COMMENTS

PARENS PATRIAE REPRESENTATION IN TRANSNATIONAL CRISES: THE BHOPAL TRAGEDY*

INTRODUCTION

On December 3, 1984, poisonous methyl isocyanate gas leaked from holding compartments of Union Carbide's chemical plant located in Bhopal, Madhya Pradesh, India. As a result, more than two thousand nearby residents were killed, and approximately two hundred thousand more were injured.[1] Legal chaos ensued. Attorneys from twenty-nine American law firms were soon at the scene, aggressively sequestering victims and subsequently filing claims for over $250 billion in damages in the United States against Union Carbide.[2] Indian lawyers, while not as prominent as their United States counterparts, also began filing claims in India.[3] To further complicate the matter, in March 1985, the Indian government passed a statute appointing itself the exclusive representative for the victims,[4] and pursuant thereto filed claims against Union Car-

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* On May 12, 1986, the presiding judge dismissed the case against Union Carbide on *forum non conveniens* grounds. Hiltzik, *U.S. Judge Returning Bhopal Case to India*, L.A. Times, May 13, 1986, Part I, at 1, col. 3. Despite the dismissal, the issue of *parens patriae* representation in transnational torts must still be addressed as a similar case is bound to arise in the future. Significantly, U.S. District Judge John F. Keenan did not rule on the applicability of *parens patriae*, leaving its use in this type of case uncertain. This article focuses on the only case in which this issue has arisen to date.

1. Diamond, *U.S. Lawyers Plan Suit To Keep Bhopal Clients*, N.Y. Times, Apr. 4, 1985, at D1, col. 1.

2. Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 290 (1985). The United States attorneys arrived on the scene as early as December 11, 1984. Stevens, *U.S. Lawyers are Arriving to Prepare Big Damage Suits*, N.Y. Times, Dec. 12, 1984, at A10, col. 3. Among the legal teams who filed suit were: Melvin Belli, a class action suit for $15 billion; Gould & Sayre, a class action for $20 billion; Coale & Associates, $10 billion; Mr. Musselwhite, $50 billion; Kenneth Ditkowsky, $50 billion; and David Jaroslawicz, $20 billion. Dhavan, *For Whom? And For What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L.J. 295, 304 (1985); Stevens, *supra*, at A10, col. 3.

3. Dhavan, *supra* note 2, at 299. The Madhya Pradesh Congress Legal Aid Committee filed 120 cases totaling over 200,000 rupees on behalf of each victim against Union Carbide. *Id.* By March, 1985, about 2,000 individual claims were filed and the Legal Aid Society had plans to file 36,000 more. Galanter, *supra* note 2, at 290.

4. The Bhopal Gas Leak Disaster (Processing of Claims) Ordinance, 1985 [hereinafter cited as Act], reproduced *infra* at Appendix A.

bide in the United States.[5]

This scenario demonstrates that all interested parties were not equipped to begin organizing the legal problems presented by the crisis. Effective mechanisms for instituting orderly legal proceedings did not exist. The Indian government appeared to be the first to contemplate organized litigation when it passed the statute making itself the representative for all victims. Acting in a *parens patriae*[6] capacity for the claimants, India believed it could best serve its citizens' interests by seeking relief in United States courts.[7]

However, India's attempt to unite the scattered efforts for remedies was thwarted. India's statute appeared to grant its government *parens patriae* status, a common law method of representation used in various contexts in United States courts. But, no American court had yet allowed a foreign sovereign to act as *parens patriae* in United States proceedings. The existing precedents seemed to preclude India's attempt to represent its citizens. However, this was a case of first impression which required resolution to disentangle the confusion resulting from the lawsuits filed. Hence, a new question was presented to United States courts: Should a foreign government have standing to sue in American courts as *parens patriae* representative for its citizens when the law of that country so permits?

This Comment will first examine the development of American *parens patriae* law, both within the United States and with regard to foreign sovereigns, in order to demonstrate the ambiguities which confronted the Bhopal litigants.[8] Second, it will discuss the peculiar circumstances of the Union Carbide case in light of American *parens patriae* law and the Indian statute purporting to grant the Indian government such status.[9] Third, it will show that the Indian statute in fact satisfied the American *parens patriae* requirements. Finally, it will examine relevant policy concerns and transnational legal principles in order to formulate guidelines for other countries which will surely endeavor to act as *parens patriae*.[10]

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5. Lewin, *Carbide is Sued in U.S. by India in Gas Disaster*, N.Y. Times, Apr. 9, 1985, at A1, col. 5. Subsequently, attorneys from several United States law firms filed suit in India to prevent the Indian government from representing the victims. Diamond, *supra* note 1, at A1, col. 1.

6. *Parens patriae* literally means "parent of the country." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

7. Lewin, *supra* note 5, at D1, col. 1.

8. *See infra* notes 11-73 and accompanying text.

9. *See infra* notes 74-98 and accompanying text.

10. *See infra* notes 99-160 and accompanying text.

I. THE DEVELOPMENT OF PARENS PATRIAE LAW IN THE UNITED STATES

Parens patriae issues arise when a governmental entity attempts to represent its citizens' claims in one consolidated legal proceeding. In the United States, *parens patriae* has undergone varied applications in diverse contexts. The principle has developed primarily from case law.

The doctrine of *parens patriae* representation originated under the British common law system.[11] It was first applied under the concept of "royal prerogative," in which the king was the guardian of the people, particularly those citizens unable to care for themselves.[12] Practical considerations such as pecuniary interests of the disadvantaged citizens also prompted the king to act as *parens patriae*.[13] The *parens patriae* doctrine was imported in its prerogative form into the American judicial system early in this country's history.[14] Its use originally centered around juvenile delinquency and the juvenile court system.[15] It has since been applied in the area of the mentally ill.[16] However, due process considerations of individual liberty have limited, although not entirely eliminated, *parens patriae* in this prerogative form.[17]

In addition to the prerogative usage of *parens patriae*, United States courts developed a second application of this doctrine: the state suing as *parens patriae* to represent its "quasi-sovereign" interests. Quasi-sovereign interests, while not easily defined,[18] generally involve cases where the state sues for its own well-being, apart from those damages individuals may have sustained.[19] The state acts to protect its entire territorial citizenry and/or economy.[20] It cannot, however, act as a nominal party to represent individuals

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11. *See generally* Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DE PAUL L. REV. 895 (1976).

12. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982). Those considered unable to take care of themselves were infants, idiots and lunatics. Curtis, *supra* note 11, at 896 (citing J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN 155 (1820)).

13. Curtis, *supra* note 11, at 898.

14. *Id.* at 899-900. By the early 1800's, reformers were invoking prerogative *parens patriae* principles in northeastern states. *Id.*

15. *Id.* at 900-02.

16. *Id.* at 903.

17. *Id.* The parameters of due process rights in juvenile court proceedings have not yet been definitively outlined.

18. *Alfred L. Snapp & Son*, 458 U.S. at 601.

19. Comment, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411, 412 (1970).

20. Curtis, *supra* note 11, at 908.

who are the real parties in interest.[21]

In the earliest cases involving quasi-sovereign interests, environmental concerns and injunctive relief were the focus of *parens patriae* causes of action. In *Missouri v. Illinois*,[22] local government entities in Illinois dumped large amounts of raw sewage into water used by Missouri residents for drinking and other purposes.[23] The Court found that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them . . ." for all residents might be indirectly injured from the spread of disease.[24]

In *Georgia v. Tennessee Copper Co.*,[25] a Tennessee corporation allowed noxious gas to escape which spread over part of Georgia.[26] The Court found that the suit was not merely between private citizens, despite the fact that Georgia owned little of the affected land. Rather, the Court held that "in its capacity of *quasi*-sovereign . . . the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."[27]

The Court in *Kansas v. Colorado*[28] recognized also that the prosperity of a certain tract of land "affects the general welfare of the State. The controversy rises, therefore, above a mere question of private local right and involves a matter of State interest. . . ."[29] These cases demonstrate that American courts were receptive to consolidated governmental action when substantial portions of the populace were harmed.

