AFFIDAVIT OF N.A. PALKHIVALA IN SUPPORT OF DEFENDANT'S MOTION FOR DISMISSAL ON FORUM NON CONVENIENS GROUNDS

STATE OF MAHARASHTRA)
UNION OF INDIA)

N.A. Palkhivala, being duly sworn, deposes and says:

I took the M.A. Degree (1942) from St. Xavier's College, Bombay, and the LL. B. Degree (1944) from Government Law College, Bombay. I am a Senior Advocate of the Supreme Court of India (corresponding to English QC) and have wide practice before the Supreme Court of India, the Bombay High Court and other High Courts of India.

I was a Professor of Law at Government Law College, Bombay, for several years, and was appointed the Tagore Professor of Law at the Calcutta University. I was a Member of the First Law Commission of India (1955) and also of the Second Law Commission (1958).

In 1975 I was elected an Honorary Member of The Academy of Political Science, New York. The Honorary Degree of LL.D. was conferred upon me by the Princeton University, New Jersey, in 1978, and by the Lawrence University, Wisconsin, in 1979.

From 1977 to 1979 I served as Ambassador of India to the United States of America.

"I have done the State some service". Thrice India had to present its case before international forums and I was engaged as the Counsel for the Indian Government on all the three occasions—the Rann of Kutch case before the Special Tribunal appointed by the United Nations in Geneva (1962-65); the case regarding Pakistan's alleged right to overfly India before the International Civil Aviation Organization (ICAO) Tribunal in Montreal (1971), and the appeal therefrom to the International Court of Justice at The Hague (1971-72).

I have been and am the Counsel for some of the largest corporations, Indian and foreign, which had or have business operations in India. I was the Chief Counsel for the citizen in cases which have substantially shaped the growth of our constitutional law, particularly the first five cases mentioned on p. 225 below:

I am the author of numerous articles, and several books including:

"We, the People", 1984
"India's Priceless Heritage", 1980
"Our Constitution Defaced and Defiled", 1974
"The Law and Practice of Income Tax",
7th edition updated, 1982
and "Taxation in India" (co-author of the book published by the

Harvard University), 1960.

At present I hold a number of positions on the Board of Directors of some of the major companies in India, including—

Chairman	: The Associated Cement Cos. Ltd.
	Tata Exports Ltd.
Deputy Chairman	: Tata Engineering and Locomotive Co. Ltd.
Vice Chairman	: Associated Bearing Co. Ltd.
Director	: Tata Sons Ltd.
	The Tata Iron & Steel Co. Ltd.
	National Organic Chemical Industries Ltd.
	The Press Trust of India Ltd.

I am the Chairman of the Income-tax Appellate Tribunal Bar Association and President of the Forum of Free Enterprise.

I have reviewed the Affidavit dated July 31, 1985 affirmed by Mr. Bud G. Holman, and dated December 14, 1985 affirmed by Mr. J.B. Dadachanji. I say that Mr. Holman's statements regarding the adequacy of the Indian legal system and Indian courts are correct, and Mr. Dadachanji has presented a true picture of the state of the law and administraion of justice in India.

I have seen the Memoranda and Affidavits filed in opposition to Union Carbide's Motion regarding Forum Non Conveniens. In those papers it has been stated that the Indian legal system is "deficient" and "inadequate". I am constrained to say that it is gratuitous denigration to call the Indian system deficient or inadequate.

The Indian legal system is essentially based upon the common law of the United Kingdom. The Code of Civil Procedure, 1908, which continues in force, is based upon the procedure in the courts of the United Kingdom. The Indian Evidence Act is also based upon the law of evidence in the United Kingdom, while the Indian Penal Code, again, codifies the criminal law of the United Kingdom. There is a basic similarity in essentials between the American legal system and the Indian legal system, since they both have had their origin in the jurisprudence of the United Kingdom.

A legal system is not a structure of fossils but is a living organism which grows through the judicial process and statutory enactments. Thus in course of time systems which were once similar become different in some respects. We do not have the jury system in India in civil or criminal matters, nor do we have the type of "discovery" which is a specialty of the American procedure. While it is true to say that the Indian system today is different in some respects from the American system, it is wholly untrue to say that it is deficient or inadequate. Difference is not to be equated with deficiency.

