Chapter 4: Right to Clean & Healthy Environment and Transnational Corporations: Legislative Endeavours in India

Chapter – 4

Right to Clean and Healthy Environment and Transnational Corporations: Legislative Endeavours in India

‘Legislations are weak, monitoring is weaker and enforcement is weakest.’

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The Frame

This chapter discusses the approach of colonial regime towards the right to clean and healthy environment. It gives an overview of those legislations that have been used to enforce right to clean and healthy environment against corporations including TNCs. It also discusses India’s approach towards BITs.

The Focus

This chapter focuses on the analysis of regulatory framework, created through various statutes and rules framed under them, which have been more frequently invoked by or against TNCs in India for enforcing of right to clean and healthy environment. It also focuses on Indian attempt to safeguard right to clean and healthy environment through Model BIT.

The Objective

The objective of the chapter is to comprehend the salient features of various laws enacted for enforcing right to clean and healthy environment in India and the obligations created thereby for TNCs. It also aims to understand the contribution of Model Indian BIT regarding right to clean and healthy environment.

4.1 Introduction

India is an incredible land with incredible people living together incredibly. She represents one of the most ancient civilizations of the world. She is projected to overtake China by 2022 to become most populous nation in the world.² Her land and people represent exceptional diversity – political, economical, social, linguistic, cultural, religious, geographical and environmental. In different phases of its development, Indian society has looked towards surrounding environment and natural resources through different perspectives and outlook which reflected in her values and shaped her culture. Reverence for nature and resultant environmental protection and conservation was integral to Indian philosophy in ancient India (as discussed in chapter-1). This ancient tradition was also followed in Mohenjodaro, Harappa,

Channudaro and Dravidian civilizations.\(^3\) Mauryan period emerged as the most glorious period of Indian history from environment protection point of view.\(^4\) However, environmental conservation was not much of a priority during Mughal period.\(^5\) Nevertheless, Mughal Emperors were known for establishing beautiful gardens, fruits orchards and rural communities enjoyed free access to forests around them which were effectively managed through regulations during their regime.\(^6\)

4.2 British Colonial Rule

The onset of colonial rule in India brought a dramatic shift in the approach towards environment and natural resources. It can be divided into the following –

4.2.1 East India Company (EIC) Rule

Colonization of India started with arrival of ‘The Governor and Company of Merchants of London trading into the East Indies’ (East India Company, EIC) for the purpose of trade.\(^7\) EIC was incorporated in England by issue of Royal Charter by Queen Elizabeth I on 31 December 1600. Its incorporation as a joint stock company was the source of its enduring strength as it allowed English merchants to share risks of trade (beyond the capacity of individual merchants and unwillingness of English crown to commit resources to such uncertain undertaking) which enabled them in raising further funds.\(^8\) Charter permitted the EIC to undertake ‘at its own adventures, costs, and charges… one or more voyages… to East Indies, in the countries and parts of Asia and Africa and to as many of the islands, ports and cities, towns and places, thereabouts, as where trade and traffic may by all likelihoods be discovered, established or had.’\(^9\) EIC was given the privilege of trading exclusively as the crown

\(^3\) ‘There is no record to tell us as to what exact environment protection policy in the above civilizations had been. But it seems that these civilizations lived in consonance with its ecosystem and the harmony with the environment was maintained by their small populations and their needs.’ See Kailash Thakur, Environmental Protection Law and Policy in India (Deep and Deep 2007) 104.

\(^4\) ibid 104.

\(^5\) ibid 106.

\(^6\) ibid 107.

\(^7\) ‘The emergence of the British Empire in India stands out as a unique event in the history of the World. Unlike many others empires, the huge edifice of this Empire was created by merely a company which organized in England for furthering the British commercial interests in overseas countries.’ GB Patnaik, Yasobant Das and Rita Das (eds), MP Jain Outlines of Indian Legal and Constitutional History (7th edn, LexisNexis 2014) 7.

\(^8\) Barbara D Metcalf and Thomas R Metcalf, A Concise History of Modern India (1st South Asian edn, Cambridge University Press 2013) 44.

\(^9\) EIC Charter (31 December 1600) <http://www.centralexcisehyderabad4.gov.in/documents/history/>
will ‘not grant liberty, license or power any person or persons whatsoever, contrary to the tenor of these our letters patents to sail, pass, trade or traffick, to the said East Indies’\textsuperscript{10}. Further, any person trading into and from East without the license or agreement of EIC will face Crown’s ‘indignation, and the forfeiture and loss of goods, merchandizes, and other things whatever, which so shall be brought into this realm’ along with the ‘ship and ships with furniture thereof, wherein such goods merchandizes, or things shall be brought’.\textsuperscript{11} Its members were to form a General Court which was to elect Court of Directors consisting of a Governor and 24 directors.\textsuperscript{12} Charter gave power to EIC to make ‘laws, constitutions, orders and ordinances’ as were ‘necessary and convenient’ for its good governance and ‘for the better advancement and continuance’ of trade and to revoke or alter them.\textsuperscript{13} It can punish offences by fine or imprisonment according to laws, statutes and customs of the realm.\textsuperscript{14} Thus, EIC was conferred law making powers limited to the extent of governing the company. However, Crown retained the power to revoke Charter if its grant or continuance ceases to be profitable after giving two years’ notice.\textsuperscript{15} Crown may continue the Charter if its further continuance is profitable and not prejudicial or hurtful to it, with alterations suggested by the EIC.\textsuperscript{16} There was no intention to control through Charter any territorial acquisition by EIC.

Dutch East India Company thwarted EIC’s attempt to enter into highly profitable spice trade with islands of East Indies compelling latter to focus on trading operations in India.\textsuperscript{17} However, it confronted strong Mughal Empire in India.\textsuperscript{18} British ousted Potuguese (already established in Surat) in a naval battle and established its factory (a misnomer since factory was a warehouse by nature and not site of production) in Surat with the permission of local Mughal Governor in 1612.\textsuperscript{19} Mughal Emperor Jehangir issued \textit{ferman} (secured by Sir Thomas Roe who was sent as ambassador by

\textsuperscript{10}ibid.
\textsuperscript{11}ibid.
\textsuperscript{12}Patnaik and Das (n 7) 7.
\textsuperscript{13}EIC Charter (n 9).
\textsuperscript{14}Sumeet Malik, \textit{V. D. Kulshreshtha’s Landmarks in Indian Legal and Constitutional History} (11\textsuperscript{th} edn, Eastern Book Company 2016) 38.
\textsuperscript{15}EIC Charter (n 9).
\textsuperscript{16}ibid.
\textsuperscript{17}Metclaf and Metcalf (n 8) 45.
\textsuperscript{18}ibid.
\textsuperscript{19}Patnaik and Das (n 7) 11.
King James I) granting certain facilities to British.\textsuperscript{20} EIC was continued through issue of Charters.\textsuperscript{21} Charles II issued a new Charter to EIC on 3 April 1661 reorganizing it on a joint-stock principle and giving right to vote in its General Court to each member having share capital of £ 500.\textsuperscript{22} It also authorized EIC to appoint Governors and other officers for proper control and administration of factories and trading centres who, in turn, were to administer civil and criminal justice regarding their employees.\textsuperscript{23}

However, with gradual weakening of Mughal power, EIC did not take much time to realize that various Indian rulers were a poor mismatch to resources at its command largely due to unflinching support of the Crown. However, EIC faced tough competition from two rival trading companies namely - Dutch East India Company (chartered in 1602) and French East India Company (\textit{Compagnie des Indes Orientales} chartered in 1664), but succeeded in ousting them.\textsuperscript{24} Securing decisive victories in the battles of Plassey in 1757 and Buxor in 1764 eventually resulted in Mughal Emperor granting Diwani rights (i.e. right to collect revenue) to EIC over Bengal, Bihar and Orissa in 1765.\textsuperscript{25} Being a trading company, EIC ruled India essentially from a very narrow economic perspective. Its rule was based on the ruthless exploitation of natural resources with the singular objective of maximizing gains for itself.

Such astonishing success and enviable position made British government to demand its share\textsuperscript{26} – a demand which continued to increase over time. However, EIC’s dependence on the Crown was realised when due to rampant corruption of colossal proportions amongst its servants, it ran into heavy financial debts. It was compelled to apply for loan of £ 1 million from Crown in 1772.\textsuperscript{27} British Parliament used this opportunity to assert and exercise control over EIC’s affairs in India through restructuring the same.\textsuperscript{28} Although subsequent Charters extended the lease of life of

\textsuperscript{20} Farman allowed Britishers to trade and establish a factory in Surat in a hired house; live according to their own religion and laws without interference; settle their disputes by their President etc. ibid.
\textsuperscript{21} Charters were issued in 1609, 1615, 1623 and 1635.
\textsuperscript{22} Malik (n 14) 40.
\textsuperscript{23} ibid 41.
\textsuperscript{24} See for detailed account RC Majumdar, HC Raychaudhuri and Kalikinkar Datta, \textit{An Advanced History of India} (4$^{th}$ edn, Macmillan Publishers India Ltd. 2012) 623-661.
\textsuperscript{25} Malik (n 14) 385.
\textsuperscript{26} By an Act of 1767, British Government allowed EIC to retain territorial acquisitions and powers for 2 years subject to payment of £ 4,00,000 per year. See Malik (n 14) 107.
\textsuperscript{27} ibid.
\textsuperscript{28} Regulating Act 1773 \textit{inter alia} provided – election of EIC’s directors for 4 years; retirement of 25% of directors annually, without any re-election; voting qualification raised from £500 to £1,000; two
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EIC but subject to ever increasing Parliamentary control.\textsuperscript{29} Voice of discontent against the EIC rule became vociferous. Ever increasing discontent against its atrocious rule amongst all sections of society lead people to wage first war of independence in 1857. Unfortunately, people could not succeed in getting independence from British rule but their supreme and brave sacrifices succeeded in freeing them from the EIC rule compelling British Crown to take India under its direct rule through Government of India Act 1858.

4.2.2 Crown Rule

Although India continued to remain a British colony, direct rule by Crown offered to Indian people certain distinct advantages.\textsuperscript{30} It sowed the seeds of the modern Indian legal system through enactment of various legislations covering both criminal and civil law, namely – Indian Penal Code 1860 (IPC), Criminal Procedure Code 1861 (CrPC), Indian Evidence Act 1872, Indian Contract Act 1872, Specific Relief Act 1877, India Easements Act 1882, Transfer of Property Act 1882, Civil Procedure Code 1908 (CPC) etc. Some of their provisions were later invoked by people in courts to redress their grievance for violation of right to clean and healthy environment (discussed in chapter-6). India also became part of common law system making judicial interpretations of British courts relevant to Indian courts.

Later part of British rule legislated on certain specific aspects of environment. Statutes were enacted to regulate forests\textsuperscript{31}, water pollution\textsuperscript{32}, air pollution\textsuperscript{33}, wildlife\textsuperscript{34}
and land use\textsuperscript{35}. However, most of such statutes had limited territorial jurisdiction. They also established wild life preserves in Kaziranga in 1926 and Haily (later on Corbett) National Park in 1936.

Despite the above-mentioned legislative endeavours, British rule was essentially colonial in nature and therefore a poor substitute for aspirations of Indians for independence which was attained in 1947 after a sustained struggle (both violent and non-violent).

### 4.3 Right to Clean and Healthy Environment in Independent India

Indian Legal System comprises hierarchy of laws (Parliamentary statutes and delegated legislations) with Constitution at its peak. When India gained freedom from colonial rule, first priority was to draft a Constitution appropriate for a nation of exceptional diversity, in order to fulfil peoples’ aspirations from independence.

#### 4.3.1 Indian Constitution

Independence created hope, joy and euphoria in the heart of every Indian. Their first priority was to build the nation and protect its nationhood which they sought to achieve by drafting, debating and adopting the world’s lengthiest Constitution in 1950. Constitution makers were well aware that they were creating a living document which was as much legal as it was political, economic and social. They were conscious that constitutional text adopted by Indian people will be further enriched by the future generations in the light of their own experiences. Their immediate concern was to protect India’s independence which was in its infancy. Preamble set the tone for Indian Constitution by laying the foundation for a welfare State by committing to certain higher values in order to realize the dreams of millions of Indians – a State

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\textsuperscript{32} The Shore Nuisance (Bombay and Kolaba) Act 1853; Oriental Gas Company Act 1857, Indian Penal Code 1860; Indian Easements Act 1882; Indian Fisheries Act 1897.

