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Environment & Climate Change Law 2019

16th Edition

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Chapter 17

India

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1 Environmental Policy and its Enforcement

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

The Indian Constitution lays down the foundation for all environmental laws. Since the late 1980s and early 1990s, there has also been a clear trend of environmental policies being driven by the (activist) judiciary in India. The fundamental right to life enshrined in Article 21 of the Constitution has been expanded by judicial interpretation to include the right to a clean, healthy and pollution-free environment. The doctrine of sustainable development, "polluter pays" and the precautionary principle were all first acknowledged by the judiciary before these principles were explicitly embedded in more recent environmental legislation (such as the National Green Tribunal Act, 2010).

The Ministry of Environment and Forest & Climate Change ("MoEF&CC"), along with the Central Pollution Control Board ("CPCB") and State Pollution Control Boards ("SPCBs") of each of the 29 States in India, administers and enforces environmental laws. There are separate regulatory bodies for various environmental laws, such as: the State-level Environment Impact Assessment Authority, supervising Environmental Clearance applications and Environmental Impact Assessment reports; the Ozone Cell, supervising compliance with the Ozone-Depleting Substances Rules; Forest Officers in the context of India's Forest Act; National and State-level Coastal Zone Management Authorities, supervising the Coastal Regulation Zone Notification, etc.

We may also add here that there is only one Supreme Court in India, but each of the States has its own High Court. Importantly, various National Green Tribunals ("NGTs") were established in 2010 – dividing India geographically into several jurisdictional zones, with the central NGT in Delhi, and four other NGTs in Bhopal, Pune, Kolkata and Chennai – for the speedy disposal of cases where a substantial question relating to environment is involved, and for giving relief and compensation for damages to persons and property.

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

The interactions between these enforcement agencies and regulated entities still tend to be based on a carrot-stick approach, with few local companies, therefore, being proactive or forthcoming with their environmental compliance records. That said, in our experience voluntary disclosures are well received by all enforcement agencies, although there are no formal guidelines relating to such situations, and absent explicit rewards for such voluntary disclosures, local companies lack the confidence to approach enforcement agencies. Some of the newer environmental laws, such as the E-Waste (Management) Rules, 2016, do allow "self-declaration", e.g. relating to the Reduction in the use of Hazardous Substances ("RoHS") requirements; such approaches remain the exception rather than the rule. Some States have also adopted an "auto-renewal" of Consent Orders (i.e. environmental permits) based on self-certification if certain criteria are met, such as: when there is no increase in the overall production capacity and pollution load; if there is only a marginal increase (up to a maximum of 10%) in the capital investment, etc.

The SPCBs tend to issue "show cause" notices ("SCNs") in the event of non-compliance, giving the companies 15 to 30 days to reply and explain why criminal prosecution should not be undertaken or electricity/water supply to these companies stopped. The power of the SPCBs to cut off these basic supplies can at times be unnecessarily harsh on a company, but seems to be the only effective tool which the SPCBs have at their disposal to enforce environmental laws. Hence, all companies must ensure that they take these SCNs very seriously and duly reply. As per the respective environmental laws, all companies are also granted the right to be heard before such drastic measures such as the stoppage of basic supplies will be enforced. Moreover, if a site is found to be in grave non-compliance (such as operating without an environmental permit), the SPCBs will not hesitate to commence a proceeding before the NGT, with the request to impose a penalty, and in some cases criminal prosecution of the directors or management of a company can also be initiated.

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

Under the Right to Information Act, 2005 ("RTI Act"), a citizen can request all government authorities to provide any particular information which they hold, at a minimal fee. There are some exemptions to this otherwise broadly drafted right to information, such as: personal information of officers; evidence yet to be presented in a court of law; and also, importantly, commercially confidential information, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information. For instance, if local residents were to file an RTI petition seeking

information about a company's off-site groundwater pollution, the larger public interest would warrant that all information available to the government authority be shared with the citizens seeking this information.

