Corporate Responsibility for Bhopal

How Union Carbide Exploited a Government Loophole
K SUBRAMANIAN

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K Subramanian (subrabhama@gmail.com) retired from the Ministry of Finance and writes frequently on global economic affairs.

Union Carbide Corporation managed to wrangle out of the Bhopal gas tragedy by exploiting a loophole in the Foreign Exchange Regulation Act. If governments are not vigilant, other companies, ushered for “Make in India”, would do the same.

Thirty years have passed since the Bhopal gas leak occurred on that fateful night of 2 December 1984. The magnitude of the disaster cannot be captured in words. Official estimates of those who died or those who survived and vegetate with physical deformities and damage do not give us a clear picture about the extent of the tragedy.

For a tragedy of this magnitude, one would have expected studies or attempts to fix responsibility for the crime. Indeed, litigation has continued for years in the United States and India. Learned monographs have been written by researchers and social activists trying to fix responsibility. Unfortunately, the whole truth has been elusive. In this article we attempt to piece together material which throws light on issues related to corporate responsibility.

Subsidiary status of UCIL

On the date the tragedy occurred, i.e., 2 December 1984, the Bhopal plant was operated by Union Carbide India Ltd (UCIL) as a subsidiary of Union Carbide Corporation of US (UCC). UCC held 50.9% equity in UCIL and held it as a subsidiary. US corporations insist on having 100% ownership or, at a minimum, subsidiary status for companies under their control, as it is essential for central control and direction. It also helps to consolidate their global accounts. Among multinational corporations, especially those from the US, it is axiomatic that complete control is necessary to protect the proprietary nature of high value technology which they transfer.

The degree of control varies with individual corporations. In the case of UCC, it was detailed in a policy manual which ran to 1,300 pages. It was the corporate bible and subsidiaries
could ill afford to breach the edicts in the manual. In its affidavit filed before the US district court, the Government of India (GoI) drew attention to this nexus and how UCIL was wholly controlled by UCC. Critical to parent/subsidiary relationship is the necessity to hold more than 50% of equity. As will be explained later in this piece, UCC fought for years with the GoI and the Reserve Bank of India (RBI) to establish its right to hold more than 50% equity in UCIL.

This battle arose when UCIL’s subsidiary status was threatened under the provisions of the Foreign Exchange Regulation Act, 1973 (FERA). Under the guidelines issued for the operation of Section 29 of the FERA, UCIL was eligible to hold only 40% of non-resident (UCC) equity. This was based on an assessment of the share of hi-tech items in the basket of its manufacture. Only those companies which had more than 75% of their manufacturing in hi-tech items were allowed to hold higher levels of equity of up to 74%. All others were required to reduce their non-resident equity to 40% in a time-bound manner. UCIL was subjected to this treatment in the first round of the FERA battle.

The Bhopal tragedy struck four years after the UCC won the FERA battle. Within hours of the tragedy, UCC issued a strong disclaimer. It said,

Bhopal Plant is owned and operated by UCIL, an Indian company, in which UCC held just over half the stock. Other shareholders included Indian financial institutions and thousands of private investors in India. UCIL designed, built, managed and operated the plant using Indian consultants and workers.

The implication was that UCC, the US parent company, had no responsibility for the acts of its Indian subsidiary. This was corporate falsehood. Thereby UCC attempted to disown responsibility for the gas leak tragedy and made UCIL the scapegoat. This is the beginning of our story. As years rolled by, there were other twists and turns to the nexus between UCC and UCIL.

For the UCIL, it was a quirk of fate that its claim to remain as a subsidiary of UCC came to be linked with the Bhopal project. The project was being set up to produce a methyl isocyanate (MIC)-based pesticide, viz, sevin. What was the link and how did it come about?

**How the FERA Was Violated**

When the initial letter of the RBI conveying the decision of the GoI to allow only 40% equity was issued, it sent shockwaves through the boardrooms of UCC. The US major which was known for its political clout through its White House connection, campaign funding, etc, stepped up relentless pressure on the GoI. The government which has always been solicitous to foreign investors bowed to US diplomatic pressures. It tried to find ways to meet the UCC’s demand. The FERA guidelines were tweaked (amplified as it was called!)
with a lower threshold of 60% manufacture in hi-tech items and a longer horizon to achieve it. If the sevin project which had been delayed from 1972 could be put through, UCIL would become eligible to retain its status as a UCC subsidiary and could be let off the FERA hook. Thus, it was imperative for UCC and UCIL to establish the MIC-based sevin project. Unfortunately, the sevin project which saved UCC from the FERA led ultimately to the tragedy.

From the affidavits and other documents filled by UCC and the GoI, it was clear that the progress of the sevin project was anything but smooth. UCIL needed assurances from UCC over the project design, safety, etc. It entered into separate agreements with the parent company. There were doubts about the capacity planned and also designs to keep huge quantities of MIC in storage. By international standards, the storage planned was considered excessive and highly risky.