The Indian legal system does not provide an identical forum—identical to the American forum; but it does provide an adequate alternative forum. The differences between the two systems spring from the differences

in the history, culture and economic development of the two countries. There are some questions of substantive and procedural law which Indian and US systems have answered differently—for instance, the practice of contingency fees, the way to handle class actions, and how broad and costly "discovery" should be. Different countries have different answers to these problems. Contingency fees which are permitted in the United States are prohibited in the United Kingdom, Canada and India as serious public evils and as being against public policy. To brand the Indian system as being inadequate because its method of dealing with class actions or meeting the need of discovery is different from the American method, is to betray good chauvinism but bad international perspective.

It would be a work of supererogation to repeat the authorities and detailed documentation which have been sufficiently deployed in Mr. J.B. Dadachanji's Affidavit. On the basis of those very authorities and documentation, I respectfully submit the following broad considerations on the strident points urged in support of the plea that the Indian courts are not an adequate alternative forum.

The Indian judiciary

The Indian judiciary is wholly competent to deal with any dispute in any field of law, and has, in the 35 years of the history of our Republic, ably dealt with far more complex issues than those arising from the gas plant disaster at Bhopal.

The Supreme Court of India, in the range of its power and the sweep of its jurisdiction, is without a rival in human history. Its writ runs over more than one-seventh of the human race. It has jurisdiction in every domain of the law—constitutional and ordinary, civil and criminal, social and industrial.

It has not only the power to strike down executive action as being illegal, but also the power to declare any law made by Parliament or by any State legislature to be viod—as being in violation of fundamental rights or otherwise ultra vires the Constitution. There is no injustice which the Supreme Court is powerless to redress. Articles 32 and 136 (1) of the Constitution are reproduced in Appendix 'A'.

The charge that the Indian judiciary is not "innovative" is baseless. To say that our Supreme Court is super-innovative would be closer to truth. The Constituent Assembly which framed our Constitution deliberately rejected the due process clause and provided in Article 21 of our Constitution that "no person shall be deprived of his life or personal liberty except according to procedure established by law". But the Supreme Court, by enviable innovative techniques, has evolved the principle that "procedure established by law" is no different from procedural "due process of law". Further, by construing the words "personal liberty" in the widest sense, the Supreme Court has made the Indian Constitution approximate in this

respect to the US Constitution. The categories of personal liberty are never closed: and "due process"—created entirely by the judicial process—reigns supreme.

Our Supreme Court has dealt with cases where the legal issues presented a far greater challenge to judicial capacity to evolve the law than is presented by the Bhopal case. A few examples would suffice.

In *R.C. Cooper* v. *Union of India* (AIR 1970 SC 564), the Supreme Court held that the nationalization of the 14 biggest banks in India could be successfully challenged by a single shareholder of a single bank, when the Board of Directors of none of the 14 banks were courageous enough to question governmental action.

In *Madhavrao Scindia* v. *Union of India* (AIR 1971 SC 530) the Supreme Court struck down the executive ruse of abolishing the privy purses and privilege of the Maharajas and Princes of India by resorting to governmental derecognition of the Maharajas and Princes.

In *Kesavananda Bharati* v. *Union of India* (AIR 1973 SC 1461) the Supreme Court handed down a decision which is India's finest contribution to world jurisprudence. The Supreme Court held that the power to "amend" the Counstitution did not involve the power to make the Constitution lose its identity or to change its basic structure; that the Constitution was not a jellyfish but had basic features which could not be abrogated, and that Parliament, invested with the power to amend any part of the Constitution, could not act as the Official Liquidator of the Constitution. In 1975 when Emergency brooded over the country, and when the voice of opposition was totally silenced and Parliament enacted a vicious law to the effect that no citizen could claim freedom under the Constitution or on any principle of common law, natural law or rules of natural justice, a specially constituted Full Bench of the Supreme Court stoutly refused to review its two-year old decision in *Kesavananda Bharati's* case.

Part IV of our Constitution contains Directive Principles of State Policy which are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." (Article 37 of the Constitution). In *Minerva Mills* v. *Union of India* (AIR 1980 SC 1789) the Supreme Court, while giving due weight to the Directive Principles of State Policy, refused to hold that the Fundamental Rights could be sacrificed at the altar of Directive Principles.

