AN INCONVENIENT TRUTH FOR INTERNATIONAL TRADE: THE BHOPAL CASE REVISITED, THE CONTRIBUTION FROM INDIA TO INTERNATIONAL PRIVATE LAW

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Abstract

This paper primarily analyses the contribution of the Indian legal system for international law and the doctrine of forum non conveniens, which is a piece of American legislation mostly utilised to fend off accountability of faulty management governance from American companies. We look into the historical background of multilateral organisations, the Indian legislation to remediate the unfairness to the local communities affected by the Bhopal disaster, and particularly to the lawsuit brought in the Southern District of New York by the government of India to explain the legal argument of this doctrine applied to transnational lawsuits. We conclude that the doctrine of forum non conveniens is a judicial retrogression for legal remedies involving the protection of the national and international environment, local ecosystems, human health and the unborn. As a result, Bhopal local communities experienced injustice, inequality and health insecurity in a century of sustainable practices thus far. The Bhopal tragedy and that dismissed transnational litigation in the American jurisdiction illustrated that we all have a fiduciary and custodianship role to secure health and environment safety for future generations. Thus, we argue that the doctrine of forum non conveniens may have no place in the present times of transnational corporate liability and misconduct against the local and global environment. The Indian government being defeated by a defunct doctrine in the mid-80s illustrates forum non conveniens as a doctrine of anachronistic nature in the times of climate change.

Keywords: Bhopal Case, doctrine of forum non conveniens, transnational litigation, American jurisdiction

1. Introduction

The main query of this article is to ask why the doctrine of *foreign non conveniens* is still alive and well. In the study of legal systems evolution, India as a young democracy forging new jurisprudence and law policy after decolonisation is relevant. In the past, Indian emergent regulatory frameworks for environmental law towards domestic industrialisation are a point of inflection in international law, particularly in the aftermath of the Bhopal disaster on 3rd of December in 1984. The Bhopal gas leaking accident was a horrendous event that generated international attention from developing and developed nations policymakers to address corporate mismanagement in transnational companies against duty of care towards local communities, especially in developing States.

Historically India has influenced international law since the family of nations created the League of the Nations[1], the Havana Charter[2], the Bretton Woods[3] financial architecture, in the United Nations creation and further has been an important jurisdiction for many multilateral organizations, being an important founding member. The Conference in 1947, a collection of three meetings in distinctive nations was the first attempt to a multilateral trade system that culminated with the World Trade Organization.

Back in the Havana Charter times, India was one of the newly independent countries to enter in the international trade and commerce among many other developing nations, burying an era of mercantilism and colonialism behind the curtain of the most favourable nation principle (MFN).[4] The MFN principle has recently been tarnished by obsolete trade policies of nationalism, albeit treating other nations equally is still alive. Everyone is equal before the law, and the economic development of all jurisdictions is necessary to harmonise and facilitate cooperation in a multilateral concerted effort for everyone's wellbeing. In being a permanent member of the United Nations and a founding member of the current highly influential intergovernmental organisation called BRICS[5], India cements its role as a multilateral nation.

In an inclusive international law framework leading to a transformative multilateral relationship for developing and less developed countries, the international legal framework is fundamental for relationships. In an interconnected world, international private law became more transparent towards events that affect local populations, bringing awareness to host States receiving foreign investment. The advent of environmental governance reflects the climate

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[1] India is a founding member. See, The United Nations Office at Geneva, The Covenant of the League of Nations, Original Covenant, UNITED NATIONS OFFICE AT GENEVA (n.d.), https://www.ungeneva.org/en/about/league-of-nations/covenant.

[2] India was an active negotiator of the Havana Charter also called Havana Charter for an International Trade Organization. See United Nations Conference on Trade and Employment, Final Act and Related Documents, Interim Commission for the International Trade Organization, Lake Success, N.Y., Apr. 1948, https://www.wto.org/.

[3] India and my native Brazil were founding members. See, World Bank Group, Explore History, Exhibits, Bretton Woods and the Birth of the World Bank, WORLD BANK (n.d.), https://www.worldbank.org/en/archive/history/exhibits/Bretton-Woods-and-the-Birth-of-the-World-Bank.

[4] See World Trade Organization, Understanding the WTO: Basics, Principles of the Trading System, Trade Without Discrimination, WTO (n.d.), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

[5] BRICS is an acronym coined by Jim O'Neill in 2001, an economist, for the founding emerging economies that created a bloc for trade, finance and development among other nations that have joined this intergovernmental organization coined by Jim O'Neill. There is also an associated bank created in 2015 called New Development Bank, as a multilateral development bank. See BRICS, https://infobrics.org/ (last visited March 27, 2025).

change times we are all experiencing with natural hazards or by direct human intervention of past trade practices. India's legislative action after the Bhopal's methyl isocyanate leak illustrates exploitation of natural and human injury as poor accountability shielded by obsolete laws.

This is the case *In re Union Carbide Corporation Gas Plant Disaster* at Bhopal in 1984, which was adjudicated against India in the United States District Court of Southern District of New York in 1986.

This dispute involves one of the most consequential international environmental tragedies for humankind, with permanent emotional, health, and financial costs for the local population exposed to lethal pesticides and slow death after the gas leaked to the environment. The exercise of judicial discretion to weight in favour of American interests, a legal strategy that offered deference to the interests of invested capital and less attention to the environment and human rights is highlighted in this paper. As a landmark international lawsuit, it exemplifies a lack of fairness and justice for the local victims affected by the global corporations' interests even though evidence indicated that human lives were endangered by safety procedures maintained by foreign business practices before the disaster occurred.

It transpires that the American management at the Indian plant was unmotivated to prevent chemical disasters, so the Indian legislative enacted the *Bhopal Gas Leak Disaster Act*, an act to vest the Indian government in the legal and sole representative of individuals affected by this tragedy. Bhopal had a population for an equitable and speed compensation in the international proceedings that followed in the United States.

Regrettably, the surprising element of this horrific gas leak was unveiled by an absence of accountability in international law for a disaster that still persists in the abandoned Bhopal's pesticide plant site. Samples collected a decade ago indicate that the vicinity and surrounding areas including groundwater are still highly poisoned for the working class communities to survive. The financial and legal responsibility as these toxins and other organic pollutants persist in the local environment seem insignificant to the past management at the Union Carbide Corporation. Regardless of the current ownership of Bhopal's chemical plant, the former owner managed to avoid a domestic lawsuit in the United States due to the doctrine of *forum non conveniens*. This paper aims to shed some light in this doctrine of remote utility for today's environmental disasters produced by the hand of humans.

The doctrine of *forum non conveniens* is an ancient judicial test which aims to insulate domestic companies from accountability and enables a suggested double standard in international law. In times of climate change, to authorize domestic laws to avoid lawsuits and abandoned governance on poisonous sites, allowing hazardous chemical to contaminate surrounding areas and waterbodies is against the *United Nations Sustainable Development Goals*[6], particularly 10, 12 and 15, inter alia, for Reducing Inequalities and Responsible Consumption and Production of goods and materials; for Protection, Restoration, and Promote sustainable Use of terrestrial ecosystems, respectively. Moreover, a *forum non conveniens* doctrine applied to dangerous leaking of chemicals, heavy metals and other pollutants in waterbodies weakens the UNEP *Global Mercury Partnership*[7] to eliminate the worst management practices.

The doctrine of forum non conveniens codified in the American legislation represents a disregard to the interconnected world we live in by perpetuating inequality and non-sustainable practices outside investors' jurisdictions. Therefore, *In Re Union Carbide*, the Indian test of *forum non conveniens* on American courts is a constant reminder of why the doctrine should not survive in international law practice, particularly in cases involving foreign direct investment agreements.

This article deals with international public law and international private law to highlight the contribution of Indian jurisprudence to the development of international human rights, revealing the challenges to international trade and accountability of foreign direct investors in the decade of 1980s. It also reviews the double standard allowed by the 1980s theory of *forum non conveniens* to decline jurisdiction by American courts. This doctrine insulates international class actions claims against American financial interests and appears as a chosen American defendant strategy to repeal compensation in transnational lawsuits. Also, defendant's argument as forum shopping for international plaintiffs, it achieves insulation for American foreign investment. The efficiency of such legal argument would work in a world without global commons scarcity, without climate change mitigation policies to alleviate global warming, for the benefit of all humanity. Hence, revisiting *In Re Union Carbide* teaches us to avoid another age of calamity and support multilateralism.

[6] This is the 2030 Agenda for Sustainable Development, adopted by all United Nations members in 2015. See, United Nations, Department of Economic and Social Affairs, Sustainable Development: The 17 Goals, UNITED NATIONS (n.d.), https://sdgs.un.org/goals.