2 Environmental Permits

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

The most common Consent Orders or environmental permits to be obtained from the State Pollution Control Boards ("SPCBs") by e.g. manufacturing companies are the Consent to Establish ("CTE") under the Water (Prevention and Control of Pollution) Act, 1974 ("Water Act") in which a company submits its initial plans, shares its manufacturing capacity, pollution load, etc. for initial construction approval; which has to be followed by a Consent to Operate ("CTO") which must be obtained prior to any operations being initiated by the company. Do note that an integrated permit system is in place in most States. For instance, the CTO and its subsequent renewals under the Water Act, Air Act and Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 can typically be obtained by submitting a "Combined Consent" Application to the relevant SPCB. It is worth noting that separate pieces of legislation will trigger separate permit obligations. For instance, the recent E-Waste (Management) Rules, 2016 introduce the new concept of an "Extended Producer Responsibility – Authorisation of Producers" which would only require one centralised application with the Central Pollution Control Board ("CPCB"). Hence, depending on the type of activities undertaken by a company, multiple permits may need to be obtained.

Importantly, in August 2018, a new online environmental portal was launched by the MoEF&CC, named "PARIVESH" – which stands for Pro-Active and Responsive facilitation by Interactive, Virtuous and Environmental Single-window Hub – to facilitate online submission and tracking of various environmental clearance applications: https://parivesh.nic.in. More specifically, it will allow a single registration and single sign-in for all types of clearances (i.e. Environment, Forest, Wildlife and Coastal Regulation Zone – "CRZ"), and create a unique ID for each project for most environmental clearances.

Consent Orders issued by the SPCBs, as well as Environmental Clearances (obtained under the EIA Notification), are readily transferable, and a straightforward procedure has to be followed: the transferor would need to provide a written "No Objection" to the concerned regulatory authority; and the transferee must submit an application, along with an undertaking that it will comply with all the conditions specified in the Consent Order, along with supporting documents (explaining the underlying reason for the transfer, change of name, change of management, etc.).

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?

One can file an appeal against the decision by a State Pollution Control Board not to grant or renew a Consent Order before a State-level Appellate Authority. A subsequent appeal against a decision by the Appellate Authority would lie before the NGT (see Section 16 of the NGT Act).

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

Yes, in line with the Prior Environmental Clearance Notification, 2006, many activities require a prior Environmental Clearance ("EC"), some of which also require a detailed Environmental Impact Assessment ("EIA") study, including:

- Isolated storage and handling of hazardous chemicals (if certain quantity thresholds as identified under the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 ("MSIHC Rules") are triggered).
- Mining of minerals.
- Offshore and onshore oil and gas exploration, development and production.
- Oil and gas transportation pipelines.
- Thermal power plants.
- Nuclear power projects and processing of nuclear fuel.
- Metallurgical industries (ferrous and non-ferrous).
- Asbestos milling and asbestos-based products.
- Chlor-alkali industry.
- Chemical fertilisers.
- Pulp and paper industry.
- Sugar industry.
- Building and construction projects.
- Townships and area development projects, etc.

The process of EIA involves four stages, namely screening, scoping, public consultation and appraisal.

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

As mentioned in question 1.2 above, the State Pollution Control Boards have far-reaching powers to impose a stoppage of essential services such as electricity and water, if a company is found to be operating in violation of the conditions mentioned in the Consent Order. The SPCBs can also initiate prosecution before the courts.

3 Waste

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

The Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 ("HW Rules") introduced a definition of "waste" as materials that are not products or by-products, for which the generator has no further use for the purposes of production, transformation or consumption. The HW Rules further clarify that waste includes the materials that may be generated during the extraction of raw materials, the processing of raw materials into intermediate and final products, and the consumption of final products, but excludes residuals recycled or reused at the place of generation. A by-product is defined as a material that is not intended to be produced but gets produced in the production process of the intended product and is used as such. "Hazardous waste" is a more complex definition which takes into account several technical factors, and uses both a list-based approach as well as concentration limits; and the international trade dimension of hazardous wastes is

in line with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989, to which India is a party.

Other waste-specific legislation will define the waste being targeted respectively, such as: the Bio-Medical Waste Management Rules, 2016; the Solid Waste Management Rules, 2016; the Construction and Waste Management Rules, 2016; the Plastic Waste Management Rules; and the E-Waste (Management) Rules, 2016 ("E-Waste Rules").

