

## INTRODUCTION TO ENVIRONMENTAL LAW AND POLICY IN INDIA AT THE END OF 2011

*By Dr. Armin Rosencranz*  
*Guest Editor*

India's environmental laws are administered jointly by a weak and understaffed Central Pollution Control Board; State Pollution Control Boards ("SPCBs") of varying strengths, capacities, and effectiveness; and the central government's Ministry of Environment and Forests ("MoEF"). The MoEF has the power to issue environmental clearances—allowing a development project to go forward, for example, despite its noncompliance with environmental laws or regulations.

Article 21 of the Indian Constitution guarantees the right to life, which the courts have interpreted as including the right to a healthy environment. The constitution also enables any citizen or group to bring an interlocutory appeal directly to the High Court of each state or to the Supreme Court if a constitutional question is raised.

Most environmental cases, especially between 1980 and 2000, have been brought by a small band of public

interest litigators led by Supreme Court advocate M. C. Mehta. Since 2000, however, the courts have become markedly less hospitable to public interest litigation ("PIL"). In several recent cases, judges have dismissed PIL petitions as frivolous or motivated by personal gain.

In 2010, India's central government launched the first major overhaul of environmental governance and management since 1986. It proposed, and Parliament enacted, the National Green Tribunal Bill, creating a kind of "supreme court" of environmental law. Also in 2010, the MoEF proposed a new institution for environmental management, compliance, and enforcement, to be called the National Environment Protection Authority ("NEPA"). Among other innovations, NEPA would have instituted a civil administrative process to impose sanctions on polluters. The courts have been reluctant to punish polluters and have even denied SPCBs the power to impose penalties by finding ambiguities in the Environmental Protection Act. The draft NEPA bill,

however, was withdrawn and replaced with a much milder and toothless proposed agency, the National Environment Assessment and Monitoring Agency ("NEAMA"), discussed in the Kohli-Menon article in this issue.

The Supreme Court of India is undoubtedly the most activist court in the world, which has led it to issue sweeping decisions in favor of environmental protection. In the Ganges water pollution case, a bench of the Supreme Court, while directing that several tanneries be closed down for discharging untreated effluents into the Ganges River, held that "we are conscious that closure of tanneries may bring unemployment (and) loss of revenue, but life, health and ecology have greater importance to the people." *M.C. Mehta v. Union of India (Kanpur Tanneries) 1988*.

The justices appear to have exceeded their constitutional boundaries (and customary separation of powers) in at least two areas, however. In the so-called Delhi Pollution Case (2002), the Court preempted executive authority over air pollution and ordered all bus companies in the capital city of Delhi to power their buses with compressed natural gas (CNG) rather than petroleum or diesel fuel. In *T. N. Godavarman Thirumulkpad v. Union of India*, instituted in 1995, the Supreme Court took on the issue of forest cover and found itself issuing orders dealing with the rights of forest dwellers, employment in the wood products and timber industries, and the respective powers of federal and state forestry officials. The case is on a "continuing mandamus," meaning that the case remains open for court orders and actions relating to it; the Court has issued new orders flowing from the case virtually every week since 1995.

The Supreme Court's assumption of executive power in these cases contrasts with the judiciary's invariable approval of, or deference to, the executive regarding *all* large infrastructure projects. Notwithstanding the occasional court defense of clean air, water, and forests, and protection of people's access to common or protected spaces, there seems to be an inherent pro-development bias today in the High Courts and the Supreme Court.

In the cases of the Tehri (*TBVSS v. Uttar Pradesh*, 1992) and Narmada (*Narmada Bachao Andolan v. Union of India*, 2000) dams and the Dahanu Power Plant

(*Dahanu Taluka Environmental Protection Group v. BSES*, 1991) the respective judges made clear that it is not the job of the Court to interfere in these development activities: they raised scientific and technical issues and policy matters, which are best left to the executive agencies. The views expressed by judges in all environmental litigation concerning infrastructure projects have supported the government's assertion that it must carry out its development activities, such as dams and power plants, in the national interest.

In these cases, the judges seem complicit with the executive branch in subordinating environment to development. For example, in the Tehri Dam case, the government's own expert committee had identified several violations of the conditions that the MoEF imposed on the project before granting an environmental clearance, but the majority judgment allowed the government to construct the dam anyway. Similarly, in the Dahanu case, the Supreme Court did not follow the MoEF's Appraisal Committee report, which declared that Dahanu was unsuitable for the construction of a thermal power plant as it did not meet environmental guidelines. In the Narmada Dam case, the dissent urged that construction of the dam should not be allowed because it violated environmental guidelines. The government had not provided environmental impact assessments for the construction of the dam and the government's report on rehabilitation and resettlement measures for the "oustees" were arguably insufficient.

Indian lawyers and scholars have begun to re-examine the most flagrant example of judicial activism, namely Godavarman, which has affected all forest cover, all forest dwellers, and the timber and wood product industries through India for more than 15 years. While the concern for forest conservation provided the initial justification for judicial intervention, it has led the Supreme Court to effectively take over the day-to-day governance of many aspects of Indian forests, far beyond anything that may be justified constitutionally. The outcomes for the forests have been mixed, and the jurisprudence is of questionable quality, highlighting the dangers of judicial overreach.

In this issue of India Law News, judicial activism and the government's strong pro-development bias are explored in five of the six main articles, namely the

Kohli-Menon article on NEAMA, already mentioned, arguing for a complete regulatory overhaul; the Sahu article on environmental governance through the courts; the Shroff-Jeurkar article on whether India's environmental law lacks teeth: they conclude that it works pretty well; the Singhanian-Jaimini article on the Lafarge mining case, which they believe demonstrates the Supreme Court's wise direction of that case, as well as former environment minister Jairam Ramesh's appropriate stand on granting or withholding environmental clearances; and the Saldanha article on the government's implicit support for Monsanto and genetically modified foods, in spite of the provisions of the Biological Diversity Act and the apparently ineffective National Biodiversity Authority. A sixth

article by Patodia explores India's international negotiations on global climate change.

*Dr. Armin Rosencranz is the guest editor for this issue of India Law News. He has published several books and numerous articles on issues relating to climate change and environmental law, particularly in South Asia, and has been affiliated with several universities in the U.S. and around the world. Dr. Rosencranz is currently a Consulting Professor of International Relations at Stanford University and may be contacted at [armin@stanford.edu](mailto:armin@stanford.edu).*

Welcome to the India Committee!