\textsuperscript{33} Bengal Smoke Nuisance Act 1905; Bombay Smoke Nuisance Act 1912.

\textsuperscript{34} In 1873, Madras enacted first wild life statute for protecting wild elephants. Other relevant legislations included – The Elephants Preservation Act 1879; The Forest Act 1878; Wild Birds Protection Act 1887 and its comprehensive version in the form of The Wild Birds and Animals Protection Act 1912.

\textsuperscript{35} Britishers consolidated land holding in 1920 through Cooperative Consolidation Societies and the Consolidation of Holdings Act, 1920.
based on equality, justice, opportunity, fraternity and characterized as sovereign, democratic republic.36

Art. 13 gave continued applicability to pre-Constitution laws to the extent of not being in violation of the Constitution while mandating that all future laws in violation thereof be unconstitutional and hence void. It recognized certain rights as Fundamental under Part-III making them directly enforceable by Supreme Court u/A 32.37 Interestingly, it also included (though after a fierce debate)38 certain obligations on the part of the State as Directive Principles of State Policy (Directive Principles) which though were not ‘enforceable by any court’ but ‘nevertheless fundamental’ in country’s governance and State shall be duty bound ‘to apply them in law making’.39 Thus, Directive Principles are not justiciable and hence unenforceable through Courts. Therefore, noted constitutional expert H.M. Seervai has criticized their inclusion in the constitutional text itself.40

There was no mention of the term ‘environment’ in the Constitution as originally drafted. It was not even taken up for debate in the Constituent Assembly. However, following four Directive Principles has implied significance for environment. Art. 39 (b) provides for distribution of ownership and control of material resources of the community in a manner which best subserve the common good. All environmental resources will fall within the meaning of the term ‘material resources’. Art. 42 directs

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36 Parliament added two words ‘socialist’ and ‘secular’ through 42nd Amendment in 1977.
37 Right to equality (Art. 14-18); Right to Freedom (Art. 19-22); Right against Exploitation (Art. 23 and 24); Right to Freedom of Religion (Art. 25-28); Cultural and Educational Rights (Art. 29-30) and Right to Constitutional Remedies (Art. 32).
38 Dr. Ambedkar (Chairman, Drafting Committee) emphasised the objective behind including Directive Principles in the Indian Constitution in the following words: ‘it is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of government to be instituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal or as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. I think, if the friends who are agitated over this question bear in mind what I have said just now that our object in framing this Constitution is really twofold: (1) to lay down the form of political democracy; and (2) to lay down that our ideal is economic democracy and also to prescribe that every government whatever it is in power, shall strive to bring about economic democracy, much of the misunderstanding under which most members are laboring will disappear.’ See Constituent Assembly Debates: Official Report Vol. VII (Fourth Reprint, Lok Sabha Secretariat 2003) 494-495.
39 Art. 37.
the State to make provision for ‘securing just and humane conditions of work’. It means that the work conditions should be free from environmental pollution and generally safe. Art. 47 directs State, as its primary duty, to ‘raise level of nutrition and standard of living of its people and the improvement of public health’. State cannot succeed in performing this primary duty without succeeding in protecting and preserving a safe environment for its people. Art. 48 provides that agriculture and animal husbandry should be endeavoured to be organized by the State on modern and scientific lines. India has been an agriculture based economy and a clean and healthy environment is a *sine qua non* for such an endeavour on the part of the State. Thus, it is heartening to note that clean and healthy environment was implicit in all the above constitutional provisions as originally drafted.

In 1976, Constitution 42nd Amendment expressly included environmental concerns in the Constitution for the first time (i.e. after nearly two and a half decade of independence). It added Art. 48A as Directive Principles in Part-IV. It imposed a general obligation on the State to protect and improve environment and specific obligation to safeguard its two vital components namely – forests and wildlife. However, this amendment stopped short of recognizing right to clean and healthy environment as a fundamental right. Consequently, the nature of obligation imposed thereby was though non-justiciable yet fundamental to the governance of the country.

Constitution entrusted the paramount task of its interpretation to judiciary and conferred independence thereon in order to enable it to fulfil this constitutional mandate. Judiciary innovatively interpreted fundamental rights to include many Directive Principles within their fold – right to clean and healthy environment emerged as classical instance as discussed in detail in Chapter-6.

42nd Amendment further imposed a three-fold fundamental duty u/A 51A (g) on every Indian citizen – firstly, to protect and improve natural environment; secondly, to protect and improve forests, lakes, rivers, and wildlife; and thirdly, to have compassion for living creatures.\(^4\) However, the nature of the obligation created by Fundamental duties is uncertain.

\(^4\) In fact, an entire Part IV-A was added to the Constitution containing ten Fundamental Duties on the basis of recommendations of Swarn Singh Committee in order to bring Indian constitution in consonance with Art. 29 (1) of UDHR.
Subjects which have direct or indirect relationship with the principle of sustainable development are spread over three lists (Union, State and Concurrent) in the seventh schedule.\(^{42}\) However, till date no step has been taken to add an entry ‘environmental protection’ in the concurrent list, enabling both federal government and states to initiate measures for environmental protection although such a step was canvassed by many.\(^{43}\)

73\(^{rd}\) amendment took democracy to the grass root level by providing for Panchayats and Gram Sabhas in Part-IX. Panchayats are to be constituted at the village, intermediate and district levels.\(^{44}\) Gram Sabha u/A 243 (b) consists of ‘persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level’. Constitution has envisaged Panchayats as institutions of self-government. In order to enable them to so act in true sense of the term, Art. 243G mandates the State Legislature to devolve powers and responsibilities upon Panchayats with respect to preparation of plans for economic development and social justice and implementation of schemes thereof including the ones in eleventh schedule. Both ‘economic development’ and ‘social justice’ are terms of wide ambit capable of including right to clean and healthy environment in the form of sustainable development. Further, eleventh schedule lists many matters which are integral component of right to clean and healthy environment like – land, irrigation, water management, watershed development, animal husbandry, fisheries forestry, drinking water, health and sanitation, women and child development, welfare of weaker sections particularly Scheduled Tribes (STs) and Scheduled Castes (SCs). Thus, Constitution envisage vital role for Panchayats and Gram Sabhas in the field of environment protection through sustainable development at the grass root level in India and accordingly empowers them. Further, protection granted to Scheduled Tribes for certain areas reserved for them under Part X (Art. 244 and 244A read with Schedule V) also implicitly serves the cause of environmental protection.

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\(^{43}\) ibid.

\(^{44}\) Art. 243B.
4.3.2. Statutory Framework

It is very interesting to note that certain legislations enacted during colonial rule, e.g., The Bengal Smoke Nuisance Act 1905, were not repealed even after independence. They continue to exist and that too despite comprehensive legislations covering the same issue. A government commission after undertaking survey of environment recommended in 1963 in favour of a law for combating water and air pollution although the government did not act upon it. Even at Stockholm Conference, India was reluctant because it felt (like many other developing countries) that the prescription by industrialized countries to protect environment was a disguised attempt to deprive them of the opportunity to develop faster.

Nevertheless, 1970s marked the beginning of a phase (largely triggered by Stockholm conference) during which Parliament enacted statutes exclusively dedicated to the cause of protecting, promoting, and conserving environment in India. Certain enactments have proved to be particularly relevant for the victims of violations of their right to clean and healthy environment by TNCs to redress their grievances. They are briefly discussed hereinafter –

4.3.2.1 The Water (Prevention and Control of Pollution) Act 1974 (Water Act)

Although Parliament passed Water Act in 1974, the process started nearly a decade before. In comparison to earlier efforts, it was a comprehensive effort. It was meant for ‘prevention and control of water pollution; maintaining or restoring

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46 Following statement of the then Indian Prime Minister at the conference adequately reflected the reluctance – ‘How can we speak to those who live in villages and in slums about keeping the oceans, rivers and the air clean when their own lives are contaminated at the source?’… ‘The rich countries may look upon development as the cause of environmental destruction, but to us it is one of the primary means of improving the environment of living, of providing food, water, sanitation and shelter, of making the deserts green and mountains habitable.’ See Man and Environment Indira Gandhi’s Speech at the Plenary Session of United Nations Conference on Human Environment, Stockholm (14 June 1972) <http://lasulawenvironmental.blogspot.in/2012/07/indira-gandhis-speech-at-stockholm.html> accessed 11 March 2017.

47 In 1965, the central government, on the recommendation of two advisory committees, drafted and circulated a water pollution control bill to the states. By 1969, six states had adopted enabling resolutions, and a bill was introduced in Parliament pursuant to article 252(1) of the Constitution. Parliament passed Water Act after significant revisions. By the time the Water Act came into force, twelve of the states had passed enabling resolutions, and the remaining states approved the Act soon thereafter. See Kilaparti Ramakrishna, ‘The Emergence of Environmental Law in the Developing Countries: A Case Study of India’ (1985) Vol. 12 Ecology L.Q. 907, 920.
wholesomeness of water’ and for establishing Boards for achieving the same.\textsuperscript{48} Water Act mandated Central government to constitute Central Pollution Control Board (CPCB)\textsuperscript{49} and State governments to constitute State Pollution Control Board (SPCB)\textsuperscript{50} and even Joint Boards\textsuperscript{51}. Composition of CPCB included representatives of State Boards, Central Government officials, non-officials representing agriculture, fishery or industry or trade, Central Government’s corporations and full time secretary.\textsuperscript{52} Similar composition was provided for SPCB with addition of representatives of local authorities.\textsuperscript{53}

Main function of CPCB was to promote cleanliness of streams and wells in different areas of the States.\textsuperscript{54} Further, it was inter alia required to advise central government; lay down standards for streams/wells; coordinate activities of state boards providing them technical assistance and resolving disputes between them; publish data and measures relating to water pollution problem; prepare manuals/codes/guides regarding treatment/disposal of sewage or trade effluents; and organize training for stakeholders.\textsuperscript{55} Functions of SPCB inter alia included laying down standards for sewage and trade effluents and for quality of receiving waters resulting from discharge of effluents; laying down standards of treatment of sewage and trade effluents to be discharged into any particular stream; inspecting sewage and trade effluents; evolving economical and reliable methods for treatment of sewage and trade effluents; advising state governments; and developing comprehensive programme for prevention, control or abatement of pollution of streams and wells and secure its execution.\textsuperscript{56}

Water Act empowered SPCB to obtain information\textsuperscript{57}; take samples of effluents\textsuperscript{58}; enter and inspect\textsuperscript{59}; impose prohibition on use of stream or well for disposing

\textsuperscript{49} ibid Sec. 3 (1).
\textsuperscript{50} ibid Sec. 4 (1).
\textsuperscript{51} ibid Sec. 13.
\textsuperscript{52} ibid Sec. 3 (2).
\textsuperscript{53} ibid Sec. 4 (2).
\textsuperscript{54} ibid Sec. 16 (1).
\textsuperscript{55} ibid Sec. 16 (2).
\textsuperscript{56} ibid Sec. 17 (1).
\textsuperscript{57} ibid Sec. 20.
\textsuperscript{58} ibid Sec. 21.
\textsuperscript{59} ibid Sec. 23.
polluting matter\textsuperscript{60} and impose restriction of new outlets and discharges\textsuperscript{61}. Water Act provided penal punishment for non-compliance with any direction of SPCB. Courts were not allowed to entertain suit unless the same was brought by or with the sanction of State Board.

It empowered the court to publish offender’s name and penalty imposed in newspapers or in any other manner in case of repeat conviction.\textsuperscript{62} Subsequent statutes pertaining to environment did not contain this provision. Nevertheless, such a provision can be a potent weapon against polluters particularly TNCs (for the global reputation they enjoy) in the contemporary information technology enabled world.

In order to increase the resources of CPCB and SPCBs, Parliament enacted Water (Prevention and Control of Pollution) Cess Act (Water Cess Act) in 1977. It levied cess on every person carrying on any specified industry and every local authority which used water for specified purposes. In the following year, Parliament strengthened their implementation powers by amending Water Act.