[7] See UNEP Global Mercury Partnership, available at https://www.unep.org/globalmercurypartnership/ (last visited Jan 15, 2025).

In a sense, the Bhopal tragedy portraited *In Re Union Carbide* paved the way to advocate for the extinction of *forum non conveniens* use altogether. To argue for an exceptional Indian contribution to international law, we review *forum non conveniens* through the test in the Bhopal litigation in New York. This article looks into the background of *forum non conveniens* use by courts in the United States, the application of this doctrine that is codified in other developed countries[8], focusing on the American jurisdiction, the shortcomings of such doctrine for international commerce, including the trade-related aspects of intellectual property, shaping future policies for new technologies.

One of the reasons for a revisited analysis of the *forum non conveniens* doctrine is to test the perception rather accurate of an applied double standard to circumvent liability for a multinational company that overlooked environmental governance risks. We will delve into this concept from the perspective of public interest and judicial comity, which is the test more suitable and akin to the doctrine of forum non conveniens.

This article is divided into a historical factual analysis of the locality of Bhopal, the international public law analysis with the United Nations Charter and international organisations in the multilateral system, focusing then to the international private law doctrine of *forum non conveniens* as a legal strategic tool to select distribution of justice for victims at the Bhopal tragedy. Thus, into international private law, this article reviews judicial comity in opposition to the referred doctrine to suggest an argument that the doctrine may not be revitalised in the present climate change society era. We conclude that the plaintiff's claim in the *In Re Union Carbide* is a transnational claim, in a sense, that it involves the local risks just and fair compensation as well as the punitive damages and mismanagement that is accountable at local level. However, the leaking of a lethal gas to the atmosphere is also a global commons manifest liable act. *In Re Union Carbide*, India succeeded to illustrate the use of the doctrine of *forum non conveniens* for the solely convenience of the foreign investor, so the argument of a more convenient jurisdiction was claimed and accepted as valid in an opportunist way.

2. Bhopal, a place in Madhya Pradesh

[8] The doctrine of *forum non conveniens* is found in Australia, in the United Kingdom, and Canada, mostly Commonwealth countries, albeit the United States is not a member of this intergovernmental organization. See, The Commonwealth, About Us, available at https://thecommonwealth.org/about-us#:~:text=The%20international%20headquarters%20of%20the,on%20Pall%20Mall%20in%20London (last visited Dec. 19, 2024).

Bhopal is the capital of the state of Madhya Pradesh, located in the central part of India, a country with more than 200 languages, diverse in ethnical practices and with a rich cultural history. In 1984, Bhopal was a town with 850,000, which today has multiplied to a metropolitan area is of 2,629,000 habitants.[9] Bhopal was the site of the Union Carbide India Limited (UCIL), which was owned by Union Carbide (UCC), based in New York, in the United States by majority of shares. The factory produced Sevin and Temik pesticides that leaked by argued negligence to American management, who controlled the Indian plant and its governance according to the guidance of Union Carbide Corporation, in New York. The chemical disaster that decimated up to 20,000 individuals with a cloud of toxic gas exposure to the local population10, mercury lodged in the groundwater of the vicinity[11] as of today and left half a million survivors with blindness, respiratory malaises and eye irritation for the rest of their lives.[12]

The Bhopal industrial disaster is the worst accident involving multinational companies, with one of the highest numbers of victims suffering permanent injuries and high morbidity.[13] It is also observed the pollution of water bodies and genetic mutations in future generations exposed to the leaked gas, which was around 41 tonnes of lethal methylisocyanate trimmer (MICT), dimethylisocyanurate (DMI), Chloride, Trimethyl amine (TMA), Dione, Dimethyl, Dimethyl amine (DMA), Trimethyl urea (TMU), Dimethyl urea (DMU), Monomethyl amine (MMA), Trimethyl biuret (TMB), Tetramethyl biuret (TRMB) along with metallic ions and other chemical compounds detected at Union Carbide plant such as Ammonium chloride and others.[14] Therefore future generations were victims of the abnormal local environment before birth. Equally the ecological disaster for the planet's ecosystem should be stressed.

[9] See, Population Census, Home, Madhya Pradesh, Bhopal District, Bhopal UA, Bhopal City, Bhopal Population 2025, available at https://www.census2011.co.in/census/city/302-bhopal.html (last visited Jan. 14, 2025).

[10] See, Hannah Ellis-Petersen, 'Bhopal's tragedy has not stopped': the urban disaster still claiming lives 35 years on, The Guardian (Dec. 8, 2019), available at https://www.theguardian.com/cities/2019/dec/08/bhopals-tragedy-has-not-stopped-the-urban-disaster-still-claiming-lives-35-years-on (last visited Feb. 27, 2025).

[11] See Aniqah Majid, Why Bhopal Remains Toxic 40 Years On, The Chemical Engineer (Dec. 12, 2024), available at https://www.thechemicalengineer.com/features/why-bhopal-remains-toxic-40-years-on/ (last visited Apr. 3, 2025).

[12] See Harvard T.H. Chan School of Public Health, Environment & Climate Health, 40 Years After Bhopal Toxic Gas Leak, Suffering Continues (Sept. 25, 2024), available at https://hsph.harvard.edu/news/40-years-after-bhopal-toxic-gas-leak-suffering-continues/ (last visited Feb. 9, 2025).

[13] Other disaster such as Chernobyl nuclear plant had a high number of causalities however, Bhopal stands as the worse, because also alive and unborn individuals suffered from the gas leakage. See Rhitu Chatterjee, The World's Industrial Disaster Harmed People Even Before They Were Born, NPR News, National Library of Medicine, available at https://www.ncbi.nlm.nih.gov/search/research-news/19117 (last visited Mar. 20, 2025).

[14] For a full list of the chemical leaked in the Bhopal industrial accident and the complete analysis of core samples from one of the tanks 610. See J.P. Gupta, Bhopal and the Global Movement on Process Safety, available at https://www.icheme.org/media/9887/xviii-paper-02.pdf (last visited Jan. 30, 2025).

The aftermath of this horrific tragedy indicated a movement on corporative governance to improve international standards for environmental risks. Most countries revisited and enforced including preventive management of industrial accidents, albeit chemical accidents still occur. However, in the side of administration of justice, the enactment of laws to enforce industrial safety management are still pale when foreign investors are included in the equation of subsidiaries of transnational companies.

The Bhopal tragedy and the subsequent failed American litigation illustrated the necessity for a strict rule on absolute liability for polluters affecting human health in a continuous cycle of diseases. In spite of this, the doctrine of *forum non conveniens* applied against the Bhopal victims stands as a denial of the precautionary principle applied to international human rights. This international litigation illustrated a rebuttal of social welfare rights and equal rights for all individuals to a health environment, which should be guaranteed by domestic and foreign justice to the most vulnerable people.

3. International Human Rights and shopping for justice

The doctrine of *forum non conveniens* is a principle applicable in the domestic law of Anglo-Saxon nations and aims to curb forum shopping and choice of law for plaintiffs. The link with international human rights is almost not detected. What human rights would have to do with plaintiff's choice of jurisdiction? If human rights protect the right to life and to work among other inherent rights, that is also included the right to be treated without discrimination to ethnicity, race and status. The evolution of human rights encompasses protection to persons with disabilities and other vulnerable groups to physical and mental well-being.[15] Protecting the economic, social and cultural rights of the Bhopal population is a universal right, an international human rights regardless of nationality and locality.

Therefore, the guarantee of international human rights for people in Bhopal, living in their dwellings or residing in towns around such chemical plants must have been established by Union Carbide management via an environmental governance framework to protect wetlands, rivers and oceans from chemicals discharge.[16] The right to safe food, which drinking water is

[15] See United Nations, Peace, Dignity and Equality on a Healthy Planet, Global Issues, Human Rights, What Are Human Rights?, available at https://www.un.org/en/global-issues/human-rights (last visited Apr. 12, 2025).

[16] The American company was located in the state of New York, which had environmental law protection in 1982 by the Clean Water Act (CWA) which was enacted as the Federal Water Pollution Control Act amended in 1977, 1982 and 1987, setting water quality standards,See, U.S. Environmental Protection Agency, Summary of the Clean Water Act, available at https://www.epa.gov/laws-regulations/summary-clean-water-act (last visited Mar. 3, 2025).

the subsistence of life, is an international human right.[17] Polluted water, especially on rivers in any nation because of negligent foreign investment should have *forum conveniens* anywhere in the planet. It is the protection of global commons, that is the right to be highlighted.

The plaintiff's right to sue should be accommodated where foreign companies have their major capital and profits located in wealthy regions, which generally enjoy high standards for environmental protection. The reason for such a drastic measure to chase capital is economic: this is where shareholders and other beneficiaries will be able to accrue profits from the foreign operation.

