

## Environmental law and practice in India: overview

Resource type: **Country Q&A**Status: **Law stated as at 01-Oct-2012**Jurisdiction: **India**

A Q&A guide to environment law in India. This Q&A provides a high level overview of environment law in India and looks at key practical issues including emissions to air and water, environmental impact assessments, waste, contaminated land, and environmental issues in transactions. In addition, answers to questions can be compared across a number of jurisdictions to assist in the management of cross-border transactions (see [Country Q&A Tool](#)).

This Q&A is part of the Practical Law multi-jurisdictional guide to environment. For a full list of jurisdictional Q&As visit [www.practicallaw.com/environment-mjg](http://www.practicallaw.com/environment-mjg).

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## The regulatory authorities

Central Pollution Control Board (CPCB)

State Pollution Control Boards (SPCBs)

Ministry of Environment and Forests (MoEF)

## Online resources

## Environmental regulatory framework

*1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?*

The main environmental laws include the:

- Water (Prevention and Control of Pollution) Act 1974 (Water Act), which also sets out the powers, functions and hierarchy of the environmental agencies (that is, the Central Pollution Control Board (CPCB) and the state pollution control boards (SPCBs) (*see below*)).
- Air (Prevention and Control of Pollution) Act 1981 (Air Act).
- Environment (Protection) Act 1986 (EP Act), an umbrella law that enables the central government to take all measures it deems necessary to protect and improve the quality of the environment and to prevent, control and reduce environmental pollution. A wide range of rules and notifications were adopted under the EP Act, including:
  - Hazardous Wastes (Management, Handling and Transboundary Movement) Rules 2008 (HW Rules);
  - e-Waste (Management and Handling) Rules 2011 (e-Waste Rules);
  - Manufacture, Storage and Import of Hazardous Chemicals Rules 1989;
  - Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-Organisms and Genetically Engineered Organisms of Cells 1989;
  - Chemical Accidents (Emergency Planning, Preparedness and Response) Rules 1989;
  - Ozone-Depleting Substances (Regulation and Control) Rules 2000;
  - Batteries (Management and Handling) Rules 2001;
  - Coastal Regulation Zone Notification 1991; and
  - Environment Impact Assessment Notification 2006 (EIA Notification).
- Wildlife (Protection) Act 1972.
- Forest (Conservation) Act 1980.

- Biodiversity Act 2002.
- Public Liability Insurance Act 1991.
- National Green Tribunal Act 2010.

The main environmental enforcement agencies are the CPCB and the SPCBs. They were set up under the Water Act initially. However, the scope of their authority now includes the enforcement of the Air Act, various rules adopted under the EP Act, and so on, unless a specific authority has been set up under the rules (see box, [The regulatory authorities](#)).

## Regulatory enforcement

### *2. To what extent are environmental requirements enforced by regulators in your jurisdiction?*

The record of enforcement by the SPCBs varies across states. Environmental agencies are more active and rigorous in states with a higher business/industrial presence, such as Maharashtra, Gujarat, Karnataka, Delhi and Chennai.

## Environmental NGOs

### *3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?*

Many NGOs are active (some of the larger NGOs include Toxics Link, the Centre for Science and Environment, the World Wildlife Fund (WWF) and Greenpeace). Typically, entities face more interaction with local/neighbourhood NGOs or organisations that represent local farmers/city dwellers who take up "not in my back yard" (NIMBY) concerns (that is, people who object to the establishment of projects in their area). NGOs and individuals can take a public interest litigation (PIL) case before a state-level high court or the Supreme Court. PIL procedures are straightforward and are commonly relied on.

## Environmental permits

### *4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?*

## Integrated/separate permitting regime

Entities whose activities trigger both the Water Act and the Air Act as well as the HW Rules can apply for

a common consent application (CCA).

## Single/separate permits

Certain activities require only a single permit (for example, exporting hazardous waste). An entity can therefore apply for a permit under the relevant laws/rules.

### *5. What is the framework for the integrated permitting regime?*

## Permits and regulator

Activities governed by environmental laws require a consent to establish (CTE) from the relevant SPCB. Typically, a CTE is granted for four years. An entity must then apply for a consent to operate (CTO), which must be renewed annually.

## Length of permit

Permits are given for the following terms:

- CTE: four years.
- CTO: one year (renewed annually).

## Restrictions on transfer

Most environmental permits are transferable, provided that the same activities are taken over. However, transfers must be notified to the relevant SPCB, who can revise old conditions or impose new ones. A new/revised permit is required for any expansion, additional discharges, and so on.

