



# ICLG

The International Comparative Legal Guide to:

## **Environment & Climate Change Law 2014**

**11th Edition**

A practical cross-border insight into environment and climate change law

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# India

Trust Legal, Advocates & Consultants

Sudhir Mishra



## 1 Environmental Policy and its Enforcement

### 1.1 What is the basis of environmental policy in India and which agencies/bodies administer and enforce environmental law?

India has a robust environmental policy and detailed enforcement jurisprudence for environmental compliances. The environmental policies in India have evolved on the basis of the Constitution of India and India's participation in international declarations.

Prior to its independence in 1947, India had several environmental legislations. However, the real thrust of environmental consciousness evolved with the United Nations' Stockholm Declaration in June, 1972, to which India was a signatory. Pursuant to the Stockholm Declaration, the National Council for Environmental Policy and Planning within the Department of Science and Technology was set up in 1972 and this Council later developed into a full-fledged Ministry of Environment and Forests (hereinafter referred to as "MoEF") in 1985, which today is the apex administrative body in the country for regulating and ensuring environmental protection at the Central Government level. Further to the MoEF, there is a Central Pollution Control Board (hereinafter referred to as the "CPCB") at the Centre and State Pollution Control Board (hereinafter referred to as the "SPCB") at the State level. The MoEF, together with the CPCB and the SPCB, form the regulatory and administrative core to regulate pollution and take precautionary measures to curb pollution.

Post the Stockholm Declaration, in 1976 constitutional sanction was given to environmental concerns through the 42nd Amendment, which incorporated them into the Directive Principles of State Policy of the Constitution of India vide Article 48A, which reads as follows: "*Protection and improvement of environment and safeguarding of forests and wild life – The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country*" and as a Fundamental Duty vide Article 51 A (g), which casts a duty on every citizen: "*to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures*".

Further to the recognition of environmental protection and preservation as a Directive Principle of State Policy and a Fundamental Duty, judicial interpretation of the Fundamental Right to Life guaranteed under Article 21 of the Constitution of India brings within its ambit the right to the enjoyment of pollution-free water and air for the full enjoyment of life as held by the Hon'ble Supreme Court of India in *Subhash Kumar vs State of Bihar* [AIR 1991 SC 420].

The environmental policy is further governed by the environmental legislations, namely the Environmental (Protection) Act, 1986, the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred as "**Water Act, 1974**"), the Air (Prevention and control of Pollution) Act, 1981 (hereinafter referred as "**Air Act, 1981**"), the Wildlife Protection Act, 1972, the Hazardous Waste (Management Handling and Transboundary Movement) Rules, 2008 (hereinafter referred as "Hazardous Waste Rules, 2008"), the Forest Conservation Act, 1980, etc., covering *inter alia*, a wide range of environmental issues like water pollution, air pollution, noise pollution, plastic waste, biomedical waste, municipal solid waste, e-waste, wildlife protection, environmental compliances and clearances relating to environment, forest and wildlife.

Indian judiciary has also played a critical role in the regulation of environmental hazards and proper implementation of environmental legislations in India. Recently, the newly created Hon'ble National Green Tribunal, a specialised court to adjudicate and ensure expeditious disposal of environmental disputes, was set up under the National Green Tribunal Act, 2010, with a wide jurisdiction to deal with violations of environmental law and to provide compensation to victims of pollution and relief for environmental damage and restitution of environment. The Hon'ble Tribunal is also empowered with appellate jurisdiction against orders passed by regulatory agencies. The Hon'ble Tribunal, while passing any order or decision, apply the sustainable development, polluter pays, and precautionary principles.

### 1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The regulatory agencies at the Centre as well as at the State level have substantial powers under the Water Act, 1974, and the Air Act, 1981, to deal with violations of any nature. Similarly, Pollution Control Boards at the Centre and State level deal with the enforcement of environmental laws on a day-to-day basis and ensure strict compliance of the same. The regulatory agencies also look into aspects of hazardous waste, consent to establish, consent to operate and renewal of environmental permits, routine inspection of industrial units, surprise inspection and various other enforcement mechanisms to deal with environmental violations.

In cases where the Central and/or the State Government fails to act on environmental violations, then the individuals and public interest bodies, and in certain extreme cases the Government, approaches the courts for environmental justice.