A suggested test to the Judiciary, when *forum non conveniens* is argued should be updated and connected to the right to a clean, healthy and sustainable environment for all individuals. An environmental protection for intangible assets such as water and air are justified because these are also international human rights as declared in 2022 by the United Nations Assembly.[18] Then we could address environmental injustices worldwide with fairness to future generations. Such pitiful results in the administration of justice in developed countries should be avoided. Consequently, the doctrine of *forum non conveniens* should be abolished because it is also perceived as an instrument of colonisation and perpetuation of inequality among vulnerable populations around the globe.

Fortunately, environmental governance on hazardous industries has improved worldwide albeit some avoidable chemical accidents are still inevitable which aggravates the pollution of rivers and oceans.[19] These tragedies compromise the marine ecosystem everywhere, not only locally. Equally, international human rights are also food safety, which water is the most important

[17] See, United Nations, Department of Economic and Social Affairs, Safe Drinking Water, Sanitation, Are 'Basic Human Rights': New UN Water Development Report, available at https://www.un.org/tr/desa/safe-drinking-water-sanitation-are-%E2%80%98basic-human-rights%E2%80%99-new-un-water-development (last visited Feb. 18, 2025).

[18] In 28thof July, 2022, the United Nations General Assembly formally recognised the right to a clean, healthy, and sustainable environment a fundamental right, which around 150 countries recognized this right in their Constitutions, national laws and on ratification of international instruments. Nonetheless, the interdepend t relationship between environmental protection and human rights has been recognised in international law since 1972, in the Report of the United Nations Conference on the Human Environment, namely Stockholm Declaration. See United Nations Digital Library, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, available at https://digitallibrary.un.org/record/523249?ln=en&v=pdf (last visited Apr. 7, 2025).

[19] I refer to the United Kingdom North Sea. See Madeleine Cuff, in Major ship collision in UK waters sparks fears of toxic chemical leak, Madeleine Cuff, Major Ship Collision in UK Waters Sparks Fears of Toxic Chemical Leak, New Scientist (Mar. 11, 2025), available at https://www.newscientist.com/article/2471549-major-ship-collision-in-uk-waters-sparks-fears-of-toxic-chemical-leak/?utm_campaign=RSS%7CNSNS&utm_source=NSNS&utm_medium=RSS&utm_content=currents (last visited Feb. 5, 2025).

ingredient, essential for our body to work properly. Therefore, the environment is closely related with international human rights.

Again, the *forum non conveniens*, as a defendant's argument (commonly used by companies using foreign investment in developing countries) denying ecological rights and fair compensation to victims is nefarious. In the case of Bhopal, the American multinational company utilised *forum non conveniens* to curb claims of defective management and under satisfactory safety measures allowed the worse tragic chemical accident to occur. After, the Bhopal tragedy, laws and regulations have improved on domestic law as well as in development for the protection of environmental rights. Nonetheless, *forum non conveniens* is still alive and applicable in American courts and other Commonwealth nations.

4. The Charter of the United Nations

The public international law delineates the basic of international economic cooperation among all members of the Union Nations family. To examine the argument of denial of justice in transnational lawsuits involving the environment, it is imperative to look in the United Nations Charter, focusing on the relationship of international organisations and United Nations members, the interrelation of environment and human rights, so that we could then focus on private international law and then municipal law.

In the United Nations Charter, Chapter IX[20], stability and welfare are highlighted for achieving friendly relations among nations.[21] An important emphasis to higher standards of living, including food and access to drinking water along with full employment22 should be aimed for social progress and development for local populations. In the United Nations Charter, the cooperation among nations aims to provide solutions of international economic, social and health problems aligned with cultural and educational cooperation.[23] In the Charter's article 55

[20] See United Nations Charter, Chapter IX International Economic and Social Co-Operation, available at https://www.un.org/en/about-us/un-charter (last visited Jan. 8, 2025).
[21] See United Nations Charter, Chapter IX International Economic and Social Co-Operation, available at https://www.un.org/en/about-us/un-charter/chapter-9 (last visited Apr. 1, 2025).
[22] United Nations Charter, Chapter IX International Economic and Social Co-Operation, available at https://www.un.org/en/about-us/un-charter/chapter-9 (last visited Feb. 25, 2025).
[23] See United Nations Charter, Chapter IX International Economic and Social Co-Operation, art. 55, available at https://www.un.org/en/about-us/un-charter/chapter-9 (last visited Mar. 18, 2025)

is stated that the United Nations family of multilateral organisations or specialised agencies[24] should promote universal respect and observance of human rights among members.[25]

In the Bhopal tragedy, the outcome of the accident was disproportionally treated as solely a private international law matter. Undoubtedly, the Bhopal chemical leakage was harmful to the population and adjacent waters with irreversible consequences. It unveiled the unsatisfactory management framework practised by foreign corporations at the time, which defective corporate governance threatened the environment with immense environmental risk as part of the business strategy. Foreign companies must, as part of their portfolios of investment assess environment risk and sustainability issues for supply and chain operations overseas. Any company that trades must shield its reputation and trustworthy enterprise from disrepute, so that industrial activities may secure and attract future capital easier. Moreover, international insurance favours good governance for predictability of actions for legal certainty.

Until the Bhopal litigation in New York, there was a disharmony of good practices in management and on human rights for chemical industries mismanagement of chemical production in developing countries. Nonetheless, chemical companies leaking gases and other hazardous elements still occur in India and elsewhere.[26] In India, in spite of the strong criminal legislation in place, the contamination of the river and surroundings areas by LG Chem Korean owned plant[27], located near Visakhapatnam, an ancient port city from the Roman times located in Andhra Pradesh state occurred on the 7 of May in 2020.[28] This accident resulted in criminal charges against the corporate body of LG Chem Korean and a relocation from the site.

Recently, in the North Sea, another chemical accident involving two cargo ships potentially leaked oil fuel to the local marine biodiversity and probable another chemical of unknown hazardous levels, which is worrisome. A stationary oil tanker ship carrying an American flag, and a Portuguese ship container collided in the North Sea. At the time, twelve people died and more than one thousand felt sick because of the chemical exposure.[29] Many industries are slow

[24] See, United Nations Charter, Chapter IX International Economic and Social Co-Operation, art. 57, available at https://www.un.org/en/about-us/un-charter/chapter-9 (last visited Jan. 27, 2025).
[25] See, United Nations, Chapter IX International Economic and Social Co-Operation, art. 55(c), available at https://www.un.org/en/about-us/un-charter/chapter-9 (last visited Apr. 10, 2025).
[26] See recent North Sea spilling footnote above.
[27] See Woo-Sub Kim, Chemical Industry, LG Chem Promises Extra $14.4 Million in Aid Over Indian Gas Leak, The Korea Economic Daily (July 10, 2024), available at https://www.kedglobal.com/chemical-industry/newsView/ked202407100013 (last visited Feb. 15, 2025).
[28] Ibid.
[29] See United Nations, UN News Global Perspective, available at https://news.un.org/en/story/2020/05/1064092 (last visited Mar. 12, 2025).

in adopting good governance, nonetheless, the chemical sector is deliberately unhurried to embrace climate risks.[30] The chemical industry, especially pesticides and alike, are resistant to change.[31] The sector consistently dismisses the United Nations guidance on business practices and their risk operations are still polluting oceans and waterways around the world with minimal responsibility towards the environment and human lives affected by their actions.[32]

[30] It is argued that polluter industries are located in low income communities, including in the United States. See Jill Johnston & Lara Cushing, Chemical Exposures, Health and Environmental Justice in Communities Living on the Fence of Industry, in Synthetic Chemicals and Health, Springer Nature, Jan. 22, 2020, vol. 7, at 48–57, available at https://pmc.ncbi.nlm.nih.gov/articles/PMC7035204/ (last visited Feb. 22, 2025).

[31] In a newsletter for investors, a well-known French investment company publishes an allocation of high-end technologies to address climate change, nonetheless, the report suggests that hazardous substances can be fully contained and anticipated, which even current events may confront investors with the reality of potential environmental release, which will be a key driver of biodiversity loss. See UN Environment Programme Finance Initiative, Sectoral Risk Briefings: Insights for Financial Institutions, at 12, 13, 15, 22, 23, 28, available at https://www.unepfi.org/wordpress/wp-content/uploads/2023/04/Climate-Risks-in-the-Industrials-Sector.pdf (last visited Jan. 17, 2025).

[32] In this sector, high carbon schemes can lead to less profits and add indirect cost for foreign businesses impacting operational costs, albeit the campaign to reach net zero by 2050 is progressing for chemicals, which will impact greatly this sector. India will be impacted on prices for ammonia production. See page 23, note 31.