An environmental clearance obtained under the EIA Notification is transferable.

## Penalties

Penalties vary depending on the breach. A show cause notice (SCN) is first issued to the entity found in breach of the CTO, which offers it the right to present its case. The SCN is followed by a personal hearing. Subsequently, the relevant SPCB can disconnect an entity's electricity and water supply, if it is of the opinion that the entity is violating any of the environmental laws or permit conditions.

Various environmental laws contain different penalty provisions including:

- **Non-compliance with environmental permit.** Anyone who breaches a permit granted under the Water Act or the Air Act is subject to both:
  - imprisonment for a minimum of one and a half years and a maximum of six years; and

- a fine (the amount is not specified under the various laws).
- **Non-compliance with closure direction.** Anyone who fails to comply with a closure direction or stoppage (of electricity and water) direction is subject to both (*Water Act; Air Act*):
  - imprisonment for a minimum of one and a half years and a maximum of six years; and
  - a fine (the amount is not specified under the various laws).

If the entity continues not to comply, an additional fine to a maximum of INR5,000 for each day of non-compliance can be imposed.

- **Other specific offences.** Various offences are set out in the Water Act and the Air Act, including:
  - failing to give required information to the SPCBs;
  - failing to report an accident;
  - knowingly or wilfully making a statement that is false;
  - wilfully tampering with monitoring equipment.

These offences are subject to imprisonment for a maximum of three months or a fine to a maximum of INR10,000, or both.

- **Residuary penalty.** Anyone who breaches any provisions of the Water Act or the Air Act, or who fails to comply with any order or direction, for which no specific penalty has been provided, is subject to imprisonment for a maximum of three months or a fine to a maximum of INR10,000, or both.

As the EP Act acts as the umbrella Act for the numerous rules adopted under it, any breach of those rules is subject to imprisonment for a maximum of five years or a fine to a maximum of INR100,000, or both (*section 15, EP Act*). The rules are in relation to, for example:

- Hazardous waste.
- e-waste.
- Solid waste management.
- Hazardous micro-organisms.
- Genetically engineered organisms.

## Water pollution

6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

## Permits and regulator

A consent order (or permit) must be obtained when (*section 25, Water Act*):

- Establishing or taking any steps to establish any industry, operation or process, or any treatment and disposal system or an extension or addition to it that is likely to discharge sewage or trade effluent into a stream, well, sewer or on land.
- Using any new or altered outlets for the discharge of sewage.
- Making any new discharge of sewage.

## Prohibited activities

Generally, anyone carrying on any industry, operation or process must not discharge, emit or permit to be discharged or emitted any environmental pollutant in excess of prescribed standards (*section 7, EP Act*). It is also prohibited to handle or cause to be handled any hazardous substance except in accordance with prescribed procedures and complying with prescribed safeguards (*section 8, EP Act*).

## Clean-up/compensation

SPCBs can:

- Take samples of sewage and trade effluents.
- Enter and inspect the permit holder's premises.
- Decide to stop the supply of water/electricity if directions are not complied with.
- Give directions to the permit holder to clean up on-site and off-site pollution caused by it.

Typically, SPCBs can only request bank guarantees from the entities it supervises to ensure compliance. SPCBs can make an application to the courts to restrain apprehended pollution (containment order) of water in streams or wells. The court can also direct SPCBs to clean up the pollution. SPCBs can recover clean-up costs from the entity that caused the pollution (*section 33, Water Act*).

## Penalties

Anyone who fails to comply with or breaches the EP Act, or its rules or the orders or directions issued, is subject to imprisonment for a maximum of five years or a maximum fine of INR100,000, or both, for each failure or breach.

## Air pollution

7. What is the regulatory regime for air pollution (whether part of an integrated regime or

*separate)?*

## Permits and regulator

No industrial plant can be established or operated in an air pollution control area (identified by the state governments) without the prior consent (permit) of the relevant SPCBs (*section 21, Air Act*). Typically, water and air pollution-related permits are obtained jointly (see [Question 5](#)).

## Prohibited activities

Anyone operating an industrial plant in an air pollution control area must not discharge or cause or permit to be discharged air pollutants in excess of the standards set down by the CPCB or the SPCBs (*section 22, Air Act*).

## Clean-up/compensation

SPCBs supervise compliance with the conditions of the environmental permit and applicable standards. They can issue SCNs to permit holders (see [Question 5, Penalties](#)).