The courts in India often supplement the regulatory agencies in enforcement of environmental laws and ensure proper governance by regulatory agencies. The judicial pronouncements by the Hon'ble Supreme Court of India and various High Courts of the country have a binding effect equal to statutory enactments. Recently, the Hon'ble Supreme Court in *T. N. Godavaram Thirumulpad vs Union of India* (Writ Petition no. 202 of 1995, Order dated 6 January 2014) directed the Government to establish an environment regulator at a National level with its regional offices at State level by 31 March 2014.

In addition to the Hon'ble Supreme Court of India and the State High Courts, the Hon'ble National Green Tribunal is empowered to hear disputes involving a substantial relationship to the environment, including enforcement of any legal right relating to the environment, arising out of the implementation of statutes specified in the National Green Tribunal Act, 2010. The Hon'ble Tribunal is a quasi-judicial body set up for effective and expeditious disposal of environmental cases. The Hon'ble Tribunal in *Rayons Enlighting Humanity vs MoEF* (Application 86/2013, dated 18/07/13), observed that “while applying the concept of sustainable development, one has to keep in mind the “principle of proportionality” based on the concept of balance. It is an exercise in which Courts or Tribunals have to balance the priorities of development on the one hand and environmental protection on the other. In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a ‘reasonable person’s’ test”.

The Hon'ble National Green Tribunal has turned out to be an effective forum for the protection of citizens' environmental rights through a series of judgments on issues pertaining to mining, infrastructure projects, groundwater issues, real estate projects, environmental clearances and forest clearances.

### 1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

There are various mechanisms and statutory enactments which mandate the public authorities to provide information to interested persons in certain cases.

For example, under Section 49 of the Water Act, 1974, when the complaint is sought to be made to the court by any person and a notice of his intention for the same has been given to the relevant pollution control board, then u/s 49 (2) of the Water Act, 1974, the Board has the duty to make the relevant reports in its possession available to the person making the complaint, except such information that may be against public interest in the opinion of the Pollution Control Board.

Further, the Environmental Impact Assessment Notification, 2006, also envisages the concept of public consultation on a project in the process of an application for a prior Environmental Clearance. Within seven days of the receipt of a draft Environmental Impact Assessment Report, the Member Secretary of the concerned State Pollution Control Board is to notify the time and venue of the public hearing. Along with the details of such hearing, information about the places and offices where the public can access the draft Environmental Impact Assessment Report, and a summary of the Environmental Impact Assessment Report, are also to be given such that responses of concerned parties may be given to the same. Further, the State Pollution Control Board is also required to upload on its website the summary Environmental Impact Assessment Report.

The Hon'ble National Green Tribunal in the matter titled *Medha Patkar & Ors vs MoEF & Ors*. [Appeal No. 1 of 2013 dated 11th July, 2013] observed that in the process of granting environmental clearance, there are three stakeholders, the project proponent, the MoEF and other Government agencies, which are required to place the environmental clearance granted to the project proponent in the public domain.

India is among the few countries in the world which has given its citizens a right to information through a parliamentary enactment, the Right to Information Act, 2005. Section 6 of the Right to Information Act, 2005, provides that a person who desires to obtain any information under the Act shall make the request in writing to the Public Information Officer of the concerned authority. Thus, any citizen who requires any information available with a public authority may on an application obtain the same, subject to the just exceptions under the Right to Information Act, 2005, for his purposes.

## 2 Environmental Permits

### 2.1 When is an environmental permit required and may environmental permits be transferred from one person to another?

There are several varieties of environmental permits or consents in India which are applicable at the Central as well as the State level. However, eventually most of the environmental permits are given and approved by State instruments of governance. For example, there are various environmental permits like consent to establish, consent to operate, environmental clearances, forest clearances, wildlife clearances and diversion of forest land for non-forest purposes.

For example: under Section 25 of the Water Act, 1974, prior consent is required to be taken from the State Pollution Control Board to establish, or take any steps to establish, any industry, operation, system or process which is likely to discharge sewage or trade effluent into water; under Section 21 of the Air Act, 1981, previous consent of the State Pollution Control Board is required to establish any industry in an air pollution control area; under the Environment Impact Assessment Notification, 2006, environmental clearance required for undertaking any project (whether a new project, expansion or modernisation) is based on its potential environmental impacts; and under the Hazardous Waste Rules, 2008, every person engaged in the generation, processing, treatment, storage and/or transportation of hazardous waste shall require authorisation from the State Pollution Control Board.

