

Forum-Shopping, Forum-Skipping,  
and the Problem of  
International Competitiveness

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# Forum-Shopping, Forum-Skipping, and the Problem of International Competitiveness

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Two important issues facing Congress are trade reform and tort reform. The two interact in a way that has been largely overlooked. American courts apply more stringent liability standards than courts in other countries. By "forum-shopping," persons injured abroad can increasingly resort to the American courts to sue United States-based corporations under more generous liability rules than they would find at home. At the same time, because of antiquated jurisdictional rules, foreign exporters whose products injure United States consumers can often escape the full force of American liability laws. As a result, United States corporations face a double handicap, losing market share in both domestic and foreign markets, while American consumers are less well protected from dangerously defective foreign products.

## *Forum Follows Function*

Following the Bhopal, India, disaster in December 1984, there was intense legal maneuvering over whether the case would be tried in the United States. The Indian government, which claims to represent the victims, and the victims themselves, as represented by American lawyers, have sought to have the case heard in the United States. Union Carbide, for its part, has fought to have the case heard in Indian courts. The irony is central and revealing: the Indian government sought to keep the case in American courts even though one would have thought its persuasive powers there would be less than in its own courts, while Union Carbide,

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The first part of this essay draws heavily from two articles by the author and Peter Reuter, senior economist at the Rand Corporation, in *Wall Street Journal*, 16 May 1985 and 28 October 1985. The essay was prepared with the assistance of Harvetta M. Asamoah.

much vilified in India, was unwilling to leave its fate in the hands of its own countrymen.

Bhopal plaintiffs could sue Union Carbide in almost any United States court they choose, because a company can be sued "wherever it can be found," that is, in any jurisdiction in which it does business or with which it has "sufficient contacts." But judges need not accept a lawsuit just because it falls under their formal jurisdiction if in their view it should be heard elsewhere. They can invoke the legal doctrine of *forum non conveniens*, which as its name suggests is a doctrine based largely on convenience: in which country is it more convenient, given the witnesses and documents, to have the cases heard? Union Carbide emphasized the failure of local plant operators; the plaintiffs emphasized the role of United States designers and Union Carbide's overall corporate responsibility.

The stakes are immense for both sides. First, litigating the claim in American courts would increase the chance that the *substantive* law of an American state would be applied. If it appeared that key management and design decisions were made in the United States, an American court might apply American rules of strict liability in product manufacture and extended liability for construction or design defects. In India, however, the application of strict liability is much in doubt, even though both tort systems share a common English ancestry.

In this case, the application of American substantive law is unlikely. But substantive law is only a secondary reason for wanting the cases heard in the United States. The real attraction is American procedural rules — which would be applied in this case. (The term *procedural rules*, as used in this essay, encompasses all the nonsubstantive rules that govern litigation, a somewhat broader definition than is often used in "choice-of-law" analysis.)

Foreign plaintiffs enjoy a number of major procedural advantages when a case is tried in the United States. In addition to much more liberal rules on discovery (that is, access to Union Carbide records and officials), the plaintiffs would have enjoyed far more generous rules on damages. Noneconomic awards for "pain and suffering" and a broad definition of "consequential" damages are among the kinds of damages that are given much greater recognition in American courts than elsewhere. The availability of punitive damages as well as compensation is another procedural advantage that plaintiffs enjoy in the United States but not in most other countries.

Contingent-fee rules are likewise procedural. These arrangements provide an important public service by allowing plaintiffs' lawyers to advance the costs of litigation, thus permitting major suits on behalf of plaintiffs who are not wealthy. Although contingent fees are illegal in most countries, they are permitted in the United States.

#### *Raising the Value of a Claim*

Most lawsuits are settled before trial. The most provocative issue of the Bhopal case is how large the settlement will be. Here we see the impact of the forum issue.

If ordinary Indian court practices are followed, a large award against Union Carbide is unlikely. The consensus of informed observers is that by the most "liberal calculation" the total award would be less than \$75 million.<sup>1</sup> (There has been some suggestion that the Indian government is changing its tort laws to permit a larger award.)

An award from an American court, however, would be much larger. A rough calculation of the likely award, derived from data on claims compiled by the Rand Institute of Civil Justice, found that compensatory damages could be as much as \$235 million.<sup>2</sup> Possible punitive damages dwarf even this figure. If Union Carbide had been found to have acted with reckless disregard of the welfare of those around the Bhopal plants, possible damages would be limited only by the net worth of the company.