SPCB officers can:

- Enter and inspect premises.
- Take samples (under the procedure set out in the Air Act).
- Issue closure notices (including stopping water and electricity).

SPCBs can insist on the clean-up of air pollution and recover clean-up costs from the entity that caused the pollution. Third parties can always seek compensation through the courts for damage caused.

## Penalties

Anyone who does not comply with directions issued by SPCBs is subject to imprisonment for a minimum of one year and six months (*section 37, Air Act*). However, this can extend to six years and a fine. However, it is not specified under the Air Act when this extended term would arise and it is therefore at the court's discretion depending on the severity of the case. Anyone who commits certain specifically enumerated acts under the Air Act is subject to imprisonment for a maximum of three months or a fine that can be up to INR10,000, or both (*sections 37 to 40, Air Act*).

## Climate change, renewable energy and energy efficiency

*8. Are there any national targets for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in*

### *buildings and appliances)?*

A national action plan on climate change was launched on 30 June 2008, which focuses on the following eight areas:

- Solar.
- Enhanced energy efficiency.
- Sustainable habitat.
- Water.
- Sustaining the Himalayan ecosystem.
- A green India.
- Sustainable agriculture.
- Strategic knowledge for climate change.

As part of the national action plan, India adopted a Performance, Achieve and Trade Mechanism (PAT mechanism) in 2012. This market-based mechanism promotes energy efficiency among large energy-intensive industries by allowing trade in Energy Saving Certificates (ESCerts).

The first cycle or target achieving phase of the PAT mechanism for the 478 designated consumers (DCs) began in April 2012 and runs to March 2015. The DCs are across eight sectors: aluminium, chlor-alkali, textile, pulp and paper, iron and steel, fertiliser, cement and thermal power plants. Actual trading of ESCerts will start in April 2013. Energy consumption norms and standards were identified for each of the DCs, each of which must submit an action plan on how it proposes to achieve its energy consumption targets.

The PAT mechanism aims to lower India's overall energy consumption by 5% by using special trading platforms to trade ESCerts on power exchanges. That means a reduction in capacity of about 5,600MW over the first three-year period of the PAT mechanism.

The Bureau of Energy Efficiency (BEE), based in New Delhi (*see the Energy Conservation (Energy Consumption Norms and Standards for Designated Consumers, Form, Time within which, and Manner of Preparation and Implementation of Scheme, Procedure for Issue of Energy Saving Certificate and Value Per Metric Ton of Oil Equivalent of Energy Consumed) Rules 2012, in particular rules 5, 6 and 7*):

- Ensures compliance by DCs.
- Accredits verification agencies, who will audit the energy conservation achievements of DCs, and prepare verification reports, which they will submit to the BEE.

In addition, the BEE verifies the reported energy consumption through a check-verification mechanism. Based on the BEE's review of the verification report or check-verification report, the BEE sends its

recommendations to the Central Government who issue ESCerts to the DC. The trading mechanism will also involve commodity exchanges, for example, the National Commodity and Derivatives Exchange (NCDEX), as well as transfer agents/depositories. Energy Efficiency Services Ltd (EESL) is proposed as the process manager. EESL will make all data public to ensure equal opportunity for all participants.

*9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?*

## Parties to UNFCCC/Kyoto Protocol

India ratified the UN Framework Convention on Climate Change in 1993 and the Kyoto Protocol in 2002.

## Implementation

However, India is not an Annex-I country and will not take part in the flexibility mechanisms set out for developed countries (emission trading and joint implementation).

India is currently a leading host country of clean development mechanism (CDM) investments, which enables Annex-I countries to invest in emission-reducing projects in developing countries (thereby earning certified emission reductions).

*10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?*

There is no emission/carbon trading scheme. However, trading in energy saving certificates was launched in October 2012 (see [Question 8](#)).

## Environmental impact assessments

*11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?*

## Scope

Some activities must file an EIA report (*sections 2 and 4 and Schedule, EIA Notification*). The EIA Notification classifies activities into two categories (A and B), based on the extent of potential impact and possible effects on human health and natural and man-made resources. New projects, as well as expansion and modernisation of existing projects falling under these activities, require prior

environmental clearance. Category A activities require clearance from the central government and category B activities require clearance from a state-level Environment Impact Assessment Authority (SEIAA).

The identified activities requiring prior clearance include:

- 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.
- 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 and hide processing industry.
- Chemical fertilisers.
- Pesticides industry.
- Petrochemical complexes.
- Man-made 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 and parks.
- Building and construction projects.
- Townships and area development projects.