Regarding the transfer of environmental permits, it is not completely correct to suggest that an acquirer of an asset always has to apply for a new licence/consent to operate. Typically, an entity obtains permits for carrying out certain activities which are the subject matter of environmental and pollution-related laws applicable at a particular location. Thus, though in the case of certain permits/consents there is no need to apply for new permits/consents, the new entity is required to notify the statutory environmental authorities about the change in ownership structure for the purposes of compliance. In some instances, applications for fresh permits may be required, depending on the nature of the industry and the sensitivity and use of the product.

## 2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

The environmental regulatory framework in India dealing with consents or clearances includes provisions for appeals. For example, under Section 28 of the Water Act, 1974, any person aggrieved by an order passed by the State Board regarding the granting or not granting of environmental consent may, within 30 days of the date of such order, refer an appeal to the Appellate Authority, as defined in the said Section. A similar provision also exists under Section 31 of the Air Act, 1981. Further, the Hon'ble National Green Tribunal, under Section 16 of the National Green Tribunal Act, 2010, *inter alia*, also exercises appellate jurisdiction to hear matters against decisions passed by the Appellate Authority set up under the aforementioned relevant statutes. In cases where environmental clearances are not given in a timely manner, or are rejected on flimsy grounds by environmental agencies, then recourse to the courts is also available to the project proponent. There are cases where environmental courts in India have ordered a reassessment as to why a project was/was not given project clearance.

## 2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

In India, Environmental Impact Assessments and Environmental Audits are prerequisites for environmental clearances under various categories of the Environment Impact Assessment Notification, 2006 and other environmental regulations. Some of these clearances are given by State Environmental Impact Assessment Authorities, while more serious cases are taken up (nuclear, thermal power plants, etc.) by the Expert Appraisal Committee of the Central Government.

## 2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Environmental regulators like the Central Pollution Control Board and the State Pollution Control Board have the power to enter any industry in which they have reason to believe that an offence is being committed by the industry at any time to examine any plant, records, and documents or conduct a search and seize any plant, record or document as required for the same.

The regulatory authorities have powers to cancel, suspend the permit granted to industries by them and impose fines on polluting industries in the event of environmental violations of a serious nature.

## 3 Waste

### 3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Waste in India is categorised into classes like Hazardous Waste, Radioactive Waste, Bio-medical Waste, E-Waste and Municipal Solid Waste, which are defined under the relevant statutes.

Hazardous Waste is defined under Rule 3 (l) of Hazardous Waste Rules, 2008, as “*any waste which by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger, or is likely to cause danger, to health or environment, whether alone or when on contact with other wastes or substances...*”.

E-waste is defined under Rule 3 (k) of E-waste Rules (Management and Handling) Rules, 2011, as “*waste electrical and electronic equipment, whole or in part or rejects from their manufacturing and repair process, which are intended to be discarded*”.

Bio-medical Waste is defined under Rule 3 (5) of the Bio-medical Waste (Management and Handling) Rules, 1998, as “*any waste, which is generated during the diagnosis, treatment or immunisation of human beings or animals or in research pertaining thereto or in the production or testing of biological and including categories mentioned in Schedule F*”.

Radioactive Waste is defined under Rule 2 (xxii) of Atomic Energy (Safe Disposal of Radio Active Wastes) Rules, 1987, as “*any waste material containing radionuclides in quantities or concentrations as prescribed by competent authority by notification in official gazette*”.

Municipal Solid Waste is defined under Rule 3 (xv) of Municipal Solid Waste (Management and Handling) Rules, 2000, as “*to include commercial and domestic wastes generated in municipal or notified areas in either solid or semi-solid form excluding industrial hazardous wastes but including treated bio-medical wastes*”.

Plastic Waste is defined under Rule 3 (m) of Plastic Waste (Management and Handling) Rules, 2011, to mean “*any plastic product such as carry bags, pouches or multilayered plastic pouch or sachets etc., which have been discarded after use or after their intended life is over*”.

