. See generally Bartecchi et al., *supra* note 3.

138. Such is the situation in Durham, North Carolina, for example, where Duke University Hospital, a major cancer research and treatment center, sits in the middle of tobacco growing and manufacturing country.

B. *Sources of the Rights to Health and to a Healthy Environment:
Asia*

1. The Right to Life

The right to life is basic to the international law of human rights—it is a “fundamental, non-derogable human right.”¹³⁹ Adopted in 1948, the Universal Declaration of Human Rights (Universal Declaration) proclaims the right to life in Article 3.¹⁴⁰ The International Covenant on Civil and Political Rights, which entered into force in 1976, includes this right in Article 6.¹⁴¹ China is not a party to the Universal Declaration, but other Asian nations, as well as the United States, are parties. Significantly, members of the Human Rights Committee have expressed the view that Article 6 imposes a duty on the state “to take *positive measures* to ensure the right to life, including steps to reduce infant mortality rates, prevent industrial accidents, and protect the environment.”¹⁴²

The general trend in international human rights policy has been one of expansion, both in the scope of state responsibility and in the number of protected rights. This trend emerges in particular from the existence of “multiple co-existing instruments of human rights protection,”¹⁴³ which create overlapping expressions of human rights.¹⁴⁴ One should not, therefore, interpret the world regime of human rights expression and protection in human rights instruments as restrictive, but rather as open-ended.¹⁴⁵

139. See Schwartz, *supra* note 135, at 361.

140. “Everyone has the right to life, liberty and the security of person.” Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948), *reprinted in* 1948-49 U.N.Y.B 575, U.N. Sales No. 1950.I.II.

141. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *reprinted in* 1966 U.N.Y.B. 424.

142. Cancado Trindade, *Environmental Protection and the Absence of Restrictions on Human Rights*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY 561, 573 (Kathleen E. Mahoney & Paul Mahoney eds., 1993) (emphasis in original).

143. *Id.* at 588.

144. “In sum, there exists a clear trend towards the expansion and enhancement of the degree and extent of protection of rights recognized under co-existing human rights instruments.” *Id.* at 589.

145. See *id.* at 590.

2. The Rights to Health and to a Healthy Environment

The fact that the right to life extends to the rights to health and to a healthy environment¹⁴⁶ is manifest from documents proclaiming the right to life.¹⁴⁷ The assertion that the right to a healthy environment is a fundamental right *erga omnes*¹⁴⁸ follows naturally.¹⁴⁹ This is obvious with respect to such threats to the environment as global warming, nuclear waste, and other large-scale problems, but a more general right to a healthy environment is also clear. This aspect of human rights should be emphasized in attacking the promotion of a harmful substance like tobacco, in order to delineate the obligations of the state toward the individual who may be harmed. Since the individuals in question also form a society, human rights dangers implicate larger groups:

Focusing on the *subjects* of the right to a healthy environment, we see first that it has an individual dimension, as it can be implemented . . . like other human rights. But the beneficiaries of the right to a healthy environment are not only individuals but also groups, associations, human collectivities and, indeed, the whole of [humanity]. Hence, it has a collective dimension as well.¹⁵⁰

The latest wave of anti-tobacco litigation has implicitly recognized the social dimension of the dangers caused by tobacco.¹⁵¹ A human rights formulation also naturally accommodates both individual and societal interests.

The Universal Declaration in Article 22 recognizes a "right to a standard of living . . . adequate for the health and well-being of

146. For the argument that because the right to life is a *jus cogens* norm of international law, so is the right to a healthy environment, see Melissa Thorne, *Establishing Environment as a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301, 333 (1991).

147. See Trindade, *supra* note 142, at 575.

148. *Erga omnes* rights are ones considered so important that all states have a legal interest in their protection. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

149. For a discussion of environmental rights as *jus cogens* norms and rights *erga omnes*, and of these concepts in general, see Gormley, *supra* note 1. Gormley defines rights *erga omnes* as "duties owed by states to the international community." To illustrate, he points out that "activities . . . which lead to transfrontier pollution constitute violations of *erga omnes* duties." *Id.* at 97. Gormley had in mind the Bhopal, Chernobyl, and Exxon Valdez disasters, but tobacco promotion and sale also constitute a kind of "transfrontier pollution," one that is at least as harmful, and much more deliberate. See *id.* at 87.

