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Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law: https://scholarship.law.unc.edu/ncilj/vol16/iss2/5
The Bhopal Disaster Litigation: It's Not Over Yet

Tim Covell*

I. Introduction

On December 3, 1984, forty tons of deadly methyl isocyanate gas escaped from a Union Carbide plant and spread over the city of Bhopal, India. As many as 2,100 people died soon after the gas leak and approximately 200,000 suffered injuries, making it the worst industrial disaster to date. As of December 1990, the official death toll reached 3,828. The legal community immediately became involved, filing the first suit against Union Carbide Corporation (UCC) in the United States four days after the disaster. Eventually, injured parties filed 145 lawsuits for damages against UCC in the United States, and 6,500 against Union Carbide India, Ltd. (UCIL) in India. More than 650,000 administrative personal injury claims and 7,100 administrative death claims have been filed with the Indian government.

In the more than six years that have elapsed since the disaster, numerous lawsuits and uncountable pages of legal documents have been filed. Most litigation in the United States ended when the federal district court in New York dismissed the matter on the basis of forum non conveniens. Litigation in India began in 1986. Through a court approved settlement, UCC paid $465 million to

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* Instructor, University of Toledo College of Law.
3 * Id.*
6 In re Union Carbide Corp., 634 F. Supp. at 844.
7 In re Union Carbide Corp., 809 F.2d at 197-98.
8 * Indian Town Agonizes in 5th Year Since Gas Leak,* Wash. Post, Dec. 3, 1989, at A34.
11 All sums expressed in this Article will be in U.S. dollars, unless otherwise specified.
the Indian Supreme Court. However, the government has not distributed any of the settlement money to the victims, and the legal battles have not ended. Distribution of the settlement money will be postponed until the Indian Supreme Court resolves all petitions challenging the settlement. This Article focuses on the Bhopal litigation in India, discusses the fairness of the settlement, and suggests means for compensating victims more quickly in future disasters.

II. The Bhopal Plant

The disaster occurred at a chemical plant owned by the Indian company UCIL. UCC holds 50.9% of UCIL's stock, the Indian government owns or controls 22% of the stock, and 23,000 Indian citizens hold the remaining stock of this publicly traded company. UCIL employs over 9,000 Indian nationals in fourteen plants. Pursuant to agreements signed in 1973, UCC provided a "design package" to UCIL for the production of chemical fertilizers. UCC warranted that the design package was the best manufacturing information then available. UCC provided technical services in starting up the Bhopal plant, and Indian employees were trained in the United States in 1978 and 1979. Trial production began in 1980, and a UCC employee remained at the plant until December 1982. At the time of the accident, Indian nationals managed and operated the plant.
UCC acknowledged that the presence of a large amount of water in a methyl isocyanate storage tank started a toxic reaction that led to the gas leak disaster. UCC alleged that a disgruntled employee hooked a water hose to the tank, intending to spoil its contents, but UCC maintained that it would never reveal the saboteur’s identity. The General Counsel of India countered that “[t]here’s no saboteur. It’s still a hoax . . . . [T]he sabotage theory . . . [was] an invention based on research in the law.” The Indian government argued that lax safety standards and poor plant maintenance caused the disaster.

III. The Bhopal Act

In response to the multitude of suits filed in the United States and India seeking compensation for injuries, the Indian government adopted the Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985. The Bhopal Act confers upon the Indian government the power to “speedily, effectively, equitably and to the best advantage of the claimants” handle all claims arising from the Bhopal disaster. The Bhopal Act provides that “the Central Government shall . . . have the exclusive right to represent, and act in place of (whether within or outside of 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.” Although the Act defines the term “claim” broadly, the definition does not include criminal matters.

The Bhopal Act gives claimants a limited right to legal representation. It requires the government to “have due regard to any matters which [the claimant] . . . may require to be urged with respect to

29 Barr, supra note 28, at 16.
30 Id.
32 Bhopal Gas Leak Disaster Act, supra note 12.
33 Id. at § 3.
34 The Bhopal Act defines “claim” as: “(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 or required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster; (iv) any other claim (including claim by way of loss of business or employment) arising out of, or connected with, the disaster.” Id. at § 2(b).
35 Id. at § 3(1).
his claim." It further allows a claimant to hire a legal practitioner at his own expense to be "associated" in the conduct of any suit or proceeding relating to the claim.

The Bhopal Act authorizes the appointment of a Commissioner to assist the government in discharging its duties under the Act. The Act grants the government the right to "form a scheme" to distribute the proceeds of any settlement, to process claims, and to create a fund to meet the government's expenses of administering the Bhopal Act. India adopted such a scheme on September 24, 1985. The scheme provided for a Deputy Commissioner to supply forms and to process claims for damages under the Bhopal Act. Under the scheme, a claimant dissatisfied with the decision of the Deputy Commissioner could appeal to the Commissioner appointed pursuant to the Bhopal Act. The scheme made no specific provision for judicial review.

IV. Initial Litigation in India

A. Criminal Litigation

In December 1984, police arrested UCC President Warren Anderson and two senior UCIL officials in India and charged them with criminal conspiracy, culpable homicide not amounting to murder, causing a death by negligence, mischief in the killing of livestock, making the atmosphere noxious to health, and negligent conduct in respect to poisonous substances. The police released Anderson on bail a few hours after his arrest and the other officials the following

36 Id. at § 4.
37 Id.
38 Id. at § 6.
39 The scheme was authorized but not required to provide for:
(a) registering claims,
(b) processing claims and securing their enforcement,
(c) maintaining records of the claims,
(d) creating a fund to meet expenses of administering the scheme,
(e) adding to the fund amounts appropriated by Parliament,
(f) disbursing settlement proceeds, and
(g) providing for a judicial officer (of a rank not lower than a district judge) to resolve disputes over the disbursement of funds. Id. at § 9(2).
40 The expenses of administration as of May 1989 were estimated to be $60 million. Barr, Carbide's Escape, Am. Law., May 1989, at 99. However, the Attorney General of India asserted in proceedings before the Supreme Court that the government would not seek any portion of the $470 million settlement as reimbursement for relief and rehabilitation expenditures already made by the government for relief of gas victims. Sanu v. Union of India, No. 258 at 111 (India Dec. 22, 1989) (writ petition).
41 Sanu, at 18-21.
42 Id.
43 Id. at 20.
44 Id. at 18-21.
46 Bail was approximately $2000. Id.
week.\textsuperscript{47} Anderson left the jurisdiction and never returned.\textsuperscript{48} In February 1988, a Bhopal magistrate issued a criminal arrest warrant naming UCC President Warren Anderson, UCC, UCIL, Union Carbide of Hong Kong, and other officials of Carbide in its various forms.\textsuperscript{49} Eventually the Indian government filed four criminal actions against UCC and its officials.\textsuperscript{50} However, various summonses and arrest warrants failed to bring Anderson back within India's jurisdiction, and in February 1989 an Indian magistrate declared Anderson an "absconding offender."\textsuperscript{51} To date, none of the criminal actions have been brought to trial.

\textbf{B. Civil Litigation}

India's adoption of the Bhopal Act effectively terminated the 6,500 civil suits initially filed in India.\textsuperscript{52} As representative of the victims, the Indian government concentrated its efforts on the consolidated suit filed in the United States District Court for the Southern District of New York.\textsuperscript{53} However, the district court dismissed this action on the basis of forum non conveniens.\textsuperscript{54} India then filed suit against UCC as sole defendant in Bhopal, India in September 1986.\textsuperscript{55} India's complaint advanced the new theory of multinational

\textsuperscript{47} *India Frees Two Carbide Officials*, N.Y. Times, Dec. 15, 1984, at A4, col. 4.
\textsuperscript{48} The Indian government released Anderson on the stipulation that he leave the country. *Indians Arrest and Then Free U.S. Executive*, N.Y. Times, Dec. 8, 1984, at A1, col. 2. There are no reports that Anderson returned to India.
\textsuperscript{49} Sanu v. Union of India, No. 258, at 9-10 (India Dec. 22, 1989) (writ petition). Among the actions alleged to have led to the disaster were:
1. failing to store the methyl isocyanate gas in stainless steel containers;
2. needlessly storing large quantities of gas in large containers for inordinate time periods;
3. insufficient caution in designing and constructing the plant and its systems, and inadequate control of storage systems;
4. a lack of necessary facilities for quick and effective disposal of unstable materials;
5. storing methyl isocyanate gas in a negligent manner; and
6. failing to inform the local government of the hazardousness of the gas and the medical steps to be taken after exposure. *Id.*
\textsuperscript{50} *Summons in Bhopal Case*, N.Y. Times, July 18, 1988, at D2, col. 4.
\textsuperscript{51} *Bhopal Court Declaration*, N.Y. Times, Feb. 9, 1989, at A1, col. 2.
\textsuperscript{52} See supra note 7 (6,500 suits filed against UCIL in India).
\textsuperscript{54} Id. See Nanda, For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Reflection on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute, 15 DEN. J. INT'L L. & POL'Y 235 (1987) (discussing forum non conveniens dismissal and modification on appeal).
\textsuperscript{55} Union of India v. Union Carbide Corp., No. 1113 (D. Bhopal, India 1986).