As the doctrine of *parens patriae* developed, its parameters were narrowed in the context of injunctions for public nuisance. In *Pennsylvania v. West Virginia*,[30] the plaintiff states sued as *parens patriae* for damages to natural gas supplies caused by the defendant states.[31] The Court found that the states were properly acting within their *parens patriae* capacity, but noted that a state so acting must have "an interest [such as the general welfare of its populace] apart from that of the individuals affected . . . not merely a

21. *Alfred L. Snapp & Son*, 458 U.S. at 600.
22. 180 U.S. 208 (1901).
23. *Id.* at 209-14.
24. *Id.* at 241.
25. 206 U.S. 230 (1907).
26. *Id.* at 236.
27. *Id.* at 237.
28. 206 U.S. 46 (1907).
29. *Id.* at 99.
30. 262 U.S. 553 (1923).
31. *Id.* at 581.

remote or ethical interest but one which is immediate and recognized by law."[32]

In *Oklahoma ex. rel. Johnson v. Cook*,[33] the Court finally halted advances in certain *parens patriae* actions. When the plaintiff state attempted to enforce a bank commissioner's claim against a shareholder,[34] the Court denied the state representative status. It found that "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest."[35] Thus, United States courts would not apply *parens patriae* doctrine in its quasi-sovereign form without first examining the interest of the state itself.

In addition to environmental cases, United States courts have invoked *parens patriae* in antitrust suits since 1945. This evolution has also brought a new remedy, damages, to the forefront. In the first major *parens patriae* antitrust case, *Georgia v. Pennsylvania R.R. Co.*,[36] the state of Georgia alleged, as representative of its citizenry, that the defendants conspired to fix railroad rates.[37] Allowing Georgia to act as *parens patriae*, the Court stated:

> Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate.[38]

The case involved a suit for both an injunction and damages,[39] and the Court implied that it considered damages an appropriate *parens patriae* remedy.[40]

Twenty-five years later, the issue of damages as a remedy in economic *parens patriae* actions arose again. In *Hawaii v. Standard*

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32. *Id.* at 592.
33. 304 U.S. 387 (1938).
34. *Id.* at 388-89.
35. *Id.* at 396. The Court's reasoning included preventing a floodgate of claims based on the Court's original jurisdiction. *Id.*; *see also* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600-01 (1982), and cases cited therein.
36. 324 U.S. 439 (1945).
37. *Id.* at 443.
38. *Id.* at 451.
39. *Id.* at 445.
40. Comment, *supra* note 19, at 413. In *Georgia*, damages were denied not because Georgia sued as *parens patriae*, but because freight railroad rates had been approved by the Interstate Commerce Commission. Curtis, *supra* note 11, at 910 n.65.

Oil Co. of California,[41] the state of Hawaii sued as *parens patriae* to recover damages to the general economy of the state under the antitrust provisions of the Clayton Act.[42] It alleged that the defendant had restrained trade in and monopolized the refined petroleum products market.[43] The Court refused to allow the state to sue for treble damages as *parens patriae*. It stated that Hawaii could adequately redress the wrongs committed against it by filing a class action suit.[44] It also found that substantial danger of duplicative recovery existed if Hawaii were allowed to act as *parens patriae*,[45] since its quasi-sovereign injuries were merely the sum of the injuries of its private citizens.[46] The Court further noted that the damages to Hawaii's general economy were really no more than those suffered by consumers who could recover under the Clayton Act.[47] Finally, the Court implied that Hawaii would have standing to sue if it were merely seeking injunctive relief.[48] It thus appears that *Standard Oil* has limited the *parens patraie* doctrine severely for economic damages in the antitrust context.[49]

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41. 405 U.S. 251 (1972). For an interesting analysis of lower court rulings in this case, *see* Comment, *supra* note 19.

42. 405 U.S. at 260.

43. *Id.* at 253.

44. *Id.* at 266.

45. FED. R. CIV. P. 23, which provides specific guidelines for defining the plaintiff class, prevents double recovery. *Standard Oil*, 405 U.S. at 266.

46. *Standard Oil*, 405 U.S. at 264. Hawaii had challenged the defendants on the basis of section 4 of the Clayton Act, 15 U.S.C. § 15 then in effect. The applicable section then stated in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained. . . ." The Court found no clear expression of intent in section 4 to permit the *parens patriae* action. *Standard Oil*, 405 U.S. at 264. For a further discussion of double recovery in the Union Carbide case context, *see infra* notes 143-46 and accompanying text.

47. *Standard Oil*, 405 U.S. at 264.

48. *Id.* at 261-62.

49. Curtis, *supra* note 11, at 913, aptly explains the *Standard Oil* decision as follows:

> The state's argument in favor of treble damages in cases brought by the state in its *parens patriae* capacity ignores the development of the quasi-sovereign doctrine and confuses the prerogative with the quasi-sovereign basis of *parens patriae* actions. Justice Holmes' dictum in *[Georgia v.] Tennessee Copper* [206 U.S. 230, 237 (1907)] that quasi-sovereign interests are "independent of and behind the titles of its citizen . . ." had gained recognition as the central premise of the quasi-sovereign suit. In that capacity the state sues not on behalf of its own proprietary interests which might be injured, but on behalf of the entire state, as Holmes described it, "[A]ll the earth and air within its domain." [*Id.*] The hallmark of the quasi-sovereign suit has been the injunction to stop injury to the totality of the state's commonwealth. Damages are not only unsuited to this theory of state relief, they also defy measurement. No common law precedent exists to support payment of damages sustained by a particular group of persons to whatever body chooses to sue. Those who would allow the state that power commit the error of confusing the American precedent of quasi-sovereign interests with the common law precedent of the sovereign's prerogative responsibility of caring for the dependent classes. . . . (footnotes

In recent years, two cases have further refined the *parens patriae* doctrine with regard to actions for damages.[50] In 1975, the United States Court of Appeals for the Eighth Circuit addressed the first *parens patriae* case dealing with foreign sovereigns in *Pfizer, Inc. v. Lord*.[51] In *Pfizer*, the governments of Vietnam and India brought suit alleging antitrust violations under a *parens patriae* claim as "official representatives" for citizens of their respective countries.[52] As such, they alleged that the defendant pharmaceutical companies had engaged in price fixing within their countries.[53] In allowing *parens patriae* representation, the trial court held that the *parens patriae* arguments which normally applied to states were not salient in the context of foreign governments. That court noted that the defendants need not be concerned that double recovery would arise since 1) the suit would be given res judicata effect and 2) practical obstacles would prevent most of the involved foreign individuals from filing claims.[54]

The appellate court reversed, holding that foreign governments may not sue on behalf of their citizens as *parens patriae* representatives for damages resulting from violations of antitrust laws. The court stated: "A *parens patriae* action cannot be brought to collect the damage claim of one legally entitled to sue in his own right. The mere fact that the claimant or creditor is a foreign national does not afford him or his government access to judicial procedures barred to domestic creditors."[55]

The court placed special significance on alleged due process violations, holding that the suit would have been better brought as a class action under Rule 23 of the Federal Rules of Civil Proce-

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omitted).

Note that the author also states, "[n]evertheless, like the concept of *parens patriae*, the theory of a treble damages action, brought by the state in its quasi-sovereign capacity, has exhibited a strong staying power." Curtis, *supra* note 11, at 914.

50. A third recent injunctive remedy case also exists: Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982). This case dealt with employment discrimination. Justice Brennan's concurrence is particularly enlightening. It states that "a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." *Id.* at 612. The case demonstrates that courts realize the many possible uses of governmental representation.