\textbf{4.3.2.2 The Forest (Conservation) Act 1980}

Concern of the colonial rulers regarding forests was expressed through enactment of the Indian Forest Act in 1927. Its objective was to ‘consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce’.\textsuperscript{63} Act did not define the term forest. State government was empowered to declare, by issuing a notification, any forestland or wasteland as a reserved forest giving it proprietary rights over the same.\textsuperscript{64} Government regulated activities in such reserved forest and all rights over land and to forest produce and water course could be exercised subject to such regulation.\textsuperscript{65}

Massive deforestation causing ecological imbalance and environmental deterioration led Parliament to enact Forest (Conservation) Act (FCA) in 1980. Sec. 2 prohibited State government from de-reserving forest, using any forest land for non-forest purpose, leasing out forest land to a private agency, or cutting naturally grown trees in

\begin{itemize}
  \item \textsuperscript{60} ibid Sec. 24.
  \item \textsuperscript{61} ibid Sec. 25.
  \item \textsuperscript{62} ibid Sec. 46.
  \item \textsuperscript{63} Preamble, The Indian Forest Act 1927.
  \item \textsuperscript{64} P Leelakrishnan, \textit{Environmental Law in India} (2\textsuperscript{nd} edn, LexisNexis Butterworths 2005) 14.
  \item \textsuperscript{65} ibid 218.
\end{itemize}
forest land for the purpose of using it for reafforestation.\textsuperscript{66} Breaking up or clearing any forest land for reafforestation was permitted but not for any other purpose.\textsuperscript{67} Further, breaking up or clearing any forest land for cultivating tea, coffee, spices, rubber, palms, oil-bearing plants, horticulture crops or medicinal plants was also considered as ‘non-forest purpose’ in this regard.\textsuperscript{68} However, activities relating to forest and wildlife conservation, development and management (dams, pipelines, bridges and culverts, check-posts, wireless communications and other like purposes) were specifically excluded.\textsuperscript{69} Sec. 3 empowered Central Government to constitute a committee to advise it regarding granting approval u/s 2 and any other matter relating to forest conservation which may be referred to Central Government. Central government constituted Forest Advisory Committee (FAC) for this purpose which according to Rule 3 consists of Chairperson (Director General of Forests), official members [Additional Director General of Forests, Additional Commissioner (Soil Conservation) and Inspector General of Forests (Forest Conservation)] and three non-official members (one each being expert in mining, civil engineering and development economics).

National Forest Policy developed in 1988 emphasised that diversion of forest land for non-forest purposes be subjected to ‘the most careful examination by specialists from the standpoint of social and environmental costs and benefits.’\textsuperscript{70} It provided that conservation of trees and forests should be the foremost consideration in mining and industrial development and projects entailing such diversion should provide in their investment budget at least funds for regeneration/compensatory afforestation.\textsuperscript{71}

4.3.2.3 The Air (Prevention and Control of Pollution) Act 1981 (Air Act)

With the aim of tackling the problems in the earlier laws relating to air pollution\textsuperscript{72}, Indian government constituted Tiwari Committee (Empowered Committee) in

\textsuperscript{66} Sec. 2, The Forest (Conservation) Act 1980.
\textsuperscript{67} ibid Explanation to Sec. 2.
\textsuperscript{68} ibid.
\textsuperscript{69} ibid.
\textsuperscript{71} ibid.
\textsuperscript{72} For instance, lack of standards; lax enforcement agencies; inadequate monitoring and surveillance capabilities; and ill-informed public opinion etc.
February 1980 to review environmental protection regime in India and to recommend legislative and administrative measures. It pointed out various lacunae – outdated regime; absence of policy objectives; mutually inconsistency; weak implementation machinery; lack of procedure to review their efficacy. It inter alia recommended – review and reform of some Central and State Acts; enactment of new legislations for hitherto uncovered fields; introduction of ‘environmental protection’ in concurrent list of seventh schedule of Indian Constitution. Further, Indian government established a separate Department of Environment on 1 November 1980 as a focal agency for planning, promotion and coordination of environmental programmes.

In 1981, Parliament enacted Air Act ‘to provide for the prevention, control and abatement of air pollution’ and establishing boards for achieving the same. It followed the same model as that of the Water Act but unlike Water Act, it was the first environmental legislation through Art. 253 of the Indian Constitution without the consent of the States. Further, unlike Water Act which was enacted before Stockholm conference, it explicitly referred to implementing the decisions taken thereat.

Primary function of the Central Air Board was to improve quality of air and to prevent, control or abate air pollution. Other functions inter alia included advising central government; laying down air quality standards; coordinating activities of state boards providing them technical assistance and resolving disputes between them; carrying or sponsoring investigations and research regarding air pollution problems; publishing data and measures relating to air pollution problem; and organizing training for stakeholders. Function of State Boards inter alia included laying down air pollutants emission standards in consultation with Central Board; inspecting industrial plants and giving necessary orders for air pollution control; inspect air pollution control areas and assess air quality therein and take steps accordingly; advising state governments; and developing comprehensive air pollution control programmes.

74 ibid Statement of Objects and Reasons.
75 ibid Sec. 16 (1).
76 ibid Sec. 16 (2).
77 ibid Sec. 17 (1).
Air Act entrusted the functions of Central and State Air boards constituted under it to the Central and State Water Boards constituted under Water Act.\textsuperscript{78} State Government was empowered, in consultation with SPCBs, to declare air pollution control areas (distinguishing feature of Air Act);\textsuperscript{79} issue instructions for ensuring standards for emission from automobiles\textsuperscript{80}. SPCBs were empowered to give prior consent for establishing or operating any industrial plant in air pollution control area\textsuperscript{81}; lay down standards for discharge of any air pollutant\textsuperscript{82}; enter and inspect\textsuperscript{83}; and take samples\textsuperscript{84}. As in the case of Water Act, Air Act provided penal punishment for violations of its provisions.

Since Air Act was based on the same model as that of the Water Act both suffered from similar shortcomings - Boards hardly invoked the powers to alter/vary the conditions imposed at the time of giving consent;\textsuperscript{85} provision of deemed consent benefitted polluter due to under-staffed boards;\textsuperscript{86} excluding chairman and Secretary, no educational qualifications/expertise on environmental matters was prescribed for nominee members;\textsuperscript{87} government appointed officials were overburdened with their own duties in their parent department leaving them hardly any time to focus on their mandate in the boards;\textsuperscript{88} government appointed members served at its pleasure creating conflict of interests;\textsuperscript{89} government was empowered to give binding direction to the Board and may even supersede it;\textsuperscript{90} both government (polluter itself) and private industry were over represented in Board but NGOs did not get any representation at all;\textsuperscript{91} non-recognition of public participation in Board’s decision whether at inquiry stage or permit granting stage or appellate stage;\textsuperscript{92} boards could, at the most, institute a prosecution in case of violations which was uncertain and slow.

\begin{itemize}
\item \textsuperscript{78} ibid Sec. 3 and 4.
\item \textsuperscript{79} ibid Sec. 16.
\item \textsuperscript{80} ibid Sec. 20.
\item \textsuperscript{81} ibid Sec. 21.
\item \textsuperscript{82} ibid Sec. 22.
\item \textsuperscript{83} ibid Sec. 24.
\item \textsuperscript{84} ibid Sec. 26.
\item \textsuperscript{86} ibid 108.
\item \textsuperscript{87} ibid.
\item \textsuperscript{88} ibid.
\item \textsuperscript{89} ibid 109.
\item \textsuperscript{90} Sec. 61 and 62, The Water (Prevention and Control of Pollution) Act 1974; Sec. 47 and 48, The Air (Prevention and Control of Pollution) Act 1981.
\item \textsuperscript{91} Abraham and Rosencranz (n 85) 112.
\item \textsuperscript{92} ibid 110.
\end{itemize}
and rarely resulted in any convictions;\textsuperscript{93} prosecutions, even when successful, resulted in only modest fines.\textsuperscript{94}

Despite above criticism, enactment of both Water and Air Act by Parliament within a gap of nearly seven years, was an encouraging development. To begin with, they created a legal framework which can be further enriched in the light of the experience gained by its functioning. Nevertheless, provision mandating deemed consent was a clear indication of the legislative priority in which industrial development trumped over the right to clean and healthy environment.

\subsection*{4.3.3 Right to Clean and Healthy Environment: Post-Bhopal Gas Leak Disaster}

Bhopal Gas Leak Disaster shocked the nation while the above discussed regulatory framework was in force. At the international level, it intensified the debate over the accountability of TNCs. But back home, it threw unprecedented challenges to Indian law making, its interpretation and enforcement. It exposed the frailties of Indian legal system as a whole and environmental law in particular. Parliament was compelled (partly due to judicial verdicts given in the course of litigation relating to the Bhopal Gas Leak Disaster) to respond to the objective of environmental protection more seriously and comprehensively. It necessitated a shift in approach of law towards environmental protection. The shift became evident in the subsequent years either in the form of enactment of new statutes and rules thereunder or amendments thereto. Indian Government established Ministry of environment and Forests (MoEF) by annexing Departments of Forest and wildlife in 1985.

\subsubsection*{4.3.3.1 The Environment (Protection) Act 1986 (EPA)}

Parliament responded through enacting the Environment (Protection) Act 1986 (EPA) – a comprehensive umbrella legislation dealing with environment in its entirety.\textsuperscript{95} Compared to Water and Air Acts, EPA was a shorter piece of legislation but an enabling enactment. This was a major shift in legislative approach towards

\footnotesize{\textsuperscript{93} ibid.}
\footnotesize{\textsuperscript{94} ibid 107.}
\footnotesize{\textsuperscript{95} EPA was passed hastily in Parliament just before adjournment of Lok Sabha and partly to ensure that India fulfilled conditions stated by US Judge Keenan in Bhopal Gas Leak Disaster. See. Susan G. Hadden, ‘Statutes and Standards for Pollution Control in India’ (1987) Vol. XXII (16) EPW 709, 716.}
environment compared to the segmented and piecemeal approach adopted earlier. Definition of the term ‘environment’ itself is indicative of its broad ambit.\(^96\)

Sec. 3 (1) empowers Central Government generally to take all measures deemed necessary or expedient for protecting and improving the quality of environment and preventing, controlling and abating environmental pollution. Further, Sec. 3 (2) empowers Central Government \(\text{inter alia}\) to – lay down standards for environmental quality, emission and discharge of environmental pollutants, safeguards for prevention of accidents that may cause environmental pollution, safeguards for handling of hazardous substances; restrict areas for industrial operations; examine processes, substances etc. that are likely to cause environmental pollution; inspect and give directions for prevention, control and abatement of environmental pollution; coordinate activities of state governments; conduct investigations and research relating to problems of environmental pollution; prepare manuals etc. relating to prevention, control and abatement of environmental pollution. Thus, Sec. 3 concentrated power in the hands of Central Government.\(^97\)

It prohibits a person to discharge or emit any environmental pollutant exceeding the prescribed standards.\(^98\) Further, it permits a person to handle hazardous substances only in accordance with the prescribed procedure. It also confers upon Central Government the power of entry and inspection\(^99\) and of taking samples\(^100\). Central Government is mandated to establish environmental laboratories \(u/s\) 12.

In 1992, Rule 14 was inserted in the Environment (Protection) Rules 1986 mandating every person carrying on an industry, operation or process requiring consent under Water Act or Air Act or both or authorisation under Hazardous Waters (Management and Handling Rules) 1989 to submit an environmental statement for financial year ending on 31 March to SPCB on or before 30 September in the prescribed format. However, there was no requirement for uploading it on the website leading to ambiguity in the information provided as well as not facilitating comparison with

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\(^96\) The term ‘environment’ \(u/s\) 2 (a) includes ‘water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property’.

\(^97\) Leelakrishnan (n 64) 172.


\(^99\) ibid Sec. 10.