This issue of India Law News marks a period of transition in the leadership team of the India Committee. Our founding co-chair, Erik Wulff, has assumed the role of senior advisor. It is difficult to capture all that Erik has accomplished in his tenure, but simply put we could not have had a stronger and more dynamic leader. Over the past two years, Erik gave so much of his time, expertise, and experience to making the India Committee one of the most dynamic and engaged committees in the Section of International Law. One need only consider the large number of awards that the Committee received from the Section to understand how valuable Erik has been to the growth and success of the Committee. Just as importantly, he navigated some difficult issues that confronted the Committee with statesmanship, humility, and resolve. As a result of his commitment, we are well-positioned to continue the work that Erik started to forge mutual understanding among lawyers in India, the U.S., and beyond. On behalf of the Committee membership, we thank Erik for his outstanding leadership.

Fortunately, Erik will continue to serve as one of the Committee's most active members by leading the Committee conference in Mumbai on January 20-21, 2012. We have received substantial support from ABA leadership and many cooperating entities. The conference, which will include a substantial delegation of lawyers from the U.S. and beyond, will address the key legal issues in doing business between Indian and U.S. companies. The conference will also provide a number of opportunities for networking and meetings, both before and after the formal programming, including meetings in Delhi and Mumbai preceding the conference. Please see the conference agenda included in this edition for more information. We hope you can join us for what promises to be an outstanding few days of conference, meetings, and informal discussions.

In this issue of India Law News, we present articles on environmental law in India. The environmental challenges facing India are immense, and the articles we present seek to shed light on these issues. We are very pleased to have Armin Rosencranz, consulting professor of International Relations at Stanford University, serve as guest editor for this issue. He is one of the foremost authorities on environmental law in India, having authored *Environmental Law and Policy in India: Cases, Materials, and Statutes*, and taught advanced courses on environmental law at the National Law School in Bangalore. We hope you find this focus on environmental law to be informative and thought-provoking.

We are very pleased to have Kavita Mohan as the new editor in chief of India Law News. She has devoted substantial time and effort over the last year as a co-editor to publish a high quality newsletter, and we are

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fortunate to have her lead us in our efforts to educate and inform our membership through this publication. Joining Kavita, Poorvi Chothani and Sean Kulkarni are new co-editors Antonia Giuliana and Aseem Chawla. Thank you for volunteering your valuable time. We are also grateful to Poorvi Chothani and her law firm for continuing to desktop publish India Law News.

Finally, we wish to thank Rita Roy for her service as Committee vice-chair and, in particular, for her leadership in organizing webinars over the last two years. Anyone who has attended these webinars will recognize how committed she was to the Committee's goal of providing high quality programming for our members. As Erik so aptly put it, Rita has been one of the rocks of the Committee, someone we could always count on to get the job done, and expertly to boot. To that, we might add that she is, indeed, a rock star! Thank you Rita for your commitment and service, and we look forward to your continued involvement in the Committee.

As always, we encourage your ideas and participation in our activities in whatever way you can. We have enjoyed exceptionally strong interest from our members, and we want to thank you for that. Keep giving us your thoughts and suggestions on how to make this Committee's activities responsive to your interests and needs.

Sincerely yours,  
Vandana Shroff  
Priti Suri  
Sanjay Tailor



**India Law News**

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#### **SUBMISSION DEADLINES**

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Potential authors should review the Author Guidelines and send manuscripts via email to the Editorial Board.

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## ENVIRONMENTAL LAW IN INDIA — DOES IT LACK TEETH?

*By Vandana Shroff and Ashish Jejurkar*

The enforcement of environmental regulations in India has been a major bone of contention for the legislature. The concern was highlighted in as many words by the Chief Justice of India, Justice S.H. Kapadia. In a recent speech, Kapadia suggested amending various environmental laws so as to give them “more teeth” and also provide requisite machinery to implement them properly [*Outlook (Nov 9, 2011)*]. In light of the current political climate vis-a-vis corruption, at the forefront of public attention are many projects and factories that are alleged to have been undertaken or proposed by large corporations in contravention of environmental law or being damaging to the environment. Many of these controversies have involved civil society and native or tribal population protests, alleging that these projects have been given the approval by the Ministry of Environment and Forests (“MoEF”) and the state pollution control boards (“PCBs”), without a proper assessment of its impact on the environment and the local populace and their livelihood. Therefore, the issue at the heart of the debate regarding environmental protection has been striking a balance between environmental protection and economic development of India.

India has seen a failure of the administrative machinery in adequately protecting the environment. The Government of India had made an out of court settlement on behalf of the victims of the Bhopal gas tragedy, for an amount that was widely criticized as being inadequate. The decades subsequent to the infamous Bhopal gas tragedy saw the Supreme Court of India as the sole champion of the cause of environmental protection, with public interest litigation cases (“PILs”) being entertained from any individual citizen. Thus, it appears that it is the lack of an adequate legislative, regulatory and administrative framework

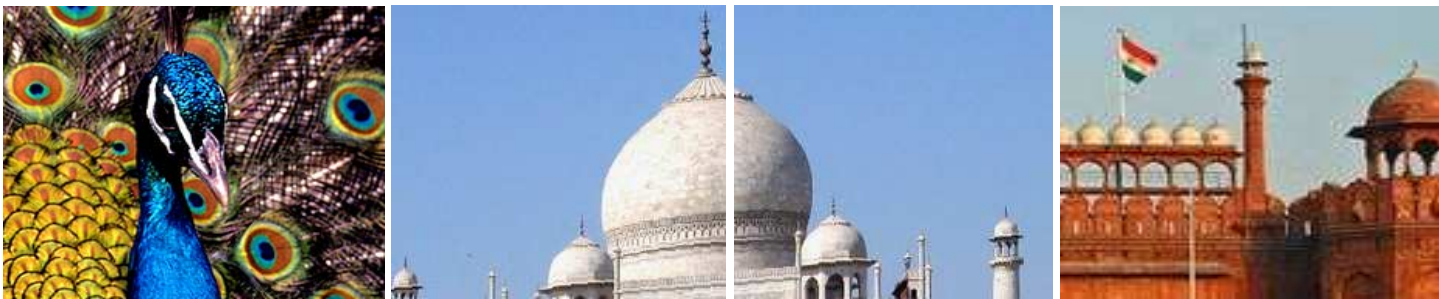
that has propelled the judiciary into the role of India’s environmental protector at large.

The present article deals with issues plaguing the cause of environmental protection in India and the role played by the executive, legislature, and the judiciary. It seeks to identify and comment upon the key challenges in enforcement of the current environmental law regime, while making a proposal for a more sustainable development mechanism.

