

The International Comparative Legal Guide to:

Environment Law 2009

A practical insight to cross-border Environment Law



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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?

A. Environmental Policy

A comprehensive National Environment Policy (hereinafter: NEP) for India was adopted in 2006.

The principal objectives of India's NEP are:

- Conservation of Critical Environmental Resources.
- Intra-generational Equity: Livelihood Security for the Poor.
- Inter-generational Equity.
- Integration of Environmental Concerns in Economic and Social Development.
- Efficiency in Environmental Resource Use.
- Environmental Governance.
- Enhancement of Resources for Environmental Conservation.

The fundamental guiding principles listed in India's NEP are:

- Human Beings are at the Centre of Sustainable Development Concerns.
- The Right to Development.
- Environmental Protection is an Integral part of the Development Process.
- The Precautionary Approach.
- Economic Efficiency (which includes the Polluter Pays principle and Equity).
- Legal Liability (which includes Fault based Liability and Strict Liability).
- The Public Trust Doctrine.
- Decentralisation.
- Integration of environmental considerations in policy making, policy research and strengthening linkages among government agencies.
- Environmental Standard Setting.
- Preventive Action.
- Environmental Offsetting.

Among the areas where reforms are envisaged, the NEP particularly refers to the need to ensure faster decision making while considering grant of environment and forest clearances for development projects. For the review of new projects, the Environmental Impact Assessment (EIA) will continue to be the principal methodology. The NEP also calls for a need to review existing legislation to ensure that there is a judicious mix of civil

and criminal processes and sanctions for the enforcement of the legal regime. This will be a change from the past approach with its predominant focus on criminal prosecution.

The Constitution of India recognises as one of its Directive Principles of State Policy that “[t]he State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”. Though the directive principles are in itself unenforceable by a court, and are mere policy prescriptions that must guide the government, the directive principles are interpreted by judges as complementary to the fundamental constitutional rights.

Though the ‘protection of the environment’ is not cemented in the Constitution of India as a fundamental right, the Supreme Court of India has interpreted the fundamental right to life and personal liberty so as to encompass “the right to a wholesome environment”. As a consequence, Public Interest Litigation, filed by concerned citizens or NGOs (non governmental organisations) based on the fundamental right to a wholesome environment, has to a large extent been able to mould environmental law in India.

B. Environmental Governance

In India's federal system, the legislative powers and enforcement authorities are divided between the Central Government and the 28 State Governments. For instance, the Central Government has power to legislate on oilfields, mines and interstate rivers, whereas the State legislatures have the absolute power to legislate on public health and sanitation, water supplies, irrigation and drainage, and fisheries. Town planning, building regulations and zoning laws are State subjects. The Parliament and the State Legislatures have concurring powers to legislate on forests and wildlife protection.

However, important environmental laws, such as the Water Act, have been passed under Article 252 of the Constitution, which empowers the Central Government to legislate in a field reserved for States, when two or more State Legislatures consent to a central law; whereas the Central Air Act was adopted by the Parliament under Article 253 of the Constitution to give effect to international agreements.

The enforcement authorities are reflective of this federal system. The prime authority is the Central Ministry of Environment and Forests. Although the Central Pollution Control Board (CPCB) and State Pollution Control Boards (SPCB) were initially set up under the provisions of the Water (Prevention & Control of Pollution) Act, 1974, their present mandate is much wider. The CPCB and SPCBs also carry out the functions under the Air (Prevention & Control of Pollution) Act, 1981. In 1986, the Environment (Protection) Act (hereinafter: EPA), an umbrella Act with a wide coverage of several aspects of environment protection, was adopted. The CPCB and the SPCBs/PCCs are expected to perform all additional functions under the EPA, as well as all Rules and Regulations promulgated under it. This includes subject matters such as hazardous wastes, hazardous

chemicals, hazardous microorganisms and genetically engineered organisms; noise pollution, plastic usage, biomedical waste, municipal solid waste management, etc. Hence, the CPCB/SPCBs are the prime environmental authorities in India, albeit not the only. For instance, the relevant authorities for the supervision of coastal zone regulations are the National Coastal Zone Management Authority and State Coastal Zone Management Authorities. At times, specialised authorities are set up by the Supreme Court of India, such as the Central Empowered Committee which supervises all forest-related matters and timber-related industries.

The judiciary, in particular the Supreme Court of India and the various State High Courts, have played a pivotal role in the development of environmental law, adopting new environmental principles, supervising the pollution control boards, and taking suo moto notice of various environmental infringements. Many environmental writ petitions have been filed via the Public Interest Litigation route by concerned citizens or NGOs. As per the Indian Constitution, Supreme Court judgments become law of the land.

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

Though India has a panoply of environmental laws, closely guarded and supplemented by the Supreme Court of India, it is generally felt that the environmental authorities fail to adequately perform their mandate, though there are State-wise differences. A recent Report submitted to the Supreme Court of India by a High Powered Committee (HPC) concluded that one of the principal weaknesses of the environmental protection regime arises from the *constitution and functioning* of these Boards. The HPC further observed that the executive positions are held largely by persons who do not have the technical knowledge required to discharge the functions of the numerous environmental laws and statutes. The pollution control boards, with few exceptions, are not effectively enforcing environmental laws. The National Environment Policy, 2006 argues for the formation of a Cabinet or a Cabinet monitored Committee to review the implementation of the Policy on a yearly basis.

The Supreme Court of India has in some cases, in sheer frustration with the malfunctioning of the executive organs, taken upon itself to closely supervise the implementation of environmental laws and standards, such as when it imposed on the public transport sector in Delhi to convert to CNG-driven vehicles, or when it set up the Central Empowered Committee, comprising of technical experts, to monitor all wood-based industries.