\(^100\) ibid Sec. 11.
statements filed earlier. Instead of manual submission, such statement should mandatorily be submitted online through a central server facilitating tracking of such reports as well as maintenance of their archives.¹⁰¹ Such statement should be available at the website of the CPCB, concerned state board as well as that of the polluter company. Further, the data provided by the larger industries should be audited by independent agency selected at random by CPCB because such statements are prepared by independent agencies which are themselves hired by such industries themselves leading to conflict of interests generating favourable statements.¹⁰²

EPA also provides for enhanced punishment in comparison to Water and Air Acts. EPA was referred to as a barking dog that never bites for various reasons – definition clauses excludes many important means of environmental pollution like heat, radiation, plasma, bacteria etc.¹⁰³ Sec. 24 (2) provides that in case an act/omission is punishable under EPA as well as any other Act, then such act/omission will be punished under such other Act instead of EPA.

Being an enabling enactment, Rule making power conferred upon Central Government u/s 3 has been frequently invoked to develop regulatory framework to enforce right to clean and healthy environment through delegated legislations.¹⁰⁴

1988 Amendment

Parliament took inspiration from US Clean Air Act¹⁰⁵ and inserted Sec. 49 in the Water Act. Sec. 49 (1) permits Court to take cognizance of any offence on a complaint made by any person after giving 60 days notice of his intention to make complaint. While on one hand it opened avenue for citizens suit thereby strengthening the possibility of enforcement of EPA, on the other hand, it warned in advance the

¹⁰² ibid.
¹⁰³ Leelakrishnan (n 64) 173.
¹⁰⁵ Hadden (n 95) 717.
polluting industry to cover up to avoid litigation. Further, Sec. 49 (2) mandates the Board to provide relevant reports in its possession to the complainant. However, the Board may refuse to do so in public interest. Such reports will enable to complainant to successfully prove its contentions before the Court.\textsuperscript{106} Sec. 33A empowers the Board to direct even closure of any industry. Earlier, Board had to wait for Court’s order for restraining a person likely to cause pollution. Sec. 39 requires Central and State Board to submit annual report to Central and State Government respectively, within first four months from the first date of the previous financial year which should, in turn, lay the same before legislature within nine months to enable it to deliberate thereon and regulate the working of Boards.

Indian government came out with Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms Genetically engineered organisms or cells 1989 under EPA. According to the World Health Organisation (WHO), GMO means ‘organisms (i.e. plants, animals or micro-organisms) in which the genetic material (DNA) has been altered in a way that does not occur naturally by mating and/or natural recombination… It allows selected individual genes to be transferred from one organism into another, as also between nonrelated species.’\textsuperscript{107} GM food refers to the foods produced from or using GM organisms.\textsuperscript{108} A statutory regulatory body (Genetic Engineering Approval Committee, GEAC)\textsuperscript{109} was constituted under the Rules. GEAC is responsible for approval of proposals relating to release of genetically engineered organisms and products into the environment including experimental field trials.

4.3.3.2 New Economic Policy: Paradigm Shift

India embarked on a new path when it adopted New Economic Policy (NEP) in 1991. It caused an express as well as implied tectonic shift tilting the balance significantly in favour of development through the route of foreign investment as discussed hereinafter.

\textsuperscript{106} Leelakrishnan (n 64) 144.
\textsuperscript{108} ibid.
\textsuperscript{109} It was renamed as Genetic Engineering Appraisal Committee without any change in its mandate. See Decisions taken in the 99th Meeting of the Genetic Engineering Approval Committee (GEAC) (17 February 2010) <http://www.envfor.nic.in/divisions/csurv/geac/decision-feb-99.pdf> accessed 10 June 2017.
4.3.3.3 The Public Liability Insurance Act 1991 (PLIA)

Bhopal Gas disaster showed vulnerability of not only workers working in the hazardous industries but also the innocent people living in their vicinity in case of an accident. It also showed that the corporation concerned in such a situation may be grossly undercapitalized not being in a position thereby to adequately and promptly compensate the victims. Victims may be poor and accident would have further impoverished them through multitude of ways. Such people, when faced with such unfortunate set of circumstances, are left with only one option i.e. to take recourse to the courts. But when they are pitted against the mighty TNCs, litigation will be deliberately prolonged – wherein while the TNCs will hire best of the legal minds available in India, victims may find engaging an ordinary advocate very difficult to afford. Taking cognizance of the above-mentioned constraints faced by the Indian people, Parliament enacted Public Liability Insurance Act, 1991 (PLIA) with the objective of ‘providing immediate relief to persons affected by accident occurring during handling of hazardous substance’. 110

Sec. 3 makes the owner absolutely liable to relief in case of death or injury to any person (other than a workman) or damage to property caused by an accident. Injury includes both permanent total and permanent partial disability or sickness caused by an accident. The term ‘accident’ is defined u/s 2 (a) as ‘accident involving fortuitous or sudden or unintentional occurrence while handling any hazardous substance resulting in continuous, intermittent or repeated exposure to death, of or injury to, any person or damage to any property but does not include an accident by reason only of war or radio-activity.’ Sec. 2 (g) defines the term ‘owner’ in case of a company as any person who owns or controls handling any hazardous substance at the time of accident and includes its directors, managers, secretaries or other officers directly in charge of and is responsible to company for the conduct of its business.

Sec. 4 requires every owner to take out one or more insurance policies (renewed from time to time) to insure himself against such liability before starting to handle any hazardous substance. Such insurance policy shall not be less than the paid-up capital of the undertaking engaged in handling of hazardous substance and owned and

controlled by the owner and not more than ₹ 50 crores. Maximum aggregate liability of insurer to pay relief under an award to several claimants shall not exceed ₹ 5 crores and in case of more than one accident during the term of the policy or one year (whichever is less) shall not exceed ₹ 15 crores.\textsuperscript{111} However, in no case the liability of insurer can exceed amount specified in terms of contract of insurance in the insurance policy. According to Sec. 7, Environment Relief Fund (ERF) is required to be established by Central Government for the purpose of paying relief. Any liability in excess of the amount in insurance policy shall be payable out of the ERF.\textsuperscript{112} Further, if the award exceeds the total of the amount of insurance and the relief fund, such shortfall will be paid by the owner.\textsuperscript{113} Owner is required to pay to insurer, a sum equal to the amount of premium, for being credited to ERF. Insurer is required to remit the same therein along with the premium.

Claim of relief can be filed u/s 6 by the injured person or owner of damaged property or legal representatives of deceased person or any duly authorized agent thereof. However, any application filed after five years of occurrence of accident will become time barred. According to Sec. 8, right to claim relief for death or injury to person or damage to property is in addition of any other right to claim compensation under any other applicable law. In case owner is also liable to pay compensation under any other law, amount of such compensation will be accordingly reduced.

India implemented the lessons learnt from Bhopal Gas Leak Disaster (also recommended by Supreme Court in the litigation) through PLIA. It marked a very welcome development to make TNCs accountable who may deliberately adopt the business strategy of leaving their Indian subsidiaries undercapitalized. However, on the flip side, accidents causing serious environmental damage can occur even in a non-hazardous industry which is out of the purview of PLIA.

\textbf{4.3.3.4 Environment Impact Assessment (EIA)}

EIA is globally recognized as a crucial and integral component of right to clean and healthy environment. Indian Government issued EIA notification u/s 3 (1) and 3 (2)

\textsuperscript{111} Rule 10 (1), The Public Liability Insurance Rules 1991.
\textsuperscript{112} ibid 10 (3).
\textsuperscript{113} ibid.
(v) of EPA for the first time on 27 January 1994.\textsuperscript{114} It mandated that any new project listed in Schedule-I\textsuperscript{115} or any expansion or modernization of an activity (causing pollution load to exceed the existing one), can be undertaken only after grant of approval by the Central Government in accordance with the EIA. Project proponent need to submit application along with Project Report including EIA Report/Environment Management Plan in proforma specified in Schedule-II to MoEF. Impact Assessment Agency (IAA) will assess it and may consult a Committee of Experts\textsuperscript{116} (constituted by IAA) in case deemed necessary. In order to discharge its functions, such Committee is empowered to inspect site at any time prior to, during or after commencement of project operations. IAA will make recommendation on the basis of documents, data collected during visits to sites and interaction with affected population and environmental groups. All documents (reports summary, recommendation and conditions) will be provided to the concerned parties or environmental groups on request but subject to consideration of public interest. IAA may ask for public comments within thirty days of the receipt of proposal through conducting public hearings after giving thirty days notice of such hearings. Public hearings may be directed in case of projects involving severe environmental ramifications or large scale displacements.\textsuperscript{117} For this purpose, subject to public interest, access will be provided to public to summary of reports/environmental Management Plans. EIA must be completed within 90 days from receipt of requisite documents and completion of public hearing and decision thereof must be conveyed within thirty days thereafter. Clearance granted on the basis of such EIA will be valid


\textsuperscript{115} Schedule-I broadly covered many industries. A few broad categories included - Nuclear Power; River Valley projects; Ports, Airports; Petroleum Refineries; Chemical Fertilizers; Pesticides; Petrochemical complexes and intermediates; Bulk drugs and Pharmaceuticals; oil and gas (exploration, production, transportation and storage); Asbestos; metallurgical industries, Mini Steel Plants; tourism projects between 200m--500 meters of High Tide Line or at locations with an elevation of more than 1000 meters with investment of more than \textcurrency{5} crores; Thermal Power plants; Mining projects (major minerals) with leases more than 5 hectares; Highway Projects; Pulp, paper and newsprint; Dyes; Cement etc. ibid.

\textsuperscript{116} Schedule-III prescribes composition of Committee of Experts. It consists of 15 members. While Chairman is an outstanding and experienced ecologist or environmentalist or technical professional with wide managerial experience, its members include experts in the field of eco-system management; air/water pollution control; water resource management; flora/fauna conservation and management; land use planning; social sciences/rehabilitation; project appraisal; ecology; environmental health; subject area specialists; representatives of NGOs/persons concerned with environmental issues. ibid.

\textsuperscript{117} ibid Explanatory Note.
for five years and till it is not granted, no construction work relating to setting up of project will be undertaken. Application rejected for insufficient data and plans may be reconsidered on submission of complete data but will be summarily rejected in case of resubmission of insufficient data and plans. Project authorities were required to submit half-yearly report to IAA so that it can monitor implementation of its recommendations which in turn will make compliance reports publicly available subject to public interest. In certain specific cases, project proponents were permitted to furnish to IAA a Rapid EIA report based on one season data (excluding monsoon season) since Comprehensive EIA report will normally take at least one year to prepare. Comprehensive EIA report was to be submitted later and that too only if asked by IAA. IAA was empowered to even dispense with EIA if project was unlikely to cause significant environmental impacts.\(^{118}\)

Public hearing under 1994 EIA notification was discretionary (to be undertaken if regarded necessary by IAA). However, EIA process was amended in 1997 to make conduct of public hearing mandatory.\(^ {119}\) Application under the new process was required to be accompanied by a project report that will inter alia include details of public hearing and the procedure for conducting the same was provided in Schedule-IV attached thereto.\(^ {120}\)

**EIA Notification 1997**

MoEF issued a new EIA notification on 14 September 2006 replacing the 1994 version which had already undergone 12 amendments.\(^ {121}\) This notification was drafted with better clarity in comparison to the 1994 EIA notification.\(^ {122}\) It categorized projects and activities into two broad categories (specified in Schedule-I) – Category ‘A’ and ‘B’ depending upon spatial extent of potential impacts and potential impacts on human health and natural and man-made resources. While the former required

\(^{118}\) ibid.
\(^{120}\) ibid.
prior Environmental Clearance (EC) from Expert Appraisal Committee (EAC)\textsuperscript{123}, latter require it from State/Union Territory Environment Impact Assessment Authority (SEAC)\textsuperscript{124}. Grant of Prior EC is a four-staged process –

a) \textit{Stage (1) Screening (only for Category ‘B’ projects and activities)}

SEAC will determine whether project/activity requires further environmental studies for preparation of an EIA for its appraisal prior to grant of EC depending on nature and location specificity of project. Projects requiring EIA report will be termed Category ‘B1’ and the ones not requiring EIA will be termed Category ‘B2’.

b) \textit{Stage (2) Scoping}

EAC for Category ‘A’ projects/activities and SEAC for Category ‘B’ will determine detailed and comprehensive Terms of Reference (ToR) addressing relevant environmental concern for preparing EIA Report. ToR so determined will be conveyed to applicant within 60 days from receipt of application. In case of default in non-finalisation or non-conveyance of such ToR, ToR suggested by the applicant will be deemed as final ToR approved for EIA studies. Approved ToR will be displayed on MoEF’s as well as SEIAA’s

\textsuperscript{123} EAC membership is restricted to Experts with the requisite expertise and experience in the following fields /disciplines - Environment Quality Experts; Sectoral Experts in Project Management; EIA Process Experts; Risk Assessment Experts; Life Science Experts in floral and faunal management; Forestry and Wildlife Experts; and Environmental Economics Expert with experience in project appraisal. Only in case of non-availability of persons fulfilling the criteria of “Experts”, Professionals in the same field with sufficient experience may be considered for membership. Its membership cannot exceed 15. Its chairperson will be an outstanding and experienced environmental policy expert or expert in management or public administration with wide experience in the relevant development sector.