The Indian judicial system, unlike that of the United States, does not have a dual system of state and federal courts. The highest authority is the supreme court, and below it are the high courts of each state, and below these are the subordinate courts, including the district courts. Jain, *judicial System and Legal Remedies*, in *THE INDIAN LEGAL SYSTEM* 153 (Minattur ed. 1978).
enterprise liability, claiming that UCC, as a multinational corporation engaged in an ultrahazardous activity, had "an absolute and non-delegable duty to ensure that the . . . hazardous plant did not cause any danger or damage to the people and the State by the operation of the ultrahazardous and dangerous activity at the . . . plant." Under this theory, the complex nature of a multinational enterprise makes pinpointing responsibility for damage caused by its subsidiaries impossible. As a single monolithic entity, only the enterprise can guard against its hazards, and it alone should be held responsible for the injuries it causes. In its answer, UCC denied the existence of this theory of recovery and stressed UCIL’s independence, the government’s regulation and ownership of UCIL, and the saboteur theory. India’s multinational enterprise liability theory is premised on

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56 Complaint at ¶ 20, Union of India v. Union Carbide Corp., No.1113 (D. Bhopal, India 1986).
57 Id.
58 The complaint alleged:
   Persons harmed by the acts of the multinational corporation are not in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational that caused the harm is liable for such harm. The defendant multinational corporation has to bear this responsibility for it alone had at all material times the means to know and guard against the hazards likely to be caused by the operation of the said plant, designed and installed or cause to be installed by it and to provide warnings of the potential hazards.
   Id. at ¶ 19.
59 Stanley Chesley, plaintiffs' attorney in the United States action, claims that discovery revealed that UCC exerted direct control over UCIL. He wrote:
   [T]he actions and documents of Union Carbide belie the notion that Union Carbide dealt with UCIL at arms length. First, Union Carbide controlled the UCIL board through its subsidiary Union Carbide Eastern, Ltd. (UCE). Second, Union Carbide organized its reporting function so that there were dual lines of authority. One ran along normal corporate lines, that is from UCIL to UCE to UCC. The other ran across business lines, that is all agricultural products businesses throughout the world reported to Union Carbide Agricultural Products, Inc. (UPAC), another wholly owned UCC subsidiary. This latter reporting scheme provided the direct control over UCIL's Bhopal plant.
   Chesley, Management of Complex Mass Tort Litigation: Strategy and Tactics, Settlement and Attorney Fees, 306 PRAC. L. INST. 455, 464. Additionally, UCC held over fifty percent of the stock of UCIL and was able to elect its board of directors and to control its management. Union Carbide Corp. v. Union of India, No. 26/88, at 91-92 (Madhya Pradesh H.C. Apr. 4, 1988) (order of Seth, J.).
60 Defendant's Written Statement and Set-off and Counterclaim, Union of India v. Union Carbide Corp., No. 1113 (D. Bhopal, India, 1986). UCC's sabotage theory would provide a complete defense under the traditional Anglo-American rule of strict liability, and Indian tort law is founded upon English tort law. Muchlinski, The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken By Foreign Investors, 50 MOD. L. REV. 545, 564-75 (1987). Under Anglo-American rules, the occupier of premises is held strictly liable for damage caused by a dangerous thing escaping due to a non-natural use of land unless the escape was caused by a stranger. Bergman, supra note 27, at 420; see Rylands v. Fletcher, L.R. 3 H.L. 330 (1868) (seminal English case); Muchlinski, supra (summarizing then-applicable tort law).
   India's multinational enterprise liability theory, however, would avoid the sabotage defense by holding UCC to an absolute and non-delegable duty to prevent damage or
the enterprise liability theory established in *M.C. Metha v. Union of India*. The *Metha* case involved a 1985 gas leak at a chlorine manufacturing plant in Delhi, India. The victims filed for relief before the Indian Supreme Court, and a panel of five justices held that, where an enterprise engages in a hazardous or inherently dangerous activity and anyone is harmed by the activity, the enterprise is strictly and absolutely liable to compensate all those affected by the accident. The *Metha* court found it "necessary to construct a new principle of liability to deal with an unusual situation which ha[d] arisen . . . on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy." *Metha* also introduced a punitive element into calculating damages; the court said that "the measure of compensation . . . must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable." Applying *Metha* to the Bhopal case, in order to establish UCC's liability India only needed to prove that UCIL conducted an ultrahazardous activity, that people were harmed, and that UCC controlled UCIL.

V. Pressures for Resolution

By early 1987, more than two years had elapsed since the Bhopal disaster, and no compensation had been paid to the Bhopal vic-

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62 Id.
63 Id. at 1099.
64 Id.
65 Id. Whether the current Indian Supreme Court approves of the concept of punitive damages is open to question. Chief Justice Mukharji, in his opinion in *Sanu v. Union of India*, said in dicta:

There are, however, serious difficulties in evolving an actual concept of punitive damages in respect of a civil action which can be integrated and enforced by the judicial process. It would have raised serious problems of pleading, proof and discovery, and interesting and challenging as the task may have been, it is still very uncertain how far [a] decision based on such a concept would have been a decision according to 'due process' of law acceptable by international standards.


Justices Ranganathan and Ahmadi agreed with the Chief Justice that punitive damages were an "uncertain province of the law" and felt it premature to conclude that punitive damages had been, or would be accepted in India. *Id.* at 21-22 (Ranganathan and Ahmadi, JJ., concurring).
This elapsed time pressured the Indian government to resolve the case. The delays were compounded when Presiding Judge Patel, who originally had promised to resolve the case by the end of 1987, requested a transfer from the case after learning his name appeared on a list of claimants for damages caused by the disaster. His removal, noted one observer, increased pressure on the Indian government to settle the case.

By presenting the multinational enterprise liability theory, attorneys for the Indian government hoped simply to prove that: (1) a dangerous activity was under way at Bhopal; (2) people were harmed; and (3) UCC controlled UCIL. The government moved for summary judgment on this theory; however, the court never heard the motion. Instead, Judge Deo, who replaced Judge Patel, sua sponte ordered the Attorney General to submit a written proposal for interim relief. On December 17, 1987, Judge Deo ordered UCC to pay $270 million in interim relief within two months.

UCC appealed the order to the Madhya Pradesh High Court where Justice Seth upheld the grant of relief, but reduced its amount to $190 million. Justice Seth held that the lower court could grant interim relief under the common law of torts. Justice Seth noted the similarity between the facts of the UCC case and the Metha case, and applied the Metha rule of absolute liability without exceptions. Justice Seth said that Metha eliminated the exceptions to strict liability that had existed previously under the rule in Rylands v. Fletcher. Under the Metha absolute liability rule, the court reasoned, the enterprise engaged in the ultrahazardous activity that led to injury was

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66 See supra note 13. There is a backlog of 10 million cases in India’s courts and the average civil case takes more than eleven years to try. *Bhopal May Join List; 10 Million Cases Await Indian Justice*, L.A. Times, June 3, 1986, § 1, at 10, col. 3. In 1985, UCC Chairman Warren Anderson felt the litigation could take from six to nine years, while plaintiff’s attorney Michael Ciresi predicted 25 years. Mr. Ciresi said UCC wanted the suit litigated in India because Indian justice moves so slowly. *Legal Wrangling Delays Bhopal Compensation*, Wash. Post, Dec. 1, 1985, at A1.