### ENVIRONMENTAL LAW IN INDIA – LEGAL FRAMEWORK & JURISPRUDENCE

#### (i) Regulatory and Policy Structure

With over two hundred legislations in force, India has an exhaustive regulatory framework for environmental protection. The Forty-Second Amendment to the Constitution of India in 1976 introduced Articles 48A, which provides as a directive principle of state policy that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Additionally, Article 51A (g) was also introduced, which imposes a fundamental duty upon all citizens of India to “*protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.*” Additionally, Article 253 of the Constitution of India requires the state to honor its international obligations by enacting appropriate domestic legislative measures. India is a signatory to a number of international conventions that mandate protection of the environment including the famous Rio Declaration of 1992 which was signed by India and a large number of other nations at the United



Nations Conference on Environment & Development held at Rio de Janeiro in 1992.

Apart from the Constitutional provisions that provide a general mandate on protection of environment, there are a plethora of other legislations dealing with specific environmental aspects. Important among these are:

- *The Water (Prevention and Control of Pollution) Act, 1974* ("Water Act") enacted to regulate the discharge of effluents into water beyond certain permissible limits.
- *The Air (Prevention and Control of Pollution) Act, 1981* ("Air Act") enacted to regulate and prohibit air pollution.
- *The Forest (Conservation) Act, 1980* provides for procedure for use of forestland for non-forest purposes.
- *The Wildlife (Protection) Act, 1972* ("WPA") provides for protection to certain endangered species plants and animals. The WPA also contains provisions for declaring a particular area in India as a wildlife sanctuary, national park or closed area for preservation of the ecological environment of such an area.
- *The Environment (Protection) Act, 1986* ("EPA") is an overarching legislation providing for the central government to take measures for controlling pollution by setting standards for emissions and discharges, regulating hazardous wastes and protection of public health. The EPA also provides for co-ordination between central and state PCBs established under the Water Act and Air Act.
- *Hazardous Wastes (Management and Handling) Rules, 1989* are rules framed under the EPA to

provide for a regulatory framework for regulating the handling, treatment, transport and disposal of waste in a manner which is not detrimental to the environment.

- *The Public Liability Insurance Act, 1991* authorizes the central government to establish an Environmental Relief Fund to provide relief to victims of accidents occurring due to handling of any hazardous substances.

Further, a number of national policies such as the National Environmental Policy, 2006, National Policy on Pollution Abatement, 1992 and the National Conservation Strategy and Policy Statement on Environment and Development, 1992, serve as directives for the central and state governments to follow.

The Environmental Impact Assessment Notification, (S. O. 1533) issued by the MoEF on September 14, 2006 ("EIA Notification") under Rule 5 (3) (d) of the Environment (Protection) Rules, 1986 ("EPR") provides that prior environmental clearance is required for the construction of certain categories of projects, which are listed in the schedule to the said notification.

Paragraph 4 of the EIA Notification provides that all projects and activities are broadly categorized within two categories - Category A and Category B. All projects or activities included as Category 'A', shall require prior environmental clearance from the Ministry of Environment and Forests on the recommendations of an Expert Appraisal Committee, and projects falling within Category 'B' shall require prior environmental clearance from the State/Union territory Environment Impact Assessment Authority ("SEIAA"), whose decision will be based on the recommendations of a state or union territory level





Expert Appraisal Committee. The EIA Notification bifurcates projects into Category A or Category B projects. The categorization is done on the basis of certain specified criteria or thresholds such as capacity for power plants or other manufacturing facilities or built up area for real estate development projects.

(ii) Judicial Contribution and Evolution of Environmental Jurisprudence in India

Indian Courts have played a pivotal role in enforcing the nation's environmental standards by evolving various judicial principles from time to time. Even though Indian legislations on environmental protection date back from the 1970s, the watershed moment for environmental law in India occurred in 1984 after the tragic leak of Methyl Isocyanate gas at the Union Carbide Corporation ("UCC") pesticide plant at Bhopal. The absence of an effective legal framework in India through which to impose adequate liability and a significant monetary penalty on UCC resulted in a global outrage. The response and handling of the disaster by the Indian government has been heavily criticized, as the government settled the issue out of the courts with UCC for a paltry sum. The disaster also signified the lack of an adequate safety framework for environmental and human damage from industrial pollution.

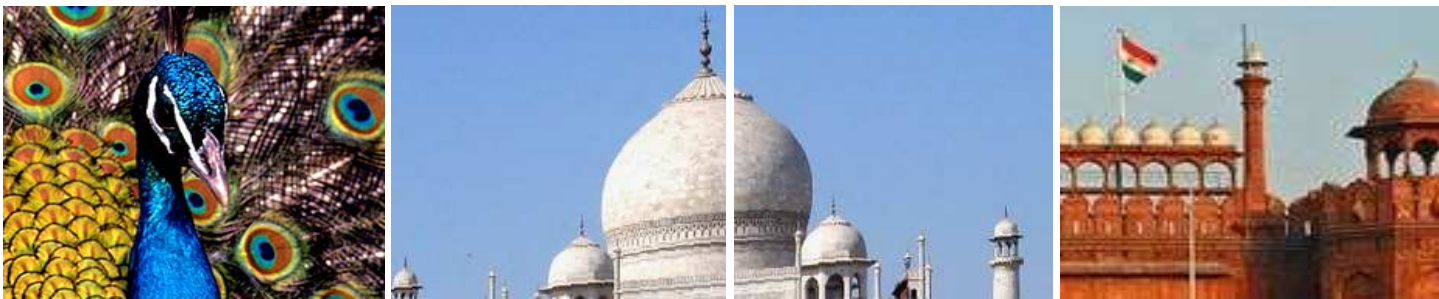
The last three decades have seen the Supreme Court and various High Courts stepping in to provide for enforcement of environmental laws through PILs by expanding the interpretation of the "right to life" granted under Article 21 of the Constitution of India, the right to a healthy environment. The court drew its inspiration from a directive principle of state policy enshrined in Article 48-A of the Indian Constitution, which imposes upon the state the duty to protect the environment as well as the fundamental duty under

Article 51-A (g) of the Constitution of India. The apex court has since passed a number of environmental decisions ordering actions for protecting the environment – such as cleaning up the Ganges river, banning tanneries and prohibiting smoking in public places.