The handling and management of certain wastes assigns certain additional duties to an occupier/operator. For example, for the handling of hazardous waste, Rule 7 of Hazardous Waste Rules, 2008, states that the occupiers, recyclers, re-processors, re-users and operators of facilities may store the hazardous waste for a period not exceeding 90 days and shall maintain a record of sale, transfer, storage, recycling and reprocessing of such waste and make these records available for inspection.

Rule 3 (l) of E-Waste (Management and Handling) Rules, 2011, defines extended producer responsibility as the responsibility of any producer of electrical or electronic equipment for their products beyond manufacturing until the environmentally-sound management of the end-of-life of their products.

Further, Rule 4 of the E-Waste (Management and Handling) Rules, 2011, stipulates that the producer of electrical and electronic equipment listed in Schedule I of the above said Act shall be responsible for:

- (1) the collection of e-waste generated during the manufacture of electrical and electronic equipment and channelling it for recycling or disposal; and
- (2) the collection of e-waste generated from the ‘end-of-life’ of their products in line with the principle of ‘Extended Producer Responsibility’ and to ensure that such e-wastes are channelled to a registered dismantler or recycler. The producer shall, as necessary, ensure collection by and channelling to authorised collection agencies.

### 3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The various enactments governing the handling, management and disposal of the different categories of waste lay down the procedure for storage and/or disposal of the waste. In this case a difference may be drawn on the storage and the disposal of wastes and the rules for storage and disposal vary with the nature of the waste generated.

In the case of hazardous waste, under Rule 7 of the Hazardous Waste Rules, 2008, occupiers of an industry may store hazardous waste for a period not exceeding 90 days and shall maintain records of sale, transfer and storage of such waste and make these records available for inspection. Further, regarding the disposal of such waste, Rule 4 of Hazardous Waste Rules, 2008, mandates that the hazardous waste generated in the establishment of an occupier shall be sent or sold to a recycler, re-processor or re-user registered or authorised under these rules, or shall be disposed of at an authorised disposal facility. Therefore, unless the industry/facility where the hazardous waste was produced has been authorised to collect, treat, recycle, reprocess, store or dispose of such waste by the relevant State Pollution Control Board, such industry/facility cannot dispose of such waste.

### 3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

The various rules for the handling, management and disposal of wastes outline the appropriate mechanisms of the disposal of such wastes. Thus, where the rules specify and/or define an authorised person/agency for the disposal of such waste, the liability of the producer of such waste may end when the waste is handed over to such authorised person/agency in the manner set out under the relevant rules. However, if such waste is transferred to an unauthorised person/agency in violation of the rules, then the producer may not be absolved of his responsibilities and liabilities arising out of such violation.

### 3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

The notion of take-back and recovery of waste does exist under the environmental laws in India. One such instance is the E-waste (Management and Handling) Rules, 2011, wherein under Rule 4 there is an obligation upon the producers of waste to set up collection centres or a take-back system either individually or collectively in accordance with the Rules. Further, the aforesaid Rules also state that the responsibility of any producer of electrical or electronic equipment shall extend beyond manufacturing and until the environmentally-sound management of the end-of-life of their products, and such responsibility is known as Extended Producer Responsibility.

## 4 Liabilities

### 4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

The breach of environment laws and/or permits can amount to civil liabilities as well as criminal liabilities, as enshrined under various environmental statutes of India. For example, the Air Act, 1981, and the Water Act, 1974, both allow imprisonment of more than one year as punishment in cases of serious violations, apart from the imposition of fines. Further, the Public Liability Insurance Act, 1991, has provisions for issues connected with compensation and liabilities. In addition to the provisions under the Air Act, 1981, and the Water Act, 1974, the Hon'ble Supreme Court has elaborated the doctrine of the polluter pays principle and absolute liability through

a series of judgments starting from the *Bhopal Gas Leak* case. It has been well established through a catena of cases that there is a duty to compensate the effects of environmental crime. The criminal liabilities are also specified in the penal enactments apart from the environmental enactments.

In *M.C. Mehta & Anr. vs Union of India & Ors.* [AIR 1987 SC 1086], popularly known as the *Oleum Gas Leakage* case, the Hon'ble Supreme Court of India has held that "where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident".