In the United Nations Guiding Principles Business Human Rights[33], the Corporate Responsibility to respect human rights completely ignored from corporative management.[34] In the UN corporate responsibility document, one finds an important deference to municipal law, which suggests that human and environmental tragedies such as in the Bhopal-Union Carbide were not fully addressed as a transnational lawsuit by international law. Thus, a recent declaration adopted by some members at the Organization for Economic Co-operation and Development (OECD) for a planet free of harm from chemicals and waste, appeared to have been the first step towards the correct direction, albeit India, South Africa and Indonesia appeared to have missed the opportunity.[35]

[33] In the general principles, we have human rights, as a main norm: "These Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached. These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure." In the privatization of human rights such a foundation principle is suggested to advocate for municipal law: "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." In the commentary, the principle of predictability is present: "There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation. States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement." This mean that multilateral and bilateral treaties play a role in supporting international human rights locally. Moreover, in the corporate responsibility: " Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Commentary The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation." See UN Guiding Principles on Business and Human Rights, The Corporate Responsibility to Respect Human Rights, available at https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Mar. 25, 2025).

[34] This can be noted also by the future agenda for the chemical industry in which circular economy is showcased, with no mention to hazardous chemicals at the World Forum, World Economic Forum, Chemicals Industry Low-Carbon Economy, available at https://www.weforum.org/stories/2023/03/chemicals-industry-low-carbon-economy/ (last visited Apr. 8, 2025).

[35] Indonesia had suffered a dreadful chemical accident recently with several people burned with caustic soda in Cimahi, Indonesia. See Algi Muhamad Gifari, Over 100 People Suffer Burns from Caustic Soda Spills in Cimahi, available at https://jakartaglobe.id/news/over-100-people-suffer-burns-from-caustic-soda-spills-in-cimahi (last visited Feb. 12, 2025). See also OECD Legal Instruments, Declaration on Supporting the Achievement of the

Therefore, this inaction by the chemical sector creates a space for domestic courts to be an appropriate venue for compensatory claims in relation to the health and environmental accidents. As a result, human right violations should be also tested by courts in international environmental litigations. The enforcement of human rights has evolved concerning such industrial accidents and international liability for transnational corporations.

One recent lawsuit is worth noting is the 2015 Mariana disaster in Minas Gerais, in Brazil, which has led to a massive class action with considerable damages to be claimed. It was commenced by the Municipality of Mariana in Minas Gerais, Brazil against BHP Group in the United Kingdom.[36] One could argue that to resort to foreign domestic courts for just compensation is one avenue that can backfire in Anglo-Saxon jurisdictions as the Bhopal-Union Carbide case illustrated with a transnational litigation initiated in New York.[37]

Since the Bhopal-Union Carbide accident followed by Chernobyl and other industrial accidents, a number of international agreements, treaties and covenants are listed for protection of human rights in the context of businesses practices, environmental local instruments.38 This paper suggests that the reason for this gap to be unsealed is due to the opportunistic defendant's argument of doctrine of *forum non conveniens*.

5. The doctrine of *forum non conveniens*

Strategic Objectives and Targets of the Global Framework on Chemicals – For a Planet Free of Harm from Chemicals and Waste, adopted May 3, 2024, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0502 (last visited Jan. 24, 2025).

[36] The case is Municipio de Mariana & Ors v BHP Group UK Limited and Anor (2022) , a class action rejected partially in 2018 and considered under appeal two years after. The death toll is up to nineteen people, and the survivors of this accident are cancer and diabetes cases are soaring due to the exposure of toxic waste from SAMARCO. Also, the river Doce pollution with toxicity for human consumption is of incalculable value, because it affected local communities and Indigenous groups in the area curtailing their cultural rights with the River Doce. The international liability is shared by SAMARCO, a joint venture between a Brazilian mining firm called Vale and the Anglo-Australia BHP, namely Broken Hill Proprietary Company Limited, originally from New South Wales, Australia. BHP is currently the biggest mining company by market value. See The Guardian, Mothers Demand Justice as London Case Over Brazil Dam Collapse Concludes, available at https://www.theguardian.com/business/2025/mar/13/mothers-demand-justice-as-london-case-over-brazil-dam-collapse-concludes (last visited Mar. 6, 2025).

[37] See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), available at https://law.justia.com/cases/federal/district-courts/FSupp/634/842/1885973/ (last visited Dec. 21, 2024).

[38] For this paper, I will stress that the Stockholm Convention on persistent Organic Pollutants in force since 2004 but see all treaties concerning chemical safety and the environment at the International Labour Organization website. See International Labour Organization, International Agreements in the Field of Chemical Safety and the Environment (Nov. 8, 2013), available at https://www.ilo.org/resource/international-agreements-field-chemical-safety-and-environment (last visited Mar. 29, 2025).

The concept of the doctrine of *forum non conveniens* was born in Scotland.[39] The theory is controversially connected to an ancient doctrine which is *forum non competens* also decided by a Scottish court in the case *Vernor v Elvies* 6 Diet, of Dec. 4788 (1610).[40]

The main purpose of the doctrine is to provide courts with the ability to grant a *discretionary stay* in the court proceedings which might have been beneficial to one of the parties, to protect a private interest from financial loss.[41] Other scholars attributed the popularity of the doctrine as a barrier for *forum shopping* by the plaintiff, which is an argument that gained traction particularly in American courts.[42] *Forum shopping* has also the ability to nullify enforcement of foreign decisions, which scholars claim that may be discriminatory to argue of no connection to the facts or company to the event.[43]

Back in the XVI and XVII centuries, the Scottish judges did not focus on the strategy to modify court or stay proceedings for the sake of economic reasons.[44] *Forum non conveniens* is then connected to procedures, witnesses and evidence. The preoccupation was whether the parties could be summoned to the jurisdiction in a reasonable time. This concern to the procedures illustrates that the transactional approach is due to a recent American interpretation of economic power competing among nations for trade and investment interests.

[39] See Ardavan Arzandeh, The Origins of the Scottish Forum Non Conveniens Doctrine, 13 J. Priv. Int'l L. 130, 130–51 (2017), available at https://doi.org/10.1080/17441048.2017.1303044 (last visited Jan. 11, 2025).

[40] Most scholars cite secondary sources, so I went to search for this old case law. I have to be grateful to Rachel Prior, from the National Library of Australia, for finding this case. See Scottish Court of Session, Decision, available at https://www.bailii.org/scot/cases/ScotCS/1610/Mor1204788-005.pdf (last visited Mar. 14, 2025).

[41] See Ardavan Arzandeh, The Origins of the Scottish Forum Non Conveniens Doctrine, 13 J. Priv. Int'l L. 130 (2017), available at https://doi.org/10.1080/17441048.2017.1303044 (last visited Apr. 6, 2025).

[42] See Zanifa McDowell, Forum Non Conveniens: The Caribbean and Its Response to Xenophobia in American Courts, 49 Int'l & Comp. L.Q. 108 (2000), available at https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/forum-non-conveniens-the-caribbean-and-its-response-to-xenophobia-in-american-courts/F536EFB1DC8CCF4F77D2A9E7488DA38F (last visited Feb. 19, 2025).

[43] See Humphrey et al. v. Jolly Rogers Cruises Inc., No. 61 (High Ct. Barb. 1998). See Zanifa McDowell, Forum Non Conveniens: The Caribbean and Its Response to Xenophobia in American Courts, 49 Int'l & Comp. L.Q. 108 (2000), available at https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/forum-non-conveniens-the-caribbean-and-its-response-to-xenophobia-in-american-courts/F536EFB1DC8CCF4F77D2A9E7488DA38F (last visited Mar. 3, 2025).

