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### Viewing cable 09MUMBAI265, TWENTY-FIVE YEARS LATER, BHOPAL DISASTER NOW HAUNTS DOW

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CHEMICAL

REF: A. MUMBAI 600  
B. MUMBAI 481  
C. MUMBAI 459

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¶1. (U) Summary. In December 1984, a massive chemical leak at the Union Carbide Corporation (UCC) plant in Bhopal, Madhya Pradesh killed thousands, leaving a legacy of suffering, continued health and environmental concerns, and political controversy. As the twenty-fifth anniversary of this tragedy approaches, NGOs and other activists hope to refocus attention on issues of culpability, damages, and the environmental remediation of the accident site, which still stands unaddressed in the middle of Bhopal. These lingering issues have cast a shadow over the Dow Chemical Company (Dow), which acquired certain assets of Union Carbide in 2001, long after a series of political settlements and Supreme Court of India rulings that purportedly ended all civil liability for UCC in India. In recent years, Dow launched two sizeable projects in western India: a USD 100 million R&D facility outside of Pune in Maharashtra and a chemical manufacturing plant in Gujarat. For years, these and Dow's other facilities have been plagued by protests, political intimidation, and ongoing and indefinite litigation owing to the UCC purchase. Victims' groups and NGOs assert that Dow, as the purchaser of Union Carbide, should be held liable as a successor-company for UCC's Bhopal legacy and the environmental rehabilitation of the accident site.

¶2. (U) Summary, Cont. The controversy and the political fallout from the protests have forced Dow to halt the construction of the Pune R&D facility and consider shifting the facility to another state. Protests have also stalled the further planned development of the JV plant in Gujarat. Dow has been embroiled in drawn out litigation in the High Court of Madhya Pradesh (MP) to determine legal responsibility for the environmental clean-up of the disaster site. While the MP High Court has determined that the MP state government and the GOI bear legal responsibility for cleaning up the site, Mission India believes that NGOs and activist groups will continue to focus attention on Dow, in a public relations and legal fight that could continue unresolved for years, hampering Dows plans to invest large amounts in a promising market. End Summary.

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*courage is contagious*

A TRAGEDY. A SETTLEMENT?  
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¶3. (U) On December 3, 1984, a methyl isocyanate poison gas leak from the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh, immediately claimed the lives of approximately 3,800 people, and left almost 100,000 injured, many seriously and permanently. In the years that followed, the number of casualties swelled nearly five-fold, with over 15,000 deaths and 500,000 injuries attributed to the disaster, according to claims settled since 1984, making it the largest industrial disaster in history. In the immediate aftermath of the disaster, questions of culpability quickly and inevitably emerged. Lawsuits were filed both in India and in the U.S. against UCC and its 51 percent-owned subsidiary, UCIL. The U.S. litigation ended when the U.S. District Court of New York ruled that it had no jurisdiction over the cases, stating that the appropriate venue was the Indian court system, a ruling that stood when the U.S. Supreme Court declined to hear the case. Thus, all criminal and civil litigation against the two companies returned to the jurisdiction of the Indian legal system.

¶4. (U) With so many people killed and injured and no regular procedures available under Indian law to allow for effective representation of such an enormous class of plaintiffs, the Government of India enacted a special statute entitled the "Bhopal Gas Leak Disaster Act, 1985." The essence of the law was to enable the Central Government to conduct litigation on behalf of all the victims. In February, 1989, the Indian Supreme Court approved a settlement between the Central

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Government, in its capacity as representative of the victims, and UCC and UCIL. In the settlement, UCC, as the parent company of UCIL, agreed to pay out nearly USD 500 million in damages. This money was placed into a trust, to be administered and distributed to the victims by the Government of Madhya Pradesh as it saw fit. In consideration for the payment, UCC and UCIL (and their officers, directors and employees) were relieved of all further liability for monetary damages, and were to be free from future criminal charges. (Note: Because of widespread protests against the settlement, the Indian Supreme Court just two months later decided to reconsider its approval; eventually, the Court confirmed the resolution of the civil settlement, but held that the companies and their responsible officers remained subject to criminal prosecution. The criminal cases against UCC and its former CEO Warren Anderson have continued in the Indian courts ever since. End Note.)

¶5. (U) Despite the UCC and GOI settlement, victims groups and NGOs have remained unsatisfied. They assert that the trust money has been inadequately distributed, mismanaged, and misappropriated by the state and central government. The groups have also continued to express outrage that the accident site has to this day not been cleaned up. The site remains a highly toxic area and a place of enormous concern to local residents. At the time of the accident, India had not yet passed its Environmental Protection Act, and there was thus no regulatory plan or legal mechanism for the site's remediation. Neither the courts, nor the GOI, ever ruled on the thorny but fundamental questions of who would actually do the cleanup work or bear the costs.