## Permits and regulator

Prior environmental clearances are valid for the following terms:

- Ten years for river valley projects. The project life is estimated by the Economic Advisory Council (EAC) or the State Expert Appraisal Committee (SEAC), subject to a maximum of 30 years for mining projects.
- Five years in the case of all other projects and activities.

Project managers must submit compliance reports to the relevant expert appraisal committee (EAC or SEAC) every six months addressing the prior environmental clearance terms and conditions.

A prior environmental clearance granted for a specific project or activity can be transferred to another legal entity that is undertaking the project or activity if it is still within its validity period and is:

- On application by the transferor (or by the transferee with a no objection letter of the transferor) to the relevant regulatory authority.
- On the same terms and conditions under which the previous environmental clearance was initially granted.
- For the same validity period.

Referral to the relevant expert appraisal committee (EAC or SEAC) is not required in these cases.

An EIA rarely operates as a stand-alone licence as an EIA is often a prerequisite to obtaining an environmental licence (no objection certificate) (NOC) under other environmental legislation or Supreme Court directions.

## Penalties

The penalty provisions of the EP Act apply as the EIA Notification is adopted under the EP Act ( see [Question 6, Penalties](#)).

## Waste

*12. What is the regulatory regime for waste?*

## Permits and regulator

Generally, all waste-related matters are under the jurisdiction of SPCBs. However, import and export-related matters are directly supervised by the Central Ministry of Environment and Forests (MoEF).

The following five main categories of waste are governed by separate rules:

- Hazardous waste.
- Radioactive waste.
- Biomedical waste.
- Municipal solid waste (applicable to municipal authorities only).
- e-waste.

The most comprehensive and relevant law for companies is found in the HW Rules. In addition, the e-Waste Rules require private companies to participate in take-back schemes organised by producers of electrical and electronic equipment (EEE).

## Prohibited activities

Anyone engaged in the following, among other things, for the hazardous waste must be authorised by the relevant SPCB (*HW Rules*):

- Generation.
- Processing.
- Treatment.
- Packaging.
- Storage.
- Transportation.
- Use.
- Collection.
- Destruction.
- Conversion.
- Offering for sale.
- Transfer.

In addition, hazardous waste must be collected, treated, recycled, reprocessed, stored or disposed of only in facilities authorised by the relevant SPCB. It is prohibited to engage in any of these activities

without SPCB approval.

## Operator criteria

In all environmental laws an "occupier" is anyone who has control over a factory's or premises' affairs and includes anyone in possession of hazardous waste/substances.

SPCBs require a bank guarantee for an environmental permit application, the amount of which is based on the applicant's turnover.

## Special rules for certain waste

**Hazardous wastes rules.** Hazardous waste is any waste that by its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger or is likely to cause danger to health or the environment, whether alone or when in contact with other waste or substances, and includes (*rule 3(I), Schedule I and Schedule II, HW Rules*):

- Waste generated by 36 categories of processes (independent of concentration levels).
- Waste containing any of 75 types of constituents, which are listed under five categories with different concentration limits.

Importation of waste from another country for dumping and disposal is not permitted (*HW Rules*). However, importation of that waste can be permitted for processing or reuse as raw materials. Each case is examined on its merits by the relevant SPCB and approved by the MoEF.

Importation of hazardous waste listed under annex VIII of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 is prohibited, by Supreme Court order.

The following must obtain prior authorisation from the relevant SPCB:

- Occupiers handling and storing hazardous waste (*see above, [Operator criteria](#)*).
- Recyclers of waste.
- Operators of facilities for the collection, reception, treatment, storage and disposal of hazardous waste.

Producers of waste retain liability for that waste, based on joint liability principles for hazardous waste, as follows:

- The occupier and operator of a facility are both responsible for the proper collection, reception, treatment, storage and disposal of hazardous waste.
- The occupier, transporter and operator of a facility are all liable for damages caused to the

environment owing to the improper handling and disposal of hazardous waste.

- The occupier and operator are also liable for reinstating or restoring damaged or destroyed elements of the environment at their cost.

**e- Waste Rules.** e-waste is EEE that is dependent on electric currents or electromagnetic fields to be fully functional (*e-Waste Rules*). However, the e-Waste Rules contain an exhaustive list of EEE that are covered under the rules, which includes (*Schedule I, e-Waste Rules*):

- Information technology and telecommunication equipment, for example, personal computers, laptops, notebook/notepad computers, printers including cartridges, copying equipment, facsimiles, telephones, cellular telephones, answering systems, and so on.
- Consumer electrical and electronics, for example, television sets, refrigerators, washing machines and air conditioners (but excluding centralised air conditioning plants).

