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United States-Based Multinational Corporations Should be Tried in the United States for their Extraterritorial Toxic Torts

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I. INTRODUCTION

On December 3, 1984, a heavy cloud of methyl isocyanate (MIC) gas blanketed the city of Bhopal, India. The gas escaped from the Union Carbide India, Ltd. plant, a fifty-one percent-owned subsidiary of Union Carbide Corporation,[1] a United States-based manufacturer of chemicals, killing almost 2,000 people. The leak injured an additional 300,000 people, 17,000 seriously.[2] Indian citizens continue to attribute deaths to the disaster.[3] Residents of Bhopal report lung and eye problems, vomiting, boils, miscarriages, and severe anxiety, all, it is alleged, caused by the MIC gas.[4] Initially the world reacted to this disaster with shock. That shock turned to confusion and cynicism, however, as lawsuits piled up

1. *Bhopal, A Year Later: Union Carbide Takes a Tougher Line*, BUS. WK., Nov. 25, 1985, at 96 (hereinafter *Bhopal, A Year Later*).
2. *Id.* at 97.
3. *Id.* at 96.
4. *Id.* at 96-98.

and United States lawyers rushed to the scene.[5] Since the initial confusion, the Government of India, as representative of the injured people, has taken control of the multitude of suits filed. Although most of the United States suits were first consolidated in federal court in New York,[6] they were subsequently dismissed to India.[7]

Ironically, many Bhopal residents do not know the name of the company responsible for the plant and the lethal gas leak. They refer to the Union Carbide plant only as a factory that "belongs to America."[8] More and more companies that "belong" to United States-based multinational corporations (multinationals) are operating around the world. Direct investment by all multinationals is over $350 billion, with United States companies investing close to $170 billion.[9] Generally, the largest United States multinationals are oil companies and automobile manufacturers. In addition, several chemical companies have large interests outside the United States.[10]

The extent of the investments, coupled with increased activity, suggests that tragedies like the MIC gas leak may be repeated. Again, the injured parties will point the finger of blame at the foreign subsidiary of

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5. Harnett, *Are American Lawyers Hustling the Indian Tragedy?*, 14 THE BRIEF, Spring 1985, at 6.

6. In re Union Carbide Corp., 601 F. Supp. 1035 (J.P.M.L. 1985).

7. In re Union Carbide Corp., MDL No. 626 Misc. No. 21-38 (S.D.N.Y. May 12, 1986) (Lexis, Genfed library, Dist. file). The court used the test outlined in *Gulf Oil Corp. v. Gilbert*, *infra* note 13, and dismissed the action on grounds of *forum non conveniens*. *See infra* notes 14-18 and accompanying text. First, the court found that India provided an adequate alternative forum due to Union Carbide's amenability to process in India and the perceived ability of the Indian courts to handle complex litigation. Noting that most of the claimants, witnesses and documents were located in India, the court next declared that private interest factors overwhelmingly favored India as a forum. Finally, the court stated that because no United States interest existed that would justify the administrative and financial burden of hearing the cases in the United States, and because India had a strong interest in the matter, public interest factors favored moving the case to India. The court made the dismissal contingent upon Union Carbide submitting to the jurisdiction of Indian courts, waiving statute of limitation defenses, and agreeing to satisfy any judgment rendered by an Indian court so long as minimal due process requirements were met. The court further stipulated that discovery in the case was to be governed by the United States Federal Rules of Civil Procedure.

8. *Bhopal, A Year Later*, *supra* note 1, at 101.

9. O. FREEMAN, THE MULTINATIONAL COMPANY 2 (1981).

10. A. RUGMAN, D. LECRAW & L. BOOTH, INTERNATIONAL BUSINESS 14 (1985). The 1979 Fortune 500 study of the largest United States MNCs revealed that the top ten MNCs based on sales were Exxon, General Motors, Mobil, Ford Motor Co., Texaco, Standard Oil of California, Gulf Oil Co., International Business Machines, General Electric and Standard Oil of Indiana. E.I. DuPont de Nemours Co. ranked sixteenth.

a United States multinational. This is, therefore, a pivotal time in the field of international civil litigation. The United States Government must make certain policy decisions. First, it must decide the extent of its interests in the industrial activity of these United States-based foreign companies. Should the United States Government recognize an interest in regulating or monitoring the foreign subsidiaries, it must then consider whether the level of interest is sufficient to require subsequent complex litigation to be tried in United States courts. In turn, the United States courts must decide whether to review extraterritorial toxic tort cases or to dismiss them to foreign courts. If the United States courts retain jurisdiction, certain domestic procedural tools used in this country must be altered or amended to achieve fairness in this controversial, international litigation.

II. Can These Cases be Tried in the United States?

A. *Jurisdiction*

A multinational corporation based in the United States is subject to the personal jurisdiction of the state and federal courts sitting in any state with which the corporation has minimum contacts.[11] In addition, there must be adequate notice to all relevant parties to satisfy the requirements of due process.[12] Finally, all parties must meet the requirements of the appropriate federal or state jurisdictional statute. Ultimately, jurisdiction should not be controversial in these cases, unless the United States corporation can demonstrate that the foreign corporation responsible for the tort is a separate entity with no ties to the United States.