Dow's Purchase of UCC Sparks New Rounds of Litigation  
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¶6. (U) Nine years after the disaster, in September of 1994, UCC sold its entire stake in UCIL to Eveready Industries India Ltd., a Kolkata-based battery manufacturer. (Note: A substantial portion of the proceeds of the sale was attached by the Government of India, to be used to establish the Bhopal Memorial Hospital and Research Center for the victims; it appears that this attachment was part of the settlement reached by UCC with the GOI. End Note.) The sale of UCIL's assets ended UCC's business presence in India. Eveready became the lessor of the disaster site and its surrounding property. Four years later,

Eveready's supervision of the property ended and the State Government of Madhya Pradesh assumed full control.

¶7. (U) With the UCC Bhopal debacle ostensibly settled, at least in respect to civil claims, the Dow Chemical Company (Dow), one of the largest chemical manufacturers in the U.S., began to consider an acquisition of UCC in the late 1990's. Dow officials and legal counsel determined that because UCC had sold all of its India interests to Eveready, and because it had settled all outstanding civil litigation, no successor liability from the Bhopal disaster would attach to Dow in its purchase of UCC. Nevertheless, many of Dow's shareholders opposed the proposed acquisition, and in suits intended to block the transaction, cited fears that UCC's Bhopal-baggage would subject Dow to residual liability from the disaster itself, as well as jeopardize future business prospects in India. At the same time, protests by Bhopal victims groups and environmental activists erupted in Bhopal, Mumbai (home of Dow's existing India headquarters), and in the U.S. upon hearing word of Dow's intentions. Ultimately, the shareholder suits were dismissed, and the Federal Trade Commission allowed Dow to acquire UCC in February 2001.

Dow Inherits Troubled Legacy

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¶8. (SBU) Activist groups in India and elsewhere quickly honed in on Dow, and insisted that Dow had inherited the legal and moral legacies of the Bhopal disaster. The scores of NGOs and activist groups fighting against Dow coalesced into a single organization called the International Campaign for Justice in Bhopal (ICJB), spearheaded by Amnesty International and Greenpeace. (Note: Representatives from the ICJB traveled to Washington in May 2009 and met with State Department officials and members of Congress to present an update on the many civil and criminal cases pending in India and the U.S. End Note.) The ICJB, after a series of failed attempts at criminal prosecution of Dow employees, successfully initiated a Public Interest Litigation (PIL) suit in the Madhya Pradesh High Court. The suit charged the Central Government, the State of Madhya Pradesh, Eveready Industries and Dow with failure to address the enduring medical and ecological effects of the disaster. The High Court ruled that it would permit the PIL to proceed, but would limit its focus exclusively on the site remediation and its costs, and not permit claims for the injuries to persons or other damages. After hearing argument and testimony on the environmental issues, the High Court issued two orders in March and May of 2005, charging the Central and State governments' with responsibility to clean up the site and to dispose of the toxic waste. Moreover, the Court ruled, the process must begin immediately for the safety of the citizens. The Central and State governments would share the cost of the clean up, until the Court made its final ruling in the PIL determining who would ultimately have to pay.

¶9. (U) Some Central government officials looked to Dow to ultimately pay for a portion of the remediation costs. Fearing that Dow might divest itself of its India operations before the ruling on the PIL (Dow had two smaller facilities in India at the time), the Union Ministry of Chemicals and Fertilizers filed an application with the High Court requesting an order that Dow deposit approximately USD 25 million against environmental remediation costs that might arise later out of the PIL. The Court to date has not made a decision on the matter.

NGOs Demand a Political End to the Legal Standoff

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¶10. (SBU) On June 11, CongenOfs met with Satinath Sarangi of the ICJB and Vinuta Gopal, the Greenpeace liaison to the ICJB in Mumbai. They listed three demands that the ICJB wanted Dow to meet. First, ICJB wants Dow to remediate the site of the gas disaster and to clean up and remove all waste and hazardous material. Second, Dow should pay for the costs of medical

monitoring to assess health damages caused by the soil and ground water contamination both before and subsequent to the gas leak. And last, ICJB wants Dow to present representatives of UCC to Indian courts to stand trial for criminal liabilities. According to Sarangi, UCC is an "absconder from justice" since 1992, and its owner, Dow, is "shielding the company" from criminal prosecution in India. He alleged that Dow was also selling UCC's processes and technology in India under its own name. According to Sarangi, Indian Oil Corporation cancelled a contract to purchase a technology from Dow after it learnt that Dow planned to sell UCC's technology under the Dow brand name. ICJB is not seeking additional monetary compensation for survivors or descendants of victims, as they noted that the Indian Government had already settled civil liabilities arising out of the gas leak.