EAC and SEAC comprises only professionals and experts. A professional must have at least – 5 years of formal University training leading to MA/MSc Degree; 4 years of training leading to B.Tech/B.E./B.Arch. degree; other professional degree (for instance, law), 5 years of University training and prescribed practical training; Prescribed apprenticeship/article ship and pass examinations conducted by concerned professional association (e.g. Chartered Accountancy ); a University degree, followed by 2 years of formal training in a University or Service Academy (e.g. MBA/IAS/IFS). Experience gained in their respective field will be counted. An expert should possess in addition to the above, at least 15 years of relevant experience in the field, or with an advanced degree (e.g. Ph.D.) in a concerned field and at least 10 years of relevant experience. Maximum tenure of a Member, including Chairperson, shall be for 2 terms of 3 years each. See ibid Appendix-VI

\textsuperscript{124} Comprise three Members including a Chairman and a Member-Secretary to be nominated by the State Government or the Union territory Administration. Other two Members shall be either a professional or expert fulfilling eligibility criteria given in Appendix-VI. One member who is an expert in EIA process shall be its chairman. State Government or Union territory Administration shall forward the names to Central Government which will constitute SEIAA within thirty days of the date of receipt of the names. Tenure of non-official Members and the Chairman will be three years. All its decisions will be taken unanimously. ibid.
website. Regulatory authority may reject prior EC at this stage itself, if so recommended by EAC/SEAC and such decision along with reasons must be communicated to applicant within 60 days of receipt of application.

c) Stage (3) Public Consultation

It is mandatory for all category ‘A’ and Category ‘B1’ projects/activities to undertake Public Consultation except the ones relating to – modernization of irrigation; located in industrial estates/parts approved by concerned authorities and which are not disallowed in such approvals; Roads and Highways expansion not involving further acquisition of land; building/construction/area development projects and townships; Category ‘B2’; national defence and security or other strategic considerations.

Public consultation consists of two essential components – first, public hearing at the site or in its close proximity for determining concerns of local affected persons and conducted by SPCB/UTPCC in accordance with Appendix-IV and second, getting responses in writing from other concerned persons having plausible stakes in environmental aspects of project/activity. Member Secretary of the SPCB/UTPCC will determine the date, time and venue of public hearing within 7 days of receipt of draft EIA Report from the project proponent. Once fixed, it can only be changed in exceptional circumstances and that too on recommendation of District Magistrate. District Magistrate or his representative not below the rank of Additional District Magistrate assisted by representative of SPCB/UTPCC will supervise and preside over the entire public hearing process. SPCB or UTPCC will video record the entire proceedings and its copy will be enclosed with public hearing proceedings. Attendance of all present at the venue will be noted and annexed with the final proceedings. Every person present at the venue will be given an opportunity to seek information or clarification. Summary of hearing proceedings as recorded by SPCB’s representative will be read over to the audience explaining its content in vernacular language at the end of the proceedings and the District Magistrate or his representative will sign and forward the agreed minutes to SPCB/UTPCC on the same day. A statement of
the issues raised by the public along with applicant’s comments will also be prepared both in English and local language and be annexed to proceedings.

After conducting such public hearing, SPCB/UTPCC will send its proceedings to regulatory authority within 45 days of applicant’s request. In case of their failure to do so, regulatory authority will engage another public agency/authority within a further period of 45 days. If such public agency/authority reports impossibility of conducting public hearing which will facilitate free expression of views of concerned local persons, regulatory authority may decide that public hearing need not include public hearing. Written responses will be solicited by the SPCB/UTPCC through placing Summary EIA report prepared by applicant along with copy of application on its website within 7 days of receipt of written request for arranging public hearing. Regulatory authority will ensure wide publicity through other media. Even Draft EIA report will also be made available for inspection on a written request from any concerned person at a notified place for public hearing.

Applicant is required to address all material environmental concerns expressed in the course of the above process and accordingly change draft EIA and Environment Management Plan (EMP) and submit final EIA to regulatory authority for appraisal.

d) **Stage (4) Appraisal**

EAC/SEAC will appraise the final EIA report and proceedings of public consultations in a transparent proceeding to which it will invite applicant for providing required clarifications. EAC/SEAC will make categorical recommendations to regulatory authority, either for granting prior EC subject to certain terms and conditions or rejecting the same, stating the reasons thereof. Appraisal must be completed within sixty days of receipt of final EIA report and the same must be placed before competent authority for a final decision within next fifteen days.
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Regulatory authority will consider such recommendations and convey its decision to applicant within 45 days of receipt of such recommendation (145 days from receipt of final EIA Report and 105 days from receipt of complete application in case EIA is not necessary). Normally, regulatory authority will accept such recommendation. In case it disagrees, it may request reconsideration by EAC/SEAC stating the reasons for disagreement, within 45 days of receipt of such recommendation. EAC/SEAC will convey its views after reconsideration within sixty days. After considering such views, the decision of the regulatory authority will be final and the same will be conveyed to the applicant within next thirty days. In case of non-conveyance, EC will be regarded as granted/denied in terms of the final recommendation of EAC/SEAC.

EC so granted will be valid for 10 years in case of river valley projects, 30 years in case of project life estimated by EAC/SEAC for mining projects, and 5 years in case of all other projects/activities. Any material deliberate concealment, submission of false or misleading information or data regarding screening or scoping or appraisal or decision on application will result in cancellation of prior EC subject to granting personal hearing to applicant.

It is mandatory for the project management to submit half-yearly compliance reports regarding of terms and conditions attached to prior EC on 1st June and 1st December of each calendar year respectively. Decision of regulatory authority, final recommendations of EAC/SEAC and compliance report will be public documents.

EAC/SEAC will consider applications seeking prior environmental clearance for expansion or modernization or change of product mix in existing projects in 60 days. It will decide on necessary due diligence including preparation of EIA and public consultations and accordingly appraise the same.

The above notification has been amended on many occasions thereafter in order to enlarge its ambit and to further streamline the process of facilitating foreign
investments by TNCs. As a result, now the process prescribes in detail the procedure to be followed meticulously before a project is granted EC. However, experts have pointed out that the whole process is ridden with following problems –

a) EIA consultants are hired by project proponents themselves leading to conflict of interests vitiating thereby EIA Report itself;

b) Voluntary system of accreditation of EIA consultants established by Quality Council of India (QCI) for conducting EIA not proving adequate;

c) Transparency and fairness of Public Hearing in terms of timing of hearings, selection of venue thereof as well as use of force, coercion and threat;

d) Showing of final EIA report only to regulatory agency and its expert committees and to no one else;

e) Selection of heads of the committees suffer from conflict of interest e.g. chairpersons of various committees constituted to conduct EIA of different river-valley and mining projects in 2005 also served on BoD of the very companies which were engaged in construction of power plants and mine development;

f) EIA process itself becoming litigation prone;

g) Conducting EIA at a stage when TNCs like any other foreign investors has already invested time, money and personnel into their projects and government has bound itself through various contracts giving impression of delay. Accordingly, the focus has shifted globally from EIA to Strategic Impact Assessment (SIA).

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126 See Manju Menon and Kanchi Kohli, ‘Environmental Regulation in India Moving ‘Forward’ in the Old Direction’ Vol. 1 (50) EPW 20, 21.
127 ibid.
128 ibid.
129 ibid.
130 ibid.
131 Dzogu (Sikkim); Siang (Arunachal Pradesh) – PH cancelled 14 times; Bastar (Chhattisgarh); Kutch (Gujarat).
132 Menon and Kohli (n 126) 22.
133 ibid.
h) EIA formats ignore site specificities, knowledge and views of development of local people.134
i) Panel for Public Hearing (PH) consists of only officials and no local community’s representative.135
j) Lack of any mechanism to ensure project proponent’s effective response to the questions raised during the PH.136
k) No quorum is prescribed for PH.137
l) Lack of mechanism to ensure that draft EIA reports are made on basis of ToRs. Further, final EIA reports are not available in public domain to ascertain if and how questions and concerns raised during public hearings are addressed.138
m) Non-redressal of issues raised during PH will not only shake trust in the project concerned but also in future projects.139
n) Deeming provisions require meticulous work by all the bodies/committees constituted to perform EIA. A failure in performance of such bodies will mean failing environment. In fact, work should be performed in such a manner that the necessity of invoking deeming mechanism is never felt.

EIA is the key process which helps resolve the long felt conflict between development and environment. But the above-mentioned lecuna in EIA process lead to piling up of cases before the courts which in turn are sent to expert committees for review causing further delays in the project. Ease of doing business does not mean short circuiting the EIA process and thereby breach the right to clean and healthy environment. In true sense, it means strengthening the machinery established to execute the task meticulously and that too in a time bound manner. Further, environmental activists and NGOs are the ones who red flag the issues and therefore, should be encouraged and their concerns responded too on merits instead of drubbing them aside on the ground of furthering the agenda of the foreign powers. Bypassing EIA process or otherwise weakening it will have the effect of rendering Sustainable

134 ibid.
136 ibid.
137 ibid.
138 ibid.
139 ibid.
Development meaningless. A detailed and meticulous EIA, implemented in its true letter and spirit, is our best guarantee for our marching forward towards the objective of achieving Sustainable Development.

However, another tool which takes care of many shortcomings of EIA has emerged in the form of Strategic Environment Assessment (SEA). It is a process which provides for systematic analysis of effects of development projects on environment. What is important is that while former is undertaken at the end of decision making cycle, latter is undertaken at the earlier stage of decision making cycle, when major alternatives are still open. In this manner, SEA helps in avoiding a situation wherein EIA has to be diluted since the project proponent has already invested huge amount of money in the project.

4.3.3.5 The Biological Diversity Act 2002

Biodiversity that we see around us is the culmination of millions of years of evolution of life on earth and its conscious preservation by our ancestors. However, it presently faces serious threats from multitude of sources including business operations undertaken by TNCs. India being party to CBD, Parliament enacted the Biological Diversity Act in 2002 with the objective of ‘conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge’. Sec. 2 (b) defines biological diversity as ‘variability among living organisms from all sources and the ecological complexes of which they are part, and includes diversity within species or between species and of eco-systems’. Act provides mechanism for fair and equitable benefit sharing to be determined by National Biodiversity Authority (NBA) in case of commercial utilization inter alia by body corporate not incorporated/ registered in India or incorporated/registered in India but having non-Indian participation in its share capital or management. Such benefit sharing can take various forms mentioned u/s 21 (2).

Chapter IV (Sec. 22-25) provides for constitution of State Biodiversity

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142 Joint ownership of IPRs to benefit claimers or NBA (in case they are not identifiable; transfer of technology; selecting location of production, research and development units in areas to facilitate better living standards of benefit claimers; associating benefit claimers, local people and Indian scientists with research and development in biological resources and bio-survey and bio-utilization;
Board and its powers and functions. Thus, TNCs constitute integral stakeholders under the scheme of the Act.

4.3.3.6 The Right to Information Act 2005 (RTIA)

The Right to information Act was enacted due to considerable pressure from NGOs working at the grass-root level in India. There is hardly any aspect of governance in India which RTIA has not impacted since its enactment. In fact, it has emerged as a key instrument for transforming the manner in which India is governed. Although it does not concern directly with the right to clean and healthy environment, yet it has been effectively used by social activists towards the cause of environmental protection. In this sense, RTIA has indirectly strengthened the regulatory framework for the right to clean and healthy environment.