68 An Indian daily newspaper commented, “This development has raised once again the question of whether interests of the gas leak victims would be better served by the government of India having an out of court settlement with Union Carbide.” *Id.* at 3 (quoting *The Statesman*, Feb. 21, 1987).


70 *Id.*

71 Judge Deo was inspired by an earlier motion of an activist attorney injured during the Bhopal disaster. *Id.* at 100-01.

72 *Union Carbide Corp. v. Union of India*, No. 13080, at 12 (India 1988) (special leave petition).


74 *Id.* at 88-102.

75 *Id.* at 79-80.

76 *Id.* at 80 (citing Rylands v. Fletcher, L.R. 3 H.L. 330 (1868)). See Muchlinski, *supra* note 60, and sources cited therein.
liable for the resulting damages.\textsuperscript{77}

In justifying the grant of interim relief, Justice Seth analogized to English law, which allows interim orders for damages in certain circumstances.\textsuperscript{78} Justice Seth incorporated the English rule into the common law of India, with the requirements that: (1) if the action proceeded to trial the plaintiff would obtain judgment for substantial damages; and (2) the payor is (a) insured in respect of plaintiff's claims, (b) a public authority, or (c) a person whose means and resources are such as to enable him to make the interim payment.\textsuperscript{79}
The case against UCC met all of these requirements.\textsuperscript{80}

The Madhya Pradesh High Court upheld the district court's "lifting of the corporate veil" of UCIL and held UCC liable for the operations of UCIL.\textsuperscript{81} The court said that legal grounds for lifting the corporate veil had been expanding\textsuperscript{82} and that it could be lifted on purely equitable considerations in the case of a mass disaster when the assets of a subsidiary were utterly insufficient to meet the just claims of the victims.\textsuperscript{83} The court also considered that UCC held more than one-half of the voting power of UCIL, enabling it to elect the board of directors and to control the management.\textsuperscript{84} The court concluded that UCC "had real control over the enterprise which was engaged in carrying on the particular hazardous and inherently dangerous industry at the Bhopal plant and as such [UCC] was absolutely liable (without exceptions) to pay damages/compensation to the multitude of gas victims."\textsuperscript{85} The court reduced the amount of interim compensation ordered by the lower court to an amount it calculated as one-half of the reasonable compensation for the estimated number of injured people.\textsuperscript{86} Justice Seth

\begin{footnotes}
\footnotetext[77]{Union Carbide Corp. v. Union of India, No. 26/88, at 81 (Madhya Pradesh H.C. Apr. 4, 1988) (order of Seth, J.).}
\footnotetext[78]{Id. at 82-83.}
\footnotetext[79]{Id. at 86-87.}
\footnotetext[80]{Id. at 87-88. Earlier in the case, UCC filed an affidavit which revealed it had adequate resources to make the interim payment. See infra notes 81-85 (establishing UCC's liability).}
\footnotetext[81]{Union Carbide Corp. v. Union of India, No. 26/88, at 91 (Madhya Pradesh H.C. Apr. 4, 1988) (order of Seth, J.).}
\footnotetext[82]{Justice Seth quoted the Indian Supreme Court's decision in Life Ins. Corp. of India v. Escorts Ltd.,[1986] A.I.R. (S.C.) 1370 which said: The corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented or a taxing statute or benevolent statute is sought to be evaded or where associated companies are inextricably connected as to be in reality part of one concern. It is neither necessary nor desirable to enumerate the class of cases where the lifting [of] the veil is permissible, since, that must necessarily depend on the relevant statutory or other provisions, the objects sought to be achieved, the impugned conduct, the involvement of the element of public interest, [and] the effect on parties who may be affected . . . . Id. at 90 (emphasis in original).}
\footnotetext[83]{Id. at 88-91.}
\footnotetext[84]{Id. at 91-93.}
\footnotetext[85]{Id. (parentheticals in original).}
\footnotetext[86]{Id. at 98. Justice Seth first considered the size and value of UCC under the Metha}
offered little explanation for his choice of the overall sum; he simply found it to be a reasonable portion of the damages to be recovered by the plaintiff.87

A UCC official reportedly said there "was no way in hell" that UCC would pay the interim compensation without a final, unappealable order.88 Attorneys for the Indian government expressed discomfort with the interim relief order, but were obligated to argue for it due to the political exigencies of the situation.89 Furthermore, it was doubtful that the order could be enforced against UCC in American courts.90

Because India considers its image in the international arena to be important, its desire to avoid another review in the United States courts may have encouraged it to settle the matter. While the Bhopal case was pending in the United States courts, counsel for India argued that Indian courts could not justly compensate the victims of the Bhopal disaster.91 The High Court of India took strong exception to this characterization. Justice Seth said, "this Court cannot
restrain itself from expressing shock over the manner in which . . .
the plaintiff Union of India under-rated its own judiciary and made it
the subject of ridicule so publicly before a foreign court." The In-
dian government's desire to avoid further review by the United
States courts, and perhaps the United States courts' refusal to en-
force an Indian judgment, made the prospect of settlement more
attractive.

Both UCC and the Indian government appealed Justice Seth's
decision to the Indian Supreme Court. The Indian government ar-
gued that the amount of interim relief awarded should not have been
reduced. These appeals set the stage for more delays in compen-
sating the disaster victims. Hearings began before the Indian
Supreme Court on November 1, 1988. Settlement talks were revi-
talized by India's desire to avoid further delays and by UCC's desire
to be done with the matter.

In previous settlement negotiations, UCC consistently offered
$350 million paid over ten years. On January 1, 1989, UCC of-
fered $240 million in a lump sum, but a few days later it reduced the
offer to $150 million. The Indian government demanded at least
a $615 million lump sum payment. On February 3, UCC offered

"..."

92 The court continued:

Indeed, before this Court, during the course of arguments, the learned At-
torney General, Shri Parasaran, frankly confessed that it was most unfortu-
nate that the plaintiff Union of India chose to advance such an argument
before a foreign court as had the effect of tarnishing the fair image of the
Indian judiciary.

Union Carbide Corp. v. Union of India, No.26/88, at 8-9 (Madhya Pradesh H.C. Apr.4,

93 All four of India's trial counsel, as well as the Minister of State for Law and Justice,
expressed doubt that the interim relief order would be upheld in American courts. Barr,
supra note 40, at 102.

94 India was hesitant to press the matter in the United States for fear of losing due
process arguments, and because the interim order might not be a final judgment enforce-
able under the Foreign Judgments Act. Stille, supra note 90. See supra notes 88-90. Even if
India were successful in the United States courts, more than five years would have elapsed
before India obtained any of UCC's assets. N.Y. Times, Feb. 15, 1989, at D3, col. 1. Set-
tlement would avoid these problems. However, UCC also felt pressure to settle. Former
plaintiff's attorney Aaron Broder said UCC was beginning to face the potential for a guar-
anteed loss and perhaps a catastrophic one. Neither UCC nor India wanted to risk losing
in the United States courts. Stille, supra note 90.

95 Barr, supra note 40, at 102.

96 Id.

97 See supra note 94.

98 Barr, supra note 40, at 102.

99 Id.

100 Id.
$350 million over time, and on February 4, UCC offered $420 million in a lump sum. The Indian government counter-offered at $600 million and said that it would not consider any amount less than $500 million. The Indian Supreme Court, in a May 1989 order analyzing the eventual settlement, said UCC’s highest offer was $426 million and the lowest government offer was $500 million.

VI. The Bhopal Settlement

The facts behind the February 14, 1989, settlement are unclear; however, the following account has emerged. On February 14, Supreme Court Chief Justice Pathak ordered a “settlement” compensation payment of $470 million. Both parties immediately agreed to the deal, which caused allegations of a “stage managed” settlement, engineered to alleviate criticism of the Indian government for settling the matter by adding the judiciary’s imprimatur to the deal. One Indian lawyer commented, “There’s no question about it, the settlement was sprung. Obviously talks were going on. You can’t arrive at a settlement like that on a particular day, [with] the histrionics of Mr. Nariman, counsel for Carbide—‘Standing here as I do, my client bows to the wishes of the highest court in the land,’ and his client accepts it, and the Attorney General agrees.... It’s absurd.” Judicial initiative apparently played some role in the settlement; however, UCC directors were polled about the settlement before the matter was publicly presented by the court, showing that behind-the-scenes negotiations were in progress.