150. Trindade, *supra* note 142, at 584.

151. See *supra* Part III.A.2.

[an individual] and of [the individual's] family."¹⁵² The right to a healthy environment imposes certain obligations on the state. It puts states "under the obligation to avoid serious environmental hazards or risks to life, and to set in motion 'monitoring and early warning systems' to detect serious environmental hazards or risks and 'urgent action systems' to deal with such threats."¹⁵³

Some international agreements specify the right to health, though Asia lacks a broad agreement of this type. The International Covenant on Economic, Social and Cultural Rights, which entered into force in 1976, upholds in Article 12 the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health."¹⁵⁴

Regional agreements also support a right to health as a norm of customary international law. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950, proclaims the right to life in Article 2.1.¹⁵⁵ The European Social Charter, adopted in 1961, announces the right to protection of health in Article 11, which imposes a duty upon the parties to the agreement to "take appropriate measures designed *inter alia*: . . . to remove as far as possible the causes of ill-health."¹⁵⁶ The American Declaration of the Rights and Duties of Man, a resolution of the Organization of American States adopted in 1948, guarantees to "every human being . . . the right to life" in Article I,¹⁵⁷ and in Article XI states that "[e]very person has the right to the preservation of [personal]

152. G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 22, U.N. Doc. A/810 (1948), *reprinted in* 1948-49 U.N.Y.B. 576.

153. Trindade, *supra* note 142, at 575. One might argue that it is inappropriate to view smoking as an environmental danger analogous to other forms of air pollution, largely because it is a matter of personal choice and because it affects only the individual. But this argument overlooks what U.S. society has learned the hard way about tobacco's effects. The U.S. population now knows that tobacco is an addictive substance, a fact that is increasingly being used to show a reckless disregard on the part of manufacturers for the well-being of their customers. The actions of the manufacturers themselves demonstrate an awareness of the coercive effects of advertising, particularly its operation on targeted, vulnerable groups. *See supra* Parts II and III.

154. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *reprinted in* 1966 U.N.Y.B. 421.

155. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

156. European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, 104 (entered into force Feb. 26, 1965).

157. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, art. I, *reprinted in* 1 *Annals Organization Am. Sts.* 130, 130 (1949).

health through sanitary and social measures . . . to the extent permitted by public and community resources."¹⁵⁸ The American Convention on Human Rights, to which the United States is not a party, asserts the right to life in Article 4.¹⁵⁹ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights guarantees in Article 10 the "right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being,"¹⁶⁰ and in Article 11 that "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services."¹⁶¹

One limited regional human rights document, the 1983 Declaration of the Basic Duties of ASEAN (Association of Southeast Asian Nations) Peoples and Governments, to which Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei Darussalem are now parties, does ensure the right to life and health-related rights to Asians.¹⁶² This document endorses and is intended to supplement the Universal Declaration.¹⁶³ Even in the absence of such an agreement for other Asian countries, the right to health constitutes a norm of customary international law that is as applicable in Asia as anywhere else. As an emanation from the basic right to life,¹⁶⁴ the right to health and the right to a healthy environment have a fundamental basis as norms of customary international law.¹⁶⁵

The right to health as a norm of customary international law is binding on the United States, even though the fixation of basic rights under the United States Constitution may exclude an

158. *Id.* art. XI.

159. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

160. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* 28 I.L.M. 161, 164 (1989).

161. *Id.*, 28 I.L.M. at 165.

162. WASHINGTON INSTITUTE FOR VALUES IN PUBLIC POLICY, HUMAN RIGHTS SOURCEBOOK 646 (Albert P. Blumstein et al. eds., 1987) [hereinafter WASHINGTON INSTITUTE].