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?

Different waste rules impose different responsibilities and requirements regarding waste storage; for instance, the E-Waste Rules – which are based on the Extended Producer Responsibility – only allow the storage of e-waste on-site up to 180 days after its generation (which can exceptionally be extended up to 365 days), and impose the further obligation on the producer to ensure that the e-waste, at end of life, finds its way to a registered recycler or an authorised treatment storage disposal facility.

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)?

Once the title has been transferred to another party, no such residual liability will be retained by the generator/producer of the respective waste(s) as this is not specified in any environmental law, nor developed via case law. Various environmental laws do specify that all the parties (be it manufacturer, producer, importer, transporter, dismantler, recycler, etc.) shall be liable for any damages caused to the environment or third party due to improper handling and management of the (respective) waste, but this is based on fault-based liability which will have to be proved in court.

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

The concept of Extended Producer Responsibility ("EPR") is embedded in several more recent pieces of environmental legislation, such as the E-Waste Rules and the Plastic Waste Management Rules. Hence, under the E-waste Rules, the producer of electrical and electronic equipment ("EEE") has a duty to channel back the e-waste and ensure the environmentally sound management of such waste. The EPR may consist of setting up a take-back system or collection centres, or having arrangements with an authorised dismantler or recycler, or through a Producer Responsibility Organisation. The producer would need to obtain a prior EPR Authorisation from the CPCB approving its proposed EPR approach and take-back targets.

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 Water Act, the Air Act and the Environment (Protection) Act, 1986 ("EP Act") – under which all the waste-related Rules were adopted – all contain penalty provisions. Failure to obtain the required Consent Order or environmental permit will incur penalties. For instance, under the Water Act, any person who breaches the consent application process is punishable with imprisonment for at least 18 months, which can be extended to six years, and a fine.

Importantly, the NGT Act contains penalty provisions which are considerably higher compared to previously adopted environmental laws. Most likely all existing environmental laws will be amended (at some point) to be aligned with the National Green Tribunal Act penalty provisions. More specifically, section 26(1) of the National Green Tribunal Act states that a person who fails to comply with an order or award or decision of the Tribunal is punishable with imprisonment for a term of up to three years, or with a fine of up to INR10 crore, or both (1 crore is equal to 10 million). If the failure or contravention continues, an additional fine applies up to INR25,000 for every day the failure/contravention continues, after conviction for the first failure or contravention. Moreover, if a company fails to comply with any order, award or decision of the Tribunal, the company is punishable with a fine up to INR25 crore. If the failure or contravention continues, an additional fine applies up to INR100,000 for every day the failure/contravention continues, after conviction for the first failure or contravention.

The Water Act, Air Act and Environmental Protection Act all contain specific provisions for offences committed by companies. Under these Acts, every person who is in charge when an offence is committed, and is responsible to the company for the conduct of its business, is guilty of the offence and liable to be prosecuted and punished accordingly. However, a person is not liable if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the offence. Further, if the offence was committed with the consent or connivance of, or is attributable to any neglect by, a director, manager, secretary or other officer of the company, the other person is also guilty of the offence, and liable to be prosecuted.

Moreover, the Supreme Court and the State High Courts can and do impose exemplary damages for damage to the environment. For instance, in the *Sterlites Industries* case (2013), one of the largest copper smelter plants in India was found to be operating without a valid renewal of its environmental consent to operate. When assessing the company's liability to pay damages, it reviewed the company's annual report, and determined that 10% of the profit before depreciation, interest and taxes ("PBDIT") had to be paid as compensation, which amounted to INR1 billion.

About 30 years ago, the Supreme Court evolved two far-reaching environmental civil liability concepts which are now engrained in Indian case law:

- Enterprises engaged in hazardous or inherently dangerous activities are absolutely liable to compensate those affected by an accident (such as the accidental leakage of toxic gas). Such absolute liability is not subject to any of the exceptions under the tort principle of strict liability in *Rylands v Fletcher* (that is, act of God, act of third party, consent of victim and statutory authority).
- The measure of compensation must be correlated to the magnitude and capacity of the enterprise. The larger and more prosperous the enterprise, the greater the amount of compensation payable by it for harm caused by an accident, in the carrying on of 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?