In response to these allegations, the Indian Ministry of Information and Broadcasting issued a ten page information release. Answering the question of whether the event was a settlement or court order, the information release stated that the court’s order “makes it abundantly clear” that the judges found the $470 million settlement “just, equitable and reasonable.” The release continued, “It should be remembered that the government made several attempts and failed to arrive at an out of court settlement.... [A]ll attempts failed

\[101\] Id.
\[102\] Id.
\[103\] Union Carbide Corp. v. Union of India, No. 13080, at 11 (India 1988) (special leave petition).
\[105\] Id.; Barr, supra note 40, at 102-04.
\[106\] Barr, supra note 40, at 104 (quoting Soli Sorabjee).
\[107\] Reportedly, before the settlement the chief justice placed the other justices hearing the case into pairs and asked them to independently determine a fair settlement figure. Both pairs came up with figures in the $450 million range, which were rounded up to approximately 7 billion rupees or $470 million. Id.
\[108\] Id.
\[109\] Barr, supra note 40, at 102-04.
and it was ultimately left to the Supreme Court to make a figure and pass an order.\textsuperscript{110}

On May 4, 1989, the Supreme Court issued an order explaining its reasons for adopting the February 14, 1989, settlement.\textsuperscript{111} The court's main consideration was its compelling duty, both judicial and humane, to provide immediate relief to the victims.\textsuperscript{112} The court recognized the desirability of litigating the matter and setting judicial precedent in such a disaster; however, the pressing needs of the victims overrode the desire for judicial precedent.\textsuperscript{113} In arriving upon an appropriate sum for settlement, the court considered the estimated numbers of injured people and chose a sum that was more than three times the amount that would have been statutorily granted to automobile accident victims.\textsuperscript{114}

The settlement brought an immediate public outcry.\textsuperscript{115} Public criticism forced Supreme Court Justice Venkataramiah to withdraw from the case.\textsuperscript{116} Former Supreme Court Justice V.R. Krishna attacked the settlement as a "sinister surrender" to UCC.\textsuperscript{117} In denouncing the settlement he said: "The central government's conduct of the litigation, regardless of their bona fides, was the worst legal disaster . . . . Is Indian life so cheap, Indian justice so weak that a U.S. multinational trading in lethal gas can blackmail the managers of our republic into bending before them?"\textsuperscript{118} Similarly, retired Indian Supreme Court Chief Justice Bhagwati said in a magazine interview, "the multinational has won and the people of India have lost."\textsuperscript{119} Presiding Indian Supreme Court Chief Justice Pathak commented, "I want to make it clear that we did the best that could be done under the facts and circumstances of the case. But we shall be happy to repair if any error is shown."\textsuperscript{120}

The settlement eliminated all criminal and civil claims against

\textsuperscript{110} Id. at 102.
\textsuperscript{111} Union Carbide Corp. v. Union of India, No. 13080 (India 1988) (special leave petition).
\textsuperscript{112} Id. at 5-7.
\textsuperscript{113} Id. at 20-24.
\textsuperscript{114} Id. at 12-19.
\textsuperscript{116} Justice Venkataramiah said, "You take any newspaper. We are being impeached every day. All sorts of things are spoken of us. No one speaks for us. The best is to withdraw from the case . . . . I want to withdraw and live peacefully at this state in my life." \textit{Int'l Envtl. Rep. (BNA) No. 113 (Mar. 8, 1989)}.
\textsuperscript{118} \textit{Id}.
\textsuperscript{120} \textit{Int'l Envtl. Rep. (BNA) No. 113 (Mar. 8, 1989)}. 
UCC. Some critics strongly argued that the bargaining away of criminal liability is unauthorized by the Bhopal Act. Retired Indian Supreme Court Chief Justice Bhagwati remarked, "It defies comprehension how criminal proceedings against Union Carbide Corporation's officers can be quashed without even examining if there is a prima facie case. Can immunity from prosecution be bought by paying compensation?" However, the Indian Attorney General explained that the discharge of criminal liability was made within the broad powers of the Supreme Court bench, not in the way of settlement.

On February 24, 1989, UCC paid $465 million to the Indian government, twenty-nine days before it was due. The court credited UCC for a prior $5 million payment that UCC had made to the Red Cross. UCIL paid $45 million of the total settlement.

The government deposited the money into an Indian Supreme Court account, where it remains pending resolution of all challenges to the settlement.

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122 Bhopal activist Vinod Raina of the Bhopal Group for Information and Action said, "By agreeing to drop the criminal charges, the government has allowed the guilty off and the killer multinational to go scot-free." Tarrant, Union Carbide Seen as Victor in Bhopal Disaster Settlement, Reuter Libr. Rep., Feb. 19, 1989.
123 India: Supreme Court May Not Revise Settlement, Inter Press Service, Mar. 9, 1989.
124 Id. See infra note 142. The Indian Code of Civil Procedure provides, "Nothing in this code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice." Stille, supra note 90, at 1, 43 (quoting the Indian Code of Civil Procedure).
126 Supra note 121.
127 See Blum, supra note 14, at 3, 26. There have been other related suits. In October 1989, the Supreme Court of India ordered UCC to respond to charges by workers that UCC had experimented on its employees with lethal gases. L.A. Times, Oct. 5, 1989, part 4, at 2, col. 1. UCC responded that the allegation is absurd. Id. The workers, however, claim to quote from a memo sent from UCC headquarters in Connecticut that indicates tests were conducted on 12 employees without their knowledge, and that the employees were referred to as "volunteers." Bhopal, United Press Int'l, Oct. 4, 1989.
128 Indian tax authorities in July 1989 demanded payment from interest earned on the $470 million settlement fund paid by UCC. The sum has been deposited in the court's register pending legal challenges and is earning interest at a rate of about $130,000 a day. Indian Taxman Eyes Compensation for Bhopal Victims, Reuter Libr. Rep., July 17, 1989. The Indian Attorney General says he will fight to prevent any of the money falling into the hands of the tax service. Id.
130 American attorneys F. Lee Bailey and Stanley Chesley, on behalf of the plaintiffs' lawyers executive committee, petitioned the New York District Court for costs incurred in the United States portion of the suit. In re Union Carbide Corp. Gas Plant Disaster, Misc. No. 21-38 (S.D.N.Y. June 14, 1989) (1989 WL 66637). The court denied the motion, noting that the appellate court had, "in broad and sweeping strokes swept away the notion that this court retained any vestige of jurisdiction after the forum non conveniens dismissal." Id. See Nanda, supra note 54 (discussing forum non conveniens dismissal).
Upon reaching the settlement, the Indian government promised that the money would be disbursed "impartially, speedily, and effectively." In April 1989, an estimated one person per day was dying from the effects of the gas, but only four survivors of the disaster had been identified as permanently and totally disabled. This prompted the Supreme Court to order the payment of token interim relief of $35 per month to the four, and a lump sum payment of $200 to 773 others.

In May 1989, the Indian government gave bank account books to twenty-five of 1,609 relatives of those injured in the Bhopal disaster in anticipation of the disbursement of a $50 interim payment to be made by the government. By August 1989, the Indian government classified only nineteen of more than 120,000 claimants examined as permanently disabled.

On March 5, 1990, the Indian government announced it would distribute $12 per month for three years to each of 500,000 people who were exposed to the gas. The government hopes that within three years all pending court cases arising from the disaster will be resolved. A government spokesperson declared that the distribution would be made to the unusually large group because all persons exposed to the gas would suffer, even though the effects might only show up years later. The funds will not initially come from the settlement paid by UCC. Instead, the government has set aside $212 million to make the payments. The expenditure will be "adjusted against" any recovery the victims may get in the current litigation. As of December 1990, the government was paying monthly compensation to 372,000 Bhopal victims.

VII. The Constitutionality of the Bhopal Act

In December 1989, the Indian Supreme Court upheld the con-
stitutionality of the Bhopal Gas Leak Disaster (Processing Claims) Act of 1985 which authorized the government to enter into the settlement on behalf of the Bhopal victims. The decision was rendered by the new Chief Justice appointed under newly elected Prime Minister V.P. Singh. The lengthy opinion contained far-reaching language, although the specific question addressed was only whether the Bhopal Act was constitutional, not whether the settlement itself was fair or should be upheld.