[44] The doctrine of *forum non competens* is linked to the origins of *forum non conveniens*, however, there are other scholars that oppose this argument. See Ardavan Arzandeh, The Origins of the Scottish Forum Non Conveniens Doctrine, 13 J. Priv. Int'l L. 130 (2017), available at https://doi.org/10.1080/17441048.2017.1303044 (last visited Jan. 26, 2025). "(…) the seventeenth- and eighteenth-century forum non competens cases makes it difficult to accept that they were the conceptual predecessors of (what we now characterize as) forum non conveniens. More significantly, further support for this conclusion can be found following a close analysis of the case law within the forum competens heading in the Dictionary. As the forthcoming analysis seeks to illustrate, in none of these cases did the parties' submissions (and, in turn, the reasoning adopted by the judges) appear to require an assessment of the question of whether the Scottish proceedings should be stayed, through the exercise of a discretionary power, in favour of the appropriate foreign forum. Instead, in the forum non competens cases, the litigants' (and the judges') only preoccupation was merely to find whether the defenders could be summoned. (…)"

Moreover, early cases of *forum non conveniens* are deeply rooted in admiralty caselaw.[45] The discretionary staying-of-proceedings practice is present in *M'Morine v Cowie* in 1845.[46] Arguably, the popularity of *forum non conveniens* may have skyrocketed after the British decision of *Spiliada Maritime Corporation v Cansulex Ltd* in 1987.[47] Before *Spiliada*, it is very well documented the use of the doctrine as *Sim v Robinow* in 1892[48] can attest. In reality, one could argue that both *forum non conveniens* and *forum non competens* may have merged in the past so a retrospective study of both doctrines may show more evidence of the usage of these legal strategies to pursuing more convenient courts somewhere else, which is traced back to the XVI century.[49]

The doctrine of *forum non conveniens* is unsurprisingly convenient to private interests in international private law, mainly to common law countries. Basically, parties test the courts on whether the connection with the chosen jurisdiction is suitable and whether private interests are protected and better served by another court's adjudication in the pursuit of justice. In our interconnected world, in which everything travels via submarine cables and digital platforms that appears an obsolete argument.

Another important point, *forum non conveniens* is arguably a double edge sword test, because it is well known that transnational corporations have the bulk of their profits retained by foreign capital, where profits flow from invested capital. Generally, subsidiaries have headquarters located in developed countries, where *forum non conveniens* has been adopted as the doctrine of safe foreign investment. Consequently, the result of the application of *forum non conveniens* does not transfer equality and justice among stakeholders. However, *forum non conveniens* works with efficacy if the parties have an economic imbalance.

[45] See William S. Dodge, Maggie Gardner & Christopher Whytocks, The Many States Doctrines of Forum Non Conveniens, 72 Duke L.J. 1166, 1166 n.10 (2023) (last visited Feb. 14, 2025).

[46] A case of a testament of an English captain, who died in India. See M'Morine v. Cowie, Docket No. 48, Ct. Sess. (Inner House–First Div.), Ld. Robertson N., available at https://vlex.co.uk/vid/m-morine-v-cowie-803610985 (last visited Mar. 20, 2025).

[47] A case of shipping, cargo and damages and where shall the plaintiff litigate. See Spiliada Maritime Corp. v. Cansulex Ltd., (1987), available at https://vlex.co.uk/vid/spiliada-maritime-corporation-v-793567649 (last visited Apr. 4, 2025).

[48] A case in which parties had entered into a joint adventure to explore South African mines, when payments were not paid at the time, then parties returned to Scotland and England, their place of residence. Importantly, the accounting books and witnesses were located in South Africa. See Sim v. Robinow, Docket No. 123, Ct. Sess. (First Div. 1892), available at https://vlex.co.uk/vid/sim-v-robinow-807542285 (last visited Mar. 31, 2025).

[49] See contra infra footnotes 9, 13.

Parties with similar economic power have a neutral advantage before courts. For instance, the appeal in *Samsung Electronics v LG Display* [2022][50] brought to the High Court of Justice in the United Kingdom is an example of the *forum non conveniens* neutrality when two parties have the means to pursue a long costly litigation. In *Samsung*, both parties are two transnational corporations (TNC), with operations and sales networks worldwide, highly profitable in the electronics sector, in which economic power between the two parties is counterbalanced by LG. Like Samsung, LG is a transnational corporation (TNC) in electronics, chemicals, and telecommunications. Both are South Korean TNCs, with a global presence, holding power to litigate for indeterminate time anywhere in the world, with an unlimited financial resources.

As previously stated, where the defendant's economic power is abundant against a vulnerable plaintiff or in a class action, neutrality is inexistent. A chosen legal system that is costly, weakens the plaintiff, that eventually may desist of pursuing such expensive lawsuit.

In such circumstances, applying the doctrine of *forum non conveniens* is a negative factor for the public interest and is an example of justice not served. Thus, the role of administrator of justice when *forum non conveniens* doctrine is applied to a decision does not ensure that everyone is treated equally under the law.

The test of litigation connected with the matter and acceptable evidence does not consider the broader interest to maintain fair justice among all stakeholders. Some may argue to admit a foreign claim may be a waste of time and taxpayers' moneys, so the reasoning for *a stay* in the transnational case is justified, to avoid the burden on the court system. However, the doctrine of *forum non conveniens* is tested in discretionary manner by common law judges. Generally, the applicability of *forum non conveniens* involves a subtle argument of protection of economic interests from a defendant, who is generally resident in the chosen jurisdiction.

It is reasonable to argue that *forum non conveniens* is a doctrine for defendant's use to protect economic interests. Consequently, an abandonment of responsibility and international liability against a whole community injured and in the process of suffering permanent injuries. That is the result of the continuous harm inflicted to vulnerable communities, as the Bhopal-Union Carbide case illustrates.

[50] See *Samsung Electronics Co. Ltd., Samsung Electronics Taiwan Co. Ltd., Samsung Electronics (UK) Ltd., Samsung Semiconductor Europe Ltd., Samsung Display Co. Ltd. v. LG Display Co. Ltd., LG Display Taiwan Co. Ltd.,* [2022] EWCA Civ 423, Case No. CA-2021-000656 (Ct. App. Civ. Div. 2022), available at https://www.judiciary.uk/wp-content/uploads/2022/07/Samsung-Electronics-v-LG-Display-Judgment.pdf (last visited Feb. 27, 2025).

In the New York decision of In *re Union Carbide Corporation Gas Plant Disaster at Bhopal, India (1984)*[51]*,* hereinafter *In Re Union Carbide*, there is a strong argument for a denial of justice for Indian plaintiffs, victims of debilitating health and permanent environmental harm. Unfortunately, a test for denial of justice was never intended to be investigated by the Panel of Judges and is absent on the doctrine of *forum non conveniens*. This can be illustrated by the interpretation of the doctrine codified in the American legal system.

The result on the *In Re Union Carbide*, delivered by the New York court represented a nefarious result of binding jurisprudence for future American caselaw. The *stay* decided by the United States District Court for the Southern District of New York allowed a possibility to establish precedent for future cases involving risky American interests overseas. *In re Union Carbide,* 145 actions filed in the same lawsuit brought in New York under the Judicial Panel for Multidistrict Litigation's order the decision was unjust and appalling for plaintiffs. The Judicial Panel offered some comments regarding adequacy of alternative forum that may be considered a revision of some colonialism narrative unacceptable even at the time it was decided, having a possible interpretation of passive discrimination of cultures and races.[52]

Such poor understanding of justice administration in an international dispute resolution context is not surprising. The codification of *forum non conveniens* and subsequent test application *In Re Union Carbide* was discretionary and fulfilled national interests' protection. A shield for financial stability is not uncommon in transactional jurisdictions, from which jurisprudence on *forum non conveniens* is widely acceptable as fair and just. *In Re Union Carbide*, *amicus curiae,* the argument of bringing about a lawsuit in New York for a just recovery of compensatory damages to Indian families was obscured by the argument that Indian law was applicable to the accident and mismanagement was excused from a foreign multinational company controlling its subsidiary in India since 1934.[53]

An unexpected argument against the legal interpretation of Indian law in a New York court was reinforced by the judges' decision on whether there was an alternative forum to interpret Indian

[51] See In re Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842 (S.D.N.Y. 1986), available at https://law.justia.com/cases/federal/district-courts/FSupp/634/842/1885973/ (last visited Apr. 11, 2025).
[52] See In Re Union Carbide, this quote: "No doubt Indian citizens, many of whom barely are acquainted with their American lawyers, will find the case more accessible if it is tried "in their view" in India.
[53] The factory was built in the 1970s, however, there are some reports that claim Union Carbide's discharging highly toxic waste prior to the Bhopal disaster. See Judah Passow & Tim Edwards, The Long Dark Shadow of Bhopal: Still Waiting for Justice, Four Decades On, The Guardian (June 14, 2023), available at https://www.theguardian.com/global-development/2023/jun/14/bhopal-toxic-gas-leak-chemical-environmental-disaster-waiting-for-justice-union-carbide-dow (last visited Apr. 3, 2025).

law. Following this logic, it is natural it should have been Indian courts. However, this excludes any compensation for foreign mismanagement of a highly toxic chemical production and disposal by a subsidiary completely controlled by its headquarters located in foreign soil, under another law. Moreover, the fact that the lawsuit was lodged in New York jurisdiction where the multinational was headquartered was never an element of interest for the judges. The Justice Panel solely focused their attention to evidence, witnesses roll, language barrier, and the fact that class actions are better addressed in the defendant's jurisdiction. The fact that Indian legal framework possessed no mechanisms for entertaining class action lawsuits was never contemplated by the American district court, so *forum non conveniens* was applied.