B. *Forum Non Conveniens*

Unfortunately for many foreign plaintiffs, adequate jurisdiction alone does not ensure that a claim filed in a United States court will, in fact, be tried in this country. The court could dismiss the claim to the place of the tort or to some other appropriate forum by using the doctrine of *forum non conveniens*. This doctrine allows a court to "resist imposition on its jurisdiction even when jurisdiction is authorized by the letter of a general statute."[13] The doctrine had no consistent pattern of use and application in the United States court system until 1947,[14] when the Su-

11. International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945).
12. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).
13. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).
14. Note, *Forum Non Coveniens: Standards for the Dismissal of Actions from*

preme Court decided *Gulf Oil Corp. v. Gilbert.*[15] The *Gilbert* Court formulated the standard for dismissal under *forum non conveniens* that courts still use today.

The *Gilbert* Court first required that the *forum non conveniens* doctrine be applied with flexibility: no single factor should always be dispositive.[16] The Court divided the relevant considerations into two categories: the private interests of the litigant and public interests. The private interests include:

> . . .the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial.[17]

These considerations must be balanced against public interests. The Court stated:

> Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the

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United States Federal Courts to Foreign Tribunals, 5 FORDHAM INT'L L.J. 533, 534 n.6 (1982).

15. 330 U.S. 501 (1947). The plaintiff, a resident of Virginia, brought suit in the Southern District of New York. He claimed that the defendant, a corporation organized under the laws of Pennsylvania and qualified to do business in both New York and Virginia, had mishandled a delivery of gasoline in violation of a Lynchburg, Virginia ordinance. The careless handling, the plaintiff said, caused an explosion and fire which destroyed the plaintiff's warehouse and merchandise and damaged the plaintiff's customers' merchandise. The defendant claimed that the proper forum for the trial was Virginia, where the plaintiff and most of the witnesses resided, the defendant did business, and the alleged tort occurred. The district court dismissed the case, viewing Virginia as the more appropriate forum. The circuit court of appeals reversed. The Supreme Court agreed with the district court, and reversed the circuit court of appeals. *Id.* at 502-03.

16. *Id.* at 508.

17. *Id.*

> case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[18]

Since 1947, the *Gilbert* decision has been modified and clarified. The Supreme Court formulated its most comprehensive post-*Gilbert forum non coveniens* discussion in *Piper Aircraft Co. v. Reyno.*[19] In *Reyno*, the Supreme Court addressed two distinct *forum non conveniens* issues: 1) the effect of less favorable law in the alternative forum upon dismissal, and 2) the weight afforded to a foreign plaintiff's choice of a United States forum. The court dismissed the notion that less favorable law in the alternative forum should automatically result in dismissal of a request for removal based on *forum non conveniens*, pointing out that previous decisions placed great importance on the flexibility of the *forum non conveniens* doctrine. Allowing one factor, such as the alternative substantive law, to take on elevated importance restricts the doctrine and prevents adequate consideration of other factors, such as convenience.[20] Moreover, the Court reasoned that a requisite conflict of laws analysis, followed by a value judgment as to which forum's law was actually more favorable to the plaintiff, would burden United States courts with increased delays.[21] Since the United States consists of fifty different state jurisdictions, a clever plaintiff could choose one with very favorable law, making dismissal virtually impossible.[22] The Court noted that, except for the district court in *Reyno*, no post-*Gilbert* court had allowed dismissal on *forum non conveniens* grounds simply because the law of the alternative forum was less favorable to the plaintiff.[23] The Court qualified its holding by acknowledging one possible result. The Court stated:

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18. *Id.* at 508-09.

19. 454 U.S. 235 (1981). Reyno was the representative of several persons, citizens and residents of Scotland, who were killed in the crash of a charter aircraft over Scotland. Reyno initiated a wrongful death action in California state court against the Pennsylvania airplane manufacturer and the Ohio propeller manufacturer. The aircraft was registered in Great Britain. Companies organized in the United Kingdom owned and operated the plane. Reyno sought recovery on the basis of strict liability (which is not recognized under Scottish law) or negligence. The district court dismissed the case, viewing Scotland as the more appropriate forum. The court of appeals reversed stating that the district court had abused its discretion in its application of the *Gilbert* analysis and that dismissal was automatically barred when the law of the alternative forum was less favorable. The Supreme Court reversed the court of appeals and allowed dismissal to Scotland. *Id.* at 238-46.

20. *Id.* at 249-50.

21. *Id.* at 251-52.

22. *Id.* at 252.

23. *Id.* at 250.

> We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, 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 the law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.[24]

The Supreme Court next examined the district court's use of the *Gilbert* analysis. Simply stated, the district court acknowledged that ordinarily there is a strong presumption in favor of the plaintiff's choice of forum. The court held, however, that this presumption was rebuttable if review of the private and public interest factors listed in *Gilbert* indicated the appropriateness of an alternative forum. Finally, the district court stated that the presumption favoring the plaintiff's choice of forum carries less force when the plaintiff is foreign.[25] The Supreme Court held that the district court had correctly distinguished between a citizen or resident plaintiff and a foreign plaintiff.[26] Specifically, the Court stated, "Because 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."[27]

Since the *Reyno* decision, the courts' acceptance of the foreign plaintiff/citizen plaintiff distinction is inconsistent. In *Pain v. United Technologies Corp.*,[28] the D.C. Circuit held that United States citizens or residents, or persons enjoying the benefits of equal access treaties, should

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24. *Id.* at 254.