163. *Id.*

164. See Virginia A. Leary, *Implications of a Right to Health*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, *supra* note 142, at 481, 487. "It does not strain imagination to consider the 'right to health' as implicit in the right to life. While it is frequently contended that the right to life forbids only arbitrary deprivation of life, this restrictive interpretation has not met with general acceptance." *Id.*

165. States that are not parties to treaties specifically guaranteeing the right to health are nevertheless bound to it as a human right because of its embodiment in the Universal Declaration, which has force as a declaration of customary international law. *Id.*

express right to health from U.S. law.¹⁶⁶ These norms are binding despite unwillingness on the part of the United States to sign on to many of the important human rights treaties that have followed the Universal Declaration, a much criticized policy that has put the United States in an ambiguous position with respect to human rights concerns and cast some doubt on its role as moral leader. After all, issues such as overseas tobacco promotion epitomize the discrepancy between the domestic ethic and foreign policy practice in the United States. For example, do United States concerns over human rights and related issues, like environmental quality, stop at its borders? Does United States policy contain the implicit premise that noncitizens have less claim on these fundamental rights than do U.S. citizens?¹⁶⁷

National declarations of citizens' rights also make health and environmental rights binding upon the states involved. For example, Article 25 of the 1947 Constitution of Japan supports the guarantee that "[a]ll people shall have the right to maintain the minimum standard of wholesome and cultured living" by putting an affirmative duty upon the state: "In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health."¹⁶⁸

Furthermore, the right to health and the right to a healthy environment are basic rights that are valid against all parties and enforceable by all parties.¹⁶⁹ This flows from their status as fundamental humanitarian norms.¹⁷⁰ It is essential to view these rights as effective *erga omnes*, since it is in the very nature of humanitarian norms that, in some respect, the obligation of a state toward its citizens has been neglected and is unlikely to be vindicated through ordinary legal means.¹⁷¹ Indeed, the validity *erga omnes* of humanitarian norms, seen now as common

166. See Peter Weiss, *The Right to Good Health*, BILL OF RTS. J., Winter 1994, at 1, 1-2.

167. See Hageman, *supra* note 25, at 190-94.

168. WASHINGTON INSTITUTE, *supra* note 162, at 775.

169. "Some international obligations are . . . so basic that they run equally to all other states, and every state has the right to help protect the corresponding rights." THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 191 (1989).

170. *Id.*

171. As Meron observes, it is uncertain to what extent the "basic right of the human person" recognized as rights valid *erga omnes* in Barcelona Traction are "synonymous with human rights *tout court*." However, even if "the Court . . . did not intend to bestow *erga omnes* character upon all human rights, but only on rights which have matured into customary or general law of nations," certainly even that higher status can be claimed for the rights to health and to a healthy environment. *Id.* at 192.

concerns of humanity,¹⁷² and the abandonment of the requirement of reciprocity, are principal features of the present-day law of treaties.¹⁷³

Rights such as the right to a healthy environment are "indivisible" and cannot, as some might argue, conflict with other human rights.¹⁷⁴ Thus, recognition of a right to a healthy environment need not claim priority as an emanation from the fundamental right to life. It is by its very nature, as a human right, in balance with other recognized human rights. Thus, while one might argue that the right to a healthy environment should in some cases be subordinated to the right to development or, in other words, to consideration of the community's economic well-being—the tobacco industry's old argument in the United States—it is not only necessary, but imminently possible to harmonize the two rights.¹⁷⁵ This can be achieved, for example, through the recognition of the total social cost that tobacco promotion and consumption entail—the same argument that has informed the domestic debate on tobacco in the United States.¹⁷⁶

172. Trindade, *supra* note 142, at 568.

173. If the right to health and the right to a healthy environment are seen as norms of customary international law, there is little question that they are binding on all states, whether or not they are embodied in treaties to which the states are parties or in the laws of the states themselves. The norm of customary international law is binding on states and is demonstrated by state practice. While it is true that "[i]t is, of course, not the treaty norm, but the customary norm with identical content, that binds [non-party] states," MERON, *supra* note 169, at 3, treaties can serve as evidence of state practice, and therefore of customary international law. This is especially true of the regional and global agreements on human rights mentioned above, which aim to codify traditional and universal standards of conduct and which challenge all states, not only those that expressly join the treaty, to conform. See *id.*; see also *North Sea Continental Shelf (F.R.G. v. Den.) (F.R.G. v. Neth.)*, 1969 I.C.J. 3 (1969).

