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The International Comparative Legal Guide to:

Environment Law 2010

A practical cross-border insight into environment law

Published by Global Legal Group, in association with Freshfields Bruckhaus Deringer LLP, with contributions from:

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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 been, since 1972, taking positive steps towards environmental protection, as a result of which, a host of environmental legislations have evolved. They include amongst others, the core legislations *viz*: The Environment (Protection) Act 1986 ("**EPA**"); Water (Prevention and Control of Pollution) Act, 1974 ("**Water Act**"); The Air (Prevention and Control of Pollution) Act, 1981 ("**Air Act**"); and other legislations such as The Wildlife (Protection) Act; 1972, Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 ("**Hazardous Waste Rules**"); The Public Liability Insurance Act, 1991; The Forest (Conservation) Act, 1927; The National Environment Tribunal Act, 1995; and The National Environment Appellate Authority Act, 1997. India also has a host of a comprehensive legal framework for dealing with environmental issues relating to forests, biodiversity, medical and chemical wastes.

Further, the Indian Constitution is amongst the few in the world that contains specific provisions on environment protection. The directive principles of state policy and the fundamental duties chapters explicitly enunciate the national commitment to protect the environment while the chapter on fundamental rights recognise a person's right to a wholesome environment, granted under the fundamental right to life.

India has a number of national policies governing environmental management, including the National Environment Policy, 2006 ("**NEP**") being the most recent pronouncement of the government's commitment to improving environmental conditions while promoting economic prosperity nationwide and is based on the principle of sustainable development. The NEP is intended to be a guide to action: in regulatory reform; programmes and projects for environmental conservation; and review and enactment of legislation by agencies of the Central, State and local Governments.

The Ministry of Environment and Forests ("**MoEF**") is the nodal agency of the Government of the India. The MoEF is responsible for: (i) regulating and ensuring environmental protection; (ii) formulating the environmental policy framework in the country; (iii) undertaking conservation & survey of flora, fauna, forests and wildlife; and (iv) planning, promotion, co-ordination and overseeing the implementation of environmental and forestry programmes.

The responsibility for prevention and control of industrial pollution is primarily executed by the Central Pollution Control Board ("**CPCB**") at the Central Level, which is a statutory authority, attached to the MoEF. The State Departments of Environment and State Pollution Control Boards ("**SPCB**") are the designated agencies to perform this function at the State Level. The relevant authorities for the supervision of coastal zone regulations are the National Coastal Zone Management Authority and State Coastal Zone Management Authorities.

The courts along with specialised tribunals such as the National Environment Tribunal and National Environment Appellate Authority are responsible for enforcing environmental laws. In fact, specialised authorities have been set up by the Supreme Court of India for specific purposes, such as the Central Empowered Committee which supervises all forest-related matters and timber-related industries.

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

The Indian regulatory framework recognises civil and criminal liability for environmental protection. Most situations of non-compliance are governed by civil sanctions while criminal processes and sanctions would be available for serious, and potentially provable, infringements of environmental law, and their initiation would be vested in responsible authorities.

The judiciary (more particularly the Supreme Court of India and the High Courts) has been playing a proactive role in recent years in the enforcement of environmental legislations. For instance the concept of "absolute liability" was evolved by the Supreme Court of India wherein it has held that enterprises engaged in hazardous or inherently dangerous activities would be absolutely liable to compensate those affected by an accident (such as the accidental leakage of toxic gas), and such liability would not be subject to any of the exceptions which operate the tortuous principle of strict liability of Rylands v Fletcher [(1868) LR 3 HL 330] (such as, act of God, act of third party, consent of victim and statutory authority).

Further, in wake of the commitment to reduce the carbon footprint the State regulatory authorities responsible for regulating the electricity sector in various States of India has now mandated that certain portion of the electricity distributed by the distributors in India should be from renewable sources such as wind, solar, biomass.

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

The right to know and access to information is implicit in fundamental rights granted under the Constitution of India. This right plays a very important role in environmental matters. Thus

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Governmental plans/actions which directly affect the lives and health of the people of that area, are widely publicised.

The EPA and the Environmental Impact Assessment Regulations ("**EIA Regulations**") provide for public consultation and disclosure in various circumstances. For example, the EIA Regulations allow for a procedure for public hearings and publication of the executive summary of any proposal for any project affecting the environment by the person seeking to execute that project.