¶11. (U) Relying on Common Law doctrines of successor liability, Dow counters that it acquired UCC nearly twenty years after the disaster, fifteen years after a settlement was agreed upon between the Government of India (GOI) and UCC, and nearly ten years after UCC had sold off its stake in Union Carbide

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India Ltd. (UCIL), UCC's Indian subsidiary that actually owned and operated the Bhopal facility at the time of the disaster. Thus, according to Dow officials and attorneys, there is no legal basis for a claim that it ought to be held liable for any outstanding Bhopal liabilities. (Note: Dow's leadership has shown enthusiasm for a proposal made by Ratan Tata, Chairman of the Tata Group, which calls for the creation of a pan-industry trust to pay for the remediation. Tata hopes that a clean up through a collaborative trust, made up of donations from corporations with an interest in seeing the Dow matter resolved, would not only serve to clean up the site, but would serve as an assurance to overseas companies that India remains a desirable destination for foreign investment. The ICJB objects to this proposal because it would, to their minds, absolve Dow of further liabilities. End Note.) For their part, senior Madhya Pradesh state officials have told Congenoffs that while there is money for the clean-up, several technical hurdles related to the disposal of the waste have prevented action; in addition, they acknowledged, the issue is highly political, and they did not expect the remediation to move forward in the near term.

¶12. (SBU) Congenoff met with the Director of Corporate Affairs at Dow Chemicals India, Rakesh Chitkara, and Dow India's chief legal advisor, Ramolla Karnani. When asked why Dow had become the primary target of the NGO groups while Eveready, the parent of UCIL, had been left virtually untouched by criticism, Chitkara postulated that "the NGOs have to pick their battles. They don't have the resources to go after both companies, so they chose to go after us because we are a larger, international group. A campaign against us will simply be more visible. It's more publicity. Plus, since we're a larger company so they figure they'll get a bigger payout." Chitkara also speculated that Eveready had paid off the protesters. He had no concrete information that other competitor companies might be funding the protests, but acknowledged that even if a competitor-culprit were uncovered, there was no reasonable legal remedy. While the Bhopal remediation costs are relatively small, compared to Dow's disruption of business and legal costs, Dow has consistently refused to pay on principle. Chitkara said that should Dow pay these costs, it will appear as an admission of guilt, and have the potential to provoke additional litigation. Chitkara has noted previously that Dow has a robust corporate social responsibility program in India, focused on the provision of safe drinking water and artificial limbs.

¶13. (SBU) When posed the same question, Sarangi and Gopal explained that the legal and moral cases against Eveready are far less compelling. The ICJB asserts that their investigation has proven that UCIL was not a wholly independent subsidiary of UCC, as Dow has maintained. Since UCC made virtually all the critical decisions at the UCIL facility, there was no legal separation between parent and subsidiary. Sarangi maintains that the UCIL facility in Bhopal (including the waste disposal facility) was completely designed by its parent company, UCC. UCC maintained complete "control" of the Indian subsidiary. Greenpeace India's Gopal concurred, and added that documents attesting to UCC's control of UCIL had been presented in a U.S. court during the disclosure process. The gas leakage at the Bhopal facility is therefore a direct consequence of decisions and actions taken by UCC and not UCIL, she argued. Sarangi pointed out that Dow had even paid around \$2 billion for

liabilities arising out of exposure of UCC workers to asbestos in the U.S. even though it did not own UCC at the time the asbestos exposure occurred. If Dow accepted liability for UCC's past actions in the U.S., it should bear similar responsibility for damages in India, Sarangi argued.

PUNE FACILITY TARGETED

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¶14. (SBU) What was once simply a legal matter regarding potential monetary damages has now become a larger vexation for

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Dow, as the company attempts to expand its presence in India. In October of 2007, Dow commenced the construction of a Research and Development facility at the Shinde-Vasuli village near Chakan, 35 kms from Pune (see reftel A). The land was acquired from the Maharashtra Industrial Development Corporation (MIDC). According to Chitkara, this investment was encouraged by the then-Union Minister for Science & Technology, Kapil Sibal, and approved by the former Maharashtra Chief Minister Vilasrao Deshmukh. All clearances were in place before construction commenced at the site, he added.