Sec. 3 confers right to information upon all citizens. Sec. 4 envisages a governance regime under which a public authority ensures that all the information is placed in the public domain *suo motu*. The term ‘public authority’ u/s 2 (h) means any ‘authority or body or institution of self-government established or constituted’ by or under Indian Constitution or any other law made by Parliament or State legislature or notification/order of appropriate government. It includes any body owned, controlled or substantially financed directly or indirectly by government funds. Sec. 5 requires every public authority to appoint Central Public Information Officer (CPIO) or State Public Information Officer (SPIO) as the case may be. A citizen can make an application in writing u/s 6 specifying the particulars of information sought without specifying the reason for seeking information and without revealing personal details. Only those personal details are required to be given as are necessary to contact him. Sec. 7 mandates the CPIO or SPIO to provide information (as expeditiously as possible) or reject the request specifying reasons within a period of 30 days from the receipt of request. However, information concerning life or liberty of a person must be provided within 48 hours from the receipt of request. Failure to specify reasons is deemed as refusal. In case of refusal, CPIO or SPIO is required to inform the applicant reasons for rejection, duration for filing appeal and particulars of the appellate authority.
Sec. 8 exempts certain kinds of information from the purview of the Act which *inter alia* includes – information relating to commercial confidence, trade secrets or intellectual property whose disclosure will harm competitive position of third party, information acquired by a person in his fiduciary relationship. However, even such exempted information can be disclosed upon the satisfaction of competent authority that larger public interest requires such disclosure. Further, Sec. 24 exempts certain intelligence and security organizations specified in Schedule II from the purview of the Act.

RTIA provides appellate procedure u/s 19. Any person aggrieved by the decision of the CPIO or SPIO may file appeal within 30 days of the receipt of decision to officer senior in rank to such CPIO or SPIO as the case may be. Second appeal from the above decision is permitted within 90 days to Central Information Commission (CIC) and State Information Commission (SIC) as the case may be and its decision is binding. However, the onus of proving that the request was justifiably denied will be on the concerned CPIO or SPIO.

In case a CPIO or SPIO refuses to accept application without reasonable cause or does not furnish information within the time limit or denies request for information *mala fide* or knowingly gives incorrect, incomplete or misleading information or obstructs furnishing of information, Sec. 20 provides penalty for ₹ 250 per day till the receipt of application or furnishing of application, subject to maximum limit of ₹ 25,000. Further, in such a situation, CIC/SIC may recommend disciplinary action against the concerned CPIO/SPIO under relevant service rules.

A private entity is not covered under the term ‘public authority’ u/s 2 (h). But private entity may be covered u/s 2 (f) which provides that the term information includes the one ‘relating to any private body which can be accessed by a public authority under any other law’. Thus, in case of companies, applicant may seek information indirectly from either with whom such companies are registered i.e. Registrar of Companies (RoC) or bodies having regulatory jurisdiction over such companies like SEBI, Reserve Bank of India (RBI) etc. Further, even a private entity not substantially funded by the government may also be covered within the ambit of RTIA. \(^{143}\)

\(^{143}\) *Sarbajit Roy v DERC Application No CIC/WB/A/2006/00011 (3 January 2006) <http://ciconline.nic*
Indian government came out with New Environment Policy in 2006 to create more opportunities for enduring partnerships between various stakeholders involved like investment community, public agencies, local communities etc. It *inter alia* laid special emphasis on managing environmental resources on the principles of good governance, intergenerational equity and efficient use of environmental resources. It aimed at facilitation of integration of environmental values into cost-benefit analysis and efficient allocation of resources while undertaking public investment decisions.

### 4.3.3.7 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA)

Forest dwelling Scheduled Tribes and Traditional Forest Dwellers play crucial role in environmental management and development. In fact environmental conservation is deeply and inseparably integrated into their traditional practices and culture. Protection of their identity and culture will enable them to become vital stakeholder in sustainable development. It was with this end in view that Parliament enacted FRA conferring powers on Gram Sabha constituted under it to protect community resources, individual rights, cultural and religious rights. It regarded them as integral to the survival and sustainability of forest ecosystem.

FRA recognized and vested forest rights and occupation in forest land in forest dwelling scheduled tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded. It provided a framework for recording the forest rights so vested and for nature of evidence needed for this purpose.

Forest dwelling scheduled tribes u/s 2 (c) means members or community of scheduled tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes Scheduled Tribe Pastoralist communities. Similarly Sec. 2(o) defines the term ‘Traditional Forest Dweller’ as ‘any member or community

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145 Preamble, The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.
146 ibid.
147 ibid.
who has at least three generations prior to 13 December 2005 primarily resided in and who depend on forest(s) land for *bona fide* livelihood needs’.

FRA protected customary rights, right to collect, use and dispose of minor forest produce, community rights like grazing cattle, community tenure of habitat and habitation for primitive tribal groups, traditional rights customarily enjoyed etc. Parliament through FRA intended to protect custom, usage, forms, practices and ceremonies forming traditional practices of forest dwellers. Sec. 3 enlists their forest rights which *inter alia* include right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use.

Sec. 5 imposes duties on the holders of forest rights to protect wild life, forest and biodiversity; ensure adequate protection of adjoining catchment area, water resources and other ecological sensitive areas; ensure preservation of their cultural and natural heritage from any form of destructive practices; ensure compliance with Gram Sabha’s decision to regulate access to community forest resources and stop any activity adversely affecting wild animals, forest and biodiversity. Sec. 6 makes Gram Sabha to be the authority for initiating process for determining nature and extent of individual or community forest rights or both and passing a resolution thereon. An aggrieved person may appeal to Sub-Divisional Level Committee within 60 days of passing of such resolution. Second appeal is permitted to District Level Committee.

Scheduled Tribes and Traditional Forest Dwellers are very poorly aware about their rights. In order to improve implementation of FRA, Ministry of Tribal Affairs issued guidelines in 2007 and again in 2012 specifying elaborate procedures.

### 4.3.3.8 The National Green Tribunal Act 2010 (NGTA)

The need to provide effective access to judicial and administrative proceedings to victims of environmental damage has been reiterated in both UNCHE (Stockholm) and UNCED (Rio) at the international level. At the domestic level also, Supreme Court has not only included right to healthy environment as part of right to life u/A 21 of Indian Constitution but also emphasised on the need to have an expert body to

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decide vexed issues of inter-disciplinary nature relating to environmental damage (discussed in Chapter-6). Accordingly, it requested Law commission of India to consider the need of establishing specialized environmental courts. Latter recommended establishment of environmental courts having both original and appellate jurisdiction relating to environmental laws. After nearly two decades of adopting NEP, Parliament responded to the long standing demand to establish a body in the form of National Green Tribunal (NGT) having expertise in matters relating to environment to decide disputes involving violation of the right to clean and healthy environment. Statement of Objects and reasons clarified that the aim of establishing NGT is to implement right to healthy environment that has been interpreted to be included in right to life u/A 21 of Indian Constitution. This is a categorical recognition by Indian Parliament that Right to clean and healthy environment is a Fundamental Right under Indian Constitution and is justiciable like any other fundamental right in India.

NGT is conferred original jurisdiction u/s 14 (1) over all civil cases involving substantial question relating to environment (including enforcement of any legal right relating to environment). However, a big limitation attached is that such question must have arisen out of the implementation of Water Act; Water Cess Act; Forest (Conservation) Act; Air Act; EPA; PLIA; and Biological Diversity Act. Application to settle disputes becomes time barred after six months of first arising of dispute. Sec. 15 empowers NGT to give relief and compensation to victims of environmental pollution and other environmental damage under the above-mentioned Acts; restitution of damaged property; and most importantly restitution of environment. Such relief, compensation and restitution is over and above any amount paid/payable under PLIA. Claim for such relief, compensation and restitution become time barred after five years of the date on which the cause of action first arises.

150 First attempt in this direction was made when Parliament enacted National Environment Tribunal Act in 1995 providing strict liability for damages occurring as a result of an accident while handling any hazardous substance. But it could not be established. Thereafter, Parliament established National Environment Appellate Authority (NEAA) through National Environment Appellate Authority Act 1997. It had limited workload since its jurisdiction was limited to hearing appeals regarding restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under EPA 1986. See ibid.
Appellate jurisdiction is conferred on NGT u/s Sec. 16 (which aggrieved person may resort to within thirty days from the date of the order) over the following – Water Act 1974 – Decision of (Appellate Authority u/s 28; State Government u/s 29; Board u/s 33A); Water Cess Act 1974 – Decision of appellate authority u/s 13; Forest (Conservation) Act – Decision of State Government or other authority u/s 2; Air Act 1981 – Decision of appellate authority u/s 13; EPA – direction issued u/s 5; grant of environmental clearance in any area in which industries, operations or processes or class of industries should not be carried out or carried out subject to certain safeguards; and Biological Diversity Act 2002 – determination of benefit sharing or order by National/State Biodiversity Board. Appeal against any decision of NGT lies in Supreme Court within ninety days u/s 22.

Liability is imposed u/s 17 on the person responsible in case of death or injury to a person not being a workmen or damage to any property or environment caused by any accident or adverse impact of any activity etc. under any of the Schedule-I enactments (Water Act; Water Cess Act; Forest (Conservation) Act; Air Act; EPA; PLIA; and Biological Diversity Act). Liability is to pay such relief or compensation under all or any of the heads specified in Schedule II\(^{151}\) as NGT may determine.

NGT is mandated to decide issues on the basis of applying the principles of sustainable development, precautionary principle and polluter pays principle u/s 20 and no fault principle in case of an accident u/s 17 (3). Thus, Parliament has made all these three foundational principles, comprising the very heart and soul of right to clean and healthy environment, explicitly enforceable through the judicial system.

Jurisdiction of NGT may be invoked u/s 18 by wide range of persons namely - any person sustaining injury; owner of damaged property; legal representatives of the person who died due to environmental damage; their agent; aggrieved person including any representative body or organization; Central/State Government;

\(^{151}\) Schedule II provides the following heads, namely – death; disability or other injury or sickness; medical expenses incurred for treatment; damages to private property; expenses incurred by government in providing relief; aid and rehabilitation or for any administrative or legal action or coping with any harm or damage, including compensation for environmental degradation and restoration of environmental quality; loss to government arising out of or connected with activity causing any damage; damage to fauna (including milch and draught animals and aquatic fauna) and flora (including aquatic flora, crops, vegetables, trees and orchards); costs of restoration for damage to environment (including pollution of soil, air, water, land and eco-systems); loss of business or employment or both; claim arising out of or connected with handling of hazardous substances.
Central/State Pollution Control Board; Pollution Control Committee; or local authority.

Expertise of NGT on environmental issues is secured through its composition u/s 5. It consists of a full time chairperson and minimum ten but maximum twenty full time judicial members and minimum ten but maximum twenty full time expert members to be appointed by Central Government. Expert members should have either – Master of Science (M.Sc.) (physical sciences or life sciences) with doctorate or Master of Engineering (M.E.) or Master of Technology (M.Tech.) and fifteen years experience in relevant field including five years practical experience in field of environment and forests (including pollution control, hazardous substance management, environment impact assessment, climate change management; biological diversity management and forest conservation) in a reputed national level institution; or administrative experience of fifteen years including five years experience in dealing with environmental matters in Central/State Government or national/state level reputed institution.

Judicial expertise of NGT is ensured by providing that while a judge of Supreme Court or Chief Justice of High Court is qualified to be appointed as Chairperson, a judge of High Court is qualified to be appointed as its judicial member.

Judicial and Technical expertise is balanced by empowering the Chairperson to constitute each bench having minimum two members, consisting of at least one judicial and one expert member.152

In order to avoid conflict of interests, all members including Chairperson are prohibited from accepting any employment or connection with management or administration of any person being party to proceedings.