Both the Air Act and the Water Act oblige the relevant Pollution Control Boards to disclose relevant internal reports to a citizen seeking to prosecute a polluter unless such information, if disclosed, would be 'against public interest'.

The Right to Information Act, 2005 ("**RTI Act**") has been designed to promote greater transparency and accountability of the Government and public participation in decision-making. Any person may make a request in writing to the concerned authority, without being required to give any reason for requesting the information, for example one can seek information regarding municipalities' sanitation programmes or even inspect copies of building permissions and accompanying plans. The information sought under the RTI Act can be refused only on certain qualified grounds.

2 Environmental Permits

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

Permits or licences are required for a wide range of business and commercial activities. Such permits are specific to the kind of business being undertaken.

Some examples of environmental licenses required under Indian law are as follows:

Under the Air Act, a permit is required to establish or operate any industrial plant in an air pollution controlled area. Under the EPA, environmental clearances are required to undertake any project, or even for the modernisation of any existing project. The Hazardous Wastes Rules also require the occupier of the premises or the operator of the facility handling the hazardous wastes require an authorisation for handling the hazardous wastes. The Water Act also requires a person establishing an industry to obtain sanction of the SPCB.

Environmental permits would be transferable, provided that the transferee is carrying out the same activities and the procedure as set out in the conditions of the permit or the applicable regulations allows such transferability.

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 regulations dealing with the grant of licences/authorisations include provisions for appeal where: (i) licences/permits are not granted by the concerned authority; or (ii) against any onerous conditions contained in the licences/permit. Ordinarily, the appeal lies to the higher authority within 30 days from the date of the order against which the appeal is to be filed. A writ petition may lie with the High Court or Supreme Court on the ground that any of the conditions imposed in the permits/licences are arbitrary or the grant of permits/licences has been arbitrarily rejected.

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

Environmental Impact Assessment (EIA) in India is a management tool for ensuring optimal use of natural resources for sustainable development. EIA has now been made mandatory under the EPA to procure an environmental clearance from the MoEF for 30 categories of developmental activities involving investments of Rs. 500 million and above. The application can be made in any of five-sub groups, which are: Industry; Mining; Thermal Power; River Valley and Hydro Electric; and Infrastructure and Miscellaneous projects. A certain category of projects reserved for Small Scale Industry where investment is less than Rs. 10 million has been exempted from the purview of Environmental Clearance.

The rules under the EPA make it compulsory for every person carrying on an industry, operation or process requiring consent under the Water Act, 1974 or under the Air Act, or authorisation under the Hazardous Wastes Rules to submit an environmental audit report for the financial year in the specified form to the concerned SPCB.

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

The regulatory framework in India provides for criminal liability in the event the requisite licences have not been obtained to carry out the particular business function. This liability may also arise in the event that the business operations are being carried out in contravention to the terms and conditions attached to the licence. The terms and conditions listed out on the licences generally also permit suspension or revocation of the licence in the event of non-compliance with its terms.

3 Waste

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

Four main categories of wastes are recognised in India i.e. Hazardous Waste, Radioactive Waste, Bio-medical Waste, and Municipal Solid Waste and each of which is governed by separate rules. The rules governing each of these categories set out the duties and controls for dealing in such wastes.

Hazardous Wastes as defined under the Hazardous Wastes Rules, essentially means waste, which by reason of it physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger, or is likely to cause danger, to health or environment.

Radioactive Waste as defined in the Atomic Energy (Safe Disposal of Radioactive wastes) Rules, 1987 means any waste material containing radionuclides in quantities or concentrations as prescribed by the competent authority by notification in the official gazette.

Bio-medical Waste as defined in the Bio Medical Wastes (Management and Handling) Rules, 1998 means any waste, which is generated during the diagnosis, treatment or immunisation of human beings or animals or in research activities pertaining thereto or in the production or testing of biologicals.

The Municipal Solid Wastes (Management and Handling) Rules, 2000 defines Municipal Solid Wastes to include commercial and residential wastes generated in a municipal or notified area in either solid or semi-solid form excluding industrial hazardous wastes but including treated bio-medical wastes.