25. *Id.* at 255.

26. *Id.*

27. *Id.* at 256.

28. 637 F. 2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). A helicopter owned by a Norwegian corporation crashed into the North Sea approximately 87 miles from its takeoff point in Norway. People killed in the crash included a French citizen and domiciliary, a Norwegian citizen and resident, a British citizen and resident, an American citizen who resided in Norway and a dual Norwegian-Canadian citizen whose residence was in Norway. The Norwegian Civil Aviation Administration conducted an investigation of the crash. The defendant, United Technologies Corp., a Delaware corporation with its principal place of business in Hartford, Connecticut, manufactured the helicopter and were participants in the investigation. All witnesses, records and documents from the investigation were located in Norway. The decedents' survivors brought five wrongful death suits in federal district court. Only one of the plaintiffs was a United States citizen. The owner-operator of the helicopter had no contacts with the United States and, therefore, escaped the personal jurisdiction of the court. The district court judge granted United Technologies Corp.'s *forum non coveniens* motion and the court of appeals affirmed. *Id.* at 778-79.

receive no preference in selecting a United States forum.[29] The court explained that citizenship was not dispositive in the *Gilbert* test, but, rather, was one of the "convenience" factors to be considered.[30] Based on this interpretation of *Gilbert*, the *Pain* court outlined a *forum non conveniens* inquiry based on the earlier case's analysis. The D.C. Circuit presented a four-step analysis:

> 1) The court must determine whether an alternative forum exists which possesses jurisdiction over the entire case. 2) The court must consider all relevant *private* interest factors, giving significant weight to plaintiff's initial choice of forum. 3) If the trial judge finds this balance of private interests to be in equipoise or near equipoise, the court must determine whether the public interest factors tip the balance in favor of a trial in a foreign forum. 4) If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.[31]

Since *Reyno*, other lower federal courts have taken a course different from that of the *Pain* court. In *Gates Learjet Corp. v. Jensen*,[32] the court held that when the plaintiff selects his home forum, that choice deserves greater deference.[33] Specifically, a United States citizen enjoys a strong presumption in favor of his choice of United States forum. In *Friends for All Children v. Lockheed Aircraft Corp.*,[34] the D.C. Circuit held that the district court had improperly applied a strong presumption in favor of the foreign plaintiffs' choice of forum. Because that error might have marred the district court's entire *Pain* analysis, the D.C. Circuit conducted a *de novo* review and denied the *forum non con-*

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29. *Id.* at 795-96. "Equal access treaties" put foreign plaintiffs on equal jurisdictional footing with their United States counterparts. Examples of such treaties include: Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Friendship, Commerce, and Consular Rights, Dec. 24, 1952, United States-Finland, art. I, 4 U.S.T. 2047, 2052, T.I.A.S. No. 2861; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. VI, 7 U.S.T. 1839, 1845, T.I.A.S. No. 3593; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. III, 14 U.S.T. 1284, 1288-90, T.I.A.S. No. 5432. A person affected by such a treaty should not be considered "foreign" for purposes of *Reyno*. Note, *Forum Non Coveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, 6 FORDHAM INT'L L.J. 577, 578, 590-91 nn. 77-82.

30. 637 F.2d at 797.

31. *Id.* at 784-85.

32. 743 F.2d 1325 (9th Cir. 1984).

33. *Id.* at 1335.

34. 717 F.2d 602 (D.C. Cir. 1983).

veniens motion.

Any *forum non conveniens* inquiry involves a balancing of the interests of the plaintiff, the defendant, and the forum.[35] It is necessary, therefore, to consider the effect of a defendant's request for dismissal from his home forum on a *forum non conveniens* decision. In *Manu International, S.A. v. Avon Products, Inc.*,[36] the Second Circuit held that the residence of the parties, although not dispositive, was a relevant factor. The fact that the plaintiff chose the defendant's home forum, the court continued, should weigh heavily against dismissal to another forum.[37] The court explained:

> It is almost a perversion of the *forum non conveniens* doctrine to remit a plaintiff, in the name of expedience, to a forum in which, realistically, it will be unable to bring suit when the defendant would not be genuinely prejudiced by having to defend at home in the plaintiff's chosen forum.[38]

How does the current case law on *forum non coveniens* apply to a plaintiff's ability to sue a United States multinational in a United States court for an extraterritorial toxic tort? The first determination is the availability of an adequate alternative forum. No alternative forum exists, for example, if the appropriate foreign court lacks jurisdiction over the case.[39] If the statute of limitations has run in the other forum, there is no true alternative.[40] Further, no alternative forum exists if the foreign forum will not allow litigation of the particular subject matter of the case.[41] At least one court has also held that no alternative forum exists if the forum court will dismiss the case on the merits.[42]

Interestingly, the contingent fee system in the United States may render alternative forums inadequate and dismissal inappropriate. In *Fi-*

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35. Note, *supra* note 14, at 542.

36. 641 F.2d 62 (2d Cir. 1981). The plaintiff, a Belgian corporation sued the defendant, a New York corporation with its principal offices in New York, for fraud that allegedly occurred in Taiwan.