**Sevin Project Delayed**

By the winter of 1978, when the project was half way through, there were worries about overruns and potential demand for pesticides in India. Even the feasibility of scaling down the plant was discussed in New York and given up as the project had already reached an advanced stage. It was also seen from these documents that within UCC there were inter-departmental differences and squabbles. Its agriculture department was keen to maintain its exports of sevin to India as it had reached overcapacity in the US. A Bhopal task force of UCC was formed to iron out the differences. It could not ban the exports. Sadly, it could not find other commercially viable alternative uses for MIC. Ultimately, it was decided to go ahead and complete the project solely for the purpose of retaining the subsidiary status of UCIL. UCC secured the approval of the RBI to retain UCIL as its subsidiary. This was on 5 July 1980. It did not prove to be a moment of victory. Demand for sevin did not pick up and stocks began to pile up. UCC had not studied the Indian market or the Indian farmer’s psychology. Sevin was efficacious in very large US farms covering thousands of hectares. Not so in small patches of land as in India. Insects treated with sevin ravaged the neighbouring untreated farms! Moreover, the country faced severe drought and farming was substantially reduced. Other competitive pesticides had entered the market. The Bhopal plant had become sick and was beyond redemption.

In keeping with the US corporate tradition, UCC began to engage in savage cost cuts to salvage the plant. Many studies done later have proved that these measures were unwise and imprudent. The most glaring mistake was the reduction in the capacity of cold storage tanks. Local journalists like Rajkumar Keswani issued warnings about the safety lapses and these went unheeded. In their book *It Was Five Past Midnight in Bhopal* (Full Circle, 2001) Dominique Lapierre and Javier Moro describe the utter state of neglect in the plant. The plant management could not even provide the minimum safety requirements recommended by inspection teams from UCC.
All this was because UCC had lost interest in the project and began to look for suitors in India to take over the plant. It was too late in the day. By October 1984, the possibility of dismantling the plant and shipping it to another developing country such as Brazil or Indonesia was also explored and given up. One important factor which militated against that idea was that the MIC plant was so corroded that it could not be dismantled! On 2 December 1984 the plant blew up – water entered MIC tanks and toxic fumes engulfed the whole of Bhopal. Given these facts which are on record and verifiable, it was immoral, unethical and legally irresponsible on the part of UCC to suggest that it was an Indian plant, owned and operated by UCIL and also add “...the plant was designed, built and managed by UCIL, using Indian consultants and workers.”

**Legal failure**

After the litigation was transferred from the US to India, the GoI, for its own reasons, did not engage in serious litigation in Indian courts. There was an overarching desire to reach a settlement. Unfortunately, the Supreme Court, on its part, did not pursue the matter to its logical end to ensure justice. It was indeed true that India did not have any law to decide such instances of industrial disasters. For reasons unknown, the Supreme Court tended to broker an arrangement or settlement. In retrospect or with hindsight, it was a miscarriage of justice. The Supreme Court delivered its judgment on 14 February 1989. The company was absolved of all liability on payment of a piffling amount of $470 million and all pending cases were also closed.

The judgment paved the way for the UCC to wrap up ECIL operations. In 1994, UCC sold its entire stocks to McLeod Russel India and was renamed Eveready Industries India. When this transfer took place, there was no “due diligence” about the takeover of contingent liabilities. The sale proceeds were used to create a trust. (Curiously one of the Supreme Court judges became a president of that trust!) By this act of sale of all shares, UCIL had also washed off its hands over the Bhopal liability.

The next development took place in the US. In 2001, UCC was taken over by Dow Chemical. There are several studies on the background to such a merger between two companies which are known to be cantankerous litigants and Dow, on its part, had a load of liability cases such as those attached asbestos unit, poisonous gas, etc.

Once Dow had taken over, the corporate game was complete. In 2001 when the Bhopal district court issued its verdict, Dow issued a disclaimer. It said that it had sold its entire stake in UCIL in 1994 and the company was renamed Eveready Industries. “All the appropriate people from UCIL have appeared to face charges. Union Carbide and its officials were not part of this case since charges were decided long ago into a separate case.” It goes on to add, “Furthermore, Union Carbide and its officials are not subject to the jurisdiction of the Indian court as they did not have any involvement in the operation of the plant which was owned and operated by UCIL.” Dow Chemicals has issued more or less the
same disclaimer whenever any news on the Bhopal gas leak case surfaces in the press. It is also on record that Dow Chemicals continued its lobbying backstage to get cleared of all responsibility and to enter India through new projects/ventures. This was observed in the mails exchanged between Lawrence Summers and Montek Singh Ahluwalia.

**Conclusion**

The lesson we can draw is this - while dealing with multinational corporations for high-value investments or the new-fangled “Make in India” projects, the policymaker has to be extremely cautious. S/he must gather the full picture about ownership and also get guarantees against industrial/project hazards. It may not be easy. The ghost of Bhopal should always be guiding them.