Thereafter, in 2010 the Civil Liability for Nuclear Damage Act was enacted, which stipulates that the operator of the nuclear installation shall be liable for nuclear damage caused by a nuclear incident and provides for penalties in the nature of imprisonment and/or a fine.

### 4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

In normal circumstances, an operator is liable to operate within the limits as specified under the various statutory enactments. However, on the application of the principles of polluter pays and absolute liability, the person responsible for causing the pollution may have to pay for the damage done to the natural environment and restore it.

### 4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

The directors and certain officers of corporations may be responsible towards the acts and liabilities which have occurred while they held such positions in the corporation. For example, under Section 40 of the Air Act, 1981, when an offence is committed by the company, every person who, at the time of the commission of the offence, was directly in charge of, and responsible to, the company for the conduct of the business of the company, shall be liable to be punished subject to exceptions stated in the Section. A similar provision also exists under the Water Act, 1974. This principle was also reflected in the order of the Hon'ble Supreme Court of India in *M.C. & Anr. vs Union of India & Ors.* [AIR 1987 SC 982].

### 4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

If a company has existing environmental liabilities or concerns, a share sale may result in liability for the new acquirer, unless there are express contractual documents which define limitations and indemnities for the selling company. Such contracts will be interpreted in detail in case of a future liability. This is because the enforcement authorities will continue to proceed against a polluting company irrespective of a change in shareholding. Under ideal circumstances, the sale of shares alone resulting in the change in shareholding would not affect the proceedings being carried out by enforcement authorities against a polluting company, thus creating a new liability for new share acquirer of the polluting company.

Under normal conditions of an asset sale, the purchaser should be careful not to be endowed with environmental liabilities for any current or ongoing failure of another entity to comply with applicable law, subject to the conditions of the agreement of such sale. However, post-acquisition of the asset, if the asset is the cause of the violation of environmental law, the purchaser shall be liable.

#### 4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

In India, like any other developed legal system, regulators are concerned about management and legal structure of the industry in question. Ordinarily, financial institutions or lenders shall not be directly responsible unless they have a Board position, nomination in the company, a shareholding of substantial size and involvement in the day-to-day running of the company. Since, under the environmental laws in India, liability is directly inflicted upon the industry, liability of lending institutions for environmental wrongdoing and/or remediation costs does not generally come into question.

## 5 Contaminated Land

#### 5.1 What is the approach of liability for contamination (including historic contamination) of soil or groundwater?

The contamination of land is caused by the dumping and disposal of industrial and domestic wastes and deforestation. The courts generally apply the principle of polluter pays to determine the extent of the liability of the person responsible for the contaminated land.

In case of the regulation of groundwater, the Central Groundwater Board under the Ministry of Water Resources, Government of India, is *inter alia*, entrusted with the responsibility for regulation of ground water resources of the country. The Central Ground Water Authority is constituted under Section 3 (3) of the Environment (Protection) Act, 1986, for the purposes of the regulation and control of groundwater development and management in the country.

#### 5.2 How is liability allocated where more than one person is responsible for the contamination?

In cases of contamination, where more than one person is responsible for contamination, generally all such people shall be jointly liable for the remediation of the contamination caused and the restoration of the environment. In certain exceptional cases, several liability may also occur depending upon the nature of the case.

#### 5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

In general cases, an agreement of environmental remediation by the regulator with the polluting industry shall be binding, subject to just and reasonable concerns/issues that may arise post-execution of the agreement.

Further, an interested/affected party may be allowed to challenge the aforesaid agreement on the grounds of inherent defects, shortcomings or violation of the established principles of law.

#### 5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

A right to seek contribution from a previous owner or occupier of contaminated land or the transfer of the risk of contaminated land liability to a purchaser shall depend and be governed by the terms and conditions of the sale/transfer agreement of such land.