The petitioners’ main contention was that the Bhopal Act, insofar as it took away the ability of the victims to fight for their rights, denied them access to justice. However, the Chief Justice found that the Bhopal Act provided a special procedure for protecting the rights of the victims which, in light of the circumstances, was justified. He said that in view of the enormity of the disaster, the fact that the victims were facing a mighty multinational and were being descended upon by contingency fee lawyers was a sufficient ground to provide a special procedure that was just and fair, and that this procedure did not violate the Indian Constitution.

The Chief Justice said the government adopted the Bhopal Act in recognition of the right of a sovereign to act as parens patriae.

He continued, where the citizens of a country are victims of a tragedy because of

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139 Sanu v. Union of India, No. 258 (India Dec. 22, 1989) (writ petition). Chief Justice Mukharji was joined in his opinion by Justice Saikai. Justices Ranganathan and Ahmadi joined in a concurrence, and Justice Singh filed a separate concurrence.


141 The decision of the Indian Supreme Court consisted of a 185 page majority opinion and concurrences totalling 54 pages. Sanu v. Union of India, No. 258 (India Dec. 22, 1989) (writ petition).

142 Id. As a preliminary matter, the court clarified that the Bhopal Act did not address the question of criminal liability, and that the discharge of criminal charges by the Indian Supreme Court was not before it in this case. Both the petitioners and the Indian Attorney General agreed on this position. Id. at 35, 63.

The Attorney General said the discharge of criminal liability was authorized under sections 135 and 142 of the Indian constitution as well as under common law, and that the discharge was further permitted under the plenary power of the supreme court to act as a court of equity. Id. at 109-10.

Although the court did not rule on this issue as it was beyond the scope of the appeal, it seems a well orchestrated reopening of the criminal case would serve the interests of the Indian government. The honor of the Indian judiciary and judicial support for commercial and industrial development in India could be maintained by upholding the settlement. But at the same time, the government and the people of India could vent their wrath in a criminal prosecution of executives who are beyond the reach of the courts. For example, before the criminal charges were dismissed in the settlement, India attempted to serve an arrest warrant on then UCC Chairman Anderson, but was unable to do so because the warrant was not covered by U.S. laws of international judicial assistance. The same thing happened with warrants for the arrest of Union Carbide Eastern officials in Hong Kong. Briefly, L.A. Times, Jan. 9, 1989, § 4, at 2, col. 1.


144 Id. at 137-38.

145 Id. at 81.
the negligence of a multinational corporation, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievance and demands of the victims, for which the conventional adversary system would be totally inadequate. The state in discharge of its sovereign obligation must come forward.\(^{146}\)

The court further explained that "[t]he State has taken over the rights of the victims in the exercise of sovereignty in order to discharge the constitutional obligations as the parent and guardian of the victims who in the situation as placed needed the umbrella of protection."\(^{147}\)

The court noted that the doctrine of *parens patriae* traditionally required that the group for whom the state acted be disabled. The unique circumstances of the Bhopal disaster provided the disability in this case.\(^{148}\) The court did not apply the doctrine of *parens patriae* strictly; it commented that the Bhopal Act was an appropriate evolution of the expression of the sovereignty of the state.\(^{149}\)

In response to the petitioners' allegations of a conflict of interest because the government of India was a shareholder in UCIL, the court replied that the suit was against UCC only, and that the Bhopal Act and the settlement did not affect any future claims that might be brought against the government of India and the state government.\(^{150}\) Therefore, the court reasoned that there was no conflict of interest. Even if the government of India were a joint tortfeasor, its interest in the litigation against UCC—to have the largest amount of monetary liability attributed to UCC—would still be compatible with the victims' financial interests.\(^{151}\) Furthermore, even if there were a conflict of interest, India was the most suitable party to bring the suit based upon the common law doctrine of necessity.\(^{152}\)

The petitioners argued that the Bhopal Act violated the concept

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\(^{146}\) *Id.* at 81-82. *Parens patriae* means "literally 'parent of the country,' [and] refers traditionally to the role of the state as sovereign and guardian of persons under legal disability. . . . It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people." *Black's Law Dictionary* 1003 (5th ed. 1979).

\(^{147}\) Sanu v. Union of India, No. 258, at 156.

\(^{148}\) The court said the victims after the disaster were physically, mentally, financially, and economically not a match for the powerful multinational company. *Id.* at 140.

\(^{149}\) *Id.* at 142.

\(^{150}\) *Id.* at 150-51. This declaration may set the stage for even more litigation.

One petitioner argued that the negligence of the Indian government included:

1. allowing the factory to be installed in the heart of the city,
2. allowing people to live in front of the factory, knowing that dangerous gases were being used in the manufacturing process,
3. realizing gas leakage from the plant was a common event which was complained about continuously by the people.

*Id.* at 70-71 (Dec. 22, 1989).

\(^{151}\) *Id.* at 19 (Ranganathan and Ahmadi, JJ. concurring).

\(^{152}\) The court applied by analogy the common law doctrine of necessity, borrowed from British law. Under that doctrine, if all members of a tribunal are disqualified from hearing a matter because of a conflict of interest, the lack of an alternative forum will oblige the court to hear the matter anyway. *Id.* at 167-68.
of "natural justice."\textsuperscript{153} Under Indian law, the principle of natural justice "requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that effect their lives and property should not continue in their absence and that they should not be precluded from participating in them."\textsuperscript{154} The court interpreted the Bhopal Act as providing the injured with an opportunity to state their positions before the government reached any settlement.\textsuperscript{155} However, the court said the concept of natural justice also required notice to be given to the claimants before the government reached a settlement.\textsuperscript{156} This notice was not given to the Bhopal victims.\textsuperscript{157} The court opined that justice had been done to the victims, but because they lacked input, justice did not appear to have been done.\textsuperscript{158} This failure to give notice, however, was not fatal because, "to do a great right after all, it is permissible to do a little wrong. In the facts and circumstances of this case, this is one of those rare occasions."\textsuperscript{159}

In interpreting the Bhopal Act, the court added a new requirement that categorization of claims and decisions of the Deputy Commissioner under the scheme be appealable to a judicial authority.\textsuperscript{160} The court also called for swift disbursement of the settlement proceeds to the victims.\textsuperscript{161} So modified, the Indian Supreme Court upheld the constitutionality of the Bhopal Act.

Far reaching dicta in the decision hinted at the court's likely posture in future hearings on the fairness of the settlement. The Chief Justice noted that the disaster victims received justice, but because of the failure to allow them input, justice did not appear to be done. To remedy this injustice, the settlement funds should be vigorously distributed.\textsuperscript{162} In their concurrence, Justices Ranganathan and Ahmadi said the Chief Justice's statement "showed that the court had applied its mind fully to the terms of the settlement in light of the data as

\textsuperscript{153} Complying with the principles of natural justice is a requirement of the Indian Constitution. \textit{Id.} at 159.

\textsuperscript{154} \textit{Id.} at 163.

\textsuperscript{155} \textit{Id.} at 165-66 & 168. See supra notes 35-37 and accompanying text (discussing victims' right to limited representation under the Bhopal Act).

\textsuperscript{156} Justices Ranganathan and Ahmadi did not support this part of the majority opinion. They felt that the provisions for input that existed in the Act were sufficient and that the Indian Constitution did not require any additional opportunity to be heard. Sanu v. Union of India, No. 258, at 32 (Ranganathan and Ahmadi, JJ., concurring).

\textsuperscript{157} \textit{Id.} at 172.

\textsuperscript{158} \textit{Id.} at 177.

\textsuperscript{159} \textit{Id.} at 178.

\textsuperscript{160} \textit{Id.} at 179. The scheme adopted under the Act had no provision for judicial review. See supra notes 38-44 and accompanying text.

\textsuperscript{161} Sanu v. Union of India, No. 258, at 183.