Yes, the principle of absolute liability (discussed above under question 4.1), combined with the "polluter pays" principle, the

precautionary principle and the sustainability principle – which are well established in many environmental cases – could hold a company liable for environmental pollution or damage even if a company complies with its current environmental permit. For instance, we could think of a situation of off-site groundwater pollution caused by both historic pollution and current activities which can be traced back to the company's site and have a combined effect of negatively impacting the groundwater quality – a situation which was otherwise not covered by the environmental permit, but is negatively impacting the environment and health of neighbouring farmers or making the water unusable for irrigation purposes.

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?

As discussed under question 4.1, the Water Act, Air Act and EP Act state that every person who was in charge of, and was responsible for, the conduct of a company's business along with the company, shall be deemed to be guilty of all offences and shall be liable to be proceeded against and punished accordingly. For example, the Supreme Court has imposed personal liability to the tune of one year's salary on a managing director – but such personal liabilities for environmental damage are still rather exceptional and tend to be imposed in grave situations of non-compliance and serious environmental damage. As mentioned above, defences are provided in these laws as well, and a person will not be held liable if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the offence.

The market for insurance policies for personal liability is not mature in India, whereas such insurance is available to cover companies against environmental damage claims.

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?

As is the case in many other jurisdictions, in the event of a share sale, the buyer also acquires all liabilities, including environmental liabilities, incurred by the company. Typically, in India, even in the event of an asset sale, the buyer will take over these liabilities, but the parties can contractually decide otherwise. This is because environmental laws in India do not address historical pollution and the regulatory authorities in India typically simply connect environmental liability to the occupier, i.e. the entity having current control over the site, without any further investigation in terms of previous ownership. As a result, parties will settle this point via the insertion of contractual warranties relating to environmental liabilities, which highlights the importance of a robust environmental due diligence prior to the purchase.

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

In India, lenders do not directly incur liability for environmental wrongdoing and/or remediation costs for contaminated land, unless they are directly responsible or liable for the management of the company, with a board position or substantial shareholding and involvement in the day-to-day running of the company. However, lenders increasingly undertake an environmental risk assessment of the projects of their customers and will include contractual clauses pertaining to environmental compliance in their loan documents. Lenders normally undertake prior due diligence and insist on appropriate conditions before granting a loan, requiring the management of the company to take effective measures to minimise their environmental liability.

5 Contaminated Land

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

Unlike many other jurisdictions, environmental laws in India do not explicitly address the situation of historic pollution and related remediation. As a result, even for historic pollution the current owner/occupier will be held liable. Similarly, India has no specific legislation addressing soil contamination and remediation yet, but major changes with a step-wise approach are in the pipeline. The first proposed short-term implementation strategy proposed is the draft "Contaminated Sites (Identification and Management) Rules" containing standards for soil and water pollution, carrying out mandatory site assessment and reporting and the determination of a contaminated site. Environmental consultants have already prepared reports mapping the priority (most contaminated) sites which should be covered in a first stage. Importantly, the remediation would not be merely parameter-based but take into account the expected use of the land. The longer-term implementation strategy would require amendment of the EP Act addressing the liability of parties, including for historic contamination; and the subsequent draft "Remediation of Polluted Sites Rules" would have a wider application beyond the initially identified contaminated sites.

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

Allocating environmental liability is not always an easy undertaking, particularly in industrial zones, or manufacturing or chemical clusters, with a long history of different activities having been undertaken over the years. However, the NGT in many cases has divided the cost of remediation equally amongst the responsible parties, when it is found that more than one legal person is responsible for such contamination.

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 environmental regulatory authority could impose additional works or remediation activities, particularly if the desired result is not being achieved within the agreed time. However, the principles of natural justice would apply, and such decisions by the regulator could be challenged by a company based on the ground that the decision is arbitrary, unreasonable, no personal hearing was granted, etc.