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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 provisions under each of the rules governing storage and/or disposal of wastes are essentially the same, they broadly lay down that it would be the duty of the occupier and the operator of a facility to take adequate steps to contain contaminants and prevent accidents and limit their consequences on human and the environment. Each of these rules also make it essential to obtain an authorisation from a competent authority to deal with the waste substances.

The Hazardous Wastes Rules in specific lay down that the occupiers, recycler, re-processors, re-users, and operators of facilities may store the hazardous wastes for a period not exceeding ninety days and maintain a record of any sale transfer storage, recycling and reprocessing of such wastes.

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)?

An authorised generator of waste shall be responsible for dealing with the waste and liable for any damage caused on account of such waste. The generator of waste who has legitimately transferred it to an authorised person for disposal/treatment of such waste would not retain residual liability if the transfer to the transferee is done in the manner that the transferee is in control over the affairs of the premises and/or the substance. However, if such transfer is made to an unauthorised person or agency then the transferor may retain residual liability in respect of the waste.

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

The Hazardous Waste Rules provides that waste producers will have an obligation regarding take-back of their waste in case of international illegal traffic i.e. movement of hazardous waste shall be considered illegal if it is without the prior permission of Central Government or such permission is obtained through falsification or misrepresentation. So in cases of such illegal movement, the hazardous wastes in question shall be taken back within ninety days either to the exporter or to the exporting country.

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 environmental legislative framework in India envisages civil and criminal liability that can arise from breach of environmental laws and/or permits.

In case of enforcement of civil liability the aggrieved person is entitled to (i) a common law tort action against the polluter; (ii) a writ petition to compel the agency to enforce the law and recover clean up or remedial costs from the polluter; and (iii) in the event of damage from hazardous industry accident an application for compensation under Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995. The courts in India have zealously enforced tortuous liability in cases of pollution and accidents causing harm to the public and have succeeded in evolving jurisprudence leaning towards public interest while enforcing the principles of "strict liability", "deep pocket theory" i.e. measure of compensation must be correlated to the magnitude and capacity of the enterprise, "polluter pays principle" and "precautionary approach". In fact with respect to enterprises dealing in hazardous substance the principle of "absolute liability" is applicable. *[Please refer to the answer under question 1.2]*. Defences such as action in good faith, being diligent (i.e. adhering to duty of care) or act of God will be available in scenarios other than scenarios which attract absolute liability.

In case the pollution amounts to a "public nuisance" a remedy under the criminal law is also available. Further a criminal complaint can be filed under the relevant environmental legislations to trigger the prosecution of polluters in the form of levying of penalty and/or imprisonment.

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

The courts have repeatedly acted upon the polluter pays principle whereby even within permitted limits tortuous liability can be imposed on the polluter for the damage caused on account of polluting activity.

In the Oleum Gas Leakage case [AIR1987SC965], though Shriram Industries was in compliance with the Air Act and situated in a designated air pollution control area, the Supreme Court of India held the company liable for the accidental leakage of oleum gas. It is in the Oleum Gas Leakage case that the Supreme Court evolved the two far-reaching environmental liability, i.e. the principle of "absolute liability", and the "deep pocket theory".

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?

All the environmental legislations in India explain the consequences in case of offences by companies. Where an offence is committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to the guilty of the offence and shall be liable to be proceeded against and punished accordingly. However, if the concerned person had no knowledge of the offence or had exercised due diligence in order to prevent such offence from being committed he shall not be held liable.

In going a step further, the Supreme Court of India has, at times, also ruled that a personal undertaking should be obtained from the persons in actual control of the management for possible future accidents, as per which they would directly be held liable for any death or injury of workman or people living in the vicinity of a plant.

A contractual indemnity provision would not be able to protect officers of a company as the liability imposed under the legislations is criminal in nature. The tortuous claims are generally founded against the company with the officers as parties to the suit.

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?

In case of sale of shares of a company, all environmental liabilities associated with the company concerned are assumed by the purchaser on account of the purchaser becoming the owner of the company and/or acquiring control of the company.

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However, in an asset purchase, the purchaser does not automatically take on the environmental liability for any current or ongoing failure of another entity to comply with applicable law. However, post-acquisition of the asset, if the asset is the cause of violation of environmental law, the purchaser shall be liable.

There are a wide range of contractual and other mechanisms available for transferring and otherwise allocating the environmental risk, therefore practically there is no inherent distinction with regard to environmental liabilities based on whether there was a share sale or an asset purchase.

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

The law currently does not impute any liability on the lenders in case of any environmental wrong doing. However, the lenders are now becoming increasingly aware of risks to their reputations as a consequence of lending to potentially sensitive projects, resultantly certain lending institutions in India have begun to register themselves with the Equators Principles. The Equators Principles are specifically designed to promote responsible environment and social practices in project financing and apply to all industry sectors and to all loans for projects with a capital cost of US$ 10 million or more.

5 Contaminated Land

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

Courts have, in various cases, held the person whose activities are the cause of land contamination liable.

For several years various versions of a bill to regulate and control the development and management of groundwater have been tabled before the Parliament, without being enacted. Recent versions of the model bill, including the latest version unveiled in early 2005 have had significant influence on legislative activity because groundwater regulation has become a priority in many states. In fact, several states have proposed groundwater related laws, which are related to the model law. This is, for instance, the case of the Kerala Ground Water (Control and Regulation) Act, 2002 and the Delhi Water Board (Amendment) Bill, 2005. These provide for *inter alia* the conservation of ground water and for the regulation and control of its extraction.

In a recent case involving the bottling plant of Coca Cola in Kerala [2005(2)KLT554], which was granted a licence to set up its bottling plant over total area of 35 acres where Coca Cola began extracting exceedingly large quantities of groundwater there were, within two years, numerous complaints from the communities residing around the area of the plant of acute drinking water scarcity and environmental problems. As a result, the panchayat decided to cancel the licence, which it did on 15 May 2003, however after receiving the report of an expert committee constituted the High Court directed the licence to be re-instated. The panchayat has taken the case to the Supreme Court where it is currently pending.

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

The principle of joint and several liability is applied where more than one person is responsible for contamination in cases of civil liability arising out of the torts of nuisance, negligence or trespass i.e. in such scenarios the claimant has the right to claim against all or any of the polluters.

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 cases where the regulator has directed a remediation programme to a person, the same shall be binding on him. However, the regulator may in cases where it deems necessary and acting reasonably require additional works to be carried out over and above the agreed remediation programme. The person instructed to carry out the additional works may in such case challenge the directions of the regulator on grounds of arbitrariness.

The third party can challenge such remediation programme provided it is able to establish his locus in the matter and prove that the act of the regulator was contrary to 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?

The principle that the polluter pays for any damage to the environment means the owner who caused the contamination would be liable to remedy it. However, when a potential purchaser agrees to acquire a property, and such purchaser is made aware of the pollution or contamination to the land or ground water, that purchaser would then be liable and would not have any right to seek contribution from the previous owner or occupier unless it has been agreed otherwise.

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

The government has not been statutorily authorised to obtain monetary damages for aesthetic harm to public assets. However, the Pollution Control Boards have the power to impose fines on polluters for the violations of the various environment laws in force.

Further, the courts have imposed mandatory duties upon the wrong doers to remove the nuisance and conduct a clean-up operation of the polluted areas. These rules have been laid down in leading judgments like the Municipal Council of Ratlam v Vardhichand [AIR1980SC1622] and L. K. Koolwal v State of Rajasthan [AIR1988RAJ2]. The "public trust doctrine" was adopted from the US jurisprudence by the Supreme Court in the Span Motels case [1997(1)SCC388] where it was laid down that the State is the trustee of all natural resources which are by nature meant for public use and enjoyment. The public is at large the beneficiary of the sea shores, the running water air, forests and ecologically fragile lands and Span Motels was made to pay compensation by way of costs for the restitution of the environment and ecology of the area. The court also directed that the pollution caused by various constructions made by the Motel have to be removed and reversed.

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.?

Environment regulators have similar powers under most Indian environmental statutes to require production of documents, take samples, conduct site inspections and talk to employees. For

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example, sections 10 and 11 of the EPA, give the right to enter and inspect a premises to the environmental regulators at all reasonable times with such assistance as the regulator considers necessary, at any place - for the purpose of examining and testing any equipment, industrial plant, record, register, document or any other material object or for conducting a search of any building in which he has reason to believe that an offence under EPA or any other rules have been or are being or is about to be committed. Powers are also given to the environment regulator for seizing any such equipment, industrial plant, record, register, document or other material object if he has reason to believe that it may furnish evidence of the commission of an offence punishable under EPA or any other rules or that such seizure is necessary to prevent or mitigate environmental pollution. The relevant statutes also cast a duty upon every person carrying on any industry, operation or process to render all assistance to regulator for the aforesaid purposes.

Moreover, environmental regulators have the power to take, for the purpose of analysis, samples of air, water, soil or other substance from any factory, premises or other place in such manner as may be prescribed.

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?

As per the provisions of the Water Act, if at any place any poisonous, noxious or polluting matter is being discharged, or is likely to be discharged into a stream or well or sewer or on land and, as a result of such discharge, the water in any stream or well is being polluted, or is likely to be polluted due to any industry, operation or process, or any treatment and disposal system, due to accident or other unforeseen act or event, then the person in-charge of such place is placed under the obligation to intimate the occurrence of such accident, act or event to the SPCB.

The Air Act also provides that where in any area the emission of any air pollutant into the atmosphere in excess of the standards laid down by the SPCB occurs or is apprehended to occur due to accident or other unforeseen act or event, the person in charge of the premises from where such emission occurs or is apprehended to occur shall forthwith intimate the fact of such occurrence or the apprehension of such occurrence to the SPCB. It would then be the SPCB's duty to cause remedial measures to be taken at the expenses (and interest) of the person causing the pollution.

A similar provision has also been laid down under the Hazardous Wastes Rules. Under these Rules, the occupier or the operator of a facility or transporter must mandatorily immediately report to the SPCB in case of an accident at the facility, or on a hazardous waste site or during transportation.

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

A person does have an affirmative obligation to investigate land for contamination in certain cases e.g. the EIA Regulations require an environment clearance for new projects or expansion or modernisation of existing projects based on their potential environmental impacts. To procure the environment clearance a report would have to be submitted to the authorities containing details *inter alia* on risks of contamination of land or water from releases of pollutants into the ground or into sewers, surface waters, groundwater, coastal waters or the sea and on the basis of the which information the clearance may be granted. Details on the source of the information contained in the report must also be added, therefore it is obligatory for the applicant to carry out investigations regarding the same.

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?

India, the arena of environmental laws lacks a coherent approach towards any necessity to disclose environmental problems unlike many others developed nations. Under the basic position of *caveat emptor* or let the buyer beware, the sellers are not required under the law to disclose environmental problems to a purchaser in the context of a merger and/or takeover transaction. In the light of increasing awareness on the repercussions that an environmental law breach may have upon the business being bought or taken over, as a contractual mechanism a prospective purchaser would normally demand representations and warranties with respect to environmental compliance from the seller backed with indemnities. Action then may be taken against the seller for a beach or representation and warranties or incomplete disclosures. In India, the process of a due diligence is normally carried out prior to any such transaction, which would also make the purchaser aware of any environmental problems.

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?

Environmental indemnity can be structured to limit exposure for actual or potential environmental related liabilities of another person under an indemnity. This is an effective tool to transfer the risk of the indemnified party to the indemnifying party. The contract of indemnity sets out *inter alia* the events triggering the indemnity obligation, the manner in which the indemnity can be claimed, the limitations on the claim of indemnity e.g. *de-minimis* claim.

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

Any litigation/claim pending against the company is normally required to be reflected as part of the "contingent liabilities" in the balance sheet. The company can do an off balance sheet transaction wherein the environmental liability of the company is passed on to another entity, however, this will not absolve the company from being proceeded against, however, the claim may in such case be settled by the transferee on account of the off balance sheet transaction.

Voluntary dissolution of the company requires the directors of the company to make a declaration of solvency, the declaration should be accompanied by the auditor's report on the balance sheet and profit and loss account up to the date of the meeting of the Board with respect to voluntary dissolution. Thus, in the event that the company does not have enough assets to settle the environmental liabilities the company cannot be voluntarily dissolved.

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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 principles of Indian law, a company is a separate legal entity, which is distinct from its shareholders and therefore an act of the company cannot be considered to be the act of its shareholder. The liability of a shareholder in a limited company is normally limited to his shareholding.

The law with respect to companies in India recognises certain circumstances in which the courts can lift the corporate veil to reach the person behind the veil or reveal the true form and character of the concerned company. Some of such circumstances are (a) in case of fraud of a shareholder taking the cover of a limited liability company to evade his obligations, the court will not allow the principle of a separate legal entity to be used as a engine of the fraud, (b) in the case of group of enterprises where several companies are existing under a single parent company, the principle of a separate legal entity may not be adhered to and the court may lift the veil in order to look at the economic realities of the group itself, (c) in case a company has the power to act as an agent for all or any of the individual shareholders if they authorise it to do so the members will be bound by the acts of its agent so long as those acts are within actual or apparent scope of the authority.

In the Bhopal Gas Leak [AIR1990SC273] case a number of civil suits claiming damages from Union Carbide Corporation ("**UCC**") were filed in the United States of America, since it was the parent company of the Indian entity and similar litigation also followed in Indian courts against UCC and the Indian entity. The Indian courts held UCC as well as the Indian entity liable for the environmental damage as the UCC was in control of the affairs of the Indian entity.

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

The Law commission of India has proposed the enactment of the Public Interest Disclosure (Protection of Informers) Bill, 2002 aimed at encouraging and protecting honest persons to expose corrupt practices on the part of public functionaries. This Bill covers the public servants whether inside or outside India. This Bill focuses essentially on the behaviour of officials in the public sector who unlawfully or improperly enrich themselves by the misuse of public power entrusted to them and not to private organizations. However, this Bill is yet to be enacted. In India, large private companies have their internal policies for "whistle-blowers" which are implemented within the organisation only.

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

Representative suits "class" actions suits are recognised under the Code of Civil Procedure, 1908. It has rarely been used in suit for claims arising out of environmental liability. However, a class suit was filed by the Indian Government on behalf of the victims in the Bhopal Gas Leak case on behalf of the victims who suffered on account of the gas leak. Public Interest Litigation in India is filed under the writ jurisdiction of the Supreme Court of India and the High Court. Writ petitions are normally a quicker and inexpensive means of redressal of grievances as against any civil suit including representative suits.

Penal and exemplary damages are granted by courts in India and are primarily aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities.

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 Central Commission has under Regulation 3 (1) of Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("**REC Regulations**"), designated the National Load Despatch Centre ("**NLDC**") established under sub-section (1) of Section 26 of the Electricity Act, 2003, inter alia, as the Central Agency for ensuring integrated operation of the national power system and for regulating the development of market in power from Non Conventional Energy Sources by issuance of transferable and saleable credit certificates referred to as Renewable Energy Certificate ("**REC**"). The REC Regulations have been framed on account of the State Commissions imposing renewable energy purchase obligation ("**RPO**") on the obligated entities to procure at least a certain percentage of their power for distribution from the renewable energy source, however, not all obligated entities could meet their obligations on account of non-production of renewable energy in their respective States. The REC Regulations overcome these constraints and facilitate harnessing of renewable energy sources in the locations where there is potential for such sources of energy and is thus aimed at addressing the mismatch between availability of renewable energy resources and the requirement of the obligated entities to meet the RPO.

The key features of the REC Regulations are:

- (i) The renewable energy generator will have two options: (i) either to sell the renewable energy at preferential tariff; or (ii) to sell electricity generation and environmental attributes associated with renewable energy generations separately.
- (ii) The environmental attributes can be exchanged in the form of REC.
- (iii) REC will be issued to the renewable energy generators for 1MWh of electricity injected into the grid from renewable energy sources.
- (iv) REC would be issued to renewable energy generators only.
- (v) REC can be purchased by the obligated entities to meet their RPO under the Electricity Act, 2003. Purchase of REC would be deemed as purchase of renewable energy for RPO compliance.
- (vi) REC would be exchanged only in the CERC approved power exchange.

10 Asbestos

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

Unlike countries like US, asbestos litigation in India is limited. Amongst the first reported case, was the Consumer Education and Research Center case [AIR1995SC922] which was decided in 1995 wherein the Supreme Court of India laid down that a workman, employed in any asbestos industry also has the right to livelihood, better standard of life, hygienic conditions in the work place and

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leisure - right to life includes the right to a clean and healthy environment. In another recent public interest litigation, wherein the Clemenceau, which was a French aircraft carrier that was lined with asbestos was on its way to India to be dismantled, raised controversies regarding its impact on the workmen who would be dismantling in carrier in particular and the environment, generally. After several demonstrations and other retaliations by environmental groups, the Supreme Court of India ordered the ship to return [JT2007(11)SC49].

The slow growth of asbestos litigation could be attributed to various factors including, lack of awareness amongst workers and lack of legislation.

India has only banned blue and brown asbestos. Recently a Bill has been introduced to ban the use and import of white asbestos. This Bill, when enacted, would be the first legislation to focus on asbestos related environmental problems, entirely.

In 2002, a group of concerned health, environment and labour activists came together to form a network-Ban Asbestos Network of India ("**BANI**") with a mandate to create awareness amongst public, policy makers, political leadership about hazards of asbestos, BANI has been consistently disseminating information through factsheets, popular writing, website, e-groups, lobbying and petitioning policy-makers and political parties over the last few years.

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

The manufacture, handling and processing of asbestos and its products is recognised as a "hazardous process" under the Factories Act, 1948. This legislation sets out the duties of the occupier of the factory towards health, safety and welfare of all workers while they work in the factory. The Indian Standards Institution has brought out a number of national standards and specifications relating to asbestos mining, manufacturing and handling.

The clearances under the EIA Regulations will have to be obtained when an asbestos project or unit manufacturing asbestos products is being established or such existing unit is being expanded.

The production of asbestos or asbestos-containing materials has been identified as one of the hazardous wastes generating processes independently of the concentrating levels. Thus mandatory requirements of permissions and precautions under the Hazardous Waste Rules would also be applicable.

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?

These days businesses are increasingly aware of the environmental liabilities that may arise. There is a pressing need of debate on introducing sound insurance mechanisms into environmental protection system in India. Environmental insurance is becoming an economic and legal policy instrument of environmental regulatory systems, worldwide.

In India the Public Liability Insurance Act, 1991 mandates that public liability insurance is obtained by business owners dealing in hazardous substance to provide relief to the victim. Such an insurance, apart from safeguarding the interests of victims of accidents would also provide cover and enable the industry to discharge its liability to settle claims arising out of major accidents. The mandatory public liability insurance is based on the principle of "no fault" liability.

General insurance companies these days also offer environmental insurance. Some of their products include full range of environmental liability solutions; from traditional risk transfer for simple operational exposures, to tailored made programmes specifically designed for complex merger, acquisition or liability relief transactions. Insurance policies also cover gradual as well as sudden and accidental pollution conditions, coverage for historic conditions and operational exposures and on-site clean-up of pollution conditions.

11.2 What is the environmental insurance claims experience in India?

Information regarding insurance claims in India is difficult to obtain, possibly due to the lack of collation of such information or, careful dissemination of such information. Experience with environmental insurance claims in India are still very limited.

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.

The field of environmental law is very much an evolving area in India and the Government. Judiciary and other entities involved in the protection of environment are taking various initiatives in this regard in conformity with the global trend/initiatives.

India's energy sector has been undergoing significant transformation as a number of measures have been taken to promote clean technology and green house gases mitigation. In fact a separate legislation on renewable energy is being contemplated by the Ministry of New and Renewable Energy.

The Bureau of Energy Efficiency and the Hong Kong and Shanghai Banking Corporation Limited, India signed a Memorandum of Understanding on 18th March 2010 to work closely on the former's Energy Efficiency Financing Platform. The implementation plan for the National Mission on Enhanced Energy Efficiency prepared by Ministry of Power and the Bureau of Energy Efficiency, approved by the Prime Ministers Council on Climate Change earlier this year, will be implemented from the 1st of April, 2010.

In the wake of the Copenhagen summit and the widening global debate on carbon emissions and global warming, India's current environment minister, has reportedly told his officials in the MoEF to put these projects through a tough scrutiny, instead of issuing blanket no-objection certificates. Therefore for industrial projects to get environmental clearances it will need to stringently comply with applicable environmental law.

Further, the Courts have in recent judgments reiterated that the principles of "polluters-pay" and "precautionary principle" have to be read with the doctrine of "sustainable development" and it becomes the responsibility of the industry to ensure that it carries out the industrial activities without polluting the environment. This is illustrative of the fact that "sustainable development" is the mantra for the future.

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He has obtained his law degree from ILS Law College, University of Pune. He has various publications to his credit including publications in the Economic Times, Hindu Business Line etc. He has been lecturing at various fora including Centre for Civil Society; Xaviers Institute of Management, Mumbai and ILS Law College, Pune.

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