¶15. (U) Three months after construction began, on January 16, 2008, local villagers blocked access to the road leading to the Pune site. Chitkara believes that anti-Dow NGOs in Bhopal incited the villagers to protest against the Dow R&D facility by conjuring up memories of Bhopal, but he offered no direct evidence to back this allegation. (Note: Sarangi and Gopal confirmed that the ICJB had played some part in the protests. End Note) As a result, the state government imposed a stay on construction at the site and appointed a committee headed by the Environment Secretary to investigate the complaints. In March 2008, the committee found that the grievances of the villagers were unfounded and that the R&D center was a zero-discharge facility that would have no adverse impact on the environment. It therefore recommended that construction resume, and the Maharashtra state government re-opened the site in July 2008.

¶16. (SBU) On July 25, the same day that the site was re-opened, a group of Hindu religious devotees of a shrine 50 kms from the site, known as Warkaris, vandalized and set fire to nearly \$500,000 worth of equipment at the facility. The Warkaris claimed that the Dow facility would pollute the ground water and otherwise defile the environment of the shrine, which marks the birth-place of their saint. With added police protection, construction resumed immediately despite the damage caused by the vandalism, but the government once again stopped construction at the site in September 2008. According to Chitkara, the explanation for the state government's actions is simple politics: there are 2.5 million Warkaris in Maharashtra who are affiliated with Sharad Pawar, the leader of the Nationalist Congress Party; that party, in coalition with the Congress Party, controlled Maharashtra at the time. Even though Pawar publicly denounced the actions of the Warkaris, Chitkara believes that the Warkaris pressured Pawar to stop construction, and that Pawar, with the upcoming state and national elections in mind, appealed to Chief Minister Deshmukh.

¶17. (SBU) Thus, yet another committee was appointed in September 2008 to investigate this second round of allegations of ground water pollution by the R&D center. The committee has not yet made any recommendations, but the new Chief Minister of Maharashtra, Ashok Chavan, has asked Dow voluntarily to withdraw from the Pune site, which Dow has refused to do unless ordered by the state government. Chavan has also suggested that Dow relocate from the current site in Pune to an alternative site in Maharashtra. Dow is considering this suggestion, as well as exploring options to relocate to Gujarat or Karnataka, but has not yet decided on its course of action. If Dow pursues its option of constructing a facility in the new locations, it will likely contract the construction to an independent contractor, and take over the facility only upon completion. Dow has not communicated its plans to the Maharashtra government for fear that it may taint the findings of the committee's report. The committee may render an unfavorable opinion against Dow to portray Maharashtra investment climate in a good light if they realize that Dow is deciding to leave Maharashtra, Chitkara

explained. The committee was expected to render a recommendation within a month, but to date has not made any decision. Any decision will come out only after the Maharashtra state assembly election in October 2009, Chitkara opined.

¶18. (SBU) Chitkara explained that the situation in Pune has undoubtedly discouraged further Dow investment in India,

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especially in Maharashtra or Madhya Pradesh. Dow has already invested \$20 million in the construction of the R&D facility in Pune. The company had planned to increase its investment in India from \$750 million today to \$5 billion by 2015, but given the difficulties Dow has recently experienced, that level of investment looks extremely unlikely now, he added. Chitkara pointed out that the company has four manufacturing facilities in Maharashtra which were constructed and are operating without any problems. Dow also has an operational laboratory in Pune that it planned to shift to the R&D facility once it was constructed. However, the only facility that met with objections and opposition was the non-manufacturing R&D site in Pune, he noted.

¶19. (SBU) Comment: As the 25th anniversary of the Bhopal disaster approaches this December, both Dow and the Bhopal NGO groups seem unwilling to compromise. The NGOs are reluctant to permit the Government of Madhya Pradesh or the Central Government to remediate the site, citing past instances of government incompetence with hazardous waste disposal. They are also averse to the idea of a pan-industry fund if Dow is not included in the contributors. For them, Dow must be held responsible. Dow, on the other hand, worries that contributing to the clean-up project, voluntarily or by court order, will inspire an even more virulent string of lawsuits and protests that would plague the company indefinitely. With the state government, activists, and Dow all refusing to move, this problem could likely continue for years, hindering Dow's presence in India. The collateral damage to Dow's Pune research facility highlights the strength of the feelings in India about the Bhopal tragedy, and provides another example of the declining business environment in Maharashtra. End Comment.  
FOLMSBEE