It was the specter of punitive damages that probably led Union Carbide to offer a settlement of \$350 million, a figure approximating the likely compensatory award of an American court but many times higher than that likely from an Indian court.<sup>3</sup> (The company apparently offered a "structured settlement," with an initial payment followed by installments to be paid over a number of years. Thus the present discounted cash value of the offer was substantially lower.) For the plaintiffs, it was probably also the possibility of punitive damages that led them to reject an otherwise plausible offer. As the resolution of the forum issue became clearer, the American plaintiffs' lawyers apparently grew willing to accept the Union Carbide offer, but the Indian government held out for more money—its suit in India sought \$3.12 billion. The Bhopal victims' attempt to persuade American courts to accept jurisdiction over their claims is the prototypical example, albeit the largest, of a growing class of cases. Numerous aircraft and drug companies, for example, have been sued in the United States for products sold abroad and, in some instances, even manufactured and licensed there.

The majority of foreign claims in American courts are ultimately dismissed, as it appears the Bhopal claims will be. But "majority" and "ultimately" are important qualifications. Although most attempts to bring United States lawsuits for foreign injuries fail, some succeed—some because of their facts, some because of the law of the particular state in which the claim is brought. In *Corrigan v. Shiley*, for example, California courts exercised jurisdiction over a wrongful-death and products-liability claim involving a heart valve surgically implanted in the chest of an Australian citizen in an Australian hospital. The courts also permitted the application of California's substantive law of strict liability for product defects, not Australia's negligence standard. The courts observed that even though the valve was sold only abroad and, in fact, was subject to a Food and Drug Administration license that permitted international (but not domestic) sales, it had been manufactured in California by an American company.

Furthermore, "ultimately" means that it can take years of litigation, often to the U.S. Supreme Court, before a case is dismissed. Plaintiffs' lawyers know that uncertainty and delay can raise the value of a claim; that is one reason such cases continue to be filed.

The lesson to American companies doing business abroad is clear: assume that American levels of liability can be imposed on goods and services sold anywhere—and act accordingly.

### *Exporting Safety*

Many Americans will welcome this higher level of corporate accountability. The United States does not want to export dangerous products and manufacturing processes that exploit unprotected foreigners. But such high-minded attitudes ignore two unpleasant realities of the international marketplace. First, stringent liability standards inexorably raise the price of United States-produced goods, services, and investments. Other countries do not want to pay the price for the higher level of citizen protection that the United States provides. They will reject our attempts to sell them this protection by buying fewer American goods and services, and the United States's share of international trade will continue to erode.

Other developed countries, even those with higher per-capita wealth, have not adopted a liability regime like that of the United States. They rely on a combination of government regulation and social insurance to protect their consumers, and they have many rules that discourage products-liability litigation. They are doubly unwilling to accept foreign claims: if Union Carbide were a Japanese company, no Japanese court would have seriously considered hearing the Bhopal claims.

Conversely, less-developed countries cannot afford an American-style liability scheme. The per capita gross national product (GNP) of the United States is \$15,000; India's is a mere \$256. Third World peoples tolerate more product and workplace hazards than we do, because they want to encourage economic development just as we once did. As the federal district court stated in dismissing the Bhopal claims: "It would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country."<sup>4</sup>

Placing higher levels of liability on American companies doing business abroad handicaps them as they compete against foreign companies that need not carry a similar burden. In 1985 the McDonnell Douglas Corporation, trying to sell aircraft to the government of China, felt obliged to incorporate possible American liability costs in the price. The Chinese protested that there was no such liability in China and denounced the company's explanation as "American flim-flam." McDonnell Douglas explained that, although such a suit might be unlikely in China, it was possible for Chinese citizens and foreign nationals to sue in American courts. The sale was made anyway, but at the higher price. Salespeople for the European Airbus consortium certainly labor under no such burden.

Products differ, of course, in the amount of damage they can cause and thus in the extent to which their price must be raised to cover potential lawsuits. In the case of a bar of soap, the degree of risk is negligible and the concomitant rise in price trivial. But for other products, the cost of liability can be high enough to inflict substantial market-share losses. Liability insurance constitutes about 10 percent of the cost of general-aviation aircraft manufactured in the United States; for certain machine tools, as much as 15 percent.