Bulk consumers (that is, multinational organisations, international agencies and private companies that are registered under the Factories Act 1948 and Companies Act 1956) must:

- Record e-waste generated by their company (for example, computers to be discarded).
- Ensure that e-waste generated is sent to authorised collection centres, is recycled or is returned to the pick-up or take-back service provided by the producers.

The records of e-waste must be kept on a prescribed form (Form 2) and must be made available for SPCB inspection.

In addition, producers have extended producer responsibility (EPR) for their end-of-life products until disposal, which requires them to provide for a take-back system for their products that become e-waste (*e-Waste Rules*). Producers must:

- Create awareness about the hazardous constituents of EEE and the hazards of improper handling.
- Provide contact details of authorised collection centres to bulk consumers and standard consumers.

Every producer, collection centre, dismantler and recycler of e-waste must obtain SPCB authorisation and registration.

## Penalties

Both the HW Rules and the e-Waste Rules were adopted under the EP Act, therefore, the penalty provisions of the EP Act apply (see [Question 6, Penalties](#)).

## Asbestos

### 13. What is the regulatory regime for asbestos in buildings?

#### Prohibited activities

India is still a major importer of chrysotile (white) asbestos, currently using around 125,000 tonnes of asbestos each year. Only blue and brown asbestos are banned. 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 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (revised 2011).

However, in 2009, the White Asbestos (Ban on Use and Import) Bill (White Asbestos Ban Bill) was introduced in parliament. However, it has not been adopted to date. The aim of the White Asbestos Ban Bill is to provide for a ban on the use and import of white asbestos, which is a fibrous mineral and has been reported to be highly carcinogenic (*sections 3 to 6, White Asbestos Ban Bill*). The Central Government would also promote and encourage the use of safer and cheaper alternatives to white asbestos and provide sufficient funds for research and development for this (*section 7, White Asbestos Ban Bill*).

Also, in a 2011 case (*Kalyaneshwari v. Union of India, 2011 (1) FLT 94 (SC), dt. 21 January, 2011*), the Supreme Court acknowledged the importance of the White Asbestos Ban Bill, International Labour Organization (ILO) and World Health Organization (WHO) reports, and the Supreme Court's own previous directions, in relation to primary and secondary exposure to asbestos. However, the Supreme Court dismissed the petition to ban all use of asbestos.

#### Contaminated land

### 14. What is the regulatory regime for contaminated land?

#### Regulator and legislation

There is no specific environmental regime in relation to land contamination. There is no specific policy or legislation in relation to soil or groundwater pollution.

Land pollution is only considered in an indirect manner. For example, the Water Act provides that no one must 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. In addition, the definition of "stream" includes subterranean waters. An applicant must also provide details on whether the proposed activity can cause land contamination (*EIA Notification*).

The polluter pays principle is applicable in certain cases (for example, illegal dumping on sites) and courts can direct an entity to clean up the site based on this principle.

*15. Who is liable for the clean-up of contaminated land? Can this be excluded?*

## **Liable party**

See below, [Owner/occupier liability](#).

## **Owner/occupier liability**

Owner/occupier liability typically only arises for possible contamination of on-site or off-site groundwater contamination as there is no specific regulation of contaminated land. Typically, citizens bring off-site groundwater contamination to the notice of SPCBs and/or the court.

Typically, owner/occupier liability is under the EP Act (general prohibition to pollute) or the Water Act (prohibition to pollute a stream or well). Enforcement agencies always address the current occupier, therefore, the previous occupier can only be held liable if he has a contractual liability clause with the current occupier.

## **Previous owner/occupier liability**

See above, [Owner/occupier liability](#).

## **Limitation of liability**

Limitation of liability can only be done contractually. Contractual limitations have no effect on SPCB enforcement.

*16. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?*

## **Lender liability**

It is not common for a lender to incur liability for lending to owners/occupiers of contaminated land as lenders have no direct liability. However, lenders can incur liability if this is contractually decided and agreed between the lender and borrower or a third party.

Lending institutions undertake due diligence of companies to which they lend, which can include environmental liabilities particularly in the case of large and inherently polluting industries. However, liability cannot be imputed on the lenders under Indian law.