37. *Id.* at 67.

38. *Id.*

39. Nai-Chao v. Boeing Co., 555 F. Supp. 9, 15 (N.D. Cal. 1982), *aff'd sub. nom.*, Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir.), *cert. denied sub. nom.*, Nai-Chao v. Boeing Co., 464 U.S. 1017 (1983).

40. Petroleum Helicopters de Columbia, S.A. v. Textron, Inc., 15 Av. Cas. (CCH) 18,112, 18,113 (D.D.C. 1980).

41. Laker Airways, Ltd. v. Pan Am. World Airways, 568 F. Supp. 811, 817 (D.D.C. 1983), *aff'd*, 731 F.2d 909 (D.C. Cir. 1984).

42. Day & Zimmerman, Inc. v. Exportadora Salcedo de Elaboradoros de Cacao, S.A., 549 F. Supp. 383, 384-85 (E.D. Pa. 1982).

orenza v. United States Steel International, Ltd.,[43] the district court held that the plaintiff's ability to obtain United States counsel on a contingent basis was one of the chief factors in its decision to deny the defendant's *forum non conveniens* motion.[44] Because the alternative forum required a $5,000-10,000 retainer, plus costs, in advance,[45] its availability to the indigent plaintiff was uncertain.[46] The court found no adequate alternative and denied the motion for dismissal.

A plaintiff in a toxic tort suit could also argue that no adequate alternative forum exists because the United States has unique environmental regulations and a negative public perception of toxic torts.[47] A foreign court might not recognize the cause of action, or might dismiss the cause on the merits. The contingent fee argument advanced in *Fiorenza* could tip the balance in favor of the United States forum, especially if the courts or public perceive the multinational as taking advantage of indigent plaintiffs who cannot afford legal recourse.

Additionally, a foreign court may be an inadequate forum because the social or political climate adversely influences the judiciary or other crucial parties. Courts which have actually found a foreign forum to be inadequate because of such factors have done so based upon "compelling facts."[48] In *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A.*,[49] for example, the court refused to remove the case to Chile because it feared that the courts were under the influence of the ruling junta.[50] Similarly, in *Rasoulzadeh v. Associated Press*,[51] the court refused to dismiss the case to Iran for fear the plaintiff would be shot by Iranian mullahs if he returned to that country.[52]

If the court decides that an adequate alternative forum is available, it will examine the private interests of the litigant. For example, because a United States-based multinational is the defendant, witnesses and evi-

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43. 311 F. Supp. 117 (S.D.N.Y. 1969).

44. *Id.* at 120.

45. *Id.* The alternative forum proposed by the defendant was Grand Bahama Island. *Id.*

46. The plaintiff had also been unable to work since his accident, allegedly caused by the defendant. *Id.*

47. *See* McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 TEX. INT'L L.J. 333, 333 (1985).

48. Planbeck, *The Razor's Edge: The Doctrine of Forum Non Conveniens and the Union Carbide Methyl Isocyanate Gas Disaster at Bhopal, India*, 10 N.C.J. INT'L L. AND COM. REG. 743, 751 (1985).

49. 528 F. Supp. 1337 (S.D.N.Y. 1982).

50. *Id.* at 1342-43.

51. 574 F. Supp. 854 (S.D.N.Y. 1983).

52. *Id.* at 861.

dence could be located in the United States. Further, because important corporate documentation may be in English, a United States forum would encounter no translation problem.

The court will balance these private interests against the public interest factors suggested in *Gilbert*. Specifically, the defendant may point to the congested condition of the United States courts. The Ninth Circuit has stated, however, "[t]he real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket."[53] When the case is closely connected with the forum, burdens such as jury duty may be outweighed by benefits such as the public's first-hand view of the trial. The court should also consider the United States' interest in regulating the foreign activity of multinationals domiciled within its borders,[54] particularly when the corporation pursues similar domestic enterprises within the United States.

Should the public and private interests balance, the court may proceed to the fourth step described in *Pain* and decide whether or not the plaintiff may bring the suit in the alternative forum without undue prejudice or inconvenience.[55] Factors such as high court costs, lack of contingent fees, and the social and political climate of the alternative forum must be reconsidered.

The outcome of a *forum non conveniens* motion will depend upon the facts of each case. In general, if a United States citizen is injured by the extraterritorial toxic tort of a United States multinational, he will almost certainly be able to defeat a motion to dismiss.[56] In the more difficult situation where a foreign citizen is injured, *Gilbert* provides a test to determine the appropriate forum. Even if the plaintiffs cannot effectively argue the inadequacy of the foreign forum, the United States' interest in applying its legal resources and in monitoring the legal activity of the multinationals favors retaining jurisdiction within the United States.

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53. Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1337 (9th Cir. 1984).

54. Ring, *American Law: The Victims' Only Hope*, 14 THE BRIEF, Spring 1985, at 10, 13.

55. Pain v. United Technologies Corp., 637 F.2d 775, 785 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

56. Note, *supra* note 14, at 544-45. Specifically, the note discusses Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684 (1950), in which the Supreme Court supported the proposition that a United States citizen should be able to seek justice in his home courts.