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 above, there is no specific law in India addressing contaminated land and historical pollution. Hence, the regulatory

authorities will always hold the current owner/occupier as the liable entity, whether currently observed on-site/off-site. Such private rights seeking contribution from the previous owner would, therefore, have to be contractually foreseen, otherwise the purchaser would have no such right.

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

Yes. The Supreme Court, High Courts and the NGT have all recovered environmental damages from companies for the pollution of public or historical assets, or public assets such as rivers. For instance, a company was held liable for INR1 billion for loss of ecology as well as pollution caused in the Arabian Sea near the port city of Mumbai. Also, the industries operating within a 100km radius from the Taj Mahal monument were ordered to shut down. Furthermore, in series of judgments, the NGT as well as the Supreme Court imposed costs on industries which were directly or indirectly polluting the river Ganges.

6 Powers of Regulators

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

The officials of the SPCBs are empowered to inspect sites, examine and test the processes and plants, take samples for testing and conduct research, verify records and give directions to industries in order to control environmental pollution caused by companies. The CPCB and SPCBs are empowered to initiate proceedings to levy penalties on a company or criminal liability on the occupier if they are found violating the provisions of the EP Act, Air Act or Water Act.

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?

Yes, the occupier of the land is under an obligation to immediately inform the concerned authorities and affected third parties in the event of discharges of pollutants above the standards contained in the General Standards specified under the EP Act and related Rules, or in the event of an accident as regulated under, e.g., the Water Act. The issue is not as obvious in cases where the off-site migration is caused by activities which neither infringe the valid Consent Order or environmental permit nor exceed the generally applicable discharge of environmental pollutant standards, simply because such situations have not been foreseen by environmental laws in India. However, companies may still decide to inform the regulatory authorities in such situations.

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

There is no statutory obligation for investing land contamination except for the obligation to submit a pre-feasibility Environmental Impact Assessment report as part of the Environmental Clearance approval process. As mentioned, this regulatory lacuna relating to land contamination is currently being studied by the MoEF&CC and new legislation may be adopted in the future to address this legal vacuum.

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?

Material information affecting the buyer's decisions must be disclosed to him by the seller. The transferor must disclose a detailed schedule highlighting liability issues. Non-disclosure of existing environmental liability could equate to questioning of contractual validity in M&A transactions.

8 General

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

The enforcement of indemnification for limiting actual or potential environmental liability is possible. However, such contractual indemnity will only be binding between the parties, and not discharge the indemnifier's liability *vis-à-vis* third parties, or in the eyes of the environmental regulatory 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?

A company is under an obligation to disclose potential environmental liabilities as contingent liabilities in its financial audit. Non-disclosure of any such liability in the account shall be treated as fraud or falsification of accounts, which are punishable with imprisonment or fine or both.

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 Indian law, a company is a separate legal entity deemed to be acting through its directors. Thus the shareholders of a company cannot be held liable for breach of environmental law unless there is no distinction between the shareholders and directors and the facts require lifting of the corporate veil. Lifting of the corporate veil shall take place in limited scenarios such as fraud, account falsification and misleading public disclosures; and in such situations, a foreign parent company can be held liable for its subsidiary's activities.

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

India adopted the Whistleblower Protection Act, 2014, with a prescribed mechanism to investigate alleged corruption and misuse

of power by public servants and to protect anyone who exposes alleged wrongdoing in government bodies. However, no such whistle-blower laws are applicable to private companies. However, many larger companies in India have adopted internal whistle-blower guidelines based on good corporate governance principles.

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

Yes, there are instances where class action suits have been filed by groups of affected people. The more common route in India is for individuals or non-governmental organisations ("NGOs") to file Public Interest Litigations ("PILs"). As mentioned above, exemplary damages are frequently imposed by the Supreme Court as well as NGT benches (with amounts at times being as high as INR1 billion).

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

In India, there are hardly any procedural hurdles for any citizen or NGO to file a public interest litigation, as long as the issue highlighted is in the public interest. Historically, the *locus standi* was deliberately lowered, particularly to ensure that the poor and deprived had access to courts. Since then, PILs have flourished and are omnipresent, to the point that courts have started imposing fines for abuse of the PIL process.