The following are some of the landmark decisions of the Supreme Court in the space of environmental protection:

- In *M.C. Mehta v. Kamal Nath & Others* [2000 (6) SCC 213] ("*Kamal Nath Case*"), the public trust doctrine, which provided that certain natural resources like air, sea, water etc. constitute a gift of nature and as such cannot be a subject of private ownership. In this case, a company having links to Kamal Nath, the then Minister of Environment and Forests, was given approval to construct a resort on forest land and on the banks of the River Beas. The Court did not permit construction to divert the course of River Beas which had engulfed the resort. As the area was ecologically fragile and full of scenic beauty, it should not have been permitted to be converted into private ownership for commercial gains.
- In *Vellore Citizen's Welfare Forum v. Union of India* [AIR 1996 SC 2715], the "precautionary principle" and "polluter pays principle" were held to be a part of the environmental law of the country to ban the operation of tanneries until necessary effluent treatment devices have been set up. The apex court also directed all the High Courts to establish "Green Benches" to deal with environmental cases.





- In the *Taj Trapezium Case* (*M.C. Mehta v. Union of India* [AIR 1997 SC 734]), the principle of “Sustainable Development” was applied and it was held that industries causing harm to Taj Mahal through emissions should either change to natural gas or relocate outside the Taj Trapezium.
- In *Rural Litigation & Entitlement Kendra v. State of UP* [AIR 1985 SC 652], the apex court sidelined the economic interests of the State and ordered the closing of a limestone quarry for preservation of the ecological balance.
- In the *Oleum Gas Leak Case* (*M.C. Mehta v. Union of India* [AIR 1987 SC 1086]), the principle of “absolute liability” was adopted to provide compensation to victims of accident caused by an industry dealing with hazardous substances.

### KEY CHALLENGES IN ENFORCEMENT

The Indian Supreme Court through Justice B.P. Jeevan Reddy in the *Indian Council of Enviro-Legal Action vs. Union of India* [AIR 1996 SC 1446], rightly stated that if the mere enactment of laws could ensure a clean environment, India would be pollution-free. The problem in enforcement however, is more deep seated and requires taking actions at multiple levels, some of which are as follows:

#### (i) Problems with Implementing Agencies (PCBs)

Presently, most industries and projects require the prior consent of the requisite state PCB to establish or operate a facility. The PCBs (both central and states) are vested with absolute

authority and function as autonomous entities, with no central authority to regulate their functioning. Therefore, the dual chain of command, the lack of a proper co-ordination mechanism between central PCBs and state PCBs and with the MoEF as well as human, technological and financial capacity constraints, are the major reasons for their lack of efficient administration of the environmental law regime in India [OECD (2006)].

The Water Act contains a “deemed consent” provision which provides that if a state PCB doesn’t pass an order as to approve or reject an application made by an industry within a period of four months from the date of making the application, then consent shall be deemed to have been granted. Due to the absence of an effective mechanism for granting consents, state PCBs have inculcated a practice of turning a blind eye to such applications. As such, many industries have been allowed to operate on the basis of this “deemed consent” privilege. Additionally, PCBs seem to suffer from a variety of other challenges, including dearth of technical capacity, manpower and funding support, which pose as challenges to the effective enforcement of environmental law.

#### (ii) Political Conflicts, Interference and Inconsistency

While the problem of corruption is undoubtedly systemic in the Indian political and administrative setup, it has been found to be particularly rampant in environmental cases either by the Supreme Court or various inquiry committees appointed for the purpose of examining such cases.

A recent example is the proposed iron ore extraction project of POSCO, a South Korean company, in the state of Odisha in India (formerly known as Orissa). The state government had signed



a memorandum of understanding in 2005 with POSCO permitting the company to extract up to 600 million tonnes of iron ore over the next 30 years in Odisha. However, the local residents of the villages at and surrounding the proposed project site claimed that the construction would result in a loss of livelihood of the local populace. This project has now being cleared by the MoEF. However, civil society has raised significant questions on the government's commitment to protect the environment and conserve the country's natural resources. According to them, the POSCO project will result in significant environmental pollution and such approvals appear to be a prime example of administrative and enforcement agencies buckling to political pressures from the Government. The central and state governments are inclined to grant clearances and approvals for projects which involve large investments by large Indian corporate houses and especially multinational companies due to the financial benefits at the cost of environment. There also appears to be exercise of large amount of discretion without any parameters involved. For example, the Odisha government had earlier not permitted a separate proposal by the Tatas, an Indian corporate house, for an iron ore extraction of a much lower tonnage of iron ore. The Meena Gupta Inquiry Committee which was appointed to review the POSCO project reported instances of interference by the Ministry of Finance into the functioning of MoEF in granting environmental clearances for Posco's deal [Meena Gupta Committee Report (2010)].

The continued conflict between central and state governments on the power to grant clearances to development projects further substantiates the problem, especially in the case of large projects which have to be cleared by the central level authorities. Mr. Jairam Ramesh's, the former Minister of Environment and Forests correctly stated that *"beyond a point the bona fides of a*

*democratically elected state government cannot always be questioned by the Centre"* [Open Magazine (Jun. 27, 2011)].

### (iii) Economic Growth v. Environment Protection

India being a developing country, economic development is always an important consideration. However, Mr. Jairam Ramesh's tenure as the Environment Minister witnessed scrapping or delayed clearance of hundreds of development projects, which has reignited the debate on striking the balance between economic growth and environmental protection. For instance, in last August the MoEF rejected the proposal for mining in Orissa by Vedanta on grounds that the project would contravene various environmental laws and raised concerns on the livelihood related aspects of Dongria Kondh - a local tribe. This was followed by stalling construction of the ambitious Lavasa Housing Project at a hill station near Mumbai, on similar reasons of not securing the requisite environmental clearances.

Therefore it appears that there is a tradeoff between environment and growth. Environmental concerns should not be sidelined for economic growth and similarly the effective implementation of environmental protection should not be hindered in the name of economic development. A balance can be struck by following a number of principles developed in international environmental jurisprudence, such as the 'sustainable development', 'precautionary principle' and 'polluter pays principle.'

Taken as a whole, there are objective benefits to India from the FMS process and its employment in combination with DCS. While FMS is not ideally aligned with the DPP, fundamental objectives are substantially similar. It behooves



both the USG and the GOI, as well as prospective commercial partners from both countries, to anticipate and work through alignment issues. The USG has mechanisms to facilitate U.S. participation in international competition. These include the coordination of actions necessary to comply with U.S. law as well as working with the foreign government. Both countries would benefit from an initiative to identify recurring issues in the application of FMS to the full scope of prospective GOI requirements, so that recommended practices and representative solutions may be developed in advance of future procurements.