Another element was the test of forum shopping applied to *In Re Union Carbide* case. Hence, the lawsuit dismissal was accepted because the judges objected to the plaintiff's right to choose the New York forum for the case. Generally, plaintiffs should have the option to choose a court, however, the view of American judges against foreign plaintiffs is solely considered under the *forum non conveniens*. So, the best choice of law against an American defendant is any jurisdiction but the American courts. Arguably, the efficient administration of American justice is always to protect American economic interests instead of entertaining an international litigation in the American courts.[54]

Purposedly, the New Yorker Judicial Panel did not entertain the question of fair and just financial compensation to the victims from mismanagement. That should have been in the public interest test for any judgement prior to declining jurisdiction. It may be suggested that the public interest test would have been applied for avoiding punishing American taxpayers and the use of American courts by foreigners. What *In Re Union Carbide* litigation teaches us is limited international liability and rare accountability for mismanagement acts from such subsidiaries.

Therefore, victims cannot reach the host investors' jurisdiction for financial compensation, as per forum shopping, which is unacceptable in times of climate change, in which environmental disasters contribute to global warming and inefficient carbon trapping to reduce CO2

[54] See In Re Union Carbide, this quote: "Thus, this Court, sitting over a multidistrict litigation, must apply the various choice of law rules of the states in which the actions now consolidated before it were brought. Rather than undertake the task of evaluating the choice of law rules of each state separately, the Court will treat the choice of law doctrine *in toto*. The "governmental interest" analysis, employed by many jurisdictions, requires a court to look to the question of which state has the most compelling Interest in the outcome of the case. India's interest in the outcome of the litigation exceeds America's."

emissions.[55] Further, insulation of bad corporate practices destroying other jurisdiction's environment, destroying local biodiversity and access to safe food as well as contributing to rivers and oceans pollution is an outdated and obsolete legal test. Today we need domestic law to look into the effect of domestic business actions for the benefit of all.

Generally, domestic laws are meaningful to local governance until climate change disasters are taken into the equation of intergenerational wellbeing and sustainability goals for other generations. We are custodians of this planet that we live on. The future of the ones that are not borne is the right to pursue an economic, social, mental and cultural development in equal terms as anyone else that lived before them, regardless of borders, which is extraterritorial.[56] That is the global commons experience of living together.

It is undeniable that *forum non conveniens* is applicable for supporting economic sovereignty, expanding a control of natural and human resources in foreign land. If one observes that the multinational Union Carbide Corporation was the main shareholder and a global company earning the majority of profits from its Indian subsidiary, then the equation is clarified towards the defendant's best argument for choosing the New Yorker jurisdiction.

It is indisputable that being a multinational company headquartered in New York, with a strong currency for Union Carbide shareholders would generate a better financial ability to support the Bhopal victims. When we look at similar current disasters the compensation would have been substantial as in the Mariana litigation case.[57]

The transactional nature of the doctrine of *forum non conveniens* favoured a legal policy to perpetuate more risky operations and more dangerous international liabilities initiated by multinational companies. *In re Union Carbide,* the result is a lost opportunity to provide a sustainable precedent for future caselaw involving environment, climate change, human rights and access to safe food as it was obliterated.

Another aspect reiterated by the New Yorker Judicial Panel was that the Indian jurisdiction was vindicated by the use of the doctrine of *forum non conveniens*. The argument was that the right to pursue the claims in their own legal system would advocate for a recognition of the

[55] These are the Sustainable Development Goals for 2030. See United Nations, Department of Economic and Social Affairs, Sustainable Development: The 17 Goals | Sustainable Development Goals, available at https://sdgs.un.org/goals (last visited Mar. 12, 2025).
[56] Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, Preamble, available at https://digitallibrary.un.org/record/202170?ln=en&v=pdf (last visited Apr. 9, 2025).
[57] See, *Supra* note 36.

Indian independence and Indian values of a developing nation, recognised as the proper forum for the Bhopal litigation. This is the reversal of the fortune here, because it is exactly the opposite that the Judicial Panel accomplished. By not allowing the class action to prosper in US soil, they actually invalidate these values and the independence of Indian legislation to choose their best option of a court to litigate on behalf of their citizens.

Curiously this *proper forum* argument is unmatched by the act of the State of India. The nation instituted a codification of the Bhopal Claims in the Indian legislation, which bestowed the State of India, as representative for the Indian victims to pursue the litigation in the American jurisdiction demonstrating clearly to be the representative of their peoples' wishes for justice.

Unequivocally, a *proper forum* was established in New York. It was rebuked by the New Yorker Judicial Panel. One could also suggest that there was just little interest to offer an argument for compensation in American dollars for a suggested inexistent duty of care in Indian soil. Concerning evidence and witnesses heard in their native language, this would have been easily accommodated by translation services.

Even if oral evidence was a challenge, a photograph would have depicted the scenario after the tragic accident. It would have been considered sufficient to establish the tragic event and the link with the chemical company. Medical documentation could have been translated easily to English. Consequently, these arguments about relevant information to decide the litigation in New York would have been successfully contested.

So, to decide a judgment under the *forum non conveniens* was a *convenience* to defer to a Justice Panel the discretionary power to protect American companies, as a private interest test. Equally, there is an incentive to attract companies to establish headquarters in different American states.[58] Thus, the doctrine of *forum non conveniens* is proving very *convenient* to

[58] The New York application of *forum non conveniens* is alive and well in 2024. See Bangladesh Bank v. Rizal Commercial Banking Corp., No. 2023-00324 (N.Y. App. Div. 1st Dep't Feb. 29, 2024) (Pitt-Burke, J.), available at https://www.nycourts.gov/courts/ad1/calendar/List_Word/2024/02_Feb/29/PDF/Bangladesh%20Bank%20%20v%20%20Rizal%20Commercial%20(2023-00324%20OPN.).pdf (last visited Mar. 15, 2025). on appeal holding that a case of international fraud and money laundering scheme performed by alleged hackers to transfer money from the bank located in New York was dismissed without abuse of discretion, even though the victim's account was located in New York, the transfer albeit digital misappropriated the plaintiff's banking account, so the situs of injury was New York, however, the plaintiff failed to demonstrate that the defendants were subject to the New York jurisdiction.

keep American financial domestic matters safe from alien lawsuits and out-of-jurisdiction claims.[59]

Whether the Indian environmental legal framework was defective at the time of the Bhopal accident or the mechanisms for class actions were inexistent, these are secondary to the decision-making process to secure safely the Bhopal chemical plant. The management governance was solely under American management. At the time, the majority of blue collar employees at the Indian Union Carbide were of Indian nationality, except for the corporate management and the Chairman and Chief Executive Officer, Warren Anderson.[60]

The monetary compensation in a developing country is directly linked to the value tendered by the national money value, so that another element missing in the New Yorker Justice Panel for fair compensation. A strong currency may have compensated fairly and just for continuous poor health and environment issues unleashed by a company's sloppy management. Consideration to the exchange rate applicable to the victims' compensation had the forum being found convenient might have illustrated the monetary gap of what should have been the financial outcome for victims.

It is suggested that *In Re Union Carbide* decision in the American court did not seek to deliver justice. However, it presented an opportunity to vulnerable parties to be represented by a State. It also demonstrates an obsolete appropriation of the environmental and public health for economic gain.

6. Codification of the Forum Non Conveniens, from origins to legislative considerations

As stated before, a dismissal or a transfer of litigation to foreign courts, namely in diversity cases, in which lawsuits involve non-residents and domestic corporations located within these American states is legal.[61]

[59] See, William S. Dodge, Maggie Gardner & Christopher Whytocks, The Many States Doctrines of Forum Non Conveniens, 72 Duke L.J. 1166 (Mar. 2023) (last visited Apr. 21, 2025)., which reads: "Considerations of political economy may also have contributed to New York's and Delaware's competition-induced rejection of the alternative forum requirement. A large number of businesses are incorporated or have their principal places of business in these states and are therefore subject to personal jurisdiction in them. Eliminating the alternative forum requirement makes it easier for these in-state businesses to obtain a forum non conveniens dismissal when sued in their home-state courts,…)"

[60] Warren Anderson never faced charges from the Bhopal litigation in India. See Warren Anderson, 92, Dies; Faced Indian Plant Disaster, N.Y. Times (Oct. 30, 2014), available at https://www.nytimes.com/2014/10/31/business/w-m-anderson-92-dies-led-union-carbide-in-80s-.html?smid=nytcore-android-share (last visited Mar. 6, 2025).

[61] See Richard H. Fallon, Daniel J. Meltzer & David Shapiro, The Federal Courts and the Federal System 1608–15 (Foundation Press 1996) (original work published 1963).