51. 522 F.2d 612 (8th Cir. 1975).

52. *Id.* at 614.

53. *Id.* at 613.

54. *Id.* at 615-16. The trial court also dispelled due process arguments regarding notice and participation in the lawsuit by stating that " 'the relationship between a foreign government and *its* citizens is not restricted by the Constitution of the United States.' " *Id.* at 616 (quoting district court Misc. Order No. 74-37, Appendix at 18, 21).

55. *Pfizer*, 522 F.2d at 616.

dure.[56] The plaintiffs, apparently, asserted a proprietary class action style claim under the guise of a *parens patriae* suit.[57] The plaintiffs stated that a class action would not be financially feasible, and therefore requested permission to sue as *parens patriae* for citizens legally entitled, but practically unable, to sue on their own behalf.[58] The court relied particulary on *Hawaii v. Standard Oil Co.*[59] in rejecting the plaintiffs' claims. It also stated:

> We are not persuaded that these decisions are inapplicable merely because the plaintiffs are foreign governments suing on behalf of their nationals. Principles of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic states vis-a-vis their citizens. Reliance on authorities which sanction a sovereign's right to represent its citizens when their claim is against another sovereign who has not consented to suit in its own courts is misplaced. Foreign creditors are to be afforded legal access to our courts on the same basis as United States residents; practical difficulties notwithstanding, their status as foreigners does not entitle them to a more favorable remedy and procedures.[60]

However, the court did suggest that action by Congress on the issue would allow the foreign sovereigns the relief they wished. It stated that "[t]he remedy plaintiffs seek . . . must come from Congress, who is best able to weigh its economic and political consequences and to consider alternative means of [enforcement]."[61]

Since the *Pfizer* case, one court has addressed the question of the *parens patriae* doctrine pursuant to congressional legislation. In *Commonwealth of Pennsylvania v. Mid-Atlantic Toyota Distributors*,[62] the court held a state could act as *parens patriae* representative for its citizens when authorized to do so by a federal statute, irrespective of less permissive common law or state provisions. In *Mid-Atlantic*, a number of states sued for statewide economic damages pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[63] which expressly permitted states to bring *parens pa-*

56. *Id.*
57. *Id.* at 617.
58. *Id.*
59. 405 U.S. 251 (1972).
60. *Pfizer*, 522 F.2d at 618-19 (footnote omitted).
61. *Id.* at 620.
62. 704 F.2d 125 (4th Cir. 1983).
63. 15 U.S.C. §§ 15c-15h (1982).

triae actions for damages from antitrust violations.[64] The states alleged that the defendants had conspired to fix the prices of Toyota vehicles in their states.[65] The court found that the Antitrust Improvements Act changed only procedural and not substantive principles of law.[66] The court found that the statute was "aimed primarily at enlarging the potential for consumer recovery for antitrust violations by effectively bypassing the burdensome requirements of Rule 23, Fed.R.Civ.P. 23, that might tend to dissuade private litigants from pursuing conventional consumer class actions for antitrust injury. . . ."[67] In addition, the court noted that states have the authority to bring suit when the case advances public interest.[68]

In sum, the foregoing demonstrates several important issues surrounding the question of whether a foreign sovereign may appoint itself *parens patriae* representative for its injured citizens and thereby satisfy American legal requirements for application of the doctrine. First, the English common law doctrine of royal prerogative over those unable to care for themselves has been limited in the United States in light of due process concerns. Second, American case law has firmly established that a state acting in a quasi-sovereign *parens patriae* capacity must have substantially more than a mere nominal interest in its citizens' claims.[69] Third, as a general rule, the *parens patriae* doctrine is narrowly construed. There appears to be a presumption against its application,[70] particularly in the economic damages context, where duplicative recovery is possible and class action suits are an established procedural alternative. Fourth, the status of the law concerning a foreign government's statute granting it *parens patriae* rights is subject to new principles: On the one hand, foreign sovereigns who act in a proprietary capacity in an antitrust suit without any legislative authority whatsoever have no standing to sue as *parens patriae* representative.[71] On the

64. *Mid-Atlantic*, 704 F.2d at 127 (citing 15 U.S.C. § 15c(a)(1)).
65. *Mid-Atlantic*, 704 F.2d at 127.
66. *Id.* at 128.
67. *Id. See also infra*, Appendix B for text of FED. R. CIV. P. 23.
68. *Mid-Atlantic*, 704 F.2d at 131. In a footnote the court stated "[a] state may well have a 'public interest' in maintaining an action without having a 'quasi-sovereign' interest sufficient to support original jurisdiction in the Supreme Court or to overcome an eleventh amendment bar to the recovery of damages." *Id.* at n.13.
69. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982).
70. *See, e.g.*, Pfizer, Inc. v. Lord, 522 F.2d 612, 618 (8th Cir. 1975); Dhavan, *supra* note 2, at 303.
71. This was implied by the court in *Pfizer* when it stated that authority for the

other hand, a federal statute authorizing a state to act as *parens patriae* is valid despite a silent state common law background.[72] Fifth, the entire nature of *parens patriae* is esoteric; where the doctrine has been suppressed in one usage, it has several times in American legal history resurfaced anew in a different setting.[73] Because of these considerations, the status of *parens patriae* law is far from settled, and there exists a need for further refinement in the area of transnational cases.

These ramifications were particularly important to the Indian government in the Union Carbide case. If the government was to effectively represent its people as *parens patriae*, it needed to find support for its position amidst the unusual circumstances surrounding the crisis. Perhaps the unique nature of the case provided an ideal situation in which application of the *parens patriae* doctrine was appropriate.

II. The Conditions of the Union Carbide Case

The Bhopal crisis left in its wake a host of litigation; however, it also created the potential for the development of new legal principles, including new applications of the *parens patriae* doctrine. As indicated by several factors arising in the early stages of the Bhopal litigation, established methods for settling disputes may be unworkable in the context of transnational torts. These unusual circumstances included the concentration of lawsuits in the United States, the need for centralization of claims, India's representation statute, and the class action alternative.

Initially, parties focused their legal efforts in the United States. Although some lawsuits were filed in India by Indian attorneys,[74] the litigants directed their greatest efforts in the United States.[75] By 1985, American lawyers, for instance, had filed claims in excess

governments to act as *parens patriae* should come from Congress. *Pfizer*, 522 F.2d at 620.

72. *Mid-Atlantic*, 704 F.2d at 129-30.

73. *See* Curtis, *supra* note 11, at 895-96. The author states "[b]ecause it is uninhibited by a strict conceptual or precedential definition, this theory [of *parens patriae*] imparts an extensive discretionary power to the court, agency, or government which is able to justify its usage."

74. *See* Diamond, *supra* note 1.

75. Galanter, *supra* note 2, at 284. Within a few days of the disaster, the regional Indian government expressed a desire to sue Union Carbide in the United States. This plan was reiterated later in December 1984. In addition, the Indian Central government focused its attention on the United States from an early date. *Id.* In April, 1985, the Indian government made good on its threat by filing suit against Union Carbide in the United States. Lewin, *supra* note 5, at A1, col. 1.

of $250 billion.[76] They cited reasons for the concentration in United States as including the following: 1) higher compensation for victims in the United States courts, 2) high filing fees in India, 3) potential inability of Indian victims to pay non-contingent lawyers' fees in India, 4) long-term nature of Indian legal proceedings, 5) application of the certain United States legal principles, and 6) ability of the plaintiffs to pursue parent company liability under United States corporate law.[77]

The litigation became very complex, even in the early stages. As a result of the spread of suits among many federal courts, a judicial panel for the United States District Court for the Southern District of New York consolidated all claims of February 6, 1985:[78]

> We note that Union Carbide is a New York corporation and that relevant witnesses and documents may be located at its corporate headquarters in nearby Danbury, Connecticut. We also note that the Southern District of New York has more pending actions than any other district and is, according to the preponderance of the parties' representations to the Panel, relatively more convenient for many parties, including plaintiffs and defendant Union Carbide, and witnesses.[79]

The panel also noted that "[c]entralization . . . [is] necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary."[80]

After the consolidation, the Indian government, in March of 1985, passed a statute appointing itself the exclusive representative for the victims.[81] Earlier, the Indian government and United States lawyers had been battling for chief control of the case.[82] Consequently, India's statute was enacted partially in response to actions by American attorneys who "unnecessarily complicated the situation."[83] The Indian government believed that United States attor-

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76. Galanter, *supra* note 2, at 290. *See also supra* note 2, for a breakdown of the different lawsuits thus far filed by United States attorneys.