**(iv) Lack of enforcement of the international environmental law principle of “Polluter Pays”**

As mentioned earlier, the Supreme Court has held the “polluter pays” principle to be part of the law of the land. Based on the absolute liability principle, the “polluter pays” principle imposes responsibility on a party engaged in any hazardous or inherently dangerous activity to make good the loss he caused to another through such activity, irrespective of whether he exercised reasonable care or not.

For instance in the *Kamal Nath Case*, the Supreme Court applied the principle and imposed punitive damages on one of the parties to serve as a deterrent for other establishments causing pollution. However, there are only a few other cases in which damages were imposed. Hence, for effective implementation the government should enact guidelines and lay down criteria for determining compensation and damages payable by industries causing environmental damage.

## THE SILVER LINING

There have been some healthy developments and proposals which may assist in enhancing the enforcement capabilities in relation to environmental law.

Recently, the tough stance which has been taken by the Ministry of Environment and Forests of the Government, in strictly scrutinizing projects prior to granting of clearances, is a step in the right direction. Other noteworthy efforts include the coming into force of the National Green Tribunal Act, 2010 and a recent proposal by the Prime Minister for an independent environmental regulator.

**(i) The Green Tribunal Act**

The 186th Law Commission of India had recommended the establishment of specialized environmental tribunals with exclusive jurisdiction with regard to environmental cases. In terms of the said recommendation, such tribunals were to be vested with same powers as a civil court exercising original jurisdiction with appeals lying with a national environmental tribunal. On October 18, 2010, the National Green Tribunal Act, 2010 (“Green Tribunal Act”) was enacted. This Green Tribunal Act places India in a select group of countries having specialized tribunals for environmental protection (“Green Tribunal”). This Green Tribunal Act replaced the National Environmental Tribunal Act of 1995 and National Environmental Appellate Authority Act, 1997. The enactment of the Green Tribunal Act is a beneficial step for environmental governance in India, for the following reasons:





- (a) Green Tribunals help ease the burden of the courts from the existing docket explosion of environmental cases; and
- (b) The Green Tribunal Act seeks to do away with the lacunae in the existing adjudicatory mechanism contained under various environmental legislations. [Gill (2010)].

The Green Tribunal has a broad-based jurisdiction with power to adjudicate upon not only violations of environmental laws, but also issue clarifications involving substantial questions of law and review compliances and clearances under different environmental statutes. India has successfully implemented specialized tribunals for a number of classes of disputes for speedier dispute resolution – such as the Securities Appellate Tribunal, Central & State Administrative Tribunals, Intellectual Property Appellate Tribunals, etc. Therefore, this approach appears to be a good way to ease the burden and backlog of disputes on the various High Courts and the Supreme Court. On the other hand, orders issued by these tribunals are still appealed by aggrieved parties before the High Courts and the Supreme Court invoking their writ jurisdiction, which defeats the purpose of creation of specialized tribunals.

## (ii) Single Window Clearance

One significant development in relation to the administration of environmental approvals for industrial projects establishment has been the enactment of single window clearance legislations by many states beginning with Andhra Pradesh, wherein projects within a particular project cost threshold can apply for approvals through a single window clearance mechanism. [Rangarajan (2009)]. A leading criticism of India has been its administrative setup for obtaining any approvals, licenses or registrations. Therefore, a single window

system of obtaining clearances would greatly incentivize industrialization at the same time as encouraging industries for approaching the authorities for clearances without fearing bureaucratic red tape.

## (iii) Proposal for an Independent Environment Regulator

The current Prime Minister of the Indian central government, Dr. Manmohan Singh, has recently proposed the establishment of an independent environment regulator called the National Environmental Appraisal and Monitoring Committee ("Environmental Committee"), tasked with granting clearances to industrial projects. According to the Prime Minister, the Environmental Committee would effect a complete change in the process for granting environmental clearances by introducing better evolved and objective standards of scrutiny. The Environmental Committee is to be established with the vision of reducing litigation in development projects due to environmental issues, without going back to the "license permit raj". [Business Standard (Jul. 25, 2011); The Hindu (Jul. 24 2011)].

The establishment of a unified central regulator has the potential to be an excellent approach to solve the multiplicity of problems plaguing the enforcement of environmental law today. However, it remains to be seen what the bifurcation of the roles of the MoEF, PCBs and the Environmental Committee shall be. Certain independent regulators such as the Securities and Exchange Board of India have been considered to be fairly efficient as a regulator. In other cases such as in the telecom space, in relation to the establishment of the Telecom Regulatory Authority India, the introduction of another independent regulatory body has only increased the confusion resulting from conflicts in jurisdiction of the regulators.



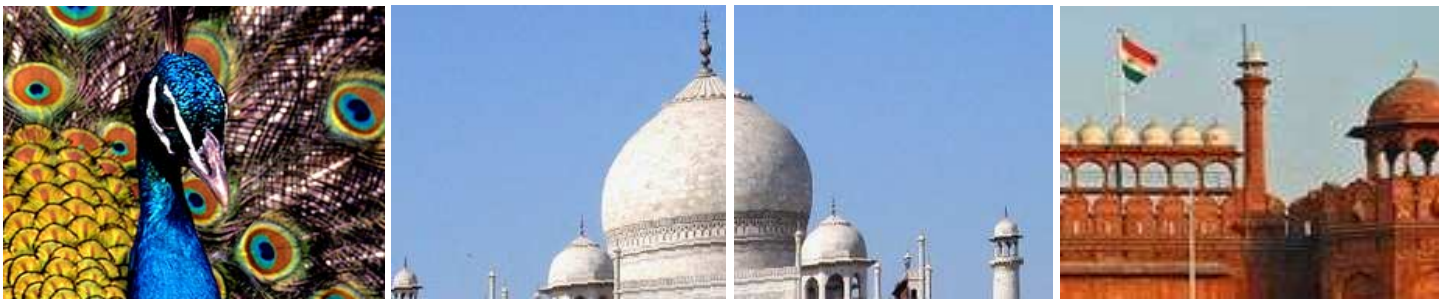


Hopefully the government will take their past experiences in the failure of multiple regulatory bodies and streamline an effective administrative machinery for the enforcement of environmental laws.