## Minimising liability

Lenders normally conduct an appropriate and thorough due diligence to minimise liability.

To be eligible for funding from the World Bank Loan facility, projects in India must prepare a comprehensive review report (CRR) that includes details of:

- Finance.
- Procurement.
- Environment.
- Social aspects.

Environmental due diligence (EDD) is therefore part of the CRR, even for power transmission projects.

### *17. Can an individual bring legal action against a polluter, owner or occupier?*

Most environmental actions are brought under Article 32 and 226 of the Constitution, that is, the writ jurisdiction of the high courts and the Supreme Court. The writ procedure is relatively inexpensive and less time-consuming than ordinary claims and offers direct access to the highest courts (*PIL*) (see [Question 3](#)). Since the early 1980s, the rules of who can bring a case before the courts were relaxed to enable and encourage public interest litigation to redress public grievances. Concerned Indian citizens or voluntary organisations can sue in their own right as members of the public to whom a duty is owed. Citizens or NGOs can, therefore, challenge government action or inaction in "the public interest" without having suffered any personal harm. In addition, the Supreme Court has upheld the right to a clean environment as a fundamental right. Through PILs, the Supreme Court has acted as a catalyst to define Indian environmental law. Increasingly, PILs will be heard by the newly-created National Green Tribunal (NGT) based in New Delhi.

## Environmental liability and asset/share transfers

### *18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?*

### General

Asset sales and share sales in mergers and/or takeovers require prior approval from the Company Law Tribunal (Tribunal). Both asset and share sales must follow the same procedures. The Tribunal approves the arrangement between the transferee and transferor company (target). More specifically, the Tribunal sanctions and makes provision for all matters, including:

- Transfer of property or liabilities.
- Allotment of shares.
- Continuation by or against the transferee company of any legal proceedings.
- Dissolution of any transferor company.
- Other incidental matters.

There is therefore no distinction for environmental liabilities in share sales or asset purchases as the Tribunal decides the details and outcome of each case.

## Asset sale

In asset sales, buyers take over all the assets and liabilities of the company and inherit pre-acquisition environmental liability.

## Share sale

If a buyer takes a controlling interest in the company, a share sale is treated similar to an asset sale (see *above*, [Asset sale](#)). However, an ordinary non-controlling shareholder does not have any environmental liability as under Indian law a non-controlling shareholder is not the owner of the company.

*19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?*

Sellers can retain environmental liability through contractual terms and conditions. Generally, environmental authorities hold the current owner liable as the company and its management is liable for a company's environmental liability, and not an individual in his personal capacity or a past owner.

However, if a case is ongoing against a seller before a sale, the seller retains environmental liability until the relevant environmental authority agrees to replace the seller with the buyer. The replacement request must be made by both the seller and buyer together.

*20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?*

There is no mandatory legal requirement for sellers to disclose environmental information to buyers in either asset or share sales. Sellers and buyers contractually agree the terms and conditions of sales and purchases.

## *21. Is environmental due diligence common in an asset sale/a share sale?*

EDD before purchasing a controlling interest in a property, land sale, manufacturing company/unit, project or asset sale has become quite common in the past ten years.

### **Scope**

The scope of EDD depends on the purpose for which the EDD is required and is to be used. The purpose of an EDD process is to:

- Understand site liabilities.
- Manage any associated costs and activities for site clean-up.
- Identify other environmental concerns.

In cases of change in land use, the occupier must carry out these studies and take mitigation measures before any transfer, in accordance with the relevant provisions of the Notification dated 14 September 2006 issued under section 3 of the EP Act.

### **Types of assessment**

Types of assessments depend on the purpose and scope of EDD. Generally, assessments include:

- Assessment by experts to identify potential areas of contamination and environmental concern through site visits, review of records and regulatory requirements, and geologic and hydro-geologic review (if required).
- Further assessment by sampling and analysis to confirm or deny the presence of suspected contamination against environmental or hazardous waste standards as required under pollution control acts, notifications and their rules.
- Based on these results:
  - further analysis of the nature and extent of contamination;
  - identify appropriate:
    - clean-up technologies;
    - potential clean-up goals;
    - technology application.
  - allocate environmental liability in terms of applicable law and cost of clean-up alternatives for remedial action.

## Environmental consultants

Environmental consultants are not commonly used for EDD. However, they are commonly relied on at a later stage to assist companies with their enviro-technical matters.