77. Stevens, *supra* note 2, at A10, col. 3. For a discussion of forum considerations, see *infra* note 92.

78. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 601 F. Supp. 1035 (J.P.M.D.L. 1985).

79. *Id.* at 1036. In addition to the federal district for Southern New York, suits had also been filed in the federal districts for Northern Illinois, Southern West Virginia, Eastern New York, Southern Florida, Eastern Pennsylvania and Connecticut.

80. *Id.*

81. Act, *supra* note 4.

82. Diamond, *supra* note 1, at D1, col. 2.

83. Galanter, *supra* note 2, at 285.

neys had unnecessarily complicated the situation,[84] presumably because of the attorneys' quick rush to the disaster scene and subsequent multidistrict filings. With the enactment of the statute, the Indian government believed that American lawyers would have to work under its main counsel.[85]

Regardless of the motivation for passing the statute, its provisions demonstrated extensive control over the plaintiffs' claims. First, in its role as *parens patriae*, the Indian government asserted that it was the chief representative of any plaintiff in all litigation concerning the Bhopal disaster, both within and without India.[86] Second, while the government had set itself up as the primary administrative clearinghouse for victims' claims, it also permitted individuals to retain their own counsel to act "in association" with the government.[87] At the same time, the activity of individual attorneys, in India at least, appeared extremely curtailed. As one author noted before the dismissal of the cases filed in American courts, the Act

> derails any litigation in India. It empowers the Government of India to interpose an administrative compensation process as the exclusive primary resort of the victims. Apparently victims are cut off from direct recourse to the courts; Indian courts are perforce foreclosed from any innovations that would enlarge their capacity to address such instances of mass victimization.[88]

Third, the statute stated that the Indian government had control of all cases, whether pending or yet to be filed.[89] Finally, the statute gave the Indian government the right to pursue all avenues of legal recourse, including "compromise."[90] Pursuant to this statute, the Indian government filed suit in the United States District Court for Southern New York on April 9, 1985.[91]

Several legal complications existed which could have foreclosed the entire Indian strategy.[92] Of particular concern to the parties

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84. *Id.*
85. *Id.*
86. Act, *supra* note 4, § 3(1).
87. *Id.* § 3(4).
88. Galanter, *supra* note 4, at 286 (footnote omitted).
89. Act, *supra* note 4, § 3(3).
90. *Id.* § 3(2). In fact, after passing the statute, the government, acting as *parens patriae* reportedly rejected a settlement offer of $200 million by Union Carbide. Galanter, *supra* note 2, at 285.
91. Lewin, *supra* note 5, at A1, col. 5.
92. For an interesting discussion of problems unrelated to *parens patriae*, *see generally Symposium. The Bhopal Tragedy: Social and Legal Issues*, 20 TEX. INT'L L.J. 267-339 (1985). An important issue was the possibility (and now the reality) that the court would

was the strong possibility that the court might have found it preferable to try the case as a class action under Rule 23 of the Federal Rules of Civil Procedure.[93] Current American case law appears to prefer class actions over *parens patriae* representation in transnational cases.[94] Several United States attorneys had precautiously drafted their claims as class actions on behalf of individual victims.[95] Another attorney, however, expressed concern that a class action was simply not feasible in this case by stating: "I don't believe in just pulling a figure out of the air."[96]

Another important complication was the possibility of settlement. In fact, American attorneys representing the claimants presented a settlement offer with Union Carbide to the court in March, 1986.[97] The Indian government forcefully condemned this act and implied it would not cooperate with the settlement.[98] However, if the court had accepted the settlement plan, India might well have been left with no further recourse in the United States.

The unusual circumstances of the Union Carbide case demonstrates the need for reevaluation of United States *parens patriae* law. Several factors lend insight into the feasibility of India's attempt to represent its citizens in American courts.

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find that India was a more appropriate forum for the litigation. It was clear that a *forum non conveniens* motion would be one of Union Carbide's first strategies as the litigation proceeded to pretrial motion stages. Robertson, *Introduction to the Bhopal Symposium*, 20 TEX. INT'L L.J. 269, 270 (1985). In that regard, the fact that the Indian government had appointed itself as *parens patriae* added potency to the notion that the Indian legal system could better handle the entire matter. Galanter, *supra* note 2, at 286. The state of the law regarding forum non conveniens is unclear and there is a lack of consistency in rulings. *Compare* Piper Aircraft v. Reyno, 454 U.S. 235 (1981) (holding American courts were not the proper forum for disputes arising from an air crash in Scotland) with *In re* Air Crash Disaster near Bombay, India, 531 F. Supp. 1175 (W.D. Wash. 1982) (holding United States courts were the proper forum for cases resulting from a crash in India). In fact, on May 13, 1986, the judge in the Bhopal case did dismiss the suits on forum grounds. Hiltzik, *U.S. Judge Returning Bhopal Case to India*, L.A. Times, May 13, 1986, Part I, at 1, col. 3. F. Lee Bailey, an attorney in the case, said there would be an appeal. *Id.* at 17, col. 1. Other related problems include the application of Indian law and other issues regarding tort law specialization.

93. *See* Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975). *See infra*, Appendix B for the text of FED. R. CIV. P. 23.

94. For further discussion of the class action versus *parens patriae* dispute, *see supra* notes 41-68 and accompanying text and *infra* notes 117-23 and accompanying text.

95. Dobrzynski, Glaberson, King, Powell and Helm, *Union Carbide Fights for Its Life*, BUS. WK., Dec. 24, 1984, at 52, 56 [hereinafter *Union Carbide Fights for Its Life*]. Melvin Belli and Gould & Sayre are among the attorney teams drafting class actions. *Id. See also* Stevens, *supra* note 2, at A10, col. 4.

96. Stevens, *supra* note 2, at A10, col. 4.

97. Tempest, *India Scorns Union Carbide Bhopal Offer*, L.A. Times, Mar. 25, 1986, Part I, at 4, col. 1.

98. *Id.*

III. Factors Supporting the Indian Government's *Parens Patriae* Status

Whether the Indian statute authorizing its government to act as *parens patriae* satisfied American legal requirements is still a complex issue. When examined, the Indian government's endeavor appeared to make practical and theoretical sense. This assertion, when considered in light of the unusual circumstances of the case, is supported by the ambiguities in the current status of American case law, policy concerns, and principles of international comity.

A. *The Current Status of American Law*

The issue of whether a foreign sovereign's statute granting its government *parens patriae* status in United States courts satisfies American requirements is one of first impression. The current state of the law is embodied in *Pfizer, Inc. v. Lord*,[99] which held that foreign sovereigns had no standing to sue in American courts as *parens patriae* representatives of their citizens.[100] However, *Pfizer* can be distinguished from the Union Carbide case on two major points.