III. Should These Cases Be Tried in the United States?

A. *Forum Shopping*

Although there are valid legal grounds for trying a suit in United States courts, conflicting policy considerations may mitigate availability. Specifically, United States courts may dismiss cases to discourage plaintiffs from forum shopping. United States courts, in general, are the most favorable forums for a plaintiff in the world. Together the federal and state jurisdictions provide over fifty bodies of law. If a plaintiff can demonstrate minimum contacts between the multinational and the forum most favorable to his case, he can bring suit in the chosen jurisdiction. In addition, juries, which are available in the United States, are nonexistent in civil law countries and relatively rare in the United Kingdom.[57] Juries in the United States generally place a high value on human life and deplore suffering. The relatively high awards given for pain and suffering and punitive damages reflect this attitude.[58] Further, United States courts allow attorneys to collect contingent fees and do not require losing parties to pay their opponents' attorneys' fees. These arrangements, unique to the United States, lessen the financial disincentives inhibiting a plaintiff. Finally, federal and state discovery rules are extensive in the United States.[59]

The United States forums are particularly hospitable to tort liability actions. The liberal procedural rules (i.e., class actions and extensive discovery) favor the plaintiff over the defendant. In addition, federal and state substantive rules, such as strict liability, facilitate proof of liability and collection of damages.

One way to discourage forum shopping is to make the United States forums less attractive to the plaintiff. Specifically, the courts can apply the substantive law of the place the tort occurred, thus partially undercutting the advantages of the United States forum.[60] Two attractions of the United States court system to plaintiffs filing personal injury suits against United States multinationals for extraterritorial toxic torts are the generous damages and the contingent fee system.[61] If the federal or state legislatures eliminated one or both of these factors by statute, fewer foreign plaintiffs would file their claims in the United States.

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57. Piper Aircraft Co. v. Reyno, 454 U.S. 235, at 252 n.18 (1981).

58. Besharov & Reuter, *Tort Laws Hobble U.S. Business Abroad*, Wall St. J., Oct. 28, 1985, at 22, col. 2.

59. Piper Aircraft Co. v. Reyno, 454 U.S. at 252 n.18 (1981).

60. Besharov & Reuter, *supra* note 58, at 22, col. 5.

61. *Id.* at 22, col. 4.

Legal and other observers have expressed dissatisfaction and even alarm at the liberal damages awarded by United States juries. For example, juries awarded over 250 one million dollar verdicts in personal injury cases from 1970 to 1977.[62] In addition, the frequency of awards is increasing: in 1982 alone, juries again awarded 250 one million dollar verdicts.[63] Legal commentators accuse juries of irresponsibility in setting the amounts of awards.[64] In practice, defendants may accept large settlements to avoid the whims of United States juries.[65]

One suggested reform to curb escalating damage awards and to lessen the hardship on defendants is the imposition of a maximum figure or "cap" on the amount of damages a jury may award a plaintiff.[66] Presently, the only real limit on damages is remittitur,[67] a device which courts have not often utilized during the 1970s and 1980s.[68] A "cap" which is set low enough to discourage forum shopping may result in instances of unfairly small plaintiff awards. Arguably, this is a sacrifice worth making to preserve the credibility of United States juries and to prevent a deluge of disaster claims in United States courts.[69]

Despite the arguments to limit damage awards, certain policy considerations support complete jury discretion. Specifically, a trier of fact should determine damages because (1) the injured party is entitled to full compensation for his injuries; (2) the party who breaches his duty is responsible for all of the consequences that flow from his actions; (3) our legal system places the risk of uncertainty in the amount of damages on the tortfeasor; and (4) defendants may reduce their risk by purchasing liability insurance.[70] Together, these assumptions about the United States legal system support the trier of fact as arbiter of the award.

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62. Wallace, *The Expanding Cost of Tort Litigation*, 52 VIT. SPEECHES DAY 79, 80 (1985).

63. *Id.*

64. Cooper, *Should There Be a Cap on Personal Injury Awards?*, 64 MICH. BAR. J. 135, 137 (1985).

65. *Id.* at 138.

66. *Id.*

67. FED. R. CIV. P. 59, 28 U.S.C. App. at 628 (1983). The power of remittitur allows a court to reduce the amount of damages which the jury awarded. This is done only when the amount of the award is so excessive as to indicate prejudice, corruption or other improper influence. As an alternative to remittitur, Rule 59 allows a new trial under these circumstances. *See, e.g.*, T.D.S. Inc. v. Shelby Mutual Insurance Co., 760 F.2d 1520, 1530 (11th Cir. 1985).

68. *See* Cooper, *supra* note 64, at 137.

69. *Id.* at 137-38.

70. Schwartz, *Should There Be a Cap on Personal Injury Awards?*, 64 MICH. BAR. J. 135, 136 (1985).

One reason for awarding damages in a personal injury action is to restore the plaintiff to the status he enjoyed before the injury.[71] "Capped" damages which do not correspond in amount to the extent of injuries suffered[72] are inconsistent with this principle of tort law. Under the present system, if the jury award is too high or low, the court can use the power of remittitur to adjust the amount of the award.[73] The multi-million dollar damage award is, in fact, rare. Nearly eighty percent of personal injury disputes involve amounts less than $50,000 and some ninety percent of cases are resolved in settlement.[74] The damages awarded, corrected for inflation, are not much different from damages awarded twenty years ago.[75] A "cap" on damages also threatens to violate the equal protection clause and due process clause of the United States Constitution.[76] A "cap" would also remove the element of mutual uncertainty, disrupting the equal bargaining position which allows plaintiffs and defendants to settle fairly and efficiently.[77] Although a "cap" on damage awards may discourage forum shopping it may unacceptably conflict with basic assumptions of our legal system.