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

Both the Air Act and the Water Act oblige Central and State pollution control boards (CPCB/SPCBs) to disclose relevant internal reports to a citizen seeking to prosecute a polluting entity. However, the CPCB/SPCBs are allowed to withhold any report if it considers that it would be against the 'public interest' to do so. The Environmental Impact Assessment Regulations also confer a right on members of the public to access the 'executive summary' of a project proposal. This is as far as explicit provisions in environmental statutes is concerned.

In 2005, however, Parliament promulgated the Right to Information Act, 2005, which is applicable to all public authorities. Any person may make a request in writing to the concerned authority, without being required to give any reason for requesting the information. The Act defines information broadly as any material in any form, including records, documents, memos, e-mails, opinions, advices,

press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. There are some qualified grounds on which the authority can refuse to provide the information sought, such as prejudice to the sovereignty of India; information expressly forbidden to be published by a court; commercial confidence, trade secrets and intellectual property, the disclosure of which would harm the competitive position of a third party, etc. The Act further couches these grounds under an overarching proviso according to which information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

The Right to Information Act has drastically changed the scenario, and public authorities such as the PCB/SPCBs cannot refuse information to any person, except on the limited grounds listed above.

2 Environmental Permits

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

Under the Water Act, a Consent Order (or permit) must be obtained by a person when: (a) *establishing* or taking any steps to establish any industry, operation or process, or any treatment and disposal system or an extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage); (b) bringing into use any *new or altered outlets* for the discharge of sewage; or (c) beginning to make any *new discharge* of sewage.

No industrial plant can be established or operated in an air pollution control area (identified by the State Governments) without the prior consent (permit) from the respective State Pollution Control Boards (SPCBs). Certain Industries are also required to obtain a clearance based on an Environmental Impact Assessment. Details of such requirements are discussed under question 2.3.

Every occupier (person having the control over the affairs of the factory or premises) handling hazardous waste; every recycler or reprocessor who procures and processes hazardous waste for recycling, recovery or reuse; and every operator of a facility for the collection, reception, treatment, storage and disposal of hazardous wastes must obtain a prior authorisation from the SPCBs.

Manufacturing units which must obtain an Industrial Licence (such as breweries, paper industries, asbestos industries, hazardous chemicals, entertainment electronics, etc.) must also obtain a No Objection from the Central Ministry of Environment and Forests. Furthermore, veneer, plywood and wood-based manufacturing units must obtain their environmental licence from the Central Empowered Committee (CEC) set up by the Supreme Court. Such CEC permits are location and person-specific, and are non-transferable.

Most environmental permits would be transferable, provided that the same activities would be taken over. As soon as any expansion, additional discharges, etc., would be undertaken the person would have to apply for a new/revised permit. However, such transfer would have to be notified to the environmental authorities, and they have the right to revise old/impose new conditions.

A prior environmental clearance obtained under the Environmental Impact Assessment Notifications are explicitly transferable, as will be discussed below in question 2.3.

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 Water Act and the Air Act provide for a specific appeal procedure (time-bound) or revision procedure (not time-bound) to challenge the conditions contained in a permit (consent order), or the withdrawal of a permit, or the refusal to grant a permit.

a) Appellate Authority - time-bound

The Water Act and the Air Act provides for a route to challenge the conditions imposed by the SPCB in its consent order (permit) with a State-level Appellate Authority (which often consists of scientists as well as jurists).

Such appeal with the Appellate Authority would have to be filed within 30 days from the date on which the new, revised or renewed consent order is communicated to him.

Importantly, the Appellate Authority has the power to *uphold, annul or substitute conditions* imposed by the SPCB in the consent order.

b) Revision by the State Government - not time-bound

After the expiry of the said 30-day period for filing an appeal with the Appellate Authority or after a decision by the Appellate Authority, an industry may at *any time* approach the *State Government* to seek a *revision* of a consent order issued by a State Pollution Control Board.

c) Appeal - writ petition - High Court

After exhausting the above two remedies, a company would have the right to file a writ petition with the High Court (State-level) to challenge the consent order or failure to issue a permit, on the ground that the conditions imposed/refusal are unreasonable or arbitrary.

d) Appellate Authority - Hazardous Wastes

The Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, provides that any person aggrieved by an order of suspension or cancellation or refusal of authorisation/registration, or its renewal passed by the SPCB/CPCB shall lie with the "Appellate Authority", which respectively consists of the Environment Secretary of State / Secretary in the Ministry of Environment and Forests. The Appellate Authority is obliged to dispose of the appeal within 60 days from the date of filing.

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

The Environment Impact Assessment Notification, 1994 (EIA 1994), adopted under the Environmental Protection Act prescribed a mandatory EIA procedure for various types of projects. The notifications and all its amendments have now been replaced by a comprehensive EIA Notification published on 14th September 2006 (EIA 2006).

In the EIA 2006, various activities have been identified where an EIA report is mandatory. The notification envisages that the various activities be classified into two categories, 'A' and 'B' based on the spatial extent of potential impacts and potential impacts on human health and natural and man made resources. New projects as well as expansion and modernisation of existing projects falling under the mentioned activities *will* require prior environmental clearance. Whereas category 'A' activities require clearance from the Central Government, category 'B' activities require clearance from a State level Environment Impact Assessment Authority (SEIAA). As per the 19th January, 2009, amendment, applications would have to be submitted to the Central Government in cases where a State has

failed to set up a SEIAA.