*22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?*

Environmental warranties and indemnities are not usually given. Typically, asset sale/share purchase agreements may only include:

- Statements by sellers that, to the best of their knowledge, there are no pending enquiries or prosecutions for environmental liability.
- Sellers indemnifying buyers against any environmental liability existing on or before the date of sale/purchase.
- Disclosure of pending enquiries or proceedings or liabilities.

*23. Are there usually limits on environmental warranties and indemnities?*

Generally, the following are included:

- Indemnities apply for a fixed period after sale.
- Seller's liability above a fixed amount is to be paid by the purchaser.
- Seller's maximum liability is fixed.
- A reduction of the sale price in consideration for the seller's environmental liability.

## Reporting and auditing

*24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?*

### Public registers

Relevant government authorities/regulators maintain records/registers of environmental permits of contaminated properties and relevant information. For example, the status of environment clearance for applications received is available on the MoEF (<http://environmentclearance.nic.in>).

## Third party procedures

Currently, there is no procedure for a third party to search a private company's registers/records. However, third parties can obtain information from the relevant public authorities about organisations covered by the Right to Information Act 2005.

*25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?*

Reports and returns are required under environmental laws, for example:

- All industries must submit an environmental statement in the prescribed form by 30 May each year (*section 14, EP Act*).
- An environmental audit report for the financial year ending 31 March of each year (Form V) must be submitted to the relevant SPCB by anyone engaged in an industry, operation or process that required either:
  - authorisation under section 25 of the Water Act or section 21 of the Air Act, or both; or
  - authorisation under the HW Rules.

These reports and returns must be submitted periodically by companies to the relevant authorities/inspectors giving up-to-date compliance reports and information on various aspects of environmental performance. The information and records are checked and site inspections are done by the relevant authorities/inspectors on a regular basis.

*26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?*

Companies must report environmental incidents to the relevant authorities as required under the applicable environmental laws, such as water pollution and soil contamination. It is not mandatory to report environmental incidents to the public.

*27. What access powers do environmental regulators have to access a company?*

The relevant inspectors/authorities can, under the relevant environmental law:

- Enter a company.
- Inspect documents and take copies.

- Seize documents.
- Inspect sites.
- Interview employees and any other persons/contractors/contract labour to conduct detailed enquiry into the matter.
- Issue notices.
- Order work to stop, if required.
- Launch prosecutions.

## Environmental insurance

*28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?*

### Types of insurance and risk

The main environmental insurance mechanism covers immediate relief to persons for accidents caused by hazardous substances.

Anyone who owns or has control (in companies, that is, any director, manager, secretary or other officer directly in charge of and responsible to the company) over the handling of hazardous substances must have insurance policies. Handling of hazardous substances includes:

- Manufacturing.
- Processing.
- Treating.
- Packaging.
- Storing.
- Transporting.
- Converting.
- Selling.
- Transferring.

The insurance must give relief to persons (but not a workman, who is protected by labour laws) for death, injury, or damage to property that resulted from an accident (*Public Liability Insurance Act 1991*) (PLI Act). (A workman is any person (including an apprentice) employed in any industry to do any

manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward (*section 2(s), Industrial Disputes Act 1947*).)

Owners of hazardous substances have no-fault liability (*section 3(2), PLA Act*). In addition, claimants need not plead and establish that the death, injury or damage was due to any wrongful act, neglect or default of any person.

The insurance policy must not be less than the amount of the paid-up capital of the company handling the hazardous substances and must not exceed INR500 million. However, the compensation amounts are low by international standards. For example, each claimant can claim compensation for:

- Medical expenses: up to a maximum of INR12,500.
- Fatal accidents and total permanent disabilities: INR25,000.

Exporters of hazardous wastes must have a full-cover insurance policy. If they do not, the central government will not permit the export of the consignment (*rule 15, HW Rules*).

## Obtaining insurance

Generally, most multinational companies' foreign insurance policy covers their India-based activities as well.

## Environmental tax

### 29. What are the main environmental taxes in your jurisdiction?

Environmental taxes as a policy tool are not widespread. However, the government adopted the Water (Prevention and Control of Pollution) Cess Act 1977 (Cess Act), to increase the SPCBs' resources. A cess (tax) is levied based on the amount of water consumed by an industry (*section 3, Cess Act*). The cess rate depends on (*section 3 and Schedule II, Cess Act*):

- The purpose for which the water is consumed, for example, industrial cooling, spraying in mine pits or boiler feeds.
- Whether the pollutants are either easily biodegradable or non-toxic.

A rebate of up to 25% is given to industries that install any plant for the treatment of sewage or trade effluents (*section 7, Cess Act*).