Elimination of the contingent fee system would also make United States forums less attractive to foreign plaintiffs. The main criticism of this system, in which an attorney agrees to accept a percentage of the damages awarded rather than charge a flat fee, is that by placing the plaintiff in a "no lose" situation, it encourages people to sue in the United States courts. Moreover, lawyers eager to win large contingent

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71. Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L. J. 965, 965 (1985).

72. Schwartz, *supra* note 70, at 135.

73. *Id.* at 136. The court has no power to increase the amount of damages awarded by a jury. The Supreme Court of the United States has held that action unconstitutional as a violation of the defendant's right to the verdict of a jury. Dimick v. Schiedt, 293 U.S. 474, 479-83 (1935).

74. Schwartz, *supra* note 70, at 136 (citing a study by the University of Wisconsin referred to as the Civil Litigation Research Project). Over 50% of all cases deal with disputes involving less than $10,000. Only 12% involve claims over $50,000. *Id.*

75. *Id.*

76. *See, e.g.*, Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (a $250,000 statutory limit on the amount of damages medical malpractice insurers would be required to pay for pain and suffering or other noneconomic loss violated the equal protection clause of the Fourteenth Amendment because it prevented only the most seriously injured plaintiffs from obtaining full recovery); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976) (a $200,000 statutory limit on the damages awardable in any medical malpractice action was held to violate the equal protection clause of the Fourteenth Amendment because it unfairly favored a troubled medical profession over the injured plaintiff).

77. Schwartz, *supra* note 70, at 138.

fees may "recruit" plaintiffs, a practice which both encourages litigation and is unethical under ABA standards. An extraterritorial toxic tort with the accompanying large numbers of plaintiffs and high damage awards will attract fee-motivated attorneys. The MIC gas leak in Bhopal evinced that undesired behavior among United States lawyers.[78] The contingent fee system has one inherent advantage. Potential plaintiffs who do not have significant financial resources can file a claim and participate in the judicial system. In order to maintain this advantage to plaintiffs but to correct the system's flaws, the contingent fee system requires a built-in "cap" limiting attorneys' fees. Reducing the attorney's percentage of the fee as the award increases is one method of limiting the fee. Attorneys are, therefore, compensated for the extensive preparation time required by a tort case, but are faced with diminishing extravagant returns to awards. The "cap" partially discourages the filing of frivolous suits in the United States courts.

This traditional discussion of forum shopping, focusing on the plaintiff's attempts to get a favorable verdict and a large damage award, may not be on point when the defendant is a United States multinational responsible for an extraterritorial toxic tort. In that instance, the plaintiff's goal may not be the largest award possible, but the *only* award possible. Are the defendants trying to escape a legal system skewed against them, or are they running from their legitimate legal responsibility? United States-based multinationals actually consider the available forum as one factor influencing the corporate decision to locate outside the United States. Specifically, extensive environmental, health, and safety regulations result in a high cost of doing business in the United States. The multinationals "begin to 'forum shop' for countries with lax health and environmental laws, where workers are forced by day-to-day economic exigencies to work without risk premiums."[79] The justice unique to a United States court outweighs the potential exploitation of the system by forum shopping.

Even if the legislature limits the amount of compensatory and punitive damages that a plaintiff may receive, the United States remains an attractive plaintiffs' forum. The United States' social policy concerns for health and the environment result in a hospitable if not lucrative forum. The victims of toxic torts will, therefore, file their claims in United States courts and the multinationals will continue to seek dismissal. Considering concerns for health and the environment, nothing short of elimi-

78. Harnett, *Are American Lawyers Hustling the Indian Tragedy?*, THE BRIEF, Spring 1985, at 6.

79. McGarity, *supra* note 47, at 333.

nation of the contingent fee system or an extreme limit on damages would significantly diminish the United States' attractiveness to plaintiffs looking for the optimal forum.

B. *Case Load*

Parties who move to dismiss a case from a United States court often agree that the overloaded dockets and accompanying delays are unacceptable. A civil case filed in a major metropolitan area may take up to five years to get to a jury trial. Trials within a year of filing are rare.[80] Delays in other countries, however, can be as long or longer. India, for example, has relatively few judges and delay-vulnerable procedural law, factors creating an inevitable backlog.[81] A comparison of the case loads of the alternative forums is, therefore, the more relevant inquiry.[82]

In addition to a lighter case load, United States courts have proven their ability to handle mass disaster cases. Procedural tools such as the class action, consolidated actions, and offensive collateral estoppel allow the courts to try a large complex case efficiently in the United States.[83] Because United States courts are well-equipped to handle a disaster such as a toxic tort and because the case load is relatively smaller than in other countries such as India, domestic forums are optimal.