#### 5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g. rivers?

Under Indian Law, the Government as such is not empowered to obtain damages for aesthetic harms to public assets from a polluter. The State Control Pollution Board possesses the power to impose fines for environmental violations on polluting industries, however the judicial courts in India have, through judicial precedents, applied the principles of environmental law like the polluter pays principle, the precautionary principle and the Public Trust Doctrine. The most significant principle in this case is the Public Trust Doctrine, which was adopted by the Hon'ble Supreme Court of India in *M.C. Mehta vs Kamal Nath & Ors.* [1997 (1) SCC 388] and primarily rests on the principle that certain resources, like air, sea, water and forest, have such a great importance to the people as a whole that it would be wholly unjustified to make them subject to private ownership, and the Government enjoins to protect the resources for the enjoyment of the general public rather than to permit them for the use of private ownership or commercial purposes. Thus, it can be stated that by virtue of this principle of the Public Trust Doctrine, which is the law of the land, the Government holds the rivers, seas and other natural resources in trust for the benefit of the general public.

## 6 Powers of Regulators

#### 6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

The regulatory agencies in India are given powers under the respective statutes to take samples for the purpose of examining or testing them in such manner as prescribed. Such agencies are empowered to enter an industrial plant and inspect or search it at reasonable times and the duty is cast upon the persons in the industry to render all the assistance to the officers for inspection.

## 7 Reporting / Disclosure Obligations

#### 7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

In cases where pollution is found on-site or discovered to be migrating off-site, it is imperative that the regulatory authorities be suitably notified, and any potentially affected third parties are also notified in advance so that the threat or the damage can be arrested at the initial stages to reduce casualties. Such an obligation is also provided under the Water Act, 1974, wherein a duty is cast upon the

person carrying out the industry, operation, process or any treatment or disposal system, to inform the regulatory bodies about any accident or unforeseen event which has occurred or which is likely to occur, in regard to the causing of pollution in water. Similarly, under Rule 24 of the Hazardous Waste Rules, 2008, when an accident occurs at a facility or on a hazardous waste site or during transportation of the hazardous waste, the occupier or operator of the facility or the transporter, is to report the accident immediately to the State Pollution Control Board.

### 7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

In the event of an application for Environmental Clearance, the person applying for the same has an obligation to submit, *inter alia*, details on the risk of contamination of land or water from the release of pollutants into the ground or into sewers, surface waters, groundwaters, coastal waters or the sea. Therefore, such a person is normally under an obligation to investigate the land for contamination also.

### 7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

Mergers and/or takeover transactions are contractual in nature. Thus, in cases where the mergers and/or takeover transaction documents contain specific representations and warranties in respect to environmental compliance from the seller backed with indemnities, action may then be taken against the seller for a breach of representation and warranties or incomplete disclosure.

In all other cases, it is generally the duty of the purchaser to carry out reasonable due diligence prior to any such transaction which shall make the purchaser aware of any environmental problems. The basic position under Indian law is '*caveat emptor*' or 'let the buyer beware'.

## 8 General

### 8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

The environmental indemnity can be used to limit exposure for actual or potential environmental-related liabilities, and one such instance is the introduction and impact of the Public Liability Insurance Act, 1991. The contract of indemnity can be used as an instrument to transfer the risk for environmental liability.

### 8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

The balance sheet of the company shows the contingent liabilities of the company. In some cases, it may also include environmental liabilities and information about pending environmental litigation.

The directors of the company, in the case of voluntary dissolution of the company, need to make a declaration of solvency, which illustrate the paying capability of the company towards its debt, supported by an Auditor's Report on the Balance Sheet and a Profit & Loss Account up to the date of the meeting of the Board for voluntary dissolution. It is pertinent to note here that environmental liabilities may not be avoided by voluntary dissolution of the company if such liability shows on the balance sheet of the company which cannot be settled by the assets of the company.

### 8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Under the Indian law, generally an individual shareholder will not be directly liable for breaches of environment laws based on the principle that a company is a separate legal entity. Therefore, a shareholder cannot be punished for the acts of the company.

A parent company may be sued in the Indian courts for environmental offences caused by an Indian subsidiary in cases where the corporate veil is lifted to observe the extent of actual control the parent company has over the management of the Indian subsidiary. For example, the Hon'ble Supreme Court of India in *Union Carbide Corporation vs Union of India & Ors.* [AIR 1990 SC 273] directed the parent company (being Union Carbide Corporation) to pay the full settlement amount of all claims, rights and liabilities related to and arising out of the *Bhopal* case disaster to the Union of India.