There are four stages which have to be followed by typical projects to obtain clearance.

- Stage (1) Screening (only for Category 'B' projects and activities).
- Stage (2) Scoping.
- Stage (3) Public Consultation.
- Stage (4) Appraisal.

Public hearings are exempted for some projects, such as modernisation of irrigation projects, projects within industrial estates or parks, expansion of roads and highways not needing further land acquisition, all building/construction/area development and townships.

An Expert Appraisal Committee (EAC) or State Level Expert Appraisal Committee (SEAC) must complete its assessment and make a recommendation within sixty days from the receipt of all requisite documents and the completion of the public hearing. The regulatory authority shall consider the recommendations of the EAC or SEAC concerned and convey its decision to the applicant within forty five days of the receipt of the recommendations of the EAC or SEAC concerned or in other words within one hundred and five days of the receipt of the final Environment Impact Assessment Report. For projects which do not require an Environment Impact Assessment (so-called 'B-2' projects identified by the SEAC in stage 2 or Scoping Stage), the final decision must be conveyed within one hundred and five days of the receipt of the complete application with requisite documents.

The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of River Valley projects, project life as estimated by EAC or SEAC subject to a maximum of thirty years for mining projects and five years in the case of all other projects and activities. It is mandatory for the project management to submit half-yearly compliance reports in respect of the stipulated prior environmental clearance terms and conditions.

A prior environmental clearance granted for a specific project or activity to an applicant may be transferred during its validity to another legal person entitled to undertake the project or activity on application by the transferor, or by the transferee with a written "no objection" by the transferor, to, and by the regulatory authority concerned, on the same terms and conditions under which the prior environmental clearance was initially granted, and for the same validity period. No reference to the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned is necessary in such cases.

The identified activities requiring prior clearance include: mining of minerals; offshore and onshore oil and gas exploration, development and production; oil and gas transportation pipe line; thermal power plants; nuclear power projects and processing of nuclear fuel; coal washeries; mineral beneficiation; metallurgical industries (ferrous and non-ferrous); cement plants; petroleum refining industry; coke oven plants; asbestos milling and asbestos-based products; chlor-alkali industry; soda ash industry; leather/skin/hide processing industry; chemical fertilizers; pesticides industry; petro-chemical complexes; manmade fibres manufacturing; synthetic organic chemicals industry; distilleries; integrated paint industry; pulp and paper industry; sugar industry; isolated storage and handling of hazardous chemicals; ship breaking yards; industrial estates/parks; building and construction projects; townships and area development projects, etc.

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

The Water Act and the Air were amended in the late eighties to empower the State Boards to issue directions to any person, officer or authority found to be in non-compliance with the environmental permit, *including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service*. The umbrella EP Act, under which numerous Rules have been adopted (such as the Hazardous Wastes Rules) includes similar provisions. More generally, pollution control boards have the power to cancel or suspend environmental permits if it has reason to believe that a person has failed to comply with the conditions contained in the permit.

The Courts are involved in *enforcing* such orders since the State Boards have no direct powers to extract fines, order imprisonment, or otherwise compel compliance with their directions.

Furthermore, the Pollution Control Boards have the power to make applications to the Courts for restraining apprehended pollution.

3 Waste

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

In India, four main categories of wastes are governed by separate Rules: (a) hazardous wastes; (b) radio-active wastes; (c) bio-medical wastes; and (d) municipal solid wastes. By far the most comprehensive and most relevant law for companies are the Hazardous Wastes (Management and Handling) Rules, 2008 (the "HW Rules"), which recently replaced the 1989 HW Rules.

Hazardous waste is defined 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 in contact with other wastes or substances, and includes:

- (a) Hazardous wastes generated by 36 categories of processes enumerated in Schedule I of the HW Rules, ranging from petrochemical processes, to metal surface treatment, the production of iron and steel, the production of asbestos or asbestos-containing material, the production or industrial use of solvents or paints, pulp and paper industry, etc. Schedule I raises a presumption that the processes generate hazardous wastes, but one can rely on the concentration limits listed in Schedule II to rebut this.
- (b) Waste constituents listed under Schedule II, which contains five categories (the first four categories refer to specific concentrations limits or thresholds, whereas the fifth category identifies characteristics, regardless of concentration limits). Schedule II, which is based on the lists prepared by the Netherlands Environment Protection Agency, contains further guidelines to assess whether specific wastes will be treated as hazardous or not.
- (c) Wastes specified in Part A or Part B of Schedule III, pertaining to import and export of hazardous wastes, or other wastes if they possess any of the hazardous characteristics specified in Part C of Schedule III.
 - The list under Part A of Schedule III is based on Annex VIII of the Basel Convention on the Transboundary Movement of Hazardous Wastes, and in principle require Prior Informed Consent (PIC) from the country where it is being imported from, as well as the permission the Ministry of Environment and Forests (MoEF) and a license from the Directorate

General of Foreign Trade. A person can rely on Part C (which contains a list of hazardous characteristics) to establish that the waste is non-hazardous.

- Part B of Schedule III, which is based on Annex IX of the Basel Convention, contains a list of hazardous wastes which in principle do not require a PIC from the country where it is being imported from. Nevertheless, Part B does contain certain wastes which import will only be permitted (a) for recycling or reprocessing by units registered with the MoEF or CPCB and have a DGFT licence; (b) by the actual users, with the permission of the MoEF and a DGFT license; and (c) which require the explicit permission of the MoEF.
- The import and export of wastes which have hazardous characteristics outlined in Part C of Schedule III, will require the prior written permission of the Central Government.
- Lastly, Schedule VI contains a list of 30 wastes which are prohibited for import and export.