### NOTES

1. *Outlook* (Nov 9, 2011): Chief Justice of India Seeks Teeth for Green Laws, *OUTLOOK INDIA*, November 9, 2011.
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## THE IMPLEMENTATION OF ENVIRONMENTAL JUDGMENTS

By Geetanjoy Sahu

The role of the Indian Supreme Court in resolving environmental disputes has contributed immensely to the evolution of environmental jurisprudence principles in India. These principles include: recognizing the right to a healthy environment as part of the fundamental right to life; directing polluters to follow environmental norms and regulations; ordering implementing agencies to discharge their constitutional duties to protect and improve the environment; determining the quantum of compensation for affected persons; taking *suo motu* actions against polluters; entertaining petitions on behalf of affected parties; and expanding the sphere of litigation.

The Indian Supreme Court also has introduced environmental principles for the environmental safety, protection, and the well-being of the people. These environmental principles include the “polluter pays” principle, where the polluting party pays for the damage done to the natural environment; the precautionary principle, which aims to provide guidance for protecting public health and the environment in the face of uncertain risks, stating that the absence of full scientific certainty shall not be used as a reason to postpone measures where there is a risk of serious or irreversible harm to public health or the environment; the absolute liability doctrine, in which legal responsibility for an injury can be imposed on the polluter without proof of carelessness or fault; and the public trust doctrine, a principle that certain resources are preserved for public use, and that the government is required to maintain it for the public's reasonable use. In this paper, I have discussed how the judicial activism of the Indian Supreme Court has been extended to implement its own directions, and the major implications of this development for environmental jurisprudence in India.

Although the Indian Supreme Court's directions have been implemented in a number of cases, there remain a fair number of cases where the Court's directions have not been implemented or have been only partially implemented. In *M.C. Mehta and Others v. Union of India*, AIR 1987 SC 965 (“Oleum Gas Leak case”), the Court created the doctrine of absolute liability, while clarifying the principle of strict liability set forth in the landmark English case *Rylands v. Fletcher*. The Indian Supreme Court has also developed the principle of claiming compensation under its writ jurisdiction by creating a public remedy. However, ultimately, victims of gas leaks have been left to the ordinary relief of filing suits for damages. In *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 (3) SCC 212 (“Bichri Village Industrial Pollution case”), concerning the contamination of ground water, the Court, after analyzing all the provisions of law, rightly observed that damages can be recovered under the provisions of the Environment Protection Act. However, the assessment of compensation, payment, and the appropriate remedial measures remain unsettled. See Sanjay Parikh, *Development of Environmental Law: A Critical Appraisal*, a paper presented at the National Consultation on Critiquing Judicial Trends on Environmental Law, organized by the Human Rights Law Network in New Delhi, February 23-24, 2008.

The Court's directions set forth in *M. C. Mehta v. Union of India*, AIR 1988 SC 1115 (“the Ganga River Pollution case”) also were not implemented properly. The tanneries continue to operate despite the Court's direction that strict action be taken against the polluting industrial units in Kanpur. It has been observed by many scholars that both the sewage treatment plants and the common effluent treatment plant have failed to treat waste adequately. See Praveen



Singh, *Bridging the Ganga Action Plan: Monitoring failure at Kanpur*, Economic and Political Weekly, Vol. XLI, No. 7 (2006), pp. 590-592. In *S. Jagannath v. Union of India*, which involves the destruction of coastal ecology through extensive shrimp farming, the Court directed the closure of shrimp farms and issued orders for the payment of compensation pursuant to the “polluter pays” principle in addition to directing that the cost of remedial measures be borne by the industries themselves. See *S. Jagannath v. Union of India and Others*, AIR 1997 (2) SCC 87. However, post-judgment, the Court curiously stayed its own directions under review; and thereafter, the Parliament enacted legislation that effectively overruled the Court’s directives in the case. As a result, no compensation has been paid to the farmers and the people who lost their livelihood and the damage to the environment has not been remedied. In yet another case, the Court imposed a fine on Span Motel for harming the ecology of the river Beas. See *M.C. Mehta v. Union of India*, AIR 1997 (1) SCC 388. The Court ordered Span Motel to make restitution of the environment and ecology of the area. Subsequently, the Court clarified that no fine could be imposed under its writ jurisdiction and that the matter was required to be adjudicated under the provisions of the Environment Protection Act of 1986. An attempt to recover damages for environmental harm caused by dumping of waste oil by various importers also failed.

In a democratic set up with separation of powers, once the judgment is passed, it is left to the administration to implement the judgment. Although the Court in its judgment issues directions to the agencies of the state with respect to the implementation of its decisions, it will not oversee their actual implementation. Nor will the Court examine the extent of its implementation and the nature of its impact. Enforcement agencies like the State Pollution Control Board, in a number of instances that involve serious environmental problems and public interest, are found to have taken advantage either by postponing or not implementing decisions, notwithstanding the

importance of judgments. See M. K Ramesh, *Environmental Justice: Courts and Beyond*, Indian Journal of Environmental law, Vol. 3, No. 1, (June 2002), pp. 20-37. This has provoked the Court in recent times, to come up with an innovative method to see that its orders are implemented: continuing mandamus. See *Vineet Narrain v. Union of India and Others*, Supreme Court of India, Judgment of 18 December 1997, 1997 (7) SCALE 656. According to the Court, its *continuing mandamus* authority arises from the Constitutional framework of judicial review. The technique enables the Court to closely monitor the investigations by the government agencies.

The application of the *continuing mandamus* procedure suggests that instead of closing the case once the Court enters a judgment, it may issue a series of directions to the relevant administrative body or appoint a monitoring committee to implement the Court’s orders, both of whom would periodically report to the Court about the progress that is being made in the implementation process. For example, in several environmental cases, monitoring committees have been constituted to implement the Court’s orders, including the Loss of Ecology Authority in the Vellore Industrial Pollution Case, the Central Empowered Committee in the T N Godavarman Case, the Bhurelal Committee in the Delhi Vehicular Pollution Case, and the Dahanu Taluka Environmental Protection Authority in the Dahanu Power Plant Case. For more details, one can see Sahu, G (2008), *Implications of Indian Supreme Court’s Innovations for Environmental Jurisprudence*, Journal of Law, Environment and Development (LEAD), International Environmental Legal Research Centre, London, Number 4/1).

A representative example in which the Court invoked its continuing mandamus authority is *T.N. Godavarman v. Union of India*, which involved forest conservation. *T.N. Godavarman v. Union of India*, AIR 1997 SC 1228. The action was commenced in 1996 for the purpose of seeking an order from the Indian





Supreme Court to stop the felling of trees and to regulate the indiscriminate cutting of timber in the Nilgiris Forest. The case is yet to be finally decided. The Court in this case has entertained at least 2000 interlocutory applications and keeps hearing on every Friday afternoon.