A benefit of up to 100% depreciation in the first year of use of pollution control equipment is available (*Income Tax Act 1961*). Similarly, the recently adopted national action plan on climate change earmarks tax incentives for the promotion of energy efficiency, including differential taxation on appliances that have been certified as energy efficient through the energy labelling programme (see [Question 8](#)).

Independent power producers who set up units to sell electricity to state distribution companies typically opt for generation-based incentives that give them a benefit of INR0.5 for every unit of electricity.

The Government of India has ended the tax break given to wind energy projects in the recent Federal Budget (2012). The income-tax department issued a circular at the beginning of the financial year (April 2012) stating that wind farms commissioned in the financial year 2012-13 would not get the accelerated depreciation benefit that allowed them to write-off investments sooner. The circular states that the Income Tax Rules 1962 were amended (effective from 1 April 2012) to provide that all new wind farms can only claim a standard depreciation rate of 15%. Previously, accelerated depreciation allowed investors to take advantage of either:

- Up to 80% of the project cost if the project is commissioned before 30 September of the financial year.
- 40% of the project cost if the project is commissioned before 31 March of the financial year.

On 30 June 2010, the MoEF issued an overview of India's Post-Copenhagen Domestic Actions. It includes a levy (a clean energy cess) on coal (INR50 per tonne), which applies to both domestically produced and imported coals. The revenue from this cess goes into a National Clean Energy Fund, with expected earnings around US\$500 million for the financial year 2010-11.

## **VAT**

VAT is levied by individual state governments on the sale of goods within that state. Many state governments announced various exemptions and concessions on equipments and parts used in setting up renewable energy power projects.

However, these exemptions are subject to conditions and compliance by the engineering, procurement and construction (EPC) contractor or independent power producer (IPP).

## **Tax liability**

Suppliers are liable for payment of VAT.

## **Tax rates**

The VAT rate is 5% on the sale price.

## **Excise and customs duties**

The Government of India has granted exemption from customs and excise duties on specific goods required for setting up renewable energy generation projects, subject to conditions and compliance by the EPC contractor or the project owner. Certification from the Ministry of New and Renewable Energy in

the prescribed format is essential to claim the exemption.

The importer or manufacturer, as relevant, is liable for paying excise and customs duties.

## Tax rates

**Customs duty.** The effective rate of cumulative customs duties is 25.7% (assuming that basic customs duty (BCD) is at 5% and no exemptions are available). However, BCD is 5% on most items imported for the renewable energy sector.

**Excise duty.** The effective rate is 12.36%. Many items manufactured for the renewable energy sector are fully exempt.

## Reform

*30. What proposals are there for significant reform (changes) or environmental law in your jurisdiction?*

From a substantive law perspective, the adoption of the e-Waste Rules 2011 and the commencement of the trading in energy saving certificates (scheduled for 2013) are long-awaited developments and a trend to place domestic developments at the same level as developments abroad. From a procedural perspective, the creation of the NGT is very significant, with its ambition to take over most of the environment-related matters from the civil courts. It is expected that case law developed by the NGT will become the main driving force in further expanding environmental law and key issues in environmental law.

### The regulatory authorities

#### Central Pollution Control Board (CPCB)

**Main activities.** The CPCB adopts nation-wide guidelines and acts as an interface between government and state pollution control boards (SPCBs).

**W** <http://cpcb.nic.in>

#### State Pollution Control Boards (SPCBs)

**Main activities.** Each of the 28 Indian states has a SPCB, from which companies in the respective states must obtain their environmental permits (for example, for the State of Maharashtra, the relevant board is the Maharashtra State Pollution Control Board (MPCB)).

**W** <http://mpcb.gov.in>

## Ministry of Environment and Forests (MoEF)

**Main activities.** The MoEF supervises all import and export-related activities that can have an impact on the environment, for example, import/export of hazardous wastes for which prior approval must be obtained from the MoEF. The MoEF is also the main agency for the negotiation/implementation of multilateral environmental agreements. The MoEF's website is an excellent source of copies of domestic environmental laws and information on India's position on international environmental matters.

**W** <http://envfor.nic.in>

## Online resources

**W** <http://envfor.nic.in>

**Description.** The official website of the MoEF contains all environmental laws and their rules. The website is usually up to date. However, there may be a one-month delay at times between notification in the *Official Gazette* and uploading on the website. Domestic legislation is published in both Hindi and English, and both versions are equally binding.

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