Recently, some United States companies have considered creating undercapitalized foreign subsidiaries to market their products abroad. That sort of protection would probably be illusory, since American courts would likely bypass such a sham and hold the parent company liable.

#### *Foreign Producers' Home-Court Advantage*

At the same time that the United States is exporting high levels of tort liability to countries that do not want it, American consumers ironically do not enjoy full tort liability protection on United States imports. The problem is not the applicability of American laws—all goods sold in the United States are subject to state products-liability laws—but the enforceability of those laws against foreign manufacturers.

Many foreign companies do not have an actual business presence in the United States and instead operate through independent export agents or wholly owned subsidiaries that take title before the products are exported. If it is difficult to collect against companies like A.H. Robins (the maker of the Dalkon Shield), collecting against an elusive export agent can be impossible. Although these middlemen are subject to American jurisdiction, they are often small operations with few assets, making them all but judgment-proof. The parent company may decide to let such a subsidiary fail rather than pay a large claim. Successful recovery often requires gaining jurisdiction over the foreign producer itself. There are two ways to accomplish that goal, but neither works very well.

One way to gain jurisdiction is to "pierce the corporate veil." The legal test for doing this is one of control and capitalization: Did the parent company control the actions of the subsidiary? And was the subsidiary left undercapitalized in order to protect the parent? Both questions require the kind of evidence often available only through discovery. Unfortunately, foreign courts are unlikely to allow the degree of discovery needed. Many countries refuse to compel the disclosure of the relevant corporate records. In some countries, disclosure is actually a crime.

The second way to gain jurisdiction over a foreign company is through a "long-arm statute" that extends to parties who, though never in the United States, are legitimately subject to suit here. The judicial test is whether the party had at least "minimum contacts" with the jurisdiction. The U.S. Supreme Court has ruled that the test is met if "a corporation delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."<sup>5</sup>

In February 1987 the Supreme Court ruled unanimously in *Asahi Metal Industry v. Superior Court of California* that California had been wrong to assert jurisdiction over Asahi, a Japanese manufacturer, even though it sold 100,000 tire-valve assemblies annually to a Taiwanese company that used them in tire tubes for export. Although five justices suggested that they might take a more expansive view of personal jurisdiction under different conditions, most observers agree with David O. Stewart, a Washington lawyer, who, writing in the *Journal of the American Bar Association*, concluded that the decision "eased the risk of suit" for foreign firms.<sup>6</sup>

Even jurisdiction over the parent company, however, may not be enough. The plaintiff must still prove that the product was defectively designed or manufactured or that the defendant failed to give adequate warning of the product's dangerous characteristics. On these points, discovery in the country of manufacture can again be crucial – and difficult to obtain.

As usual, Japanese companies add a further twist of their own: many of them use wholly owned subsidiaries to conduct research and development. A "shell game" is how Miami lawyer Gary D. Fox describes what can happen: "In the past, Honda Motor has objected to discovery requests on the grounds that it did not have the information – Honda R&D had it. . . . In another case, the defendant, American Honda Motor Co., Inc., the wholly owned subsidiary responsible for importing Honda vehicles into the United States, objected to discovery requests on the grounds that the parent company, Honda Motor, had the data."<sup>7</sup>

Faced with this lack of cooperation, some American courts will award judgment for the plaintiff as a sanction; others will not. But enforcing the award is another matter. Unless the foreign company has assets in the United States, the assistance of the courts in the home country is again needed. Since these courts were hostile to the discovery claim on which the award was based, they often refuse to enforce the award or impose numerous obstacles to its enforcement. (This, by the way, is not unreasonable. American courts also reserve the right to refuse to enforce a foreign judgment that violates due process or public policy.)

It can take years of costly litigation before there is any prospect of even partial compensation from foreign defendants. This uncertainty and delay mean that smaller claims (under, say, \$100,000) are all but uncollectible. They are simply not worth pursuing, even under contingent-fee arrangements. Larger claims are worth pursuing, but their settlement value is much reduced.

In one case, a partnership between the wholly owned subsidiary of a European multinational corporation and an American company went bankrupt. An American multinational corporation with a \$40 million claim against the partnership was forced to settle for 10 cents on the dollar. The prospect of an endless argument in a European court over the discovery needed to pierce the joint venture did not seem worth while.