174. Trindade, *supra* note 142, at 592. "Furthermore, the recognition of such 'new' rights as the right to a healthy environment cannot have the effect of restricting, but only of complementing, enriching and enhancing pre-existing rights (e.g., the right to work, the freedom of movement, the right to education, the right of participation, the right to information, etc.)." *Id.* at 593.

175. It could be argued that the right to a healthy environment conflicts with the right to development. However, reducing cigarette consumption, for example, does not necessarily deprive a community of the latter (*i.e.* by restricting the local economy). "It is certainly reasonable to claim that development is about improving the quality of life and, therefore, inappropriate development is development inconsistent with basic human rights." Robert E. Lutz, et al., *Environment, Economic Development and Human Rights: A Triangular Relationship?*, 82 AM. SOC'Y INT'L L. PROC. 40, 40-41 (1988) (remarks by Robert E. Lutz).

176. See *supra* Part III.A.2.

These rights have an important two-fold quality: they are both personal¹⁷⁷ and societal. Human rights are usually conceived to flow from the individual outward. They are "justified claims to freedoms, immunities and benefits that the individual has upon his or her society and which society must respect and ensure."¹⁷⁸

The bad effects of tobacco use are now likely to be viewed as societal costs.¹⁷⁹ The dangers of second-hand smoke raise an obvious environmental issue, though one that may at first seem unimportant beside more massive forms of pollution. Other costs arise from the collective injury done to the millions of individuals who smoke, whether counted as lost productivity and work time, shortened life span, or health care costs. Just as important are the demands put on the health care system as a whole, which in Asian countries tends to be state-provided and therefore a social cost that is directly and involuntarily extracted from the citizenry.

C. Conclusion

In conclusion, while it is beyond any state's power to guarantee good health to all inhabitants, the state's duties do not end with the provision of health care. A broader interpretation of the right to health is more appropriate: "States have long recognized an obligation to protect their population from obvious risks and hazards to their health."¹⁸⁰ Indeed, many of the important human rights documents impose an affirmative duty upon the state to take steps to ensure the good health of its

177. The international law of human rights traditionally makes reference to states and to peoples, and the international law of the environment refers only to states. But the merger of these regimes in the right to a healthy environment, derived from the right to life, is seen as an imminently individual right:

The right to life can be regarded as a very typical individual right. If the notion of a "common shared environment" is understood in the sense that the basic values and prerequisites of [human] life also comprise the international concern about . . . environmental quality, then the implementation of this right will lead to an internationally accepted and also guaranteed right of the individual to a clean environment *qua* [the individual's] *right to life*.

Henn-Juri Uibopuu, *The Internationally Guaranteed Right of an Individual to a Clean Environment*, 1 COMP. L. Y.B. 101, 109 (1977) (emphasize in original). Furthermore, the bad effects of tobacco use are now more likely to be viewed as societal costs. See *supra* Part III.A.2.

178. Leary, *supra* note 164, at 482-83.

179. See *supra* Part III.A.2.

180. Leary, *supra* note 164, at 486.

inhabitants.¹⁸¹ At the very least, there is a negative duty¹⁸² implicit in the recognition of a right to health by the state and as a norm of customary international law: "[T]he government prevents certain actions which cause harm to citizens."¹⁸³ In the face of trade policies on tobacco that can directly contradict both the affirmative and the negative duties inherent in the right to health, even if read fairly narrowly, a state duty is clearly implicated. It is a duty to at least remove the harmful substance—tobacco. In addition, one could easily find a state duty to render health care for those affected by tobacco, both smokers and nonsmokers, as well as to redistribute the social costs of tobacco's ill effects.