In *Motilal Padampat Sugar Mills* v. *Uttar Pradesh* (AIR 1979 SC 621) the Supreme Court took the doctrine of Promissory Estoppel (which estops the government from pleading executive necessity and going baek on its earlier promise) an important step further, and held that it was not merely available as a defence but could supply a cause of action for instituting legal proceeding.

There is no doubt that the Indian judicial system can fairly and satisfactorily handle the Bhopal litigation. The only thing special about these cases is the number of claimants; but that can hardly be treated as

a factor which puts the cases beyond the competence of Indian judges. After all, mass tort is merely a species of mass litigation, and Indian courts have admirably handled even those cases of mass litigation which have affected the lives and destinies of millions.

The gas plant disaster at Bhopal was an unmitigated tragedy. The plant itself was the product of highly complex technology, but complexity of the technology cannot be equated with complexity of legal issues. The principles of liability and damages involved in the Bhopal cases are all well established in India. The complexity is not in the nature or determination of legal issues but in the application of the law to the events which took place in Bhopal. Well settled law is to be applied to an unusual occurrence.

The Indian Bar

To say that the Bar in India is ill-equipped to deal with the Bhopal cases is a slanderous reflection on the legal profession in India, unredeemable by the plea of truth.

There are 250,000 lawyers in India. They constitute an All India Bar—in other words, any of them is entitled to appear in the Bhopal case.

A galaxy of talent is available to the claimants in India. India is a poor country, but it is rich in talent and culture. Several lawyers have expressed their willingness to assist the claimants in India without charging any fees. I am proud to say that the tradition of public service still animates the Indian Bar—the first five constitutional cases mentioned above, each of which lasted over some months, were argued in the Supreme Court for the citizen by the Bar without charging any fees, even when the clients were so wealthy as the 14 major banks and the Maharajas. There are nobler spurs to professional excellence than contingency fees.

One of the "shortcomings" alleged against the Indian Bar is that there are no tort "specialists" among Indian lawyers. It is true that the Indian Bar does not display that degree of specialization which often spells commercialization,—the degree of specialization which made a famous American remark (of physicians) that a specialist in diseases of the left leg will not treat diseases of the right. But are we sure that a general counsel is less useful to society than a specialist in ambulance-chasing? Again, can a legal firm be said to be ill-equipped to deal with mass litigation because the number of partners in any partnership is limited by Indian law to twenty?

Eurther, since the Government of India has taken over the conduct of Bhopal cases on behalf of the claimants, the highest law officers in the state—the Attorney General and the Solicitor General of India, and the Advocate General of the Madhya Pradesh State—would be available to the claimants.

The substantive law of torts in India

The law of torts is well established in India and has been enforced for more than a century. India is an excellent example of how a country can have a fairly developed and stable tort law without having an avalanche of tort litigation. Concepts of negligence, contributory negligence, absolute liability, different types of damages which can be awarded, etc., are all well recognized. Some tort law has been codified in the form of special statutes, as pointed out on pp. 16-18 of Mr. Dadachanji's Affidavit.

The law of torts in India is the same as that which prevails in the United Kingdom, subject to modifications by our statutes which are not relevant here. That law of torts was in force in India prior to the promulgation of the Constitution in 1950; and Article 372(1) of the Constitution provides that subject to its other provisions, "all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority." Therefore, to say that the Indian law of torts is inadequate or inadequately evolved, is tantamount to saying that the UK law of torts is inadequate or inadequately evolved.

It is untrue to allege that India is industrially backward or that an adequate legal system which is normally attendant upon industrial development does not exist. According to some economists, India is the tenth most industrialized country in the world, and has the third largest number of engineers and scientists of any country. Apart from having its own satellites in space, it has atomic power stations. Only this week, Mr. Rajiv Gandhi, the Prime Minister of India, was at a function to dedicate one of our atomic power plants and research centres to the nation:

> KALPAKKAM, (Tamil Nadu), December 16:
>
> The Prime Minister, Mr. Rajiv Gandhi, here today urged Indian nuclear scientists to "take a leap ahead, so that we catch up the most advanced technology in the world".
>
> "We must look to the third millennium," Mr. Gandhi observed as he dedicated to the nation the Madras Atomic Power Station (MAPS). He also renamed the Reactor Research Centre as the "Indira Gandhi Centre for Atomic Research".
>
> The large and distinguished international gathering at the dedication included chairman of atomic energy commissions and top nuclear scientists from many countries including Pakistan.
>
> —The Times of India, December 17, 1985.