IV. If These Cases Are Tried in the United States, Should Discovery be Limited?

Discovery in the United States is very liberal compared to that allowed in other countries. A party may require that the opposing party provide all information which "appears reasonably calculated to lead to the discovery of admissible evidence."[84] According to the *Restatement of Foreign Relations Law of the United States*, a United States court can order a person before it to produce necessary evidence, even if it is lo-

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80. A.B.A. Action Commission to Reduce Costs and Delays, Attacking Litigation Costs and Delays (1984).

81. In re Union Carbide Corp., 634 F. Supp. 842, 848 (S.D.N.Y. 1986). The procedural law in India apparently allows for mid-hearing adjournments as well as multiple interlocutory and final appeals. The potential for delays and resulting backlogs appears even greater in light of the fact that India has only 10.5 judges per million population, compared to the United States, which has 107 judges per million population. *Id.* at 848 n.6.

82. *See supra* note 53 and accompanying text.

83. Ring, *supra* note 54, at 12. The author points to the relatively quick trial of such mass disasters as the Three Mile Island accident, the Agent Orange cases, the MGM Grand Hotel fire, and the Hyatt Skywalk disaster as proof of this point. *Id.* at 13.

84. 28 U.S.C. App. at 571 (1983).

cated outside the United States. Failure to comply results in sanctions.[85] Unfortunately, this power of the court is easily abused and is frequently used as a tactical weapon in litigation. For example, discovery requests can prolong litigation, resulting in an unavoidable and significant dollar investment. In addition, attempts to block discovery requests also require time and money.[86]

The potential for abuse as well as the invasive nature of United States discovery has led many foreign countries to view the process with hostility.[87] Frequently, a great disparity exists between the information that the United States demands and the information that the other country is willing to require the party to release. The United States is perhaps the only nation that does not view unilateral extraterritorial discovery as a violation of international law.[88] In response to United States discovery procedures, many countries have enacted "blocking statutes" which prohibit "the disclosure, copying, inspection or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities."[89] Although the statutes vary with respect to which documents are covered, which officials may invoke them and when they apply, all blocking statutes involve penal sanctions.[90] Many of these statutes were enacted for the specific purpose of countering investigations or litigation arising in the United States.[91]

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85. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 420(1)(a) & (b) (Tent. Draft No. 3, 1982) (hereainfter RESTATEMENT). If the person makes a good faith effort to secure the evidence, but the state where the evidence is located views disclosure as illegal, sanctions may not be imposed, although the court may make findings of fact adverse to that party. *Id.*, § 420(2).

86. Wallace, *supra* note 62, at 80.

87. RESTATEMENT, *supra* note 85, § 420, reporter's note 1, at 18.

88. Rosenthal & Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery*, 16 N.Y.U.J. INT'L L. POL. 1075, 1075 (1984).

89. RESTATEMENT, *supra* note 85, § 420, reporter's note 3, at 20-21.

90. *Id.* This source also discusses several specific blocking statutes.

91. *Id.* at 22. One such statute is the Business Records Protection Act, 1947, ONT. REV. STAT. ch. 56 (1980), passed in response to an order that Canadian newsprint companies doing business in New York produce documents for a United States court. Litigation involving Westinghouse uranium contracts motivated Canada to enact the Atomic Energy Control Act, 1970, CAN. REV. STAT. ch. A-19, and the Uranium Information Security Regulations, STAT. O. & REGS. 76-644 (1976), which prohibit any party from producing documents describing uranium marketing activities from 1972 through 1975. This body of law also prohibits oral testimony which would reveal the contents of such documents. Yet another example was the widespread response to a United States court order requiring foreign oil companies to produce certain documents. The governments of France, the United Kingdom, the Netherlands and Italy issued counter-orders forbidding the export of these documents. The furor died down when the court vacated the subpoe-

Currently, United States courts tend to limit discovery in transnational litigation.[92] The Restatement "imposes conditions of self-restraint on U.S. foreign discovery, whether or not a foreign law might apply to block it."[93] Toward this end, the Restatement places two important limitations on the ability of a United States court to compel evidence from abroad. First, a court, not a government agency or private party, must issue the order to compel discovery. Second, the test of relevancy and necessity is more strict than it would be if the evidence were located in the United States.[94] The requirement of a court order for foreign discovery controls the scope of a request for documents and ensures that the standard of "reasonableness" will be applied to the request.[95] The Restatement identifies certain elements of reasonableness including

> the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; in which of the states involved the documents or information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.[96]

Should the court issue an order compelling discovery, the party receiving the order must either produce the information or face the possibility of court-imposed sanctions.[97] Sanctions could involve dismissal of a claim or defense, or a finding of relevant facts adverse to the non-producing party. Although certain courts have threatened to do so, none have fined or imprisoned a foreign national for failure to comply with a court-ordered

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nas, but the Netherlands chose to prevent future similar incidents by enacting the Economic Competition Act of June 28, 1956, as amended by Act of Nov. 14, 1958, Art. 39 prohibiting any act of compliance with a foreign court if that act affected economic competition. *See* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE HELD AT TOKYO 565 (1965); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612, 613 n.5 (1979).

92. von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, 3 DICK. J. INT'L L. 43, 50 (1984).