Similarly to the *In Re Union Carbide*, a litigation involving human health was brought by Costa Rican workers intoxicated and contaminated by pesticides against Dole, a company incorporated in Texas, at the Supreme Court of Texas. In *Dow Chem. Co. v. Castro Alfaro* (1990),[62] the Texan legislature moved fast to approve a law to deter such lawsuits moved by foreign plaintiffs seeking justice against absent due diligence and duty of care.

In *Dow Chemical Co. and Shell Oil Co. v Castro Alfaro, et al*. (1990)[63], both companies failed to remove the case to a federal court. In this decision, Justice Ray decided what was already a factual trend for the utility of the doctrine.[64]

This interpretation is supported by other past American cases such as *Irish National Ins. Co v Aer Lingus Teoranta* (1984)[65], in which the district judge confirmed " the real purpose for bringing this action in New York does not appear to be to vindicate this forum's interest in improving New York as a point of entry, but rather to avoid the possibility that application of Irish law will result in a smaller recovery for plaintiff as a result of law in that forum with respect to the limitation of liability provision of the Warsaw Convention".[66]

Back to *Alfaro*, the applied test to the doctrine *forum non conveniens* illustrates the monetary power behind its use against the Costa Rican workers "In fact, the doctrine is favored by multinationals defendants because a *forum non conveniens* dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery."[67] That suggests the discretionary and negative effect when the doctrine is applied to human and health issues or even to death.

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[62] See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 681 (Tex. 1990), available at https://case-law.vlex.com/vid/alfaro-v-dow-chemical-888781349 (last visited Feb. 18, 2025). See also William S. Dodge, Maggie Gardner & Christopher Whytock, *The Many States Doctrines of Forum Non Conveniens*, 72 Duke L.J. 1166, 1193 (Mar. 2023). *Compare Castillo v. Newmont Mining Corp*., No. 02CA1772, 2003 WL 22677806 (Colo. App. Nov. 13, 2003).See William S. Dodge, Maggie Gardner & Christopher Whytock, *The Many States Doctrines of Forum Non Conveniens*, 72 Duke L.J. 1166, 1195, 1213 (Mar. 2023).

[63] See *Dow Chem. Co. & Shell Oil Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), available at https://case-law.vlex.com/vid/alfaro-v-dow-chemical-888781349 (last visited Mar. 16, 2025).

[64] See, Ibid.

[65] This case is a classic example of neutrality between parties. Ireland and the United States ratified multilateral treaties on equal judicial treatment, so the test of a proper court is in a deadlock. Choosing between American or Irish courts is not a productive exercise of justice administration, because both country's courts have the same weight to decide the litigation due to the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), article 28 (1). See *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90 (2d Cir. 1984), available at https://law.resource.org/pub/us/case/reporter/F2/739/739.F2d.90.84-7140.1172.html (last visited Feb. 12, 2025).

[66] See, Ibid.

[67] See Ibid.

Gulf Oil Corporation v Gilbert decided in 1947[68] is a good precedent still in current decisions when *forum non conveniens* is the test.[69] In fact, the doctrine was tested under the denial of justice test in *Gardner v Thomas* 1887[70] in New York, the same state that dismissed the *In Re Union Carbide* case centuries after. Gardner was dismissed in the New York's, because it was a dispute between a British sailor and a British master regarding a claim that arose in the high seas involving assault and battery.[71] Important to mention that the court rejected the matter and send the parties to address the matter back home.

Notwithstanding the refusal to hear the dispute, the New York court cautioned that the rule was then clearly described as foreign stakeholders in a foreign court should not be always dismissed because the alien court may produce a decision denying justice to parties. So, it illustrates some discretionary power maintained by the judge to hear or not such diversity claims therefore the test survived in *Union Carbide Corporation* centuries later.[72]

Back in the 50s, an American plaintiff may have not enjoyed a stronger consideration for forum shopping even if a present danger of being subject to race discrimination was a reality. For instance, the test to be applied *Gore v U.S. Steel Corporation* (1954)[73] is illustrative of racism. That was a litigation involving a widow of an African-American worker in Alabama. She went *forum shopping* in New Jersey searching for a neutral decision, as she was aware of Alabama's non-neutral decisions towards African Americans. It also implied that an imposed economic disadvantage for the African American workers' family was not a cause of concern for the administration of justice. By refusing *Gore*, and transferring the case to the Alabama court, unfairness and injustice were established by refusal of plaintiff's choice of jurisdiction.

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[68] See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), available at https://supreme.justia.com/cases/federal/us/330/501/ (last visited Dec. 19, 2024).

[69] See, Ibid. But Massachusetts and New York have adopted the doctrine of forum non conveniens earlier than 1947. See, William S. Dodge, Maggie Gardner & Christopher Whytock, *The Many States Doctrine of Forum Non Conveniens*, 72 Duke L.J. 1165 (Mar. 2023), available at https://scholarship.law.duke.edu/dlj/vol72/iss6/1 (last visited Mar. 7, 2025).

[70] See *Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445 (N.Y. 1817), available at https://www.courtlistener.com/opinion/5628711/gardner-v-thomas/ (last visited Jan. 23, 2025).

[71] See, *Supra* note 68 at 1178.

[72] But see that the connection with the state of residence of one of the parties could alter this logic and the test application. "To be clear, the state courts were only considering declining jurisdiction in cases that had no in-state party and no in-state cause of action. As New York's high court emphasized around the time of Gulf Oil case, "Our courts are bound to try an action for a foreign tort when either the plaintiff or the defendant is a resident of this State." Thus, the court summarized, "It is only when an action is brought by one non-resident against another for a tort committed outside the State that our courts may refuse to take cognizance of the controversy." See *Id.*at 1180.

[73] See *Gore v. U.S. Steel Corp.*, N.J. 1954, available at https://case-law.vlex.com/vid/gore-v-u-s-887767127 (last visited Apr. 5, 2025).

Arguably, the doctrine of *forum non conveniens* had in *Piper Aircraft Co v Reyno*[74] (1981) another clear denial of justice when it overlooked a perceived negligence corporate responsibility. *Piper* is a case where two Scottish nationals sued a Pennsylvania aircraft and an Ohio propeller manufacturers, as liable for a Scottish aircraft accident involving both suppliers. After *Piper's* decision, American corporations were insulated from international torts in domestic state courts.[75]

The application of *forum non conveniens* when allocated to state courts may have a different outcome than when applied to federal courts. Indeed, the competition among American states to retain capital has been the *motto* for adopting the doctrine of *forum non conveniens* and distinctive decisions to accompany the doctrine.[76]

We may learn from *In Re Union Carbide* dismissed litigation that the doctrine of *forum non conveniens* is a legal mechanism for an exclusion of alien rights and international human rights, *inter alia*, by these selected American cases.[77]

7. The public interest

Generally public interest is understood as the management of the administration of justice at the local level, for instance, jury selection, trial and time devoted to the litigation. This is a test applied since the case of *Gulf Oil Corporation* in 1947.[78] In *Gulf Oil Corporation*, there was no legal space to argue for fairness and convenience (unless the convenience was for the domestic defendant).

Another relevant factor was discretionary power to decide for the use of the doctrine. The discretionary power of the New Yorker Panel judges to accept the doctrine of *forum non conveniens* was based on evidence located in India, which is an obsolete element today. Audio and video conferencing are digital resources widely available to any locality in the planet, so

[74] See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), available at https://supreme.justia.com/cases/federal/us/454/235/ (last visited Jan. 17, 2025).
[75] See *Ibid*. See also William S. Dodge, Maggie Gardner & Christopher Whytock, *The Many States Doctrine of Forum Non Conveniens*, 72 Duke L.J. 1165, 1190 (Mar. 2023), available at https://scholarship.law.duke.edu/dlj/vol72/iss6/1 (last visited Apr. 3, 2025). But see the comments about residence connection in Kinney case, which is an aberration for Florida residents also. See *Id.* at 1191-1192.
[76] See *Id.* at 1222.
[77] Al these cases showed a consistent tendency to uphold the doctrine as the ultimate discretionary judge's power. See, *Supra* note 62.
[78] See, Catherine Cervone, *Recalibrating the Forum Non Conveniens Analysis: The Effects of Technology of Transporting Evidence*, 18 Nw. J. Tech. & Intell. Prop. 1 (Nov. 2020), available at https://scholarlycommons.law.northwestern.edu/njtip/vol18/iss1/ (last visited Feb. 14, 2025).

this technological element is dead letter for applying *forum non conveniens* doctrine.[79] Recent examples of evidence evolution on the technological factor are described in the Federal Rules of Civil Procedure, particularly Rules 32(a)(3)(B) and 43 for witnesses outside of the jurisdiction plus the Hague Evidence Convention to cite some developments in this area.[80]

8. Planet Not Convenient: Climate change

One may suggest that multinationals take advantage of weak environmental laws overseas, having a blind eye for actions of impact on the health of the local population, and other activities that increase climate change for the planet. What has changed since *In Re Union Carbide* case is the scope of environmental treaties and the insidious forgotten actor called climate change provoked by human activity destroying the planet. That affects everyone globally in weather patterns, in water pollution, so that an international cooperation for mitigating these factors is vital, including a policy in response to industrial chemical disasters affecting Nature. Climate change is a *global commons* problem.