### 8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

The Public Interest Disclosure (Protection of Informers) Bill, 2010, popularly known as the "Whistle Blowers Bill", is aimed at providing safeguards for persons who expose the corrupt practices or wilful misuse of power by public servants. However, this bill is pending before the Parliament and will take some time before it comes into force.

In India, some companies have internal policies to protect whistle-blowers in order to encourage transparency and honesty in their companies.

### 8.5 Are group or "class" actions available for pursuing environmental claims and are penal or exemplary damages available?

In India, environmental actions are often accepted and adjudicated through writ jurisdiction before the Hon'ble Supreme Court and Hon'ble High Courts under Article 32 and Article 226 of the Constitution of India respectively, where a substantial question regarding the violation of a fundamental right is also concerned. These writ petitions are classified as public interest litigation or class action suits. The Hon'ble Supreme Court and other Courts in India have been pursuing environmental petitions to ensure environmental safeguards for public for roughly the last 30 years, and have immensely contributed to the growth of environmental law in the country.

### 8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

There is no exemption from paying the costs of environmental litigation. However, the cost of court fees and other fees for filing public interest litigation/class action suit are nominal and, unlike western countries, no bank guarantee is required at the commencement of environmental litigation in India.

## 9 Emissions Trading and Climate Change

### 9.1 What emissions trading schemes are in operation in India and how is the emissions trading market developing there?

The basis of the Indian emission trading policy framework is the 2008 National Action Plan on Climate Change, which specifies eight core “national missions” for 2017, encompassing the development and use of solar energy, the enhancement of energy efficiency, sustainable habitats, the improvement of water use, sustaining Himalayan ecosystems, afforestation for “green India”, sustainable agriculture and the strategic knowledge for climate change.

India’s recent emission trading scheme is ‘Perform Achieve and Trade’, which is likened to ‘Tradable White Certificate Systems’, which are designed to trade energy saving certificates in order to achieve energy intensity targets. The ‘Perform Achieve and Trade’ scheme has mandatory energy efficiency targets for 478 facilities that are either part of energy-intensive industries or members of the electricity sector.

### 9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

WRI India, the Confederation of Indian Industry (CII) and The Energy and Resources Institute (TERI) have launched a ‘centre for excellence’ on greenhouse gas (hereinafter referred to as “GHG”) accounting in India, the **India GHG Program**, a voluntary initiative to standardise the measurement and management of GHG emissions in India. The programme promotes a more competitive, profitable and sustainable business environment; broadens engagement between policymakers and the business sector in supporting the overall advancement of national goals; and will create a pool of adequately trained and certified GHG practitioners, plus measurement and management professionals.

### 9.3 What is the overall policy approach to climate change regulation in India?

India’s overall approach to climate change regulation is on a voluntary basis, as the country is trying to minimise greenhouse gas emissions through a series of green initiatives. There is a great thrust for renewable energy, especially solar energy, and attempts have been made to remove the subsidy on petroleum products, sustainable agriculture, green building, conservation of water, etc.

## 10 Asbestos

### 10.1 Is India likely to follow the experience of the US in terms of asbestos litigation?

Unlike the United States, in India cases related to asbestos litigation are limited in spite of the considerable number of industries manufacturing asbestos in different states in the country. One of the factors that has contributed to the limited number of asbestos cases in India is the lack of awareness among workers about their right to compensation and the occupational hazards caused due to working in the asbestos industry.

The initiatives for a complete ban on asbestos in India are mostly taken by Non Governmental Organisations. The White Asbestos (Ban on Use and Import) Bill, 2009, was also drafted for the ban on the use and importation of white asbestos, but said Bill has not yet received legislative consent.

The Hon’ble Supreme Court in the case titled *Kalyaneshwari vs Union of India [(2011) 3 SCC287]*, while dismissing the petition, favoured a ban on the use of asbestos in India, and directed the Union of India, if it deemed to consider it proper and in the public interest, to constitute a regulatory body for the proper control and supervision over the manufacturing of asbestos activities while ensuring due regard to aspects of health care of workmen involved in such an activity.

### 10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Occupational health hazards of the workers employed in the asbestos industry have required owners/occupiers in the industry to take appropriate measures for the health and safety of the workmen involved in such activity under various labour laws.