Importantly, as per the HW Rules, the *import* of wastes from any country to India will only be allowed if the hazardous wastes are destined for recycling, recovery or reuse, but *not for disposal*.

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?

A distinction must be made between 'storage', defined as a *temporary* activity before the disposal, whereas 'disposal' is defined as the operation which does not lead to recycling, recovery or reuse, and includes physic chemical, biological treatment, incineration and disposal in a secured landfill.

As per the Hazardous Waste Management and Handling Rules, 2008, every person who is engaged in the generation, processing, treatment, package, storage, transportation, use, collection, destruction, conversion, offering for sale, transfer or the like, must obtain an 'authorisation' from the SPCB. The hazardous waste must be collected, treated, re-cycled, re-processed, stored or disposed of only in such facilities which have been authorised by the SPCB.

Unless the occupier has also obtained the authorisation from the CPCB to treat the hazardous wastes in his capacity as a registered recycler, re-processor or re-user, or *authorisation from the SPCB* as the operator of a common facility or *occupier of a captive facility*, industries are not allowed to store hazardous waste for a period exceeding 90 days, and they must maintain a record of sale, transfer, storage, recycling and reprocessing of such wastes. Moreover, the occupier of such a captive facility must design and set up the Treatment, Storage and Disposal Facility in accordance with the guidelines issued by the CPCB, and must obtain the specific approval from the SPBC for the design and layout of the facility. It is noteworthy that the CPCB issued specific guidelines in November, 2008, for the storage of incinerable hazardous wastes by the operators of common hazardous wastes treatment, storage and disposal facilities *and captive hazardous wastes incinerators*. Subsequently, the operator/occupier would have to maintain records of the hazardous wastes handled by him, and comply with packaging and labelling guidelines issued by the CPCB.

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 generators of waste shall retain a liability *vis-à-vis* the said waste, based on the joint reading of the various liability principles pertaining to hazardous wastes. Firstly, the occupier (having control over the affairs of the premises and/or control over the

substances) and the operator of a facility shall both be *responsible* for the proper collection, reception, treatment, storage and disposal of hazardous wastes. Secondly, the occupier, importer, transporter and operator of a facility shall all be *liable* for damages caused to the environment resulting due to the improper handling and disposal of hazardous wastes. In case the operator would go bankrupt, the liability for the non-treated hazardous waste would, indeed, remain with the occupier. Moreover, in case of litigation, the polluter pays principle is well-entrenched and could cast a wide net on the various players having generated or handled the waste.

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

No explicit take-back obligations are provided under the Hazardous Wastes Management Rules, 2008, except in case of international illegal traffic, in which case the importer is obliged to re-export the waste in question at his cost within a period of 90 days from the date of its arrival in India (the implementation of which will be supervised by the SPCB).

Nevertheless, the notion of Extended Producer Responsibility is gaining in popularity. For instance, the draft National Hazardous Waste Management Strategy circulated in December, 2008, refers to the need to establish a system whereby the producers of electronic equipment should be required to have a centralised facility for e-waste of their brand 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?

Criminal liability

a) Non-compliance with environmental permit

Whoever contravenes the permit granted under the Water Act or the Air Act, shall be punishable with imprisonment for a term of min. one and a half years and max. six years, and with a fine.

b) Non-compliance with closure direction

The Water Act and Air Act provide that whoever fails to comply with a closure direction or stoppage (of electricity and water) direction, shall be punishable with imprisonment for a term of min. one and a half years and max. six years and with fine. In case the failure continues, an additional fine which may extend to five thousand Rupees (about USD 110) for every day of non-compliance may be imposed.

We may add that the amounts of the fines stipulated in the Act are not to be multiplied with an inflation factor, but are the actual amounts that will be imposed.

c) Other specific offences

The Water Act and the Air Act enumerate various specific offences, such as the failure to furnish information to the Pollution Control Boards required by it, the failure to intimate the occurrence of an accident, knowingly or wilfully making a statement which is false, wilfully tampering with monitoring equipment, etc., which are punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both.

d) Residuary penalty

Whoever contravenes any of the provisions of the Water Act or the

Air Act, or fails to comply with any order or direction, *for which no specific penalty has been provided*, shall be punishable with imprisonment which may extend to three months or with fine which may extend to ten thousand Rupees (USD 110) or with both.

Unlike the scheme of the Water Act and the Air Act, the Environmental Protection Act, which acts as the umbrella act for the numerous Rules adopted thereunder (hazardous waste, solid waste management, hazardous microorganisms and genetically engineered organisms, etc.) provides for only one type of punishment. Any contravention of the Rules adopted under the EP Act will be punishable with imprisonment for a term which may extend to five years or with fine which may extend to one hundred thousand Rupees (about USD 2,200), or with both.

The Water Act, the Air Act and the EP Act also provide for “citizen suits”, enabling the Courts to take cognisance of any offence under the said Acts upon the notice of any person, provided that the latter has given notice of a minimum of sixty days to the Central Government, or the CPCB/SPCB.

Valid defences for companies are: (1) the ground that the offence was committed *without the knowledge* of the person in charge; or that (2) he exercised *all due diligence* to prevent the commission of such offence. This will be further discussed under question 4.3.

Tortious liability

The Supreme Court of India has evolved two far-reaching environmental liability concepts, which are unique to India. Firstly, 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 tortious principle of strict liability of Rylands v Fletcher* (such as, act of God, act of third party, consent of victim and statutory authority). Hence, the mere fact of the occurrence of the environmental and health damage would suffice to establish a company’s liability and no defence could be put forward.