#### *A Free Ride for Importers*

A major purpose of American tort law is to remove dangerously defective products from commerce. When foreign producers avoid the force of the tort law, some American consumers will go without this intended protection. Moreover, the relative freedom of foreign producers from United States tort claims gives them a substantial cost advantage over companies that must price their goods to include American levels of liability. For some products, the difference is a substantial one that can clearly affect United States competitiveness. According to Howard J. Bruns, president of the Sporting Goods Manufacturers' Association, products liability costs his American member companies over eight times what it costs Japanese companies (4.2 percent of the price compared with 0.5 percent).<sup>8</sup>

In principle, the tendency of foreign producers to escape liability should reduce the attractiveness of their products, compensating for their lower price. Or, by putting retailers and other middlemen at greater risk, it should cause them to insist on a higher price markup. However, not many consumers realize that the level of liability protection differs from one good to the next, and many consumers do not value the added protection anyway. Moreover, many sophisticated buyers expect their insurance to cover their economic losses in any case and know that premiums do not go up when they purchase foreign goods. One Fortune 500 executive, when asked whether the lack of recourse against a foreign producer might lead his company to purchase a more expensive American product, answered no—because the company's insurance would cover any accidents. Middlemen, for the same reason, may find that their liability insurance premiums do not vary according to the proportion of goods they import. Perhaps there is a message for insurance carriers here.

Unlike the forum-shopping issue, which came to widespread notice after the Bhopal tragedy, the forum-skipping issue has not yet captured the public's attention; there has yet been no one large case of inadequate relief for injured Americans, partly because when claims against foreign defendants fail an American defendant is usually available to pay the entire claim under the doctrine of joint and several liability. The cumulative impact of hundreds of small cases, however, is clear: for many American claimants, the full enforceability of products-liability laws stops at the shoreline.

The situation worsens every year as imports fill more and more of the United States market. Between 1970 and 1986, merchandise imports as a percentage of goods production have risen from 8.8 percent to 22.1 percent. Of course, there comes a point when a foreign company's sales have grown so far that it is likely to maintain a substantial business presence in the United States, which then makes full products liability enforceable. Until it reaches that point, however, its artificial price advantage will help it to build market share, at the expense of United States consumers and insurers as well as its competitors.

There are many reasons to be concerned that the level of tort liability in the United States is too high. Nevertheless, sound consumer policy and sound trade policy alike would seem to require that foreign producers be brought under the full ambit of whatever such law prevails. Likewise, both equity and national interest call for American companies selling abroad to face the same liability standards as their local competitors, not a special and extra-strict standard applicable only to them. And the inconsistency between the two phenomena—which has led American courts to police the quality of goods sold and used abroad but not goods sold and used in this country—should be apparent.

#### *Limiting Forum-Shopping*

American interests can be protected without closing the courts to foreigners bringing action against United States companies and without making major changes in American tort law. Recall that the legal doctrine of *forum non conveniens* allows

a court to decline jurisdiction when it determines that the litigants' private interests and the public interest would be better served in another forum. Significantly, the avoiding of artificial handicaps to United States trade competitiveness is not one of the "public-interest factors" that the Supreme Court has instructed federal courts to consider in deciding forum issues.

Rather than simply prohibiting the bringing of such cases, a better approach would be to remove the incentives for bringing the litigation to the United States. The law already recognizes the dangers of forum-shopping and seeks to deter it by applying the "substantive" law of the country in which the tort occurred. What it does not recognize is that procedural rules can be an equally strong attraction.

Recognizing that procedural rules can determine outcomes just as surely as substantive rules, the United States should try to see that when a case arising overseas is tried in an American court, it follows the procedural as well as the substantive law of the country where the injury took place. (Possible exceptions include cases where a good is also sold in the United States and where the foreign injury is to a United States citizen.) No one would suggest that American courts use the protocols of a foreign court right down to the filing deadlines and forms. But it is possible to aim legislation at the heart of the problem: liberal discovery, expansive damages, and contingent fees. Under its constitutional powers to regulate commerce and foreign policy, Congress has ample authority to pass remedial measures.