Further, Environmental Clearance under Environmental Impact Assessment Notification, 2006, is required to be obtained when a project related to asbestos milling and asbestos-based products is being set-up or expanded.

## 11 Environmental Insurance Liabilities

### 11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in India?

The purpose of environmental insurance is to cover the immediate relief to any person who has suffered an injury due to accidents caused by hazardous substances. Under Section 4 of the Public Liability Insurance Act 1991, every person, before starting to handle hazardous waste, must take one or more insurance policies in order to get insured against the liability from giving relief, in the event of death, injury or damage to property, arising out of accidents in the industry. The above said section stipulates that the insurance policy taken by the owner of industry shall not be less than the amount of paid-up capital of undertaking handling hazardous waste but shall not exceed the amount of 50 crores. Under the Hazardous Waste Rules, 2008, any person intending to export certain hazardous waste as specified therein, needs to take a full cover insurance policy for the consignment to the Central Government of India.

## 11.2 What is the environmental insurance claims experience in India?

The environmental insurance sector in India is still evolving and there is growing awareness among companies and corporates of its benefits and protections.

## 12 Updates

### 12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in India.

Over the past few decades in India, the growing awareness about the threat to the environment, coupled with informed warnings from scientists, has resulted in the development of environmental laws and the preservation of the environment for our progeny. With growing industrialisation, there is need for the establishment of large projects in the country, however though these are essential to economic growth, they may be detrimental to the environment. There is a trade-off between growth and the environment, which requires consideration from experts and courts in India.

The establishment of the National Green Tribunal in 2010, apart from functioning within the contours of its jurisdiction, has revalidated the values of the sustainable development, polluter pays and precautionary principles. The Tribunal, through its judgments, had emphasised *inter alia* the fresh review of various projects, cumulative impact assessment studies and compensatory afforestation, resulting in effective implementation and enforcement of environmental law. The recent judgments of the Tribunal have created a sense of awareness among industries and corporates for environmental audits and adherence to environmental compliances.

The orders passed by Green Courts against regulatory authorities have not only improved the implementation of environmental laws

in India, but initiatives were also taken on the part of regulatory authorities for the conservation and preservation of the environment. One such initiative is the need to define and protect the eco-sensitive areas in India through expert committee reports. A proper regulation system is provided for the operation of industrial activities in eco-sensitive zones in India.

There is increased awareness for the protection of the environment among people in India witnessed by an increase in public interest litigation in respect of environmental issues/concerns before courts in India. The Hon'ble Supreme Court of India, with due regard to the fundamental right of citizens to a clean environment, has placed reliance on the role of every strata of society, be it *gram sabha* or *panchayats*, in arriving at the decision to grant environmental and forest clearances to industries in India. To ease the problem of permissions from different regulatory authorities, recently the Hon'ble Supreme Court of India has also observed the need for an independent environment regulator to be set up in India to enforce environmental laws effectively by 31 March 2014 and the status of the same is still pending.

Over the past few years India has evidenced an evolving awareness amongst the masses and corporates for the protection of the environment, which has translated into a number of environmental issues being referred to the court of law for appropriate adjudication. This has contributed immensely to the growth of environmental jurisprudence from micro issues like local tree felling to issues of national significance like mining.

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Mr. Sudhir Mishra is the Managing Partner of Trust Legal and is one of the most eminent environmental, infrastructural and oil & gas lawyers in the country. In recognition of his commendable work, he had been adjudged as the **Best Environmental Lawyer of the Year** in the Legal Era Awards, 2013, in collaboration with Business Standard newspaper and CNBC TV-18.

Sudhir was selected for "one of the US Government's most prestigious professional exchange programs for foreign opinion makers", offered to very few people across the world, called the **International Visitors Leadership Programme (IVLP) sponsored by the United States of America (May 2005)**.

He is also a member of the International Bar Association (IBA) and the New York State Bar Association (NYSBA). **Mr. Mishra had been appointed "India Coordinator" and "Co-chair, New Delhi" of the International Section of the NYSBA.**

Sudhir currently advises local and international clients in environmental strategies, environmental sustainability practices and corporate strategies to oil & gas companies. His other fields of expertise include corporate litigation, healthcare laws, labour issues and matrimonial issues.



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