\textsuperscript{162} Justice Mukharji said it is "necessary to reiterate that the promises made to the victims and the hopes raised in their hearts and minds can only be redeemed in some measure if attempts are made vigorously to distribute the amount realized to the victims in accordance with the scheme [for distribution to be modified by the court]." \textit{Id.} at 183.
well as the circumstances placed before it and has been satisfied that
the settlement proposed was a fair and reasonable one that could be
approved."\(^{165}\) They further said that although they were inclined to
agree with the Chief Justice, this matter was beyond the scope of the
current proceeding.\(^{164}\)

The Indian Supreme Court has yet to decide petitions challeng-
ing the validity of the dismissal of the criminal charges\(^{165}\) and the
fairness and adequacy of the settlement.\(^{166}\) Hearings on these chal-
lenes,\(^ {167}\) which began in April 1990, have not yet been concluded.
The Indian government predicts that the matter will be resolved by
March 1993.\(^ {168}\)

VIII. Political Aspects of the Case

In campaigning against the Ghandi government in 1989,
Vishwanath Pratap Singh promised to seek greater compensation
from UCC for the Bhopal victims.\(^ {169}\) When elected in December
1989, he affirmed his support for further compensation from UCC,
explaining that the Ghandi government had no authority to enter a
settlement that extinguished all rights of the victims.\(^ {170}\)

In January 1990, Prime Minister Singh strongly voiced his gov-
ernment’s opposition to the Bhopal settlement reached under for-
mer Prime Minister Ghandi. He expressed: (1) support for the
petitioners challenging the settlement; (2) the intent to re-examine
criminal charges against UCC, UCIL, and its officers; and (3) harsh
rhetoric directed against UCC. Prime Minister Singh said, "My gov-
ernment has decided in principal to review the settlement and to
support petitions filed before courts by voluntary groups for its re-
view."\(^ {171}\) He added that the government would reinstate charges of
criminal liability against UCC if the Indian Supreme Court overturns

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\(^{163}\) Id. at 34-35 (Ranganathan and Ahmadi, JJ., concurring).
\(^{164}\) Id. at 36 (Ranganathan and Ahmadi, JJ., concurring).
\(^{165}\) See supra note 142.
\(^{166}\) Several petitions are pending before the court. Reviewing the Bhopal Settlement, Wall
St.J., Apr. 6, 1990, at 16, col. 5. The Indian Constitution provides for the court to review
its ruling if a petition is filed within thirty days of the ruling; however, the grounds for
\(^{167}\) Reviewing the Bhopal Settlement, supra note 166. In argument before the court, an
attorney for the petitioner said the Supreme Court of India lacked the authority to order a
settlement. Bhopal Lawyer Rejects High Court on Settlement, United Press Int’l, Apr. 6, 1990.
Only the government had the authority, the lawyer asserted. Id. The lawyer also argued
that the settlement was not binding because the victims were not parties to the settlement
and that the government erred in not seeking concurrence from the victims. Id.
\(^{168}\) See supra note 134 (government authorizing interim compensation for three years,
in the hope that challenges to the settlement will be resolved by then).
\(^{170}\) India Seeks to Reopen Bhopal Case, N.Y. Times, Jan. 22, 1990, at D1, col. 3.
\(^{171}\) Mankowski, Carbide Stock Drops on Indian Review of Bhopal Settlement, Reuter Libr.
the settlement. Supra note 142. He commented, "Human life and criminal liability cannot be compromised. There will be no compromise with the crime in the settlement for compensation with the company." Supra note 142.

Singh voiced even stronger language before a crowd of over 100,000 people gathered near the site of the disaster. He said that the government had "decided to do away with the settlement and pursue the $3 billion suit against the company." Supra note 142. In response the cheering crowd shouted, "death to Union Carbide." Supra note 142. Singh said that if the settlement were overturned, he would oppose returning any of the $470 million settlement to UCC. Supra note 142. UCC countered that the new government cannot disavow the settlement simply because it disagrees with it. Supra note 142. Although one analyst believes that the Indian government was merely trying to "score points" with its people, another thought the matter has become a political issue in India and is unlikely to be quickly resolved. Supra note 142. Current Indian Prime Minister Chandra Shekhar replaced Mr. Singh in November 1990. Prime Minister Shekhar said he will maintain the Singh government’s stance that the settlement compensation for the Bhopal victims is inadequate. Supra note 142.

IX. Can the Legal System Cope with Mass Disasters?

With the continuing litigation over the Bhopal settlement, Supra note 142. the likelihood of suits against the Indian government as well as the Madhya Pradesh state government, Supra note 142. the possibility of criminal suits against UCC and its officials, Supra note 142. and the failure to distribute settlement proceeds to the disaster victims, Supra note 142. it is apparent that the Bhopal litigation is not yet over. The law should operate to compensate victims fairly. Supra note 142. If the law fails, changes must be made. Supra note 142.
A. Fair Compensation of Victims

Many people recognized that the dispute between UCC and the Indian government would be settled to avoid protracted litigation. While the matter was pending in United States courts, a number of plaintiffs sought to settle with UCC for $350 million. The plaintiffs were represented by U.S. lawyers who are required to act ethically and in the best interests of their clients. These lawyers believed that this sum, minus contingency fees, was adequate compensation. The final settlement of $470 million, which is higher and does not require the subtraction of contingency fees, is not universally criticized and is supported by some civil rights lawyers in India.

However, the adequacy of the dollar amount is not the only characteristic of the settlement that should be examined. One commentator, writing before the settlement was reached, listed six characteristics of a good settlement of the matter:

1. speed
2. unnecessary transaction costs
3. resolution of all claims in India and the United States
4. fair determination of the victims' claims
5. adequate and fair compensation
6. conduct guidance (punitive effect).

awarded to compensate the victim—to redress the injuries that he or she has actually suffered") (outlines application of punitive damages).

One attorney, writing about the failure of the legal system to deal effectively with the Bhopal disaster, said:

How much better it would be if next time, lawyers were able to offer an alternative to court systems, limited as they are by their procedures and susceptible as they are to all sorts of delays. How much better it would be if rather than just exercising their advocacy skills after the next Bhopal, lawyers were, before it happens, to exercise some of their other skills and serve as catalysts for development of alternative methods to deal with such situations.


One lawyer estimated that a $300 million settlement would have provided compensation of $15,000 for the death of a breadwinner, $8,000 for the death of a non-breadwinner, $12,000 for a disabled breadwinner, and $5,000 for other injuries with a long-term effect. Magraw, *The Bhopal Disaster: Structuring a Solution*, 57 U. Colo. L. Rev. 835 (1986). Fifteen thousand dollars in the bank at ten percent interest would provide a monthly income of one hundred and twenty-five dollars. Id. The average Indian worker makes fifty U.S. dollars per month. *Court Orders $60 Payment to Bhopal Victims*, United Press Int'l, Aug. 5, 1989.

The Bhopal Act provides for the deduction of administrative costs. However, the Indian Attorney General asserted in proceedings before the Supreme Court in early 1990 that the government will not seek any portion of the $470 million settlement as reimbursement for sums already expended for disaster relief. Sanu v. Union of India, No. 258, at 111 (India Dec. 22, 1989) (writ petition).

See supra note 120.

Magraw, supra note 188, at 841-43.
The settlement meets few of these criteria.