Secondly, the Supreme Court evolved the so-called ‘deep pocket theory’, while determining the quantum of compensation, in the Shriram gas leak case. In cases of accidents resulting from handling of hazardous substances, the Supreme Court held that the *measure of compensation must be correlated to the magnitude and capacity of the enterprise*, thereby challenging well-settled principles of tort law. Hence, as per Indian law, the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activities.

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

An operator could be held liable if it causes other environmental damages, above or beyond the ambit of the conditions prescribed by the environmental permit. The Oleum Gas Leakage case is an illustration in point. Though the 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 Shriram Industries case that the Supreme Court evolved the two far-reaching environmental liability concepts discussed above (at question 4.1), that is, the ‘absolute’ liability principle, and the ‘deep pocket theory’. Generally, in tort, a polluter could be held liable even if he would have operated within permit limits.

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?

Yes. If it is proved that the offence has been committed with the *consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company*, such other person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

We may add that the Supreme Court of India has, at times, also imposed that a personal undertaking be obtained from the Chairman and officers in actual control of the management for possible future accidents, in which case they were to 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 in criminal cases. As will be discussed below, the environmental insurance sector in India is not yet well-developed.

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?

Whether by sale of shares or sale of the whole of the assets of the transferor company, the mergers and/or takeover transactions require prior approval from the Company Law Tribunal, and both type of sales will have to follow the same procedures. It is the Tribunal that will approve the arrangement between the transferee and transferor company. More specifically, the Tribunal will sanction and make provision for all matters, including the transfer of property or liabilities, the allotment of shares, the continuation by or against the transferee company of any legal proceedings, the dissolution of any transferor company, and any other incidental matters. Hence, there is no inherent distinction with regard to environmental liabilities based on whether there was a share sale or an asset purchase, the details and outcome of which will be decided in each case by the Company Law Tribunal.

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

Though lending institutions will undertake a due diligence of the financial position of any company, which may include environmental liabilities particularly in the case of large and inherently polluting industries, no such liability can be imputed on the lenders under Indian law.

5 Contaminated Land

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

Unlike the evolution that has taken place in many Western countries pertaining to the liability for (historic) contamination of soil or groundwater, India has no specific environmental regime in place pertaining to the contamination of land.

Only in an indirect manner will the pollution on land also be taken into account. For instance, the Water Act provides that no person shall knowingly cause or permit any poisonous, noxious or polluting matter to enter (whether directly or indirectly) into any stream or well or sewer or *on land*. Furthermore, the definition of 'stream' also encompasses subterranean waters. Under the

Environmental Impact Assessment Notification of 2006, details would also have to be provided by an applicant on whether the proposed activity would entail land contamination (see more on EIA under question 2.3).

Moreover, the general 'polluter pays principle' could be made applicable in certain cases as well (such as illegal dumping on sites). In case of litigation, courts could direct an entity to remediate the site, based on the polluter pays principle. That said, there is no specific policy or legislation pertaining to soil or groundwater pollution.

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

There is no statutory law on joint tortfeasors' liability in India. In India's tort jurisprudence, largely following English case law supplemented by principles of equity to suit the Indian conditions, the rules of joint and several liability are fully applicable, i.e. the full amount of the compensation can be recovered from one of the liable persons alone. A judgment debtor can, in turn, enforce a right of contribution against other judgment debtors.

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?

The CPCB/SPCBs, while granting any environmental permit, have the discretion to impose specific conditions, such as the points of discharge, the composition, temperature, volume of discharge, as well as the duration during which the environmental permit will be valid. In practice, the pollution control boards can limit the permit to just a couple of months, during which certain conditions would have to be complied with, or the industry would not be allowed to run. An industry can, then, be required to submit a plan of how it proposed to address the conditions imposed. In such case, once the pollution control boards have accepted an environmental action plan, they would not vary their stance within the said specified period, but could definitely impose new / revise earlier conditions after the expiry of the stipulated period. Hence, the approach of the environmental authorities is to define specific timeframes for achieving certain conditions, which it will keep monitoring until achieved. But, the pollution control boards have the right to revise earlier conditions imposed in a permit.

In some situations a third party could challenge permit conditions. For instance, another company, placed in a similar situation, could challenge it based on the ground of the Constitutional protection against non-discrimination. Also an NGO could challenge it via a public interest litigation based on the fundamental right to a wholesome environment, if it were to establish that such permit conditions are inadequate to protect the environment or would be contrary to environmental laws.

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?

As mentioned, there is no land contamination legislation in India, and such issues would, hence, have to be addressed contractually between the private parties.

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

Though the pollution control boards can impose fines for the infringement of the relevant environmental laws, there is no specific legislation granting power to the government to obtain monetary damages for aesthetic harms to public assets from polluters. The Supreme Court, when addressing environmental writ petitions, has held that in all cases where there is a *disturbance of the ecological balance*, either by running industries or any other activity which has the effect of causing pollution in the environment, damages can be awarded. The ratio being that any type of pollution is by its very nature a tort committed against the community as a whole. Therefore, damages can be imposed for the restoration of the environment and to those who have suffered loss.

In the Taj Trapezium case, the issue at hand was the corrosion and yellowing of the white marble of the Taj Mahal, a World Heritage site. It was found that numerous small scale refineries were emitting sulphur oxide, which when combined with oxygen formed sulphuric acid. The Supreme Court ordered that all 300-odd industries change from coke/coal to natural gas as an industrial fuel, and ordered that those industries that were not in a position to convert, should be closed and must relocate.