Any non-compliance with order, award or decision of NGT is punishable u/s 26 with imprisonment extendable to a term of three years and a fine extendable to ₹ 10 crore or with both. In case such contravention continues, an additional fine extendable to ₹ 25,000/- per day may be imposed till such continuation from the day of conviction for first such contravention. Significantly, non-compliance by a company is more severely punished – fine extendable to ₹ 25 crore and additional fine extendable to ₹ 1

lakh per day till the continuation of such non-compliance. NGT Act has also fixed the liability of company and its officers through standard provision used in other statutes for this purpose. According to Sec. 27, for an offence committed by a company, every person directly in charge of and responsible to company will be liable along with the company. Such person can defend himself by proving that such offence was committed without his knowledge or that he exercised all due diligence to prevent its commission. Further, in case it is proved that the offence committed by a company was committed with the consent or connivance of or attributable to neglect of any director, manager, secretary or other officer of company, they shall be liable for punishment.

NGT Act makes all offences non-cognizable u/s 26. Further, NGT Act bars jurisdiction of any civil court u/s 29 from entertaining any appeal which NGT is empowered to determine under its appellate jurisdiction.

The inclusion of the word ‘Green’ in the title of NGT seems to give it an anthropocentric tilt obscuring the fact that even non-green component of environment is as much important as its green component. Parliament could have opted for a better title more in tune with contemporary ethos like National Environment Tribunal (NET). Also, In case of a company (whether Indian or TNCs), fine limit should not have been fixed, if deep pocket theory is truly to be followed. If at all a fine limit was to be prescribed, it should have laid down minimum fine only.

Establishing NGT is a big leap forward and it is envisaged as a crucial pillar in the regulatory framework for right to clean and healthy environment in India. Only time will tell to what extent it succeeds in fulfilling its objective. However, the impact of its decisions is increasingly becoming more visible.

4.4 Proposed Reforms in Regulatory Framework of Right to Clean and Healthy Environment

Two recent initiatives of reformatory nature are noteworthy regarding the regulatory framework of right to clean and healthy environment –
4.4.1 Environment Laws (Amendment) Bill 2015

The Bill proposes to substantially enhance penalty for substantial damage caused to environment from existing ₹1 lakh to ₹5 crore extendable to ₹10 crore in case of continuing damage. If such damage has impact beyond 5 km but within 10 km radius from the project area, the proposed penalty is ₹10 crore extendable to ₹15 crore in case of continuing damage. If such damage extends beyond the radius of 10 km from project area, the proposed penalty is ₹15 crore extendable to ₹25 crore in case of continuing damage. Such penalty will be determined by the adjudicating body having regard to various factors – amount of damage caused to environment, amount of disproportionate gain or unfair advantage (wherever quantifiable) made thereby; repetitive nature of such damage; continuance of default; and extent of injury caused or likely to be caused to public or other living creatures or plants and microorganisms or property or public health. Appeals against the decision of the adjudicatory body lies in NGT.

Bill strengthens the civil liability regime for environmental damage although the approach tilts towards anthropocentricity.\(^{153}\) However, capping of penalty militates against polluter pays principle more so in situations involving hazardous substances that too which spill over for generations.\(^{154}\) It also militates against the principle of absolute liability (so craftily developed by Indian Supreme Court) depending upon the capacity of the polluter. New adjudicatory body may weaken the original jurisdiction of NGT thereby creating unwarranted confusion in the existing regime.

4.4.2 Recommendations of TSR Subramanian Committee 2014

The objections raised by various Ministers heading environment ministry at various points of time and on various issues impacting environment have been perceived as anti-industry and hence anti-development by various governments in India.\(^{155}\) Even for the present Government, fast tracking of environmental approvals is one of the poll agenda. In order to fulfil the same, Ministry of Environment, Forests and Climate


\(^{154}\) Ibid.

\(^{155}\) United Progressive Alliance (UPA) Government replaced Union Environment Minister twice replacing Mr. Jairam Ramesh by Ms. Jayanti Natarajan and latter by Dr. M Veerappa Moily in order to expedite clearances.
Chapter 4: Right to Clean & Healthy Environment and Transnational Corporations: Legislative Endeavours in India

Change (MoEFCC)\textsuperscript{156} constituted a High Level Committee on 29 August 2014 under the chairmanship of TSR Subramanian (comprising Viswanath Anand – former secretary to MoEF, Justice (Retd.) A.K. Sriastava – former judge of Delhi High Court, K.N. Bhat – Senior advocate of Supreme Court) for reviewing particular environmental legislations.\textsuperscript{157} Its Terms of reference (ToR) was to review six environmental laws namely – EPA, FCA, WLPA, Water Act and Air Act and to suggest amendments therein.\textsuperscript{158} On 18 September 2014, MoEFCC included Indian Forest Act 1927 within its ambit.\textsuperscript{159} Committee was given two months which was extended by one more month at committee’s request.\textsuperscript{160} However, it submitted its report 10 days before the deadline in November 2014. The mandate of the Committee was a big opportunity to have a holistic review of regulatory framework for right to clean and healthy environment considering the fact that environment is a composite whole and interplay of various environmental laws should be studied in terms of their overlap and conflicts.\textsuperscript{161} All earlier attempts obscured the big picture. Committee summed up the existing state of environmental laws in the following words:

A knee-jerk attitude in governance, flabby decision-making processes, ad hoc and piecemeal environmental governance practices have become the order of the day. The legal framework has not delivered.\textsuperscript{162}

Committee found fault with both judiciary\textsuperscript{163} and executive.\textsuperscript{164} It emphasised on the need to have a new system in place.\textsuperscript{165} Regarding the issue of EC, Committee pointed

\begin{itemize}
  \item HLC Report (n 1) 13.
  \item ibid.
  \item ibid.
  \item ibid Annexure 3.
  \item Committee observed: ‘piecemeal and sectoral legislations with their subordinate instruments, have failed to comprehend the need to address the holistic nature of the environment.’ ibid 7.
  \item ibid 8.
  \item Committee observed: ‘Judicial pronouncements frequently have supplanted legislative powers, and are occupying the main executive space’. ibid.
\end{itemize}

It further observed:

‘An alternate stream of law is seen emanating from judicial intervention wherein the principle of sustainable development has been rendered as a part of article 21 of constitution of India. The courts have become the first resort to resolve environmental conflicts, rather than the final forum for protection of rights because of perceived inability of the regulatory agencies... Continued lack of credible policy and implementation response by the executive has now seemingly rendered the judicial
out various problems in the administrative structure – duplication; shared jurisdiction; lack of deterrence in penal provisions; ineffective monitoring; inefficient enforcement machinery; non-exhaustive abatement provisions; non-accountable institutions; weak financial powers, non-professional manpower; limited application of science and technology in pollution control systems.\textsuperscript{166}

Committee recommended a new project clearing mechanism with a ‘unified, integrated, transparent and streamlined process’ based on a ‘single window’ concept with the objective of substantially reducing the time taken in clearing of the projects.\textsuperscript{167} Important recommendations regarding regulatory framework for such a mechanism are as follows –

i) Environmental Laws Management Act (ELMA) should be enacted to deal with applications of clearances.

ii) ELMA should constitute National Environment Management Authority (NEMA)\textsuperscript{168} at the national level and State Environment Management Authority (SEMA)\textsuperscript{169} at the state level (replacing CPCB and SPCB) – to grant EC through following procedure –

\begin{itemize}
  \item[i)] Environmental Laws Management Act (ELMA) should be enacted to deal with applications of clearances.
  \item[ii)] ELMA should constitute National Environment Management Authority (NEMA)\textsuperscript{168} at the national level and State Environment Management Authority (SEMA)\textsuperscript{169} at the state level (replacing CPCB and SPCB) – to grant EC through following procedure –
\end{itemize}
a) Process is initiated by an integrated web-based online application;

b) NEMA/SEMA to reject application at the preliminary stage itself in case project is located in ‘no go’ area or violations regarding pollution load, forest cover, eco-sensitive zone etc.;

c) Project proponent to undertake EIA upon submission of application and the same should have sector specific Model ToR. It should provide for information sharing with local people where project is proposed to be located;

d) NEMA/SEMA to conduct preliminary scrutiny of application and within 10 days should prescribe location specific requirement failing which project proponent should develop EIA/EMP on model ToR;

e) Project proponent to provide all relevant information about project including likely environmental impact as well as utilization of local resources in terms of land, water, agro resources along with likely waste generation and disposal methods;

f) Modify existing public consultation method to confine to only environmental, rehabilitation and resettlement issues and permit only genuine local participation;

g) Dispense public hearing in cases of projects having strategic and national importance or where local conditions were not conducive to its conduct or in those locations where optimum pollution load/cumulative pollution load is pre-determined;

h) External experts to be involved in appraisal of project by NEMA/SEMA through the means of co-option;

i) NEMA/SEMA to prescribe specific monitorable conditions for compliance;

j) NEMA to fix environmental reconstruction cost and prescribe mechanism to pay into Environmental Reconstruction Fund;

k) NEMA/SEMA to submit its final recommendation within 2 months to MoEFCC either granting (with conditions) or rejection (with reasons);

l) MoEFCC to take final decision thereon within 15 days;

investigations and research on problems of water and air pollution and advise State government thereon; lay down effluents standards for sewage; etc. ibid 51.
m) Place all decisions in appraisal process in public domain within 24 hours of the decision;

n) Prepare tight time schedule for each step in process and Chairperson of NEMA/SEMA to be accountable for adherence to timelines;

o) Review existing classification of projects as ‘A’ and ‘B’ category and amend EIA notification to increase stake of SEMA in clearance mechanism leaving only larger and strategic project under category ‘A’;

p) Separate fast track mechanism through special cell in NEMA/SEMA – for linear projects generally beneficial for society (do away with approval of Gram Sabha in cases where rights under FRA have not been settled); all strategic border projects falling within 20 kms from international border/LoAC/LoC; and power sector and coal mining projects.

iii) Exhaustively revamp the existing process of empanelment of consultants [relying on list prepared by Quality Council of India (QCI) and National Accreditation Board for Education and Training (NACBET)]. NEMA should develop objective parameters for this purpose.

iv) Induct principle of utmost good faith in holding project proponent responsible for his statements reducing ‘inspector raj’.

v) Financially incentivise compliant industrial units indicating a shift from ‘command and control approach’ to market based instruments like ‘cap and trade’.

vi) Union government will be empowered to give binding directions to NEMA/SEMA. NEMA, in turn, will be empowered to give binding directions to SEMA except on project clearances. In case of conflicting directions by NEMA to SEMA or by State government to SEMA, GoI will have the final say.

vii) ELMA shall also establish special courts which will be presided over by Sessions Judge.

viii) Serious offences under existing environmental laws to be shifted to ELMA for speedy attention.
ix) Appeals against any decision of government on recommendations of NEMA and SEMA to be made to a Board constituted by GoI that will be presided over by a retired judge of High Court with two senior officers of the rank of additional secretary to GoI or above having subject knowledge. It should decide appeal within 3 months after its lodging. Second appeal shall lie to NGT.

x) Repeal Water Act and Air Act and include their relevant provisions in EPA through revamping the same.

xi) Consolidate all existing Notifications/circulars/instructions into a single comprehensive set of instructions. Any further additions/amendments to be made only annually unless too urgent.\(^{170}\)

xii) Identify forest areas or inviolate zones (having 70% canopy cover and ‘Protected Areas’) as ‘no go areas’ which should be disturbed only in case of exceptional circumstances.

xiii) Redefine the term ‘forest’ at the earliest to exclude plantations raised on private lands. De-notify plantations on roadsides, canals and other linear structures carried out on State government land kept in reserve for expansion. Till such redefinition, add an explanatory note to Sec. 2 (ii) of IFA to the following effect: ‘Forest means any forest notified under the IF Act, 1927 and any land recorded as forest and not used/broken before 25th October, 1980’. Larger policy should be to encourage everyone to plant trees (even if for commercial intent), wherever they find land without fear of the same being declared as ‘forest’. It recommended revised procedure for forest clearance under FC Act to reduce time taken without compromising with quality of examination.

Apart from the recommendations discussed above, Committee recommended various other measures as well.\(^{171}\) The committee felt that its recommendations will make doing business easier in India.

\(^{170}\) Government has streamlined FDI policy through the same approach which is more user friendly.