First, the *Pfizer* holding dealt expressly with the state's interest only in the context of antitrust damage actions.[101] The court placed considerable reliance on *Hawaii v. Standard Oil Co. of California*,[102] which specifically held that class actions are preferable to *parens patriae* suits where antitrust violations are involved.[103] Also, the court in *Pfizer* found that plaintiffs had asserted no quasi-sovereign interest, but merely a proprietary one.[104] The court believed that the assertion of mere proprietary concerns warranted a class action rather than a *parens patriae* suit.[105]

India's concern was different from that of the sovereigns in *Pfizer*, rendering that court's reasoning inapplicable to this case. India did not claim mere economic antitrust damages; it asserted the interests of over 200,000 physically injured and deceased persons. While its attempt to officially represent its citizens did not fit clearly into any previously defined area of *parens patriae* represen-

99. 522 F.2d 612 (8th Cir. 1975).
100. *Id.* at 616.
101. *Id.*
102. 405 U.S. 251 (1972).
103. *Id.* at 266.
104. *Pfizer*, 522 F.2d at 617.
105. *Id.* The proprietary interest asserted in *Pfizer* appeared to be the sum total of damages to individuals and businesses in the affected countries. *Id.* at 613-14.

tation, it appeared India was trying to invoke a new, "hybrid" style of *parens patriae*. In one sense, India's concerns were not quasi-sovereign at all, but came under the old British common law prerogative category.[106] The government was stepping in to protect and aid those citizens who were unable to help themselves and who had no practical way to pursue independent actions. Although this is not a traditional class of dependent citizens as recognized by Anglo-American common law,[107] the principle behind India's action was consistent with prerogative *parens patriae*. In another sense, India's concerns were indeed quasi-sovereign. However, unlike *Pfizer*, the quasi-sovereign interest here revolved around the general well-being of the citizenry and the environment in India. The government's interest thus appeared to follow early 20th century American cases dealing with injunctive nuisance actions.[108] In yet another sense, India's case appeared to follow the antitrust suits in that it asked for damages as a remedy.[109] Consequently, the Indian government was asserting a new, "hybrid" species of *parens patriae* by incorporating several established theories.

This hybrid prerogative/quasi-sovereign theory was a potential method for India to fulfill American *parens patriae* legal requirements. In the complaint filed on behalf of India in the United States District Court for Southern New York, India appeared to have asserted the hybrid status as follows: "India is suing Union Carbide '*to secure the health and well-being*, both physical and economic, of all victims of the disaster, almost all of whom are physically and/or financially *or otherwise incapable* of individually litigating their claims against the defendant. . . .' "[110] The use of a hybrid type of *parens patriae* claim has not been addressed by a United States court and because of the versatility of the entire doctrine, there is leverage for a new application to transnational tort cases. As has been aptly stated, "[t]he concept of *parens patriae* has exhibited a remarkable staying power. Rebuked in one branch of the law, it makes its appearance in another; even when circumscribed, it remains actively viable within its new limits."[111] This has

106. *See supra* notes 11-13 and accompanying text.

107. *See supra* notes 14-17 and accompanying text for those traditonal situations in which the Anglo-American courts have recognized the use of *parens patriae*.

108. *See supra* notes 22-35 and accompanying text.

109. *See supra* notes 41-68 and accompanying text.

110. Lewin, *supra* note 5, at D2, col. 1 (emphasis added) (quoting complaint filed in April, 1985, by the Indian government against Union Carbide).

111. Curtis, *supra* note 11, at 895.

been demonstrated throughout American legal history as *parens patriae* has been applied to such varied cases as juvenile delinquency, environmental concerns, antitrust, discrimination, injunctions and damages claims.[112]

The second way in which the Union Carbide case differed from *Pfizer* concerns the absence or presence of a foreign statute granting the sovereign *parens patriae* status. In *Pfizer*, no foreign statute conveyed *parens patriae* status to the government of India or Vietnam. The court there recognized the plaintiffs' due process concerns of notice and ability to participate in the legal proceedings.[113] Ultimately, however, the court felt it could not permit foreign citizens to gain access to procedures not available to United States citizens.[114]

The fact that the Indian government enacted a statute appointing itself the official representative for its citizens in the Union Carbide case made much of the *Pfizer* reasoning inapplicable. As the trial court in *Pfizer* had stated, " 'the relationship between a foreign government and *its* citizens is not restricted by the Constitution of the United States.' "[115] The trial court's statement appears more salient in the Union Carbide case than does the appellate court's holding to the contrary. If India's government saw fit to appoint itself representative of its citizens in United States courts, then it was for Indian courts to decide whether Indian citizens' due process rights were being violated.[116]

Although the *Pfizer* court would not allow foreign citizens remedies not available to United States citizens, it seemingly expressed approval of foreign sovereign *parens patriae* status if some sort of federal legislation were enacted.[117] In 1983, the United States Court of Appeals for the Fourth Circuit was able to address the issue of *parens patriae* representation pursuant to a statute in *Commonwealth of Pennsylvania v. Mid-Atlantic Toyota Distributors*.[118] In *Mid-Atlantic*, a federal statute authorized states to bring *parens patriae* actions on behalf of citizens injured by antitrust vio-

112. *See, e.g., supra* notes 11-73, and accompanying text.

113. 522 F.2d at 616. These concerns would presumably be mitigated in the event that a class action suit was the vehicle by which the governments sought to protect their citizens.

114. *Id.* at 618-19.

115. *Id.* at 616 (quoting district court Misc. Order No. 74-37, Appendix at 18, 21).

116. The Indian government in fact recognized its citizens' due process rights by permitting individuals to act "in association" with government legal teams. Act, *supra* note 4, § 3(4).

117. *Pfizer*, 522 F.2d at 620.

118. 704 F.2d 125 (4th Cir. 1983).

lations.[119] The court found that common law applications of *parens patriae* could be expanded by statutory grants.[120] The court found acceptable the statutory purpose, which was to allow suits to be brought in *parens patriae* to bypass cumbersome class action requirements under Rule 23 of the Federal Rules of Civil Procedure, requirements which the court believed would discourage conventional class action suits by individuals.[121]

The *Mid-Atlantic* case portended three significant ramifications for India in the Union Carbide case. First, United States courts are not averse to allowing governmental entitles to bypass the burdensome Rule 23 class action requirements where special circumstances exist. The circumstances in Bhopal were certainly special in that the number of victims is perhaps larger than any in history.[122] This would make class action notice requirements a major task in itself, and could take years to complete. Second, *Mid-Atlantic* weakens the *Pfizer* rationale that foreign citizens may not use procedures not afforded to United States citizens. Now that American states may gain *parens patriae* access to courts through statutory enactments, it is conceivable that a foreign statute could serve the same purpose. Third, at the very least, *Mid-Atlantic* makes it almost certain that a United States federal statute appointing a foreign sovereign as *parens patriae* would withstand judicial scrutiny.[123] Thus, if United States courts needed legislative support before accepting the Indian statute, Congress would have been well-advised to enact its own legislation accommodating India.

The state of American law regarding transnational *parens patriae* cases is unclear with regard to situations such as the Union Carbide case. It seems apparent that the *parens patriae* doctrine can be expanded to include such transnational tort crisis. Support for this assertion exists also in relevant policy concerns.

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119. *Id.* at 127, where the court noted that the Antitrust Improvements Act provides that an " 'attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State,' to secure treble money damages for injury to their property flowing from violation of the antitrust laws." (footnote omitted) (quoting 15 U.S.C. § 15c(a)(1)(1982)).

120. *Mid-Atlantic*, 704 F.2d at 129-30.

121. *Id.* at 128. *See also infra* Appendix B.

122. As a comparison, claims from asbestos-related injuries in Manville total 52,700. Claims from injuries regarding Agent Orange number 40,000-50,000. *Union Carbide Fights for Its Life*, *supra* note 95, at 56. In contrast, "[m]ore than 2,000 people died and 200,000 were injured in the [Bhopal] accident." Diamond, *supra* note 1, at D1, col. 1.

123. *See* Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321, 330 (1985).