India has codified laws regarding anti-pollution, environment control, industrial safety, hazardous waste, etc.

The Indian system is undoubtedly capable of evolving the law to cope with advances in technology in the unfolding future. If the Bhopal litigation represents an opportunity for the further development of tort law in

India, that chance should not be denied to India merely because some might say that the American legal system is ahead in development.

Procedure and procedural delays

The charge of inordinate delays in the administration of justice in India would be perfectly valid in a treatise dealing with the Indian legal system. But it is wholly inapt and untenable as regards the Bhopal case.

The special law passed by the Parliament of India, The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, ("the Bhopal Act") and the Scheme framed thereunder, enact specific and well-conceived measures to deal with the cases "speedily, effectively, equitably and to the best advantage of the claimants." The Bhopal Act by itself is wholly sufficient to insulate Bhopal claimants from the law's proverbial delays. There is no "inadequacy" or "deficiency" in the Indian legal system which cannot be set right by the Government of India within a matter of days. The Bhopal Act is a good example of how innovative the Government itself can be when it comes to dealing with an unparalleled situation. Under our well settled law, the Government itself can set up, and has on several occasions set up, a special tribunal; and cases can be assigned to a special judge to ensure their speedy handling.

The year that has rolled by since the tragedy occurred leaves no doubt that the unprecedented Bhopal case will receive unprecedented treatment in India. The Government has already taken the unusual step of substituting itself in place of all claimants and of organizing legal redress in a manner which would be difficult to improve upon. The claimants have no less a champion than the sovereign Union Government. It would be ludicrous to suggest that when these very cases have been chosen by the Government for exceptional protection under its wing, the Government would be unable or unwilling to ensure their hearing without delay.

There have been countless cases in India where a judge has been directed by a higher court to deal with a particular matter on a day to day basis, or special tribunals have been constituted, or the Supreme Court itself has issued orders for the speedy and expeditious disposal of important cases. The case of *M C Mehta* v. *Union of India* (Writ Petition No. 12739 of 1985) referred to on page 7 of Mr. Dadachanji's Affidavit, shows how in a similar case of Oleum gas leak from a chemical plant in Delhi, the Court swung into action within two days of the disaster in the current month. Is there any reason to assume that the courts would not act expeditiously for thousands of victims of the Bhopal tragedy, when they did so for far fewer sufferers of the gas leak in Delhi?

The reason for the choice of the attractive American forum

Equality before the law is guaranteed by the Constitution of India to all *persons*,—citizens and non-citizens alike. Article 14 of the Constitution

provides that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Hence, if the Bhopal cases are tried in India, the quantum of damages to be awarded to claimants would be under the same law which is applicable to all other cases of similar tort, irrespective of the nationality or residence of the corporation sued. Today the government itself is the highest litigant in India, and deaths and injuries are caused in innumerable cases where the State acts through its multitudinous agencies. If the Bhopal cases are tried in India, the same principles of law and measure of damages applied therein would also have to be applied in countless cases in the future. It is not difficult to see in Article 14 the genesis of the condemnation of the Indian forum as "inadequate" and the choice of the American forum as "adequate".

The ends of justice often require the truth to be faced squarely and stated bluntly. Indian courts are inadequate only in the sense that they are an inadequate instrument for procuring the fabulous damages which American juries are prone to award. Since this affidavit is confined to the Indian legal system, I shall make no submission on the question whether "forum shopping" should be permitted as a means of virtually getting American aid thinly disguised as "damages". It is a fortuitous circumstance—but not without significance—that $9.5 billion which I believe represents the total aid given by the USA to the Indian Republic over the last 35 years is exceeded by the aggregate claims made on behalf of the Bhopal victims.

Sd/-
Nani Ardeshir Palkhivala
DEPONENT

VERIFICATION

I, the Deponent above-named, do hereby verify that the contents of the foregoing Affidavit are based on my experience as a practising lawyer and on legal research done by me and under my direction and believed to be true.

Verified at Bombay on this 18th day of December 1985.

Sd/-
Nani Ardeshir Palkhivala
DEPONENT

Before me
Sd/-
S.R. VAKIL
BOMBAY HOUSE
NOTARY MAHARASHTRA STATE