Over the years, the Court has passed a series of orders that concern the protection of forests, wildlife, biodiversity, and national parks, and the eviction of encroachers, including tribal communities. All of these orders are in different stages of implementation. A significant order issued by the Court is the December 12, 1996 order, which clarified certain provisions of the Forest (Conservation) Act, 1980 and also extended the scope of the Act. The Court held that the word “forest” shall be understood according to the dictionary meaning and that all ongoing activity, such as mining, timber cutting, saw mills etc., within any forest in any state throughout the country, without the prior approval of the Central Government, must cease forthwith. Another significant order is the Court’s May 9, 2002 order, which constituted the Central Empowered Committee, a national-level authority charged with the responsibility to monitor the implementation of the Court’s orders, remove encroachments, implement working plans, and handle other conservation issues in the T N Godavarman Case. The constitution of the Central Empowered Committee was an effort by the Court to assist, partner, and guide the administration in protecting the forests across the country, thereby presenting a model for the rest of the country to emulate. However, in the process of implementation and in its enthusiasm to present such a model, the Court became mired in the complexities of a governance issues mainly managed by the bureaucracy, local institutions and the traditional form of forest management. These efforts on the part of the Court are, without doubt, unprecedented, even though they appear to be an invasion into the administrative terrain. The Court, however, has denied any such usurpation. In its pronouncements, the Court has

justified its actions either under a statutory provision (the power to appoint commissioners in matters of civil nature is found in Order XXVI Civil Procedure Code and Order XLVI Supreme Court Rules, 1966) or as an aspect of their inherent powers (Inherent power of the Supreme Court under Article 32 and of the High Courts under Article 226 of the Constitution).

It is undeniable that the devices employed by the Court have helped get detailed facts, understand complexities of social, economic and scientific issues revolving around environmental problems so as to arrive at decisions. However, accordingly the environmental governance process has become more complex through such judicial interventions and innovations. For a more detailed analysis of the case, see Armin Rosencranz, Edward Boenig and Brinda Dutta (2007), *The Godavarman Case: The Indian Supreme Court’s Breach of Constitutional Boundaries in Managing India’s Forests* (Washington DC: Environmental Law Institute).

At the theoretical level, advocates of the theory of separation of powers among the legislative, executive, and judiciary branches argue that the Court should not have any role in the implementation of its own decisions and that its functional scope is confined to the adjudication of laws and policies, and that the implementation of the Court’s judgments rests solely with the state’s own implementing agencies. Going further, they argue that the Court’s intervention in the implementation of its judgments would not only violate the principle of separation of powers but would also be contrary to the spirit of democracy. The question then is how to ensure the implementation of the Court’s orders in environmental litigation cases. The orders issued by the Court are obviously not self-executing, as they must be enforced by state agencies. Consequently, if state agencies are not enthusiastic about enforcing the Court orders and do not actively cooperate in the task, the purpose of environmental justice would remain unfulfilled. Such failure of state





agencies to ensure enforcement of the Court's orders would not only deny effective justice to the affected people on whose behalf the litigation is brought, but also would have a demoralizing effect on the people who might lose faith in the capacity of the environmental litigation system to deliver justice.

Referring to the non-implementation of the Indian Supreme Court's orders, Justice S.P. Bharucha stated:

This Court must refrain from passing orders that cannot be enforced, whatever the fundamental right may be and however good the cause. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper. It is counter-productive to have people say, the Supreme Court has not been able to do anything or worse. It is of cardinal importance to the confidence that people have in the Court that its orders are implicitly and promptly obeyed and it is, therefore, of cardinal importance that orders that are incapable of obedience and enforcement are not made.

See Justice S.P Bharucha's Inaugural lecture as part of the Supreme Court Bar Association's Golden Jubilee Lecture Series on Supreme Court on Public Interest Litigation (2001). The success or failure of environmental litigation would necessarily depend on the extent to which it is able to provide actual relief to the persons affected by pollution and correct the damage done to the environment at the grassroots level. If the Court's orders in environmental litigation were to remain merely as paper documents, then the innovative method of allowing Public Interest Litigations ("PILs") to resolve environmental conflicts by the Indian Supreme Court would lose all of its meaning and purpose. It is, therefore, absolutely

essential for the success of PILs that a methodology be devised to secure the enforcement of the Court's orders issued in environmental litigation.

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## LAFARGE DECISION - LIGHT AT THE END OF THE TUNNEL?

By Ravi Singhania and Sunayna Jaimini

### I. Environment v. Development

Every once in a while, a developing country has to decide between two of its necessary and opposing obligations – economic development versus protection of the environment. This debate is further intensified in a country like India where the pressure to maintain the precarious balance between environment and development gets intensified due to its ever-increasing population coupled with the problem of its fast-depleting natural resources. Consequently, this debate is oft repeated in the courts of law, wherein the judiciary has to umpire between the question of development and the question of protecting the environment. In order to honor both commitments, the judiciary has finely balanced the two on the touchstone of “sustainable development.”

“Sustainable development” is defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. This concept has been adopted by most countries as a principle to harmonize the needs of development and environment.

To ensure “sustainable development” in India, Indian environmental policy dictates obtaining prior environmental clearance for certain projects from the Ministry of Environment and Forests under various environmental legislations like the Environment Protection Act, 1986 and the Forest Conservation Act, 1980. The aim of obtaining such clearances is to ensure that sensitive flora and fauna are not sacrificed on the altars of development for the masses.

Recently, most infrastructure and mining related projects in India were plagued with controversies regarding environmental clearances. In most cases, due to lack of coordination between various governmental authorities governing the projects, the developers were given the nod by one authority only to be stalled by another, sometimes even after the developers had commenced with the projects. Not only were the environmental clearances unnecessarily delayed, clearances – once granted – were also retracted by the authority after the lapse of a considerable time period.

One such recent controversy was put to rest by the Hon’ble Supreme Court of India in the landmark case of *Lafarge Umiam Mining Private Limited v. Union of India* (2011 (7) SCALE 242). In *LaFarge*, the Hon’ble Court not only settled the dispute about the legality of the environmental clearance obtained by the company, but also in a praiseworthy step of judicial activism, provided detailed guidelines for granting environmental clearances for future projects.