9 Emissions Trading and Climate Change

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

There is no specific carbon trading scheme in place in India. India ratified the UN Framework Convention on Climate Change in 1993 and the Kyoto Protocol in 2002 but, not being an Annex-I country, it did not take part in the flexibility mechanisms foreseen for developed countries (emission trading and joint implementation). On the other hand, India has been a leading host country of Clean Development Mechanism ("CDM") investments, enabling Annex-I countries to invest in emission-reducing projects in developing countries (thereby earning certified emission reductions).

Under the National Mission on Enhanced Energy Efficiency ("NMEEE"), India launched a National Action Plan on Climate Change in 2008, which focuses on the following eight areas or "missions": (1) solar; (2) enhanced energy efficiency; (3) sustainable habitat; (4) water; (5) sustaining the Himalayan ecosystem; (6) a "green" India; (7) sustainable agriculture; and (8) strategic knowledge for climate change.

As part of the NMEEE, the Perform, Achieve and Trade ("PAT") Mechanism was launched, a first-of-its-kind, market-based mechanism in India to promote energy efficiency among energy-intensive large industries by allowing trade in energy-saving certificates ("ESCerts"). The Energy Conservation Act, 2001 identified Specific Energy Consumption reduction targets for 478 "Designated Consumers" from eight industrial sectors which could take part in the PAT mechanism, *viz.*: thermal power stations; fertiliser; cement; iron and steel; chlor-alkali; aluminium; textile; and pulp and paper. The ESCerts may be traded among companies to meet their mandated compliance requirements or may be banked for the next cycle of energy savings requirements. On 31 March, 2016, comprehensive Amendment Rules were notified, essentially pertaining to the methodologies underpinning the PAT Mechanism.

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

There are no mandatory GHG reporting obligations, but there are several industry-driven voluntary initiatives to encourage such GHG reporting.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

India submitted its Intended Nationally Determined Contribution ("INDC") in October, 2015, which outlines the post-2020 climate actions the country intends to take. India's INDC includes, *inter alia*, the reduction in the emissions intensity of its GDP by 33%–35% by 2030 from 2005 levels, and to create an additional carbon sink of 2.5–3 billion tons of CO2 equivalent through additional forest and tree cover by 2030. See also the answer to question 9.1 above.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

The Supreme Court imposed a ban on the manufacturing and mining of blue and brown asbestos (*Kalyaneshwari v. Union of India*) but India remains a major importer of chrysotile (white) asbestos, and a PIL filed to ban white asbestos was dismissed (*Consumer Education & Research Centre v. Union of India*). In 2009, and again in 2014, a draft Bill, the "White Asbestos (Ban on Use and Import) Bill, 2014", was tabled in Parliament, but has still not been adopted. The Supreme Court also addressed the harmful consequences of asbestos, making the employer responsible to pay damages to workers whose health has been affected due to exposure to asbestos.

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

Owners/occupiers of premises have no specific duties to discharge regarding asbestos on-site, other than the general occupational health and safety regulations applicable to all industries under, among other things, the Factories Act 1948 (and asbestosis has been notified as an occupational hazard under the Factories Act).

Asbestos-related activities fall into the red category, that is, the most polluting industries, and environmental permit/consent applications are reviewed accordingly by the SPCBs. A prior environmental clearance must be obtained and a related EIA report must be prepared for industries proposing to engage in activities relating to asbestos milling and asbestos-based products.

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 your jurisdiction?

The Public Liability Insurance Act 1991 ("PLI Act") requires an

insurance policy to be taken out by owners, users or transporters of hazardous substances, as defined under the EP Act, which exceed the minimum quantity specified in the PLI Act. The public liability policy can be extended to cover pollution risk subject to a "no objection" certificate from the SPCB. Under the PLI Act, the Any One Accident ("AOA") must represent the paid-up capital of the company, subject to a maximum of INR50 million. The AOA limit is fixed at maximum INR150 million. Under the PLI Act, the excess of any award that exceeds the AOA limit is paid by the Government through the Environment Relief Fund. The insured must contribute an amount to this fund which is equivalent to the premium paid under the PLI Act Policy. The environmental risks insurance market is growing, but is still limited compared to other jurisdictions.

