Averting a Bhopal Legal Disaster

By DOUGLAS J. BESHARRO And Peter Reuter

"Five months ago a gas leak at a Union Carbide Corp. chemical plant in Bhopal, India, killed an estimated 1,700 Indians and injured as many as 200,000 more. The scale of death and suffering made this a singular human disaster. Now it seems that the outcome of the resulting litigation will be another disaster: Either the victims will receive grossly inadequate (and much delayed) compensation or U.S. firms operate overseas. In the former case, the legal liability, further handicapping them in competing with foreign firms. But with leadership from both governments, the interests of all parties can be reconciled.

Most lawsuits are settled, and, probably, will be in this one. Union Carbide Chairman Warren Anderson accepted "moral responsibility" for the tragedy, and the company has already pledged $1 million to survivors for "immediate interim relief." But no legal settlement is likely before we know where the case would be tried. Why? The possibility of punitive damages.

The recent legal jockeying comes down to the simple question of forum: Will the Bhopal victims persuade some U.S. trial courts to accept jurisdiction over their claims? So central is this issue to the outcome of the case that the Indian government, in joining the suit, has also asked that the case be handled in the U.S.

Two factors bring the Bhopal case to U.S. shores. First, Indian courts do not seem to be equipped for a case of this magnitude. U.S. courts have developed procedures, however cumbersome, for handling cases with very large numbers of plaintiffs and complicated legal and scientific issues. In fact, many experts believe that, should the effort to bring litigation in the U.S. fail, the suit will ever be filed in India. Instead, Union Carbide would settle for negligible amounts per victim.

Second, unbounded damages to "punish" defendants, a uniquely U.S. invention, could be awarded. They are not available anywhere else in the world. To punish wrongdoers, other societies rely on criminal prosecutions or other governmental sanctions. In recent years, however, U.S. judges have progressively expanded the old English common-law concept of punitive damages (long limited to narrowly circumscribed situations in which ordinary damages were deemed inadequate to the point that they could be awarded against any defendant whose behavior suggests a reckless or wanton disregard for safety—and allegations already made against Union Carbide. Punitive awards of between $1 million and $15 million are no longer unusual. Recognize that those were awards in favor of individual plaintiffs and one sees why these claims are in the billions.

The permitted liability Union Carbide would face in U.S. courts would undoubtedly lead it to argue that the suits belong in India. U.S. judges retain discretion to dismiss lawsuits that, although falling under their formal jurisdiction, should be brought elsewhere. It is more convenient, given the realities and demands, to have it heard in India and U.S. courts.

There is a nasty element of Russian roulette here. If the plaintiffs prevail on 100,000 injured—some very seriously, some only slightly—we base our estimate on a Rand study of asbestos litigation. The average payment to asbestos victims, a population with similarly varied injuries, was $14,000. Using the same adjustment for Indian income, we project an average of $1,100 for each injury, which would total $2.2 billion. In all, Union Carbide might expect an offer of between $120 million and $300 million to receive serious consideration, if punitive damages are a factor.

The U.S. lawyers representing the victims, sensing the possibility of an astroturf anti-union front of punitive damages will have little incentive to settle for compensatory damages. Since their contingency fees against questionable liability. If the Indian government thinks that punitive action is needed, it can bring the proper criminal prosecution—in India...

Besides facing fair to the victims, such an agreement would be in the U.S.'s interest. As a society, it has decided to impose punitive liability on business to protect U.S. citizens. Many Americans, understandably, would like to hold U.S. business to the same levels of liability for its actions overseas. But doing so handicaps U.S. firms of the competitive advantage foreign firms that do not carry similarly expensive liabilities. Whether the U.S. thinks other countries should do so is beside the point. It cannot maintain global competitiveness unless it has equal liabilities, and the result will be the further loss of overseas markets for U.S. firms.

Sensitive to Accusations

Also, not every country can afford U.S. levels of liability. Even if other developed countries decided to adopt those other wonders of contemporary America—strict liability, punitive damages, contingency fees—it is not clear that the Third World would want to buy them, embedded in exports and investment. Countries like India may reasonably deem them unnecessary luxuries, just as an Indian OSHA might allow much laxer workplace safety than would its U.S. counterpart. It is not the U.S.'s place to impose its rules concerning safety and liability.

We harbor no illusions, though, about the eagerness of either government to pursue this seemingly sensible resolution. The U.S. government will be sensitive to accusations that it is protecting a major U.S. corporation and condoning the exploitation of Third World peoples.

The Indian government, too, will fear charges that it is kowtowing to an "imperialist" nation. Better to leave the matter in the courts and, if the outcome is no recovery for the victims, the "imperialists" can still be blamed.

Nevertheless, both governments have ample reason for concluding that a compensation-based settlement is in the interest of all concerned. If either government summons up the courage to pursue its enlightened self-interest—and the best interests of the victims—the other would be shortsighted to reject the offer.

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