**Speed.** The settlement was painfully slow. The parties took more than four years to reach a settlement and now, more than six years after the disaster, the settlement funds remain undistributed.192

**Unnecessary Transaction Costs.** This aspect of the settlement has been favorable to the victims—unnecessary transaction costs193 seem to have been avoided. Not paying contingent attorney fees to the lawyers of the individual Bhopal victims was a great savings. Further, although the Indian government’s administration of the matter has already cost more than $60 million,194 India has indicated that it will not reduce the settlement fund by the sums it had already paid as of December 1989.195

**Resolution of All Claims.** The settlement has not resolved all claims in the United States and India. Further challenges are pending in India196 and further litigation is likely in the United States.197

**Fair Determination of Victims’ Claims.** The Indian government has established a process to determine the victims’ claims. The government plans to set up fifty-six special courts to disburse the money and designate seven judges to hear appeals.198 An independent “watchdog” group will monitor the disbursement.199 However, criticism of this program is rampant, and there is great fear that the claims will not be determined properly.200 Experts anticipate that

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192 See supra notes 13 (settlement funds remain undistributed) and 138 (progress in government’s distribution of stop-gap compensation to victims).
193 Magraw defined unnecessary transaction costs primarily as legal fees and other expenses. Magraw, supra note 188, at 842.
194 See supra note 40. Interestingly though, an anthropologist hired by UCC to analyze payments from a settlement fund found the Indian government needed to be involved to effectively distribute the fund. Judge Skeptical on Bhopal Proposal, N.Y. Times, Mar. 29, 1986, at A28, col. 3.
195 See supra note 189.
196 See supra notes 142 (possible future criminal suits), 150 (possible future claims against the government), 166-68 (current challenges to the settlement), 169-79 (government support for challenges to the settlement), infra note 197 (possible future lawsuits in the United States).
197 At least two plaintiffs’ attorneys say a number of cases will be pursued in the United States. Blum, Doubts Remain, the Bhopal Litigation May Linger, Nat’l L.J., Feb. 27, 1989, at 3. The Texas Supreme Court recently upheld a trial court’s refusal to dismiss a suit by non-citizens injured by chemicals outside of the United States on the basis of forum non conveniens. Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990). Justice Gonzales, in his dissent, said the majority opinion opened the door to an influx of Bhopal-type litigation. Id. at 690 (Gonzales, J., dissenting). Several lawyers for Bhopal plaintiffs noted that UCC has facilities in Texas and said they may now be able to sue UCC in Texas. Texas Courts Opened to Foreign Damage Cases, N.Y. Times, May 25, 1990, at B6, col. 3. In May 1990, Indian Attorney General Soli Sorabji travelled to the United States to explore possible legal actions against UCC. Indian Attorney General to Visit U.S. in Connection with Bhopal Case, United Press Int’l, May 9, 1990.
199 Id.
200 Blum, supra note 14, at 3, 26. Stanley Chesley, former lead plaintiff’s attorney, felt the money should have gone directly to the plaintiffs. John Coale said that the problem is
The government’s recent decision to make payments to 500,000 people who were exposed to the gas further muddies the waters. Previous estimates of the number of injured were much lower. The government has retained the right to “adjust” the estimated $212 million cost of the payments against the compensation the victims may receive through the lawsuit. It is unclear whether the “adjustment” will apply only to those who recover under the scheme, or whether the total sum will be charged against the settlement. It is also unclear if the desire to accomplish this “adjustment” will influence the government’s administration of the scheme. The questions raised about the fair determination of the victims’ claims will not be fully answered until the government distributes the settlement money.

Adequate and Fair Compensation. The question remains whether the settlement will compensate the victims fairly. The Indian government indicated that about $12,000 would be paid for death or permanent disability. At the time, this sum was almost three times higher than the amount awarded to victims in motor vehicle accident cases in India. Some Bhopal residents interviewed in 1989 felt that the sum would be adequate. Others certainly must have felt that no money could compensate them for what they had suffered and lost. One advocacy group estimates that the total recovery by United

the Indian government and doubts that the victims will receive their compensation. Id. But see supra note 194 (UCC expert says Indian Government must be involved to fairly distribute the settlement).

201 Indian Town Agonizes in 5th Year Since Gas Leak, Wash. Post, Dec. 3, 1989, at A34.
202 Id.
203 The Indian Supreme Court, in its December 22, 1989, decision, referred to figures recited by Justice Seth in his earlier opinion to estimate 3,000 had died and 30,000 were seriously injured. Sanu v. Union of India, No. 258, at 117 (India Dec. 22, 1989) (writ petition). A frequently recited figure for the number injured had been 200,000. In re Union Carbide Corp. Gas Plant Disaster, 534 F. Supp. 842, 844 (S.D.N.Y. 1986) aff’d as modified, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987). See supra note 201. Even a Bhopal victims advocacy group, Bhopal Justice Campaign, used a figure of 260,000 injured. Five Years On, Bhopal Victims Hear They Will Soon Receive Relief, Fin. Times, Mar. 6, 1990, § 1, at 4.
204 United Press International, referring to the statement of an Indian government official, reported: “He said . . . the payment would later be adjusted against the final compensation which the victims may get through pending lawsuits.” India to Pay Interim Bhopal Relief, United Press Int’l, Mar. 5, 1990.
205 Barr, supra note 40, at 100.
206 United Carbide Corp. v. Union of India, No. 13080, at 15 (India 1988) (special leave petition).
States standards would have been $35 billion. Raising the question of whether the settlement will even cover the medical costs of the victims, one victims’ advocacy group estimated that health care alone will cost $4.6 billion.

Conduct Guidance (Punitive Effect). As the settlement appears to have had little punitive effect on UCC, its conduct guidance is questionable. After accounting for insurance coverage, UCC’s actual accrued liability for the disaster was $237 million. UCC’s worldwide profit for 1988, after adjusting for the settlement payment, was $662 million. UCC’s worldwide profit for 1989, despite debt and structural problems, was $573 million. Although the Bhopal litigation must have been unpleasant for UCC, the payment was less than one-half of its 1988 profit. In the days following the settlement, UCC stock prices increased, and UCIL considered expanding its operations.

Of the six characteristics of a good settlement, only one has been met. Clearly, the law has fallen short in dealing with the Bhopal disaster. More than six years after the Bhopal disaster, the victims remain largely uncompensated, the legal wrangling continues, and unfortunately, the matter is far from over. The lessons learned from the Bhopal matter should be acted upon now; states and enterprises should develop an efficient legal procedure to cope with future disasters and strengthen prevention and emergency responses.

B. Planning for the Future

When the Indian Supreme Court upheld the constitutionality of the Bhopal Act, the Justices recommended adopting legislation to prepare for future disasters. Chief Justice Mukharji advocated a stricter licensing and authorization procedure that requires the establishment of a fund to compensate disaster victims and requires

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207 Bhopal Justice Campaign estimated the recovery of the estimated 260,000 victims, by United States standards, would be about $35 billion. Five Years On, Bhopal Victims Hear They Will Soon Receive Relief, Fin. Times, Mar. 6, 1990, § 1, at 4.

208 Bhopal Justice Campaign, a Santa-Monica-based advocate for the Bhopal victims, made the estimate. Blum, supra note 14.

209 Magraw defined “conduct guidance” as incentives for more careful behavior. Magraw, supra note 188, at 843.

210 Barr, supra note 40, at 105.


213 After the disaster, UCC stock prices dropped dramatically and a corporate raider tried to take over the company. UCC had to sell some of its most profitable subsidiaries and assume a large debt to avoid the takeover attempt. Settlement Won’t Hurt Carbide; Insurer, Fund Will Pay Most of Costs, Wash. Post, Feb. 15, 1989, at D4.

214 Union Carbide shares rose more than two dollars on the New York Stock Exchange after the settlement was announced. Carbide Comes Out from Under its Cloud, 10 PORTFOLIO LETTER 2 (Feb. 20, 1989).

215 UCIL also reported the controversy had not hurt the sale of its products in India. Tarrant, Bhopal Victims to Get Income for Life, India Says, Reuter Libr. Rep., Feb. 23, 1989.
industries to submit such disputes to arbitration.\textsuperscript{216} He also called for statutorily fixing the basis for damages and providing for punitive damages.\textsuperscript{217}

Justices Ranganathan and Ahmadi\textsuperscript{218} similarly suggested adopting legislation that provides some readiness for similar occurrences in the future. At a minimum, they suggested, the law should provide for: (1) paying fixed minimum compensation on a no-fault basis pending final adjudication of the claim; (2) creating a special forum with specific powers to grant interim relief in appropriate cases; (3) developing a procedure in the special forum to expeditiously resolve claims and avoid the formalism of regular courts; and (4) requiring industries to insure themselves against third party risks.\textsuperscript{219} They also supported the formation of an industrial disaster fund to immediately assist disaster victims, as suggested by Justice Singh,\textsuperscript{220} and called for the adoption of an international code to address industrial disasters when they occur in the future.\textsuperscript{221} Justice Singh called attention to the Code of Conduct for Transnational Corporations drafted by the Economic and Social Council of the United Nations. He said that India had adopted the Code,\textsuperscript{222} and that the government should take measures to legislatively adopt the protections provided.\textsuperscript{223}

The Indian Supreme Court recognized that the current system of dealing with large-scale industrial disasters is inadequate. As the court suggested in part, in addition to efforts to prevent future disasters, states should also consider the following approaches: (1) international conventions; (2) contractual provisions entered into between the state and the enterprise; and (3) national legislation.\textsuperscript{224} Although each of the three approaches has strengths and weaknesses, none should be ignored. Each approach should be incorporated into a comprehensive scheme.