Moreover, in the 1997 Span Motels case the Supreme Court, after reviewing US jurisprudence, for the first time adopted the “public trust doctrine” according to which the State as a trustee is under a legal duty to protect the natural resources and the public has a right to expect natural resources to retain their natural characteristics, as part of the law of the land. In this case, where constructions were undertaken to change the course of the river, damages were imposed.

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.?

Under the Water Act, officers of a State Pollution Control Board are empowered to take samples of any sewage or trade effluent which is passing from any plant, or over any place into any stream or well. However, the result of such sampling analysis of a trade effluent is *not admissible in evidence* in any legal proceeding, unless the detailed procedure prescribed by the Act has been followed.

The SPCB officers have the power of entry and inspection of any place for the purpose of examining any plant, record, register, document or any other material object, or for conducting a search of any place in which he has reason to believe that an offence has been or is about to be committed. The provisions of the Code of Criminal Procedure, 1973, shall apply, as they would apply to searches and seizures made under the authority of a warrant.

As mentioned, under the Water Act, the State Boards have the power to issue directions to any person, officer or authority, including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service.

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?

The Water Act casts an obligation on the person in charge of any place where any industry, operation or process, or any treatment and disposal system or any extension or addition is being carried on, to inform the SPCB if *due to accident or other unforeseen act or event*, 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*. As mentioned, the failure to intimate the occurrence of an accident is an offence punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both.

Similarly, the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, make it mandatory for the occupier or the operator of a facility or transporter to immediately report to the SPCB in case an accident occurs 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?

As per the 2006 Environmental Impact Assessment Notification, a prior environmental clearance application for a particular project (see question 2.3 above) would have to contain details 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. Such an application would need to offer information on the source(s) of the pollutants and convey whether there a risk of long term build up of pollutants in the environment from these sources.

No other affirmative obligation pertaining to land contamination exists under Indian law. However, a cautious purchaser would insist on a full account of all environmental liabilities, as such liabilities would be passed on to the purchaser.

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?

As per the Companies Act mergers and/or takeover transactions require prior approval from the Company Law Tribunal. During the proceedings before the Tribunal, the concerned company is required to provide a complete disclosure, which includes besides financial details, all liabilities, pending litigations as well as the management’s perception of risk factors, and covers environmental liabilities and litigations as well.

Moreover, as per the Securities and Exchange Board of India (SEBI) Disclosure & Investment Protection Guidelines, applicable to all public issues by listed and unlisted companies, and offers for sale and rights issues by listed companies, any Lead Merchant Banker must furnish SEBI a due diligence certificate, including copies and the status of environmental clearances given by the pollution control boards.

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?**

A contractual environmental indemnity clause will only be relevant between private parties, but would have no bearing on the relationship between the environmental agencies and a company. Hence, even the payment to another person under an indemnity clause would not discharge the indemnifier's potential liability for that matter *vis-à-vis* the relevant environmental authorities.

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

Directors of a company must in the annual meeting submit a balance sheet, profit and loss account, and a Director's Report. The Director's Report must contain an overview of all liabilities and assets, including all environmental liabilities, pending (environmental) litigation, etc.

The Companies Act, 1956, provides for a voluntary dissolution by members of the company. Such voluntary declaration has to be made by a majority of the Directors at the Board meeting, declaring that they made a full inquiry into the affairs of the company and that it has no debts or that it will be able to pay its debts in full within a certain period, not exceeding three years. Such declaration must be accompanied by an Auditor's Report on the profit and loss account and the balance sheet, after which a liquidator would have to be appointed. A Statement of Affairs would have to be submitted to the liquidator, which includes a statement as to all the debts and liabilities of the company, including environmental liabilities, pending (environmental) litigation, etc. It is important to note that the personal environmental liability of the management personnel/owners will not be extinguished by a voluntary winding up proceedings.

- 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?**

In India, a shareholder will not be held liable for breaches of environmental law. Similarly, a parent company will, in principle, not be sued for the environmental liability of its Indian subsidiary before Indian courts, unless the corporate veil is lifted, to be assessed on a case to case basis, but not otherwise. It must be noted that whether the parent company can be sued before its national courts would be determined by the national laws of that country. Typically, in India the corporate veil would be lifted where the statute itself contemplates it, or in case of fraud, improper conduct, tax evasion, enforcement of welfare measures relating to industrial workman, and such similar cases. For instance, subsequent to the Bhopal Gas Tragedy, the High Court in India decided to lift the corporate veil of Union Carbide India Limited (UCIL), in which the US-based Union Carbide Corporation (UCC) was holding 50.9% shares, based on *equitable considerations*. In this case, UCIL was not even made a co-defendant. We may also point out that the United States District Court of New York dismissed the petition of the Union of India against UCC on the ground of *forum non conveniens*.

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

In 2001 The Law Commission of India proposed that a Public Interest Disclosure (Protection of Informers) Bill be enacted by Parliament, but as of date the said Bill has not been passed. So far only the Central Vigilance Commission (CVC) has been appointed as a Designated Authority to receive written complaints on any allegation of corruption or misuse of office and recommend appropriate action. However, the jurisdiction of the CVC is restricted to any employee of the Central Government or of any corporation established by or under any Central Act, Government companies, Societies or local authorities owned or controlled by the Central Government. Personnel employed by the State Governments and activities of the State Governments or its Corporations etc. will not come under its purview. Hence, the whistleblowers' protection is limited in scope (to cases of corruption and misuse of office), and breadth (only covering people employed by the Central government, not employees of State entities - such as the SPCB -, and not private companies).