Congress should consider limiting the availability of all three—discovery, damages, and contingent fees—to the same degree as they would be available in the country where the injury occurred. If liberal discovery, expansive damages, and contingent fees are important to other countries, their governments should make them available against all firms—not just American corporations sued in the United States. (Congress may find it politically impossible to change discovery and contingent-fee rules, but it could probably achieve agreement to amend the law of damages, the strongest incentive for importing cases.) There is already a precedent for such a law. Many states have adopted "borrowing statutes" that apply another state's shorter statute of limitations to cut off claims that are filed in their courts after the clock has run out in the state where the dispute arose.

Congress should impose these reciprocal limitations on both state and federal courts. Under current liberal rules of state court jurisdiction, most large American companies can be sued in almost any state (since jurisdiction can be based on minimal business contacts). This is why Union Carbide could be sued in California, Connecticut, Florida, and Texas for what happened in faraway Bhopal. The forum law of the most liberal state becomes, in effect, a national law applicable to all large United States corporations.<sup>9</sup>

#### *Making American Laws More Enforceable*

Congress should also consider legislation ensuring that American courts have jurisdiction to enforce state products-liability laws against defective foreign products. To prevent the misuse of undercapitalized middlemen and subsidiaries, it could

enact a more far-reaching long-arm statute granting American courts jurisdiction over companies whose products are likely to reach the United States or a statute requiring the producer of any good entering the country to consent to being sued in the United States. To facilitate the enforcement of judgments, Congress might require goods entering the country to carry a certificate of insurance or a letter of credit sufficient to cover probable injuries caused by them. (Since this might be a difficult calculation, a simple formula might be established, proportioned to the exporter's annual sales.) Such remedial legislation would have to be carefully drafted to reflect the legitimate requirements of the American tort system — for example, the riskiness of the product — and to avoid erecting a nontariff trade barrier. To avoid disproportionate burdens on smaller and poorer producers, Congress might want to legislate an exemption for producers below some minimum level of annual sales.

No matter how carefully drafted, such legislation might antagonize the United States's trading partners. Few of them have adopted anything like the American tort system and its goals, whether because they do not understand its merits, because they understand it but do not like it, or simply because they cannot afford it. While unilateral congressional action could go a long way to remedy present difficulties, the United States should also consider an international agreement or a series of agreements addressing this and other pressing issues in international trade law that would help put American business on an equal footing with its competitors.

Other countries have recognized a national interest in reforming private international law, and over the past twenty-plus years many have reached agreements to regularize the handling of lawsuits between the nationals of different countries. For many reasons, the United States has signed few of these agreements. Some clearly do not meet American needs, in part because we did not participate in the drafting. Some have been endorsed or in part drafted by successive administrations but were not ratified because various domestic interest groups have opposed them. This relative isolation from international law reform should end; if existing treaties and conventions do not meet American needs, the United States should work with its major trading partners to develop ones that do.

#### *Conclusion*

Clearly, the suggestions of this essay would intrude on state tort law and court procedure, domains that Congress has been reluctant to enter for various political and policy reasons. There is an unusually broad coalition, however, that might be mustered to support rules to facilitate the free — and fair — exchange of goods and investments. Corporations lose both ways from the present system and would presumably welcome reform. Trial lawyers profit from the chance to seek extra damages in Bhopal-type cases but lose much more from the difficulty of suing foreign companies here; they would benefit overall from a compromise. American consumers gain nothing from giving foreign citizens the right to sue in domestic

courts and lose when foreign producers escape tort responsibility. Insurers and miscellaneous tort defendants lose when they are left holding the bag for injuries caused by fugitive foreign producers, and insurers lose again when they pay inflated damages for torts that occur abroad. That such diverse and antagonistic groups all have a stake in reform is a sign that broad national interests — as well as the cause of fairness — are ill-served by the imbalances in the present system.

## NOTES

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2. Douglas Besharov and Peter Reuter, "Averting a Bhopal Legal Disaster," *Wall Street Journal*, 16 May 1985, 32.
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5. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (citation omitted).
6. David Stewart, "Shortening California's Long Arm Statute," *American Bar Association Journal* 73 (April 1987): 45-46.
7. Gary Fox, "Discovery from Japanese Companies," *Trial* 22 (August 1986): 18-20.
8. Letter to the president of the United States, 23 April 1982.
9. See generally Peter Huber, "Courts of Convenience: or Have Lawsuit, Will Travel," *Regulation*, September/October 1985, 18.