B. *Policy Concerns*

Several policy considerations support the Indian government's endeavor to represent its citizens exclusively. Of particular importance are the well-being of the parties, India's sovereign immunity, and the avoidance of duplicative recovery.

First, and possibly most importantly, Union Carbide and India would have both benefited from India's *parens patriae* status.[124] American attorneys filed claims in excess of $250 billion,[125] which surely would have bankrupted the corporation.[126] In fact, many American attorneys expressed that their primary motive was the potentially huge contingent fees.[127] These lawyers appeared unconcerned with the possible ramifications if Union Carbide folded. The Indian government, on the other hand, had a substantial interest in keeping Union Carbide solvent. Union Carbide is a huge multinational corporation, serving the world with technological innovations which aid people worldwide.[128] Union Carbide's partially-owned subsidiary, Union Carbide India, operates thirteen plants in India: The corporation provides employment, goodwill and charity for the citizens of India.[129] If the Indian government chose to protect the viability of the entire enterprise, it would thus have aided not only Union Carbide's stockholders, but also the citizens of India and other developing nations. As a result, if the Indian government

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124. Arguably, Union Carbide's interests were best served in United States courts even though many parties argued that an Indian forum was best for Union Carbide. In India, Union Carbide's image may be severely hurt through long-term litigation. Also, litigation may entail personal threats to Union Carbide lawyers, since *gheraos* (great crowds which literally surround government officials and effectively prevent them from acting) have occurred more than once in Indian history. *See* MOORHOUSE, CALCUTTA 312-14 (1971).

125. *See supra* note 2 and accompanying text.

126. In 1984, Union Carbide's total assets equalled $10.8 billion. *Union Carbide Fights for its Life*, *supra* note 95, at 54. This is less than one-twentieth of the amount of the total claims filed by United States attorneys. There is also evidence that Union Carbide may have difficulty selling its assets at book value since two-thirds of them are in overcapacitized industries. *Id.* at 53.

127. Richard E. Brown, an associate on the Melvin Belli team has stated, "Our motivation is to make money—make no mistake about that." Diamond, *Lawyers' Fees in Bhopal Case*, N.Y. Times, Apr. 9, 1985, at D2, col. 2. Attorneys in asbestos cases received over 60% of all awards as fees. Stein, *Paying Bhopal Victims*, N.Y. Times, Dec. 18, 1984, at A31, col. 5.

128. A breakdown of Union Carbide's worldwide sales in 1983 was as follows: Petrochemicals, $2.6 billion; Industrial Gases, $1.4 billion; Metals and Carbon Products, $1 billion; Consumer Products, $1.9 billion; and Technology Services & Specialty Products, $2.2 billion. *Union Carbide Fights for Its Life*, *supra* note 95, at 55.

129. From 1956-83, Union Carbide India Ltd. paid over $300 million in excise duties and income taxes. In 1983, it also donated $44,000 to relief funds for natural disaster victims. Reinhold, *Union Carbide of India: Image is is Shattered*, N.Y. Times, Dec. 12, 1984, at A9, at col. 3-4.

were to act as *parens patriae*, it would have proceeded with greater empathy toward the valuable corporation than would have United States attorneys.

Nevertheless, India would have protected its citizens' interests. While Union Carbide would most likely have been able to continue its operations world-wide if a lesser, government-procured award were reached, the victims in India would not have been deprived of adequate compensation. The average Indian foreman earns approximately $100 (U.S.) per month.[130] It has been stated that $24,000 would be equal to income for fifty years for many of the victims.[131] Because American courts calculate damages based mainly on lost earnings, it is likely that awards would have been low enough to allow Union Carbide to stay in operation, while still compensating victims adequately.[132]

Another related policy concern revolves around the ability of victims to receive proper compensation.[133] If American attorneys had guided the cases as class actions, the victims' compensation would most likely not have been equitable. First, there were inherent difficulties in locating Bhopal victims who should have been included in the class action.[134] Second, as India is a country fraught with bureaucratic confusion,[135] there was a strong possibility that damage awards garnered by American attorneys on behalf of non-participating class action plaintiffs would have required an Indian administrative clearinghouse. The time and money involved in this endeavor could conceivably have resulted in untimely and wholly insufficient recovery by the actual victims. However, if the Indian government had acted as sole representative for the victims, a substantial amount of bureaucratic entanglement could have been eliminated. The government would have automatically served as an

130. *Union Carbide Fights for Its Life*, *supra* note 95, at 55.

131. Galanter, *supra* note 2, at 290 n.83.

132. *Union Carbide Fights for Its Life*, *supra* note 95, at 55. In fact, the Indian government rejected a $200 million settlement offer by Union Carbide. Galanter, *supra* note 2, at 285.

133. Note that American lawyers' inability to streamline actions prompted consolidation of all claims. *See supra* notes 78-85 and accompanying text. The United States government had an interest in assuring compensation for the victims since it would have made for good foreign policy in an increasingly hostile world environment.

134. Galanter, *supra* note 2, at 282. The author states that many poor Indians go through life without legal identity and status. The country has an inadequate system of records in drivers' licenses, social security and national health. *Id.* Because Rule 23(c)(2) requires notice to each affected member of a class, problems of locating victims would be compounded. *See infra* Appendix B.

135. For a discussion of the governmental system in India, *see generally* MOORHOUSE, *supra* note 124.

administrative award distribution system. Although some bottlenecks still would have existed, at least one step in the process of compensating the victims would have been removed. Additionally, although the problems of identifying victims would have been largely unmitigated, Indian officials could have acted as informed local aides to locate potential plaintiffs. From a practical standpoint, the Indian government would have been the most efficient party to represent the victims.

A further policy consideration revolves around India's sovereign immunity.[136] The Indian government retains immunity against many causes of action on its home soil.[137] There were indications that the Indian government itself may have been at least partially responsible for the disaster.[138] If the Indian government was not permitted access to the United States courts, there may have been jurisdictional questions concerning the susceptibility of India to comparative fault principles.[139] However, if the government was allowed to pursue its victims' claims as *parens patriae* representative, federal legislation practically assured that India would have been named as a cross-defendant.[140] This would have aided the courts in coming to an equitable solution in assessing fault.

A final policy concern is based on American courts' fear of duplicative recovery in *parens patriae* suits. In *Hawaii v. Standard Oil Co. of California*,[141] the Court placed a great deal of emphasis on duplicative recovery concerns in holding that the plaintiff state had no standing to sue. The Court stated:

> A large . . . part of the injury to the "general economy" . . . is no more than a reflection of injuries to the "business or property" of consumers . . . . Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State.[142]

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136. Galanter, *supra* note 2, at 277.

137. CONST. OF INDIA, art. 300.

138. Galanter, *supra* note 2, at 277, where the author states that lax government regulation and inadequate public services may have contributed to the severity of the accident. *See also* Diamond, *1982 Inspector Says Indian Plant Was Below U.S. Safety Standards*, N.Y. Times, Dec. 12, 1984, at A3, col. 3.

139. Galanter, *supra* note 2, at 277.

140. 28 U.S.C. § 1607 (1982) provides for waiver of sovereign immunity with respect to "any counterclaim . . . arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state. . . ."

141. 405 U.S. 251 (1972).

142. *Id.* at 264. In Pfizer, Inc. v. Lord, 522 F.2d 612, 617 (8th Cir. 1975), a transna-

In the Union Carbide case, however, duplicative recovery was unlikely for three reasons. First, the Indian statute provided that counsel for individuals could work "in association" with the governmental judicial bloc.[143] While the meaning of this statutory language was largely untested, it suggested that individuals could hire their own counsel to work in conjunction with the government. If the government and individuals' attorneys worked together on the recovery, there was a minimal chance of double recovery since all claims would have been processed under one coordinated body. On the other hand, as several United States attorneys had filed class actions which presumably encompassed all victims, each attorney's recovery would appear to have been duplicative.