93. Rosenthal, *supra* note 88, at 1087 (discussing § 420(1) of the RESTATEMENT, *supra* note 85).

94. RESTATEMENT, *supra* note 85, § 420, comment a, at 14-15. The evidence may actually be limited to that which is necessary to the case and directly relevant. Generally, then, evidence properly produced under this procedure will be admissible. *Id.*

95. *Id.*, § 420, reporter's note 2, at 20. The "United States position" that those who bring themselves within the jurisdiction of the United States, whether by doing business or otherwise, must experience the burden as well as the benefits of United States, is tempered with this concept of reasonableness. *Id.*, § 420, reporter's note 1, at 19.

96. *Id.*, § 420(1)(c).

97. *Id.*, § 420(1)(b).

discovery.[98]

The Restatement also describes the proper process for compelling discovery when the relevant foreign country enacts blocking laws.[99] The Restatement specifies that the party ordered to produce the information must make a "good faith effort" to have the blocking statute waived or avoid application of the law in some other way.[100] In the absence of a good faith effort to secure the information, the court may impose the sanctions of contempt, dismissal, or default.[101] The Restatement provides, however, that even if a party makes a good faith effort to cooperate with the court, the court may make findings of fact adverse to the party if the party's efforts were unsuccessful.[102] Although the Restatement does impose certain boundaries on discovery, it retains the underlying presumption that foreign blocking statutes are bad because they hinder United States-style discovery.[103]

The United States has also ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention)[104] which, although relatively untested, is enjoying increased use as authority for compelling the production of evidence from abroad.[105] The treaty, in short, provides:

> In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.[106]

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98. *Id.*, § 420, reporter's note 7, at 26.

99. *Id.*, § 420(2).

100. *Id.*, § 420(2)(a). Neither the Restatement nor relevant case law defines "good faith effort." Rosenthal, *supra* note 88, at 1094-97.

101. RESTATEMENT, *supra* note 85, § 420(2)(b). *But see supra* note 95 and accompanying text.

102. RESTATEMENT, *supra* note 85, § 420(2)(c); *see supra* note 95 and accompanying text.

103. Rosenthal & Yale-Loehr, *supra* note 88, at 1099.

104. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter Hague Convention]. As of 1986, the treaty had been signed by 17 states. Treaties Affairs Staff, Office of the Legal Advisor, U.S. Dept. of State, Pub. No. 9433, Treaties in Force (1986).

105. von Mehren, *supra* note 92, at 54-55.

106. Hague Convention, *supra* note 104, art. 1.

The Hague Convention states that the judicial authority issuing a Letter of Request may apply its domestic law to determine the applicable methods and procedures. If the requesting authority asks that a special method or procedure be used, the executing authority is compelled to comply unless the method is illegal, impractical or procedurally impossible in the executing country.[107] For example, the relevant executing official may refuse to execute a Letter of Request if the State considers its sovereignty threatened, or if the execution does not fall within the function of the judiciary of that State.[108] In addition, the specific person requested to give evidence may refuse to do so if the information is considered privileged in the State of origin, the State of execution, or any other State specified by the executing state.[109]

One provision of the Hague Convention could severely limit transnational discovery in United States litigation. Article 23 provides: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."[110]

The discovery of evidence outside the United States needs to be limited, if only to conform to the norms of international law which prescribe the scope of inquiries and requests for documents. Even when the discovery process is not abused *per se*, other nations often consider United States procedure a "fishing expedition."[111] Blocking statutes, however, are not a suitable remedy. Although they limit the extent of discovery conducted abroad, they could leave a foreign national doing business in the United States unable to defend himself in a United States court.[112] The Hague Convention is good in theory but perhaps goes too far in permitting a nation to refuse to require its national to produce evidence and otherwise participate in pre-trial discovery. The Restatement's position seems to be the best solution. It allows discovery abroad but limits it to evidence actually needed for the trial.[113]

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107. *Id.*, art. 9.

108. *Id.*, art. 12. The State of execution may not refuse to execute solely because it claims exclusive jurisdiction over the subject matter of the case or does not recognize the cause of action. *Id.*

109. *Id.*, art. 11.

110. *Id.*, art. 23.

111. RESTATEMENT, *supra* note 85, § 420, reporter's note 1, at 19.

112. von Mehren, *supra* note 92, at 49-50.

113. *See id.* at 50-51.

V. CONCLUSION

When a foreign plaintiff sues a United States-based multinational for damages resulting from an extraterritorial toxic tort, the case should be tried in United States courts. The courts are assured of personal jurisdiction as long as there are sufficient contacts between the foreign subsidiary and the United States. Dismissal on grounds of *forum non conveniens* is not desirable because the United States has a vested interest in monitoring and even influencing the behavior of multinationals that do business within its borders. The requisite "adequate alternative forum" is simply not available in some countries. In addition, despite their case backload, United States courts are relatively unfettered when compared with foreign courts. The availability of juries, the existence of efficient procedures and the contingent fee system make the United States a natural forum for large-scale litigation by non-corporate plaintiffs. Allowing plaintiffs to litigate these cases in United States courts will encourage forum shopping unless attorneys' fees are limited, damages are "capped," or both. Since limiting damages puts the plaintiff in an inferior bargaining position and may deprive him of adequate compensation for his injuries, limiting attorneys' fees is a better way to discourage forum shopping. Finally, one United States procedure that will have to be modified to accommodate trials of extraterritorial toxic torts is discovery. In the interests of fairness and international goodwill, our liberal discovery rules must be tightened.

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