Similarly, deforestation impacts climate locally and internationally as well as other dramatic weather events such as typhoons, flooding, and tsunamis. Therefore, deforestation increases the occurrence of weather calamities. So, courts that use their power to curb environmental disaster lawsuits under *forum non conveniens* are acting in opposition to the Sustainability Development Goals (SDGs). Judgments pro-pollutant defendants constitute a barrier for climate change mitigation policies nationally and internationally.

The theory of *forum non conveniens* when utilised for private interests and economic advantage ensures a *convenient forum* where insulation of further tort and criminal liability is ensured. One wonders whether the interest of substantial justice is really the intent of the application of the *inconvenient forum*.[81]

[79] " A cyber court, which only exists virtually, is extreme in its integration of technological advancements. A more modest embrace of technology might include the use of information sharing systems such as email, audio and video conferencing, and e-documents or scanned and uploaded images of physical pieces of evidence. Today, "the ease of access to documents," has greatly increased because of the ability to access electronically stored documents remotely—that is, from a place other than the offices of the law firm in which they are located." See *Id.* at 96-100.

[80] "For example, if the defendant can demonstrate that it will not be able to obtain an essential witness because the witness is unwilling and resides in a country that is not a party to the Hague Evidence Convention, then the case should be dismissed because the defendant will likely have to relitigate the issue in the future in a forum where it has access to all its witnesses." See *Id.* at 100- 102.

[81] But the situation may have a different approach when a banking institution is losing money. if a New York bank is a victim of hacking to steal money from one of their banking accounts. See, In Bangladesh Bank v Rizal Commercial Banking Corporation et al. and Maia Santos Deguito, Appeal n. 1165, 2023 at the Supreme Court of the State of New York, Appellate Division, First Judicial Department, the appeals was regarding US$ 101 million

9. An inconvenient BREXIT

In recent times, *forum non conveniens* has been rejuvenated in the post-Brexit United Kingdom.[82] The United Kingdom has embraced the doctrine again. This doctrine had been banned from the European Union members domestic laws, so the restored doctrine of *forum non conveniens* returned to the English courts.[83]

Notwithstanding this resurrected doctrine, a recent case that evokes the environmental tragedy of Bhopal has been recently accepted in the English jurisdiction to accommodate Brazilian victims of the Mariana dam disaster.[84] SAMARCO, BHP's subsidiary, argued for a dismissal under the *forum non conveniens*, which was rejected on appeal. As the litigation proceedings developed, the defendant suspended payments for the victims, a lower financial reparation in the local currency, considerably unfair and short of a just compensation for families. Concerns on evidence and language are irrelevant in the age of e-discovery and the digital world.[85]

Nonetheless, in *Tomomi Umeda, et al, v Tesla Inc.,* (2020) case number 20-cv-02926-SVK[86], the United States District Court Northern District of California for an *Order Granting Defendant's Motion to Dismiss on Ground of Forum Non Conveniens*, shielding Tesla investments from compensation and evidence. The plaintiffs had chosen the Californian

dollars that were stolen via SWIFT transactions aided by a Philippines bank and some employees, the court found New York jurisdiction competent because: "The court also considered the location of the witnesses and documentary evidence and found that this factor favoured New York because of the critical evidence of the fraudulent payment orders and the movement of the stolen funds into and out of the four correspondents accounts in New York". This case seems to be a conflict of personal jurisdiction and *forum non conveniens* application. See *Bangladesh Bank v. Rizal Commercial Banking Corp.*, No. 2023-00324 OPN, App. Div. 1st Dep't (N.Y. Feb. 29, 2024), available at https://www.nycourts.gov/courts/ad1/calendar/List_Word/2024/02_Feb/29/PDF/Bangladesh%20Bank%20%20v%20%20Rizal%20Commercial%20(2023-00324%20OPN.).pdf (last visited Apr. 18, 2025).

[82] See, Government of Netherlands, *What is BREXIT?*, available at https://www.government.nl/topics/european-union/question-and-answer/what-is-brexit (last visited Mar. 10, 2025).

[83] That does explain the reluctance to accept the class action from Municipio de Mariana against BHP. See Norton Rose Fulbright, in Back to the future – forum non conveniens and Spiliada after Brexit, published on May 16, 2022, considering that the analysis of the doctrine will be utilised in a non-predictable fashion according to the application's date for the claims (whether the Brussels regulation will be applicable or not) in the period after the Brexit transition, Norton Rose Fulbright, *Back to the Future – Forum Non Conveniens and Spiliada after Brexit* (May 16, 2022), available at https://www.nortonrosefulbright.com/en/inside-disputes/blog/202205-back-to-the-future-forum-non-conveniens-and-spiliada-after-brexit (last visited Apr. 3, 2025).

[84] See *Supra* note 36 and 57.

[85] "Adding a specificity requirement would modernize the forum non conveniens by incorporating the changes that have occurred in technology to the Federal Rules of Civil Procedure and to international treaties. The defendant should have to prove why the evidence it is seeking is not available through these channels." See *Supra* note 68 at 103.

[86] See Tomomi Umeda et al. v. Tesla Inc., No. 5:20-cv-02926 (N.D. Cal. 2020), available at https://www.govinfo.gov/content/pkg/USCOURTS-cand-5_20-cv-02926/pdf/USCOURTS-cand-5_20-cv-02926-1.pdf (last visited Feb. 12, 2025).

jurisdiction because Tesla headquarters were then located in that State.[87] As the defective designs were created in the American jurisdiction, including the faulty Tesla auto-pilot that killed a pedestrian in Japan.

The dramatic situation occurred when the Tesla auto-pilot did not recognise a person in front of its path and barged into the victim. In the absence of human judgment as the Tesla automobile was unassisted by a sleepy driver the horrific fatal accident took place. As a result, a young father perished with the crash leaving a widow and a family behind. The Californian judge in balancing the public and private interests decided that the criminal evidence was only accessible in Japan. In spite of the Japanese court proceedings lack of discovery and jury selection for a case involving design and software malfunction manufactured by Tesla, in California, the decision dismissed defective design of that automobile components. It looked like *déjà vu* of *In Re Union Carbide* again.

Interestingly, former employees from Tesla California were not deposed for supporting the plaintiffs when the litigation was initiated in Japan. So, one may expect that in the balance of private and public interest on transactional tests the lessons of *In Re Union Carbide* case are still relevant. Consider that to avoid injustices and lower financial compensation, countries adopting *forum non conveniens* will not constitute a safe harbour.

In other sectors of industry and technology, we must consider that *forum non conveniens* is an inherently dangerous legal tool that will probably produce more injustice than reparation for automation consumers, potential victims in these cybernetic times of artificial intelligence use in automobiles, computers and other algorithm apparatus we will probably use in the future.

10. Conclusion

The horrific industrial accident at the subsidiary of Union Carbide plant in Bhopal shed light at the doctrine of *forum non conveniens* widely applicable to American court to shield domestic corporations operating in foreign countries. It unveiled the *modus operandi* utilized for unsatisfactory accountability for their actions towards people and the local environment. American courts were faced with delivering efficient administration of justice against misconduct from their domestic multinational companies, which the doctrine once codified in American law helped to dismiss cases as forum shopping to protect the economic interest of investors' stakeholders. In Indian, nationals received a legal protection with the codification of

[87] Now Tesla is located in Austin, Texas since 2021, the *forum non conveniens* state.

the class action for healthcare problems faced with the leaking of lethal pesticides in the soil and surrounding areas. However, time to re-litigate the matter was lost and financial injustice was allowed to prevail. The economy protection test triumphs in transnational litigations with this doctrine. This is against public policy and a denial of justice towards the victims that were otherwise unable to advocate for their rights to be treated as humans.

In Re Union Carbide litigation, the test of public policy application on corporate irresponsibility and risky foreign investment is confronted by an unashamedly preference for a competitive edge on products and services to widen profits to the headquarters outside India, in spite of health, economic and human rights violations for victims. Their suffer is a continuous injustice to their next generation affected by exposure of such chemicals. Moreover, the degradation of the local and surrounding environment at Bhopal persists to this day, perpetuating more injustice, which the doctrine of *forum non conveniens* conveniently embraced.