11.2 What is the environmental insurance claims experience in your jurisdiction?

As mentioned, the environmental risk insurance market is still in its infancy and not much is publicly available pertaining to such insurance claims.

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 your jurisdiction.

The one major development which is expected is that a specific soil contamination law will be adopted in the near future (although this would be post the March 2019 national elections). A Report on the Development of a National Program for the Rehabilitation of Polluted Sites ("NPRPS") has recently been submitted to the MoEF&CC. As a first milestone of this exercise, a detailed mapping of the most polluted sites throughout India has already been undertaken. The Report also contains draft Rules: the Contaminated Sites (Identification and Management) Rules, which will provide standards for soil and water pollution, carrying out mandatory site assessment and reporting, and the determination of contaminated sites. The expectation (as indicated in the Report) is that the Rules could be notified approximately 24 months from now. This would be a significant development, and if the Rules are adopted along the same lines as currently proposed, it would entail that a soil analysis and possible soil remediation would need to be undertaken in the following situations: prior to a renewal of a Consent Order; when obtaining an Environmental Clearance; prior to signing an agreement for sale or lease of land; prior to applying for a permit to construct on such a site; prior to establishing new industrial projects or expanding such projects on any site; prior to the commencement of demolition of any property; and within 60 days of signing an agreement for any change in ownership of a company that owns or leases such a site. This would need to be factored in by all companies in their environmental risk analysis as part of any new project, internal environmental management system or environmental due diligence.

Several States have recently banned plastic packaging for products and imposed strict EPR obligations on generators of plastic waste, which is a trend which is expected to grow across most States in India and companies have to proactively address this shift.

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Els is a Partner at M.V. Kini and heads the firm's Environment practice.

She has law degrees from the Free University of Brussels, Belgium (*magna cum laude*), and the University of Delhi, India. She completed an LL.M. degree at the University of Georgia, USA. 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, Els headed the Centre for Global Agreements, Legislation and Trade at The Energy and Resources Institute ("TERI"), New Delhi.

Els specialises in environmental law and nuclear law, advises clients on a wide range of environmental laws, and has extensive experience assisting companies in ensuring they achieve a high level of compliance with all environmental laws.

Els is widely published and has written a book on the status of the precautionary principle.

Els serves as the General Secretary of the Nuclear Law Association of India, which she helped co-found, was the President of the International Nuclear Law Association for the years 2015–2016, and is currently the Senior Vice Chair of the International Bar Association's Environment, Health and Safety Law Committee (2017–2018).

She is regularly recognised as a leading environmental lawyer in India by the *Who's Who Legal: Environment* edition, including in 2018. She received the 2019 International Advisory Experts Award under the "Environmental Law Award within India" category.

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Tavinder is an Advocate on Record with the Supreme Court of India and is qualified to practise as a Solicitor in the Courts of England and Wales. Tavinder's expertise extends to issues relating to government contracts, tender laws, labour and employment-related matters.

Tavinder heads the environmental, health and safety ("EHS") law department in the Delhi office and oversees cases before the National Green Tribunals, the Delhi High Court and the Supreme Court.

He also represents clients before regulatory authorities to obtain environmental clearances and approvals relating to Coastal Regulation Zone ("CRZ") areas, wildlife, and use of protected areas for non-forest purposes for infrastructure projects of national importance.

He regularly advises clients on laws pertaining to water pollution, hazardous waste, e-waste and plastic waste, and in this context represents clients before the Ministry of Environment, Forests and Climate Change, the Central Pollution Control Board and the State Pollution Control Boards.

MVKini
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M.V. Kini, which was established 30 years ago, currently counts about 150 lawyers. M.V. Kini is a full-service law firm and its practice areas range from corporate and commercial law, tax law, banking law, capital markets and infrastructure law, to labour law, environmental law, aviation law, government relations team, litigation and arbitration. With our head office in Mumbai and several branches throughout India, including in Delhi, Pune, Goa, Bangalore, Hyderabad, Lucknow and Calcutta, we are able to provide India-wide services to our clients.

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