In the present matter, the Ministry of Environment and Forest (“MoEF”) alleged that *Lafarge Umium Mining Private Ltd.*, an Indian company that had leased mining rights in Meghalaya, misrepresented “forest land” to be infertile barren land to obtain environmental clearances. This gave rise to two issues before the Court—firstly, a determination of the nature of land in question, and secondly, an examination of whether the company had misrepresented the nature of the land in order to dishonestly obtain clearances from the Ministry.



## II. Lafarge v. The Ministry- Houston, we have a problem!

Lafarge Surma Cement Ltd ("LSCL") is a Bangladeshi company that has a cross border cement manufacturing project in Chhatak, Bangladesh. LSCL has a 100 hectare captive limestone mine located in Khasi, Meghalaya. The mine is leased out to its wholly owned subsidiary in India namely Lafarge Umiam Mining Private Limited and the limestone quarried in the mine is transported via a 7km long conveyor belt to the cement factory in Bangladesh. The limestone quarried from the mine in Meghalaya is the only source of limestone for the cement factory.

In 1997, before commencing the project, LSCL through its subsidiary in India, namely Lum Mawshun Minerals Private Limited ("LMMPL"), began the process of obtaining the necessary environmental clearances from the MoEF. As a part of the application, LMMPL made representations that the limestone mines did not involve the diversion of "forest land." The LMMPL's representations were supported by two sources—firstly, the letters from the Khasi Hills Autonomous District Council ("KHADC"), the local authority with jurisdiction over the mines, and secondly, a certificate from the Divisional Forest Officer ("DFO") of the Khasi Hills Division stating that the mining site was not in a forest area. After several rounds of queries from the MoEF and consequent responses from LMMPL, the MoEF finally gave environmental clearance for the mines in 2001, and subsequently LMMPL commenced its mining operations.

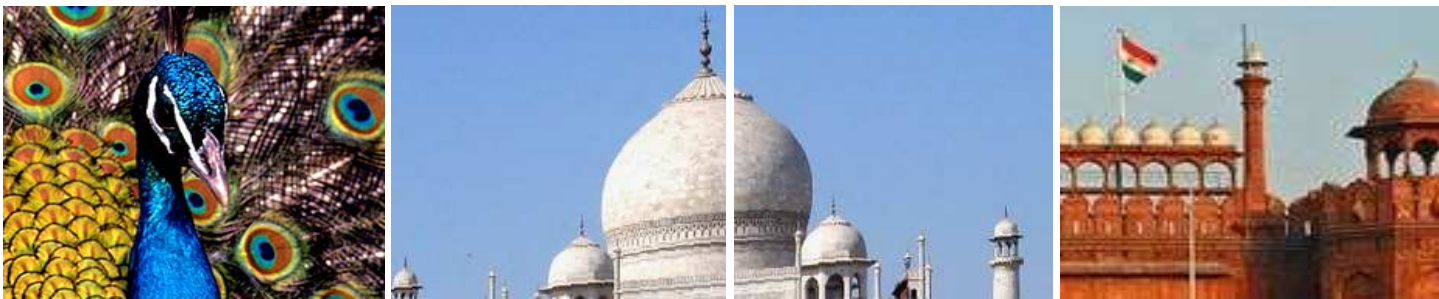
In 2007, six years after the MoEF had already granted the appropriate clearances, MoEF asked Lafarge to stop all mining activity in the area.

This step was taken after the Chief Conservator of Forests ("CCF") for Meghalaya informed the MoEF that Lafarge had misrepresented that the mining area was not a "forest land" and had diverted forest land for its mining activity without first obtaining the necessary forest clearance under section 2 of the Forest Conservation Act, 1980. The company vehemently denied such allegations and stated that it had proceeded with the developmental work on the basis of the certificate given by DFO, pursuant to which the DFO had certified that the project area was not "forest land" and did not fall in any of the notified, reserved, or protected forests. Therefore, according to the company, the requirement of obtaining a forest clearance did not arise.

Further, Shella Action Committee ("SAC"), which was spearheading the movement on behalf of tribals of the region, alleged that Lafarge was flagrantly violating Schedule VI of the Indian Constitution, which provides for protection of tribal land in the North Eastern region of India against acquisition by non-tribals. SAC argued that since Lafarge had misrepresented the nature of the project land, no forest clearance should be granted to the company.

Ultimately, the court allowed the company to resume its mining operations in the region after taking into consideration that the MoEF had granted the forest clearance in April 2010 and that the Company had complied with the preconditions to the environmental clearance. In its determination, the Court placed great emphasis on the rights of locals to decide on the value of conservation of the environment. In addition, the Court observed that the KHADC's letters as well as the Court's subsequent findings revealed that the Lafarge project resulted in significant gains for the local community.





### III. The Lafarge judgment and its impact

The Lafarge judgment is hailed for providing clarity on two important issues—firstly, for its clarification about the extent of judicial review in situations where environmental clearances have been granted but are later challenged with respect to the validity of the said process, and secondly, for laying down comprehensive guidelines for future projects that involve both forest and environmental clearances.

The Court also opined that the protection of the environment is an ongoing process and therefore “across-the-board” principles cannot be applied to all cases. Courts would have to examine the facts of each case on whether the project should be allowed or not. The “margin of appreciation” doctrine would apply in matters where questions are raised regarding governmental errors in granting environmental clearance.

#### i. Judicial Review

On the question of the extent of judicial review, the Court held that the constitutional “doctrine of proportionality” should apply to environmental clearances. Therefore, decisions relating to utilization should be judged on well-established principles of natural justice, such as whether all relevant factors were taken into account at the time of coming to the decision, whether the decision was influenced by extraneous circumstances, and whether the decision was in accordance with the legislative policy underlying the laws that governs the field. If these circumstances were satisfied, the decision of a government authority, would not be questioned by the Court.

The importance of this section of the judgment is that the Court lays down a clear principle that if a project developer complies with

the specified procedure for obtaining environmental clearances and there is evidence on record that the entity granting the clearance had done so after due consideration, such clearances would not be reversed to the prejudice of the project developer. This provides some much needed stability to the environmental clearance process and both project developers and environmental activists would definitely benefit from this consistent approach.

#### ii. Directive for future projects

In Part II of the judgment, the Hon’ble Court laid down specific guidelines to be followed in future projects. The following are a few important directives of the Court:

**National Forest Policy, 1988:** The Court upheld that the far-reaching principles of the *National Forest Policy, 1988* (which until now has been relegated to the back burners as a paper tiger policy) must govern the grant of forest clearances under the *Forest Conservation Act, 1980*. The principal aim of National Forest Policy, 1988 is to ensure environmental stability and maintenance of ecological balance, it further mandates that