Pursuit of a human rights basis for claims against tobacco companies changes the dynamic of litigation considerably. While a full discussion of how human rights arguments would be staged against U.S. tobacco manufacturers is beyond the scope of this Note, it is clear that these arguments can be made against either the local government or that of the United States. The configuration of parties would depend upon the degree of state responsibility. Where, for example, local economic policies are found to be just as self-contradictory and damaging to the health of the population as are U.S. trade policies,¹⁸⁴ the local government's role in the confrontation may be ambiguous. Alternatively, highlighting the implication of local health provisions and local recognition of the right to a healthy environment may resolve this ambiguity by making the local government a proper and more assertive representative of the threatened population.

In addition, foreign plaintiffs could find that focusing on social costs, rather than personal costs, may circumvent the problem of causation, which is still present under a human rights theory. For this reason, whole communities, government bodies,

181. *Id.*

182. Schwartz outlines three theories supporting "the contention that government action violates international law if it causes environmental damage that results in harm to an individual or group." Schwartz, *supra* note 135, at 359. The first finds the right to a healthy environment narrowly linked to the right to life. *Id.* The second recognizes the right to a healthy environment in and of itself. *Id.* The third is based on the principle of "intergenerational equity, based on the notion that each generation is a planetary trustee for succeeding generations." *Id.* at 360. Obviously this third theory is more properly environmentalist in its formulation, whereas the other two are shaped more by human rights thinking. Whichever theory one chooses, says Schwartz, "[all three theories yield the conclusion that states have a fundamental duty to refrain from environmentally destructive acts which could injure human beings . . . and to take affirmative action to prevent environmental harm wherever possible." *Id.*

183. Leary, *supra* note 164, at 486.

184. See *supra* Part II.A.2.

or even states need to become involved in litigation or in legislative movements for reform.¹⁸⁵ Again, the choice of forum, whether judicial or legislative, depends upon the identification of culpable parties and the degree of cooperation forthcoming from local institutions. The inadequacy of products liability law in many Asian countries necessitates alternatives to judicial remedies.¹⁸⁶ But even in the absence of judicial enforcement, the right to a healthy environment can be vindicated: "Formal justiciability or enforceability is by no means a definitive criterion to ascertain the existence of a right under international human rights law."¹⁸⁷ Such a right can be equally well served when information about a human rights threat is made available and affected groups are made parties to the process of reform.¹⁸⁸ Contradictory state policy, both that of local governments and of the United States government, renders protection of those in Asia who suffer from tobacco's effects especially difficult. In such an environment, the international law of human rights provides the most appropriate vindication of societal interests that are greater than the limited interests of businesses or governments.¹⁸⁹

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185. The foregoing discussion should not obscure the fact that antismoking movements have been forming in Asia and have had some impact there. One significant reason, of course, for the emergence of such groups is the very shift away from total control by local monopolies toward an open market expanded by U.S. companies and their advertising campaigns. One important antismoking group is the Asia-Pacific Association for the Control of Tobacco (APACT), with representatives from Hong Kong, Indonesia, Japan, South Korea, Malaysia, the Philippines, Singapore, Thailand, and Taiwan. APACT has informed the United States government of its opposition to U.S. promotion of tobacco. See Chen & Winder, *supra* note 19, at 661; Andrew A. Skolnick, *US Government Criticized for Helping to Export a Deadly Epidemic of Tobacco Addiction*, 267 JAMA 3256, 3256-57 (1992). Even so, U.S. tobacco companies have taken advantage of a serious deficiency in public awareness in Asia about tobacco's risks. See, e.g., *An Unhealthy Trade*, WORLD PRESS REV., July 1988, at 47.

186. See *supra* Part II.B.

187. Trindade, *supra* note 142, at 583.

188. *Id.* at 584.

189. As to United States policy, the identification of clear human rights violations in tobacco promotion could and should change the invocation of § 301. Clearly, in light of such a grave threat to human health, trade imbalances alone should not dictate U.S. trade policy. See *supra* Part II.A.2 and note 25.