Second, the Indian government was not suing for *Standard Oil*-styled quasi-sovereign economic damages. As noted above, India appeared to be asserting its citizens' individual claims primarily in a "hybrid" *parens patriae* claim.[144] Thus, the difficulties of separating individual and sovereign damages was largely unfounded in the Union Carbide case, as the Indian government asserted only damages on behalf of its citizens.

Third, the trial court's concerns in *Pfizer, Inc. v. Lord* seem particularly significant in the Union Carbide case. In *Pfizer*, the trial court found that the "defendants could not be threatened with duplicative recovery because the governments' suit would be given *res judicata* effect and, in any event, the practical difficulties facing foreign nationals would generally prevent them from filing their own suits."[145] The appellate court, however, rejected this argument.[146] In the Union Carbide case, unlike *Pfizer*, the injuries suffered by victims are not as mutable as antitrust violations; the number of victims is fixed. Because of certain financial and/or physical deficiencies, practical difficulties became true obstacles to the present victims. In addition, those individuals who suffer antitrust injuries are more likely to have the means to sue in their own right than were the Bhopal victims whose injuries were not proportionate to their respective wealth.

Policy concerns unique to this case and those of general applicability lent support to the Indian government's *parens patriae* claim.

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tional case, the court expressed the same concerns and in fact cited the above passage in coming to its determination.

143. Act, *supra* note 4, § 3(4).

144. *See supra* notes 106-09 and accompanying text.

145. *Pfizer*, 522 F.2d at 616.

146. *Id.*

This assertion is also supported by principles of international comity.

C. *Analogous Transnational Jurisprudence*

In addition to policy concerns surrounding the Union Carbide case, analogous transnational legal principles also lend support to the proposition that India's statute should have satisfied American requirements. These principles, which were developed first through customary international law, were later codified in many instances, and could now be applied in light of ambiguities in the current state of United States law.

Under customary international law, civilized nations have long recognized the existence of an international minimum standard regarding judicial treatment of aliens.[147] Under this doctrine, courts of civil law nations have held that foreigners are entitled to the same treatment as citizens of that country.[148] The court in *Cantero Herrera v. Canevaro & Co.*[149] aptly elucidated the standard as follows: "Equality between natives and foreigners before the Civil Law implies their equality as to judicial competency and form of proceeding in the same subject-matter; hence, foreigners enjoy in Peru the same rights, means, recourses and guarantees as nationals to sue for and defend their rights . . . ."[150] Most civil law countries and the United Nations have since subscribed to this view.[151] Common law courts, including those in the United States, have also rec-

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147. *See generally* SWEENEY, OLIVER & LEECH, THE INTERNATIONAL LEGAL SYSTEM 545-73 (1981).

148. *Id.*

149. Peru, Supreme Court, 1927 [1927-28] Ann. Dig. 219 (No. 149), *reprinted in* SWEENEY, OLIVER & LEACH, *supra* note 147, at 552-56.

150. SWEENEY, OLIVER & LEACH, *supra* note 147, at 553 (quoting Peru Supreme Court opinion). The court noted that its holding was not based purely on customary law by stating that

> [t]he condition of foreigners in Peru . . . is not left entirely to the provisions of international convenience, nor subordinated to the simple fact of reciprocity, since Articles 32 and 33 of our Civil Code provide that "civil rights are independent of the status of the citizen," and that "foreigners enjoy in Peru all rights concerning the security of their persons and property and the free administration of the same."

Id. (*quoting* Peru Supeme Court opinion). Note that Latin American countries have denied that there is an international standard over and above equality with nationals. *Id.* Although there has been debate as to whether an international or municipal standard should apply, it appears that the latter has taken precedence. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L. L., 863, 888 (1961).

151. *See, e.g.*, Chattin (United States) v. United Mexican States, General Claims Commission, 4 R. Int'l. Arb. Awards 282 (1927).

ognized the validity of this principle of international comity.[152]

Despite the widespread usage of the customary international principle, some states have gone one step further by enacting bilateral treaties. Most of these treaties provide broad provisions for equality of foreigners in municipal courts. For example, a treaty may specify that:

> (1) The nationals of one Contracting Party shall enjoy in the territory of the other the same rights in respect of the legal protection of person and property, and shall have free access to the courts of justice for the prosecution or defence of their rights under the same conditions, including the taxes and fees payable, as nationals of the other Contracting Party.
>
> (2) This Article applies to criminal as well as to civil and commercial matters.[153]

Some countries have provided for more narrow applications of the doctrine. For instance, several countries have enacted bilateral treaties addressing judicial treatment of foreigners involved in industrial accidents and occupational diseases. One treaty states that "[Foreigners] shall enjoy the benefits of such legislation as if they were nationals of the country concerned."[154] Thus, the doctrine has varied uses and flexible applications.

The customary and codified aspects of the doctrine provide support for the contention that the Indian government should have been permitted to represent the Bhopal victims as *parens patriae.* Although India and the United States have not signed a treaty in this specific area, the American-Iranian[155] treaty relied upon by the plaintiffs in *Pfizer, Inc. v. Lord*,[156] provides insight to the present situation. In *Pfizer*, the court found that the treaty guaranteed access to the United States courts only on the same terms available to United States nationals.[157]

When *Pfizer* was decided in 1975, no United States court had yet approved federal legislation permitting statutory *parens patriae*

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152. *See, e.g.*, Pfizer, Inc. v. Lord, 522 F.2d 612, 619 (8th Cir. 1975).

153. Art. 12 of the Convention Regarding Legal Proceedings in Civil and Commercial Matters, Israel-United Kingdom of Great Britain-Northern Ireland, July 5, 1966, 630 U.N.T.S. 189.

154. Art. 2 of the Convention between the Italian Republic and the Principality of Monaco on Insurance against Industrial Accidents and Occupational Diseases, Italy-Monaco, December 6, 1957, 363 U.N.T.S. 45.

155. Treaty of Amity & Economic Relations, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853.

156. 522 F.2d 612 (8th Cir. 1975).

157. *Id.* at 619 n.9.

representation. However, eight years later, in *Commissioner of Pennsylvania v. Mid-Atlantic Toyota Distributors*,[158] the court held that federal legislation could expand the use of common law *parens patriae* actions.[159] If United States citizens may gain access to courts through statutory *parens patriae* plans to avoid practical difficulties in massive class action claims (as the *Mid-Atlantic* court reasoned),[160] the barrier is thus removed for foreign plaintiffs. A foreign government could apparently now gain *parens patriae* representation pursuant to federal legislation. In the Union Carbide case, it appears that a congressional directive granting the Indian government *parens patriae* status would have satisfied international laws of comity. Alternatively, the United States could have substantially streamlined procedures by recognizing the Indian statute as a valid attempt to represent its citizens. Even though the United States and India presently have no reciprocal equal access treaty, this case could have been valuable in furthering the principles of international comity.

CONCLUSION

The complex nature of the Bhopal tragedy is one of the greatest environmental/industrial torts of all history. In particular, the Indian government's attempt to act as *parens patriae* representative for its injured citizens presented a difficult new issue for United States courts which previously have not allowed foreign sovereigns such status. For several reasons, however, India should have been permitted the status it sought.

This Comment has examined the reasons in favor of granting India *parens patriae* representation. First, it traced the development of American *parens patriae* law to demonstrate the potential for new interpretations.[161] Next, it examined the unusual circumstances of the Union Carbide case which warranted application of the *parens patriae* doctrine.[162] Finally, it analyzed several factors in support of India's contention: United States case law, policy concerns, and analogous transnational jurisprudence.[163]

The formation of new legal principles to accommodate the Union

158. 704 F.2d 125 (4th Cir. 1983).
159. *Id.* at 129-30.
160. *Id.* at 128.
161. *See supra* notes 11-73, and accompanying text.
162. *See supra* notes 74-98 and accompanying text.
163. *See supra* notes 99-160 and accompanying text.