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

a) Class actions and Public Interest Litigation

In India, the class action device, as provided for under the Code of Civil Procedure, has rarely been used in any personal injury tort case. In the environmental sphere, there is not much reliance on the class action route either. The notable exception being the class action suit filed by the Indian Government on behalf of all the victims of the Bhopal tragedy, for which a specific law, the Bhopal Gas Leak Disaster (Processing of Claims) Act was adopted in 1985. At present most environmental actions are brought under Article 32 and 226 of the Constitution, i.e. the writ jurisdiction of the High Courts and the Supreme Court. This is preferred as the writ procedure is relatively inexpensive and less time-consuming than ordinary suits and offers direct access to the highest courts of the country. Since the early 1980s the rules of *locus standi* before the courts were considerably relaxed, to enable and even encourage public interest litigation to redress public grievances. As a consequence, concerned citizens or voluntary organisations may sue, not as representative of others but in their own right as a member of the citizenry to whom a public duty is owed. Hence, a citizen or NGO can challenge government action or inaction in "the public interest" without having suffered any individualised harm. Furthermore, the Supreme Court has upheld the right to a wholesome environment as a fundamental right. Through the Public Interest Litigation route the Supreme Court has acted as a catalyst to define Indian environmental law.

b) Exemplary damages

The Supreme Court of India at times does impose exemplary damages, to serve as a deterrent. For instance, in the 2002 Span Motels case, in which the hotel industry was found to be located in a protected forest area, to discharge untreated effluents in the river and to have undertaken private construction to turn the natural course of the river, the Supreme Court imposed an amount of one million Rupees (about USD 22,250), which had to be remitted to the State Department of Irrigation and Public Health to be utilised only for flood protection works in the area of the river affected by the action of the Span Motels. We may also add that in this case, as in several other environmental cases, the Supreme Court *suo moto* took note of the environmental infringement by Span Motels based on a newspaper article.

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?

India ratified the United Nations Framework Convention on Climate Change (UNFCCC) in 1993 and the Kyoto Protocol in 2002, but as a non-Annex I country (OECD countries and Economies in Transition) would not be taking part in the nation-wise emissions trading foreseen for developed countries. On the other hand, India is at present a leading host country of Clean Development Mechanism investments, enabling Annex I countries to invest in emission reducing projects in developing countries. The combined effect of the uncertainty surrounding the CDM mechanism as such (linked to the outcome of the COP 15 climate negotiations scheduled at Copenhagen in December 2009) and the economic downturn, have had a dampening effect on the CDM market in India.

India launched a National Action Plan on Climate Change on 30 June, 2008, with the aim to, *inter alia*, create a domestic trading mechanism in energy efficiency certificates, the main tenets of which are described in the Boxout below. However, the trading mechanism is not yet operational.

10 Asbestos

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

Not at all. India is a major importer of chrysotile (white) asbestos, currently using around 125,000 tonnes of asbestos each year. India has only banned blue and brown asbestos. Internationally, India also objected to the extension of the prior-informed consent procedure to cover white asbestos as a material to be governed by the Rotterdam Prior Informed Consent Convention.

Furthermore, tort law in India is not as widely relied upon as in many other Western countries, and the damages awarded by way of compensation are very low in comparison.

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

Several EHS aspects would be triggered. For instance, the general occupational health and safety regulations applicable to all industries, prescribed under *inter alia* the Factories Act, 1948, which after the Bhopal Gas disaster shifted towards imposing preventive check-and-balances on industries, would be made applicable. We may point out that asbestosis was notified as an occupational hazard under the Factories Act.

Moreover, as discussed above (see question 2.3), an asbestos project or unit manufacturing asbestos products would have to submit an Environmental Impact Assessment Report with the Central Ministry of Environment and Forests. Also, such asbestos manufacturing unit would have to obtain an Industrial Licence from the Department of Industrial Policy and Promotion, Central Ministry of Commerce & Industry. Also, the *production* of asbestos or asbestos-containing materials is identified as one of the processes that generates hazardous wastes (independently of the concentrating levels). Hence, the HW Rules, 2008 (see question 3.1) 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?

The prime environmental insurance mechanism in India pertains to the coverage of immediate relief to any person due to an accident caused by hazardous substances.

Under the Public Liability Insurance Act, 1991, every person owning or having the control (in case of the company, that is, any director, manager, secretary or other officer directly in charge of and responsible to the company) over the handling of hazardous substances (that is, manufacturing, processing, treating, packaging, storing, transporting, converting, selling or transferring hazardous wastes) must take out insurance policies, to give relief to any person (but not a workman, who will be protected by labour laws) in case of death, injury, or damage to property which has resulted from an accident.

Importantly, this Act imposes a 'no-fault' liability upon the owner of the hazardous substances, and the claimant shall not be required to plead and establish that the death, injury or damage was due to any wrongful act, neglect or default of any person.

The insurance policy shall not be less than the amount of the paid-up capital of the undertaking handling the hazardous substances, but not exceeding fifty crore Rs. (USD 11 million). However, the amounts to be reimbursed are by international standards low. For instance, per claimant the reimbursement of medical expenses incurred will be up to a maximum of Rs. 12,500 (about USD 280); and for fatal accidents and total permanent disabilities the relief will be Rs. 25,000 (about USD 560).

We may add that the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, also makes it mandatory for exporters of hazardous wastes to have a full cover insurance policy (in absence of which the Central Government will not permit the export of the consignment).