\(^{171}\) Revision of compensatory afforestation guidelines (enhance CA on revenue land from 1:1 to 2:1); sharply increase quantum of NPV for CA; demarcate eco-sensitive zones around all protected areas; incorporate modern technology to undertake monitoring process; include noise pollution as offence in EPA; establish National Environment Research Institute (NERI) through Parliamentary enactment; identification of technical institutions/universities to act as technical advisors to NEMA/SEMA; create
It is very evident that the approach for the future is to relegate environmental issues relating to investments (including foreign investments by TNCs) in India to a secondary position and complete the same in a time bound manner irrespective of its quality. All dilutions in the existing regime will be justified through sticking to stipulated time limits. TNCs through seeking clearances of their foreign investment projects are penetrating deep into Indian mountains, forests, coasts etc. Dilution of environmental laws to fast track infrastructure projects is the fresh challenge posed to right to clean and healthy environment India. Thus, a better approach could have been to stick to the time limit without compromising on the existing mechanism by strengthening the execution machinery for right to clean and healthy environment. This could have been done by taking care of political influence, social exclusion, corruption and dismal administrative capacity. 172

The recommendations of the committee itself are riddled with following problems –

a) Few statutes were selected for review by the Committee aimed at speeding the clearance process and improving the ease of doing business. Nevertheless, recommendations of Committee will have far reaching ramifications on the overall regulatory framework for right to clean and healthy environment. It would have been better had the committee being given a broader mandate to review all statutes pertaining to environment and comprehensively review them by studying for a relatively longer period of time.

b) Committee did not comprise any representative of civil society or known environmental law expert.

c) Public submission to committee was limited to 2,000 characters which is too short a space particularly on issues pertaining to environment.

d) Committee itself acknowledged paucity of time for comprehensive study. 173

Going by its mandate, its recommendations have laid down a new framework

an All India Indian Environment Service; create Environment Reconstruction Fund (ERF) for facilitating research, standard setting etc.; undertaking environmental mapping of India as on-going process; create new systems and procedures for handling Municipal Solid Waste (MSW) for its effective management and accountability; finalise CRZ demarcation and place in public domain to remove ambiguity; launch multi-pronged effort to contain vehicular pollution.

172 Menon and Kohli (n 126) 23.

173 ‘Due to paucity of time, the Committee could not visit more States, and have more field visits; however, all State Governments were addressed to give their suggestions, which many did…’ HLC Report (n 1) 27.
altogether. More time should have been given to it to enable it to justify its mandate.

e) Special courts will dilute NGT’s role. 174

f) Instead of focusing on improving implementation of environmental laws, enactment of another law is suggested. 175

g) Industry continues to look at environmental laws as obstacles/hurdles to be crossed. 176

h) Environment is viewed as a mechanical system and adopts a techno-bureaucratic approach. 177

Parliamentary Standing Committee on Science and Technology, Environment and Forests found the consultations undertaken by the HLC to be not ‘comprehensive, meaningful and wider’ and its jurisdiction and constitution itself doubtful. 178 It recommended the government not to proceed with implementation of its recommendations as the same will lead to ‘unacceptable dilution of the existing legal and policy architecture established to protect our environment’. 179 Indian government has indicated that it has no plans for making substantial amendments to environmental laws and the same will be done as and when necessary. 180 Committee recommendations are one of the several inputs, government is seeking suggestions and inputs from other stakeholders also. 181

175 ibid 10.
176 ibid.
179 ibid.
181 ibid.
4.5 Transnational Corporations in India

Legislative endeavours for right to clean and healthy environment does not make distinction between Indian corporations and TNCs and therefore does not accord differential discriminatory treatment to TNCs. Same laws are equally applicable to TNCs as well as Indian corporations. However, foreign ownership of corporations in India has been an extremely sensitive issue due to bitter experience of nearly three centuries of British Colonial rule, a greater part of which was by a foreign corporation (EIC). Thus, when India won independence, Indian government adopted conscious policy of self-reliance thereby minimizing its reliance on foreign capital.

A TNC can invest in India primarily through two modes – Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI). FDI refers to ‘establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor’.\(^{182}\) Lasting interest for this purpose means ‘existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise’.\(^{183}\) Such relationship is noticed by ‘direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy’.\(^{184}\) On the other hand, FPI refers to investments made by foreign investor in the financial assets of the enterprise aimed not at establishing control but reaping profits in the process. In India, both FDI and FPI have separate regulatory regime.\(^{185}\) TNCs are a major source of FDI in India.

\(^{183}\) Ibid.  
\(^{184}\) Ibid 49.  
\(^{185}\) FDI is presently regulated through FEMA 1999 (Master Circulars issued by RBI) and Foreign Direct Investment (FDI) Policy issued annually by Department of Industrial Policy and Promotion (DIPP). FIPB along with RBI is the regulator for FDI whereas FPI is regulated by SEBI and RBI. In order to boost FDI, government has announced abolition of FIPB in 2017-18. See *Budget Speech by Hon’ble Finance Minister* (Union Budget 2017-18) 20 <http://indiabudget.nic.in/ub2017-18/bs/bs.pdf> accessed 4 November 2017.
Chapter 4: Right to Clean & Healthy Environment and Transnational Corporations: Legislative Endeavours in India

4.6 BITs as Instrumentality for Regulating TNCs vis-à-vis Right to Clean and Healthy Environment

India has been a capital importing nation since independence. However, in the course of its development in the last few decades, she has also become a capital exporting country. Many Indian corporations have launched overseas business operations and joined the league of TNCs. Therefore, Indian Government has to balance the interests of foreign based TNCs as well as India based TNCs.

In exercise of executive power recognized under Indian Constitution, Indian Government entered into first BIT with UK in 1994 with the objective of facilitating foreign investment in India. Thereafter, it has entered into number of Bilateral Investment Treaties (BITs) with other nations with the objective of facilitating foreign investment in India. TNCs have been major players who have invested in India through various available routes permitted by the relevant laws. Nearly a decade later in 2003, Indian Government reviewed its BIT programme by drafting a Model BIT which became the basis for subsequent BITs entered into by India. Till 2011, BITs did not attract much attention in India. However, India’s bitter experience regarding investment disputes (discussed in chapter-6) compelled a fresh rethink on the part of Indian Government to review existing BITs.

Accordingly, GoI came out with Draft Model Indian BIT in March 2015. It subjected the draft to a consultative process. Law Commission of India came out with a detailed report thereon containing vital suggestions. On 28 December 2015, GoI granted approval to Final Model BIT and clarified that the same will be used ‘re-negotiation of existing BITs and negotiation of future BITs and investment chapters in

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188 Indian Government has signed a total of 84 BITs out of which two have been terminated and ten have been signed but not in force. List and full text thereof <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96> accessed 29 March 2017.
Comprehensive Economic Cooperation Agreements (CECAs)/ Comprehensive Economic Partnership Agreements (CEPAs) / Free Trade Agreements (FTAs).\(^{190}\)

Model BIT provides safeguards against environmental damage caused by foreign investment made by a foreign investor including TNCs in various ways.

Its Preamble sets the tone by seeking alignment of investments’ objectives with ‘sustainable development’ though the term is not defined therein. Significantly, Art. 5.5 clarifies that any non-discriminatory regulatory measure of government aimed at protecting legitimate ‘public interest or purpose objectives such as public health, safety and the environment’ shall not constitute expropriation. Art. 5.1 requires the compensation to be adequate and be at least equivalent to fair market value. Further, it does not contain MFN protection.

Final Model BIT provides a complex, sequential procedure for dispute redressal mandating exhaustion of local remedies u/A 15.\(^{191}\) It requires an investor to submit a claim to domestic courts or administrative bodies for resolution within one year of knowledge of the breach. If investor fails to get satisfactory resolution for five years, he can submit notice of dispute to the other party. Disputed parties are further required to use next six months in making ‘best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or other third party procedures’. In case the parties still fail to settle their dispute amicably, investor is permitted to submit a claim to arbitration subject \textit{inter alia} to expiry of - six years since he came to know of the breach and twelve months from conclusion of domestic proceedings. However, investor is exempt from requirement of exhaustion of local remedies in case of non-availability of domestic legal remedies capable of reasonably providing any relief.

Arbitration Tribunal u/A 18.1 is required to ‘consist of three arbitrators having relevant expertise or experience in public international law, international trade and international investment law, or resolution of disputes arising under international


trade or international investment agreements’. The eligibility criteria is silent regarding expertise or experience relating to environmental law.

Art. 22 makes the arbitral proceedings transparent by mandating that notice, pleadings, hearing for presentation of evidence before Tribunal, its decisions, orders and awards should be made publicly available with due regard to protection of confidential information.

Most importantly, Art. 32.1 contains general exceptions which permits Host State to take non-discriminatory actions which it consider necessary inter alia for protecting and conserving environment including all living and non-living natural resources and for protecting human, animal or plant life or health. This provision has empowered Indian as a host state to take measures aimed at environmental protection and is likely to make foreign investments by TNCs contribute to her sustainable development. Final Model BIT is not self-judging (unlike the Draft Model BIT) and accordingly tribunal can review a measure taken by State on the ground of general exception.192 Further, u/A 11, a foreign investor is required to comply with all laws applicable to his investments which will also include relevant environmental laws.

Another major inclusion is the obligation of investor regarding CSR. Art. 12 requires foreign investor to ‘incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies’. Although the obligation cast is of voluntary nature but the standards may inter alia pertain to environment. This provision amalgamates the two approaches (BIT based approach and CSR based approach) aimed at strengthening the right to clean and healthy environment in India.

Incorporation of above discussed provisions gives Indian Government space to take legislative and executive measures aimed at environmental protection and justify them as well. They also pave the way for sustainable investments by TNCs. As socially responsible TNCs, they should welcome the Final Model BIT. It will ultimately lead to sustainable development in India. It definitely is a big leap forward in strengthening the accountability of TNCs for their violation of right to clean and healthy environment.

192 ibid 225.
However, it will be interesting note to what extent the Indian Government can negotiate with other nations to ensure that they sign on the basis of Final Model Indian BIT. India served notice in 2015 to 57 governments that it wanted to terminate and renegotiate its existing BITs. Further, India decided to put 83 bilateral investment treaties with different countries on notice in July 2016. India-Netherlands BIT expired in November 2016 and in the next two years Indian BITs with other 22 EU members will also expire. India wants to replace this cluster of 23 treaties and merge it with a single India-EU free trade agreement. Scrapping BIT will not immediately impact investments since all existing investments would continue to be protected for anything between 10-15 years. EU member countries have expressed hesitation in renegotiating on such basis.

4.7 Chapter Conclusion

The approach of rulers towards environment in India has changed with time. It has largely been determined by the prevailing economic, social and cultural fabric. British Colonial rule waged the most brutal assault on the Indian environment. During its later phase, few legislations were made to focus on particular components of environment. After independence, environmental protection was not part of concern for the law makers in express terms. It was only after Stockholm conference that India took many legislative initiatives. However, Bhopal Gas Leak Disaster stunned the Indian legal system. It triggered intense law making exercise on the part of the Parliament.

1991 proved to be the year which caused paradigm shift in Indian approach towards governance particularly the economic governance. This shift had direct repercussions

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195 Chaudhuri (n 193).
196 ibid.
197 Bagchi (n 194).
on the right to clean and healthy environment. Government developed foreign investment friendly EIA. Nearly two decades later, Parliament established NGT which is making its presence felt through its judgments. However, the entire regulatory framework for enforcement of right to clean and healthy environment continue to be under severe strain due to the zeal of the Indian government for improving India’s position on the parameter of ‘ease of doing business’.

TNCs are major foreign investors across the world and India is no exception. In order to boost foreign investment from TNCs India has entered into many BITs with other countries. Since BITs are discretionary, there is variation in the level of protection given to different countries through them. Problems created by unfavourable arbitral awards alarmed Indian government to come out with safeguards and accordingly it came out with Final Model Indian BIT in 2015. It made certain crucial safeguards aimed at environmental protection. Further, it included voluntary CSR obligation on the part of the foreign investor (including TNCs). However, the real test of its efficacy lies in the fact whether other countries agree to enter into BITs with India on such terms.