Carbide case would have not only benefited the immediate claimants, but would also have aided victims of future transnational torts. As United States based multinational corporations expand their operations over the globe and as nations become increasingly interdependent, other major industrial torts are certain to occur. If the United States takes the lead in allowing *parens patriae* representation in these situations, the next wave of victims will encounter more orderly legal proceedings than those faced by the unfortunate Bhopal claimants.

*Lisa F. Butler**

* Thanks to my parents, E.C. and Joan, for listening to "Bhopal" for one year.

Appendix A: Taken from the Current Indian Statute 1985, Part III, at 19 (Suri Ed. 1986).* Published originally in *Gazette of India (Ext.)*, Part II, Section I, No. 19, dated February 20, 1985.

* This is an accurate representation of the ordinance as it appears in the current Indian Statute, 1985. All typographical errors are in original.

THE BHOPAL GAS LEAK DISASTER (PROCESSING OF CLAIMS) ORDINANCE 1985

ORDINANCE NO. 1 of 1985

Promulgated by the President in the Thirty-sixth Year of the Republic of India

An Ordinance to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bopal gas leak disaster are dealt with speadily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto.

Whereas Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

Now, Therefore, in exercise of the powers conferred by clause (1) of article 123 of the constitution, the President is pleased to promulgate the following Ordinance:—

1. *Short title and commencement*—(1) This Ordinance may be called the Bhopal Gas Leak Disaster Processing of Claims) Ordinance, 1985.

(2) It shall come into force at once.

2. *Definition.*—In this Ordinance, unless the context otherwise requires.—

(a) "Bhopal gas leak disaster" or "disaster" means the occurrence on the 2nd and 3rd days of December, 1984 which involved the release of highly noxious and abnormally dengerous gas from a plant in Bhopal (being a plant of the Union Carbide India Limited, a subsidiary of the Union Carbide Corporation. U.S.A.) and which resulted in loss of life and damage to property on an extensive scale;

(b) "claim" means—

(i) a claim, arising out of, or connected with the disaster, for compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered;

(ii) a claim, arising out of, or connected with the disaster, for

any damage to property which has been, or is likely to be, sustained:

(iii) a claim for expenses incurred os required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster;

(iv) any other claim (including any claim by way of loss of business or employment) arising out of, or connected with, the disaster;

(c) "claimant" means a person entitled to make a claim;

(d) "Commissioner" means the Commissioner appointed under section 6;

(e) "person" includes the Government;

(f) "Scheme" means a Scheme framed under section 9.

Explanation.—For the purposes of clauses (b) and (c), where the death of a person has taken place as a result of the disaster, the claim for compensation or damages for the death of such person shall be for the benefit of the spouse, children (including a child in the womb) and other heirs of the deceased and they shall be deemed to be the claimants in respect thereof.

3. *Power af Central Government to represent claimants.*—(1) Subject to the other provisions of this Ordinance, the Central Government shall, and shall have the exclusive right to represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), the purposes referred to therein include—

(a) institution of any suit or other proceeding in or before any court or other authority (whether within or outside India) or withdrawal of any such suit or other proceeding, and

(b) entering into a compromise.

(3) The provisions of sub-section (1) shall apply also in relation to claims in respect of which suits or other proceeding have been instituted in or before any court or other authority (whether within or outside India) before the commencement of this Ordinance:

Provided that in the case of any such suit or other proceeding with respect to any claims pending immediately before the the commencement of this Ordinance in or before any court or other authority outside India, the Central Government shall represent, and

act in place of, or along with such claimant, if such court or other authority so permits.

4. *Claimant's right to be represented by a legal practioner.*—Notwithstanding anything contained in section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.

5. *Power of Central Government.*—For purpose of discharging its functions under this Ordinance the Central Government shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which the Central Government may, by notification in the Official Gazette, specify.

6. *Commissioner and other officers and employees*—(1) For the purpose of assisting it in discharging its functions under this Ordinance. the Central Government may appoint an officer, to be known as the Commissioner for the welfare of the victims of the Bhopal gas leak disaster, and such other officers and employees to assist him as that Government may deem fit.

(2) The Commissioner shall discharge such functions as may be assigned to him by the Scheme.

(3) The Commissioner and such of the officers subordinate to him as may be authorised by the Central Government by notifcation in the Official Gazette in this behalf may, for the discharge of their functions under the Scheme, exercise all or any of the powers which the Central Government may exercise under Section 5.

(4) All officers and authorities of the Government shall act in aid of the Commissioner.

7. *Power to delegate.*—The Central Government, may by notifi-

cation in the Official Gazette, delegate, subject to such conditions and limitations as may be specified in the notification, all or any of its powers under this Ordinance (excepting the power under section 9 to frame a Scheme) to the Government of Madhya Pradesh or an officer of the Central Government not below the rank of a Joint Secretary to that Government or an officer of the Government of Madhya Pradesh not below the rank of a Secretary to that Government.

8. *Limitation.*—(1) In computing, under the Limitation Act, 1963 (36 of 1983) or any other law for the time being in force, the period of limitation for the purpose of instituting a suit or other proceeding for the enforcement of a claim, any period after the date on which such claim is registered under, and in accordance with, the provisions of the Scheme shall be excluded.

(2) Nothing in sub-section (1) shall apply to any proceedings by way of appeal.

9. *Power to frame a Scheme.*—(1) The Central Government, shall, for carrying into effect the purposes of this Ordinance frame a Scheme as soon as may be after the commencement of this Ordinance.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), a Scheme may provide for all or any of the following matters, namely:

(a) the registration of the claims under the Scheme and all matters connected with such registration;

(b) the processing of the claims for securing their enforcement and matters connected therewith;

(c) the maintenance of records and registers in respect of the claims;

(d) the creation of a fund for meeting expenses in connecrion with the administration of the Scheme and of the provisions of this Ordinance;

(e) the amounts which the Central Government may, after due appropriation made by Parliament by law in that behalf, credit to the fund referred to in clause (d) and any other amounts which may be credited to such fund;

(f) the utilisation, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of the claim;

(g) the officer (being a judidial officer of a rank not lower than that of a District Judge) who make such disbursal or apportion-

ment in the event of a dispute;

(h) the maintenance and audit of accounts with respect to the amounts referred to in clause (e) and (f);

(i) the functions of the Commissioner and other officer and employees appointed under section 6.

10. *Removal of doubts.*—For the removal of doubts, it is hereby deciared that—

(a) any sums paid by the Government to a claimant otherwise then by way of disbursal of the compensation or damages received as a result of the adjudication or settlement of his claim by a court or other authority shall be deemed to be without prejudice to the adjudication or settlement by such court or other authority of his claim to rcceive compasation or damages in satisfaetion of his claim and shall not be taken into account by such court or other authority in determining the amount of compensation or damages to which he may be entitled in satisfaction of his claim;

(b) in disbursing under the Scheme the amount received by way of compensation or damages in satisfaction of a claim as a result of the adjudication or settlement of the claim by a court or other authority, deduction shall be made from such amount of the sums, if any, paid to the claimant by the Govenment by the Government before the disbursal of such amount.

11. *Overriding effect.*—The provisions of this Ordinance and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Ordinance or any instrument having effect by virtue of any enactment other than this Ordinance.

12. *Laying*—Every notification issued under clause (f) of section 5 and every Scheme framed under section 9 shall be laid, as soon as may be after it is made or framed, before each House of Pariiament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or the Scheme or both Houses agree that the notification or the Scheme should not be made or framed, the notification or the Scheme shall thereafter have effect, only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or Scheme.

APPENDIX B

FED. R. CIV. P.
Rule 23, Class Actions.

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An addition may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.* (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) The judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) the judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to in-

tervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.