The United Nations Draft Code of Conduct on Transnational

\textsuperscript{216} Sanu v. Union of India, No. 258, at 184-85 (India Dec. 22, 1989) (writ petition).
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 40-43 (Ranganathan and Ahmadi, JJ., concurring).
\textsuperscript{220} Id. at 10-11 (Singh, J., concurring).
\textsuperscript{221} Id. at 7 (Singh, J., concurring).
\textsuperscript{222} Id. at 10-11 (Singh, J., concurring). In fact the Code, which has been in draft form for more than 14 years, still has not been adopted by the United Nations. \textit{Draft U.N. Code of Conduct for Companies Needs to be More 'Balanced,' U.S. Aid Says,} Daily Report for Executives (BNA) No. 208, at A-11 (Oct. 26, 1990).
\textsuperscript{223} Sanu v. Union of India, No. 258, at 7.
\textsuperscript{224} Id. at 7 (Singh, J., concurring).
Corporations\textsuperscript{225} is an example of an international convention that should be considered.\textsuperscript{226} Work on the Code was begun before the Bhopal disaster.\textsuperscript{227} The Code requires transnational corporations to carry out their operations in accordance with national laws as well as to “perform their activities with due regard to relevant international standards, so they do not endanger the health or safety of consumers.”\textsuperscript{228} A similar rule is applied for environmental protection, and in addition, the transnational corporation must inform the national government of any aspect of its product that may harm the environment, and of environmental restrictions placed on the multinational in other countries.\textsuperscript{229} Similarly, the multinational must disclose the characteristics of the product that may be harmful to the health and safety of consumers and must disclose the health and safety regulations imposed upon it by other countries.\textsuperscript{230} However, the Code lacks provisions to create a fund to compensate those injured by the multinational, to hold the parent corporation liable for the acts of its subsidiary, or to resolve conflicts quickly and deliver compensation to victims without resorting to a lengthy judicial process. The Code has been ready for a number of years, yet, despite its mild requirements of notice and information and its failure to tackle tougher issues such as jurisdiction, liability, and compensation, it has not been adopted. Even if the Code were in effect in India at the time of the Bhopal disaster, and UCC had followed its provisions, the problem of the egregiously slow delivery of compensation to the disaster victims would not have changed.

Contractual provisions can be more far-reaching. Contractual provisions could be used when the multinational enterprise contracts directly with the state to build or operate an industry. If the state is not a party to the contract, national law could require that certain provisions be included in the contract. However, contractual provisions, and laws requiring them, would have little effect on industries that have already been established.

National legislation, on the other hand, has the potential to be adopted quickly and would apply to existing and future industries. Laws that are too one-sided or extreme, which could drive industries

\textsuperscript{226} Conventions with a more narrow scope have been successfully adopted. For example, the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships provides for absolute liability for damage caused by nuclear incidents involving a ship, to a limit of 1500 million francs. Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law, Agenda Item IV at 211, U.N. Doc. ST/LEG/15 (1984).
\textsuperscript{227} See Draft Code, supra note 225, 23 I.L.M. at 605.
\textsuperscript{228} Id. at 632.
\textsuperscript{229} Id. at 633.
\textsuperscript{230} Id. at 632.
from the country, may be characterized as a nationalization. However, carefully drafted laws could be effective in more adequately preparing for future disasters.231

Under each element of the scheme, the questions of jurisdiction, consolidation of claims, interim relief, liability, establishment of a compensation fund, forum and process for speedy resolution, enforceability, and distribution of compensation should be considered. The parties could agree in advance to submit to the jurisdiction of the courts of the host country, the country providing the technology, or a special forum. This would avoid delays such as the two years it took in the Bhopal matter to establish that jurisdiction in the American courts was improper. A process for consolidation of claims should also be developed and tested before the occurrence of a disaster. The parties could agree in advance to the adoption of an act such as the Bhopal Gas Leak Disaster Act, if such acts were authorized under the law of the host country. If possible, the act could be tested in a declaratory action to avoid the delays incurred by the adoption and later litigation of the act’s constitutionality, such as occurred in the Bhopal case.232

A relief fund, such as that suggested by Justice Singh,233 could be funded by individual industries, by all industries operating in the country, or with the proceeds of nationally mandated insurance policies. In conjunction with a relief fund, emergency relief could be made available almost immediately to victims of a disaster.234 A process for distributing the proceeds of the fund should also be established and debated in advance. This would help avoid later legal wrangling about the process of distribution and would give victims notice of how to preserve evidence relevant to their claims.

A set liability figure, or a minimum liability figure, should also be considered. A corporation may be willing to agree to limited liability rather than risk being excluded from the country or facing an unknown higher liability in the event of a disaster.235 Trading po-

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231 For example, Japanese law mandates a compensation fund paid for by nuclear industries. The nuclear operator has an absolute and unlimited obligation to pay compensation for a nuclear accident. However, if the damages exceed the amount of the fund, the government will pay the balance. Japanese AEC Revises Nuclear Compensation Law, NUCLEONICS WEEK, Dec. 15, 1988, at 12. The United States has national legislation regulating the nuclear industry which is not as far reaching as Japan’s, but which simplifies establishing an operator’s liability and requires a fund to pay damages. 42 U.S.C.A. § 2210 (West 1973 & Supp. 1990). See Berkovitz, Price-Anderson Act: Model Compensation Legislation?—The Sixty-Three Million Dollar Question, 15 HARV. ENVTL. L. REV. 1 (1989) (discussing whether 42 U.S.C.A. § 2210 can serve as a model for compensation legislation).


233 See supra note 220.

234 See McCaffrey, supra note 224, at 221.

235 Id.
tentially high compensation for certain and immediate relief may be agreeable and beneficial to both the state and the enterprise. For example, a multinational such as UCC, whose continued existence was questioned during the pre-settlement days of the Bhopal matter, might agree to a fixed and certain liability in anticipation of a disaster rather than face the uncertainty of limitless liability after a disaster. The state would also benefit by having money readily available to compensate disaster victims.

A special forum responsible for quickly resolving the matter should also be designated. This would avoid long delays if the entire matter were litigated. Litigation of the entire Bhopal case would have taken twenty years. United States District Judge Jack Weinstein has called for establishing “disaster courts” which could quickly and effectively deal with claims arising from a mass disaster. Designating a forum charged with dealing exclusively with the matter would speed up the currently egregiously slow process of providing compensation to mass disaster victims.

The parties could also agree to provisions for insurance to cover eventual liability, and for enforcement in the parent corporation’s home country of a decision reached in an agreed-upon process. The parties should also negotiate in advance the parent corporation’s liability where the subsidiary’s assets or insurance cannot meet potential liability.

X. Conclusion

The overriding consideration in developing a comprehensive scheme to deal with large-scale industrial disasters should be adopting strategies to quickly compensate the victims. The Bhopal disaster litigation has already lasted more than six years, and it is not over yet. The victims remain largely uncompensated, and none of the settlement money has been distributed. In this matter, the law has failed to provide prompt and fair compensation to the victims. The hard lesson learned from the Bhopal disaster is that such disasters must be anticipated. This lesson should lead states and enterprises to begin preparing for such eventualities now. The legal strategies that states must consider include international conventions, contractual provisions between the state and enterprise, and national legis-

236 A few weeks after the disaster, Business Week noted that UCC’s stock dropped twenty-seven percent of its value after the disaster, a loss of almost $1 billion. Dobrzynski, Union Carbide Fights for its Life, Bus. Week, Dec. 24, 1984, at 52. The article drew parallels between the UCC Bhopal disaster and the asbestos litigation which drove the Mansville Corporation into bankruptcy. Id. Time magazine said the litigation could endanger UCC’s financial future. A Calamity for Union Carbide; The Financial Future of the Chemical Giant is in Question, Time, Dec. 17, 1984, at 38.


lation. The scheme adopted should provide quick and fair compensation to disaster victims.