11.2 What is the environmental insurance claims experience in India?

Initially, the Public Liability Insurance mechanism failed, as the Act did not specify the quantum of the liability to be covered. As a result, the insurance companies refused to cover the companies, while at the same time the owners were obliged to insure themselves. This incongruity was later rectified, and the public liability insurance is a standard insurance now for companies handling hazardous substances. As mentioned in question 11.1, it is also a prerequisite for exporters of hazardous wastes. Experience with environmental insurances and environmental insurance claims are still rather limited in India.

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.

1) Trading in energy-saving certificates

On 30 June, 2008, the Prime Minister of India presented its National Action Plan on Climate Change, which focuses on the following eight areas or 'missions': solar; enhanced energy

efficiency; sustainable habitat; water; sustaining the Himalayan ecosystem; a 'green' India, sustainable agriculture; and strategic knowledge for climate change. Of immediate relevance to the corporate sector is the ambition to set up a first of its kind market-based mechanism in India to promote energy efficiency amongst energy-intensive large industries, by allowing trade in energy saving certificates. The existing Energy Conservation Act, 2001, already identifies nine such energy-intensive sectors, i.e. thermal power stations, fertilizer, cement iron and steel, chlor-alkali, aluminium, railways, and textile and pulp paper, but other sectors may be identified in the future. Once industry-specific benchmarks have been identified, the certified excess savings may be traded amongst companies to meet their mandated compliance requirements, or may be banked for the next cycle of energy savings requirements. It appears that the identification and detailing of industry-specific benchmarks, required for the trading mechanism to be operationalised, may be adopted some time in the latter half of 2009 or early 2010. The national elections scheduled in April-May 2009, cast some uncertainty on the timing of the energy efficiency trading scheme.

2) Hazardous Wastes

The Hazardous Wastes (Management and Handling) Rules, 1989 were replaced by the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008, notified on 24th

September, 2008. The controversial 2007 draft notification that sought to broaden the scope from 'wastes' to other 'materials' beyond wastes intended for final disposal, was attacked by both industry associations and NGO's alike, and did not see the light of the day. The HW, 2008 Rules integrates in a more logical manner aspects pertaining to recycling, reuse and recovery of wastes (including registration processes); and is presented in a more user-friendly restructured format. Simultaneously, the CPCB is issuing various guidelines to facilitate the implementation of the HW Rules, 2008 (such as for operators of common hazardous wastes, treatment, storage and disposal plants, and captive HW incinerators). On 2nd December, 2008, a draft National Hazardous Wastes Management Strategy was also notified for commentary. At this stage it is not clear, however, in which shape this broadly drafted Strategy will eventually be adopted or made binding on industries.

3) Amendments EIA, 2006, Notification

On 19th January, 2009, a draft Notification to amend the Environmental Impact Assessment Notification, 2006 was adopted to address the fact that several States have not yet set up relevant authorities. In such cases, it is proposed that project applications may be submitted at Central level. It also seeks to exempt from its ambit situations where the modernisation or expansion of projects does not increase the pollution load, water or land requirements.



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Recent work

Assisting companies in obtaining environmental permits (water pollution and air pollution), as well as appeal procedures; drafting petitions and representing wood-based manufacturing industries before the Central Empowered Committee set up by the Supreme Court; advising companies on hazardous waste management issues (including transboundary and inter-state movement of hazardous waste); and offering advice on food safety, and manufacture, import, use, research and release of genetically modified organisms (GMOs).

Background

Els Reynaers Kini obtained her law degree at the Free University of Brussels, Belgium (*magna cum laude*), as well as the University of Delhi, India, and completed her LL.M. degree at the University of Georgia, U.S.A, during which she wrote a thesis on the regulation of transboundary movement of hazardous wastes in the US and the EU. Before moving to India, she worked as a lawyer on environment and energy-related issues at Allen & Overy, Brussels and at Giordano & Associates, Chicago, USA.

Prior to obtaining her Indian law degree she worked at TERI (The Energy and Resources Institute), New Delhi, where she headed the Centre for Global Agreements, Legislation and Trade, during which she had the opportunity to work closely with the Ministry of Commerce, Government of India on the WTO trade and environment negotiations. She also taught environmental law at the TERI School of Advanced Studies (Master Program).



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Background

After obtaining his Indian law degree, he completed his LL.M. degree in International Finance at the University of Georgia, USA. Ravi Kini is the Managing Attorney at M.V. Kini & Co. After having established the Delhi branch of the law firm eight years ago, Ravi is currently in charge of the coordination of the three Mumbai-based branches of the law firm, and is head of the Corporate Department, Mumbai.

Ravi initially started his career in the litigation department, after which his area of practice shifted towards corporate law, in particular drafting and negotiating of contracts. He, for instance, is the main contact person for the National Highways Authority of India, to which he offers advice on their contracts, litigation and arbitration matters, all issues which also include environmental aspects (such as its own compliance with environmental laws, supervision of environmental compliance by contractors, as well as litigation and arbitration, which includes environmental components). He further offers advice to Indian and foreign companies (including players in the energy, alternative energy, manufacturing, steel and chemical sectors) on a wide range of corporate issues.



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The firm has 150 lawyers offering legal services in a wide range of areas, including litigation, arbitration, corporate and commercial law, international trade disputes, banking and financial services, public infrastructure contracts, civil aviation, labour and service matters, IPR and environmental law.

As the corporate sector responds to the increasing environmental awareness in India, M.V. Kini & Co. is one of the few law firms in India to offer guidance to its domestic and international clients on the comprehensive environmental laws in India, pertaining to, *inter alia*, hazardous waste management, water and air pollution, Environmental Impact Assessment, GMO regulation, forest and timber regulations, etc. We also represent our clients before various judicial and quasi-judicial environmental authorities including the ones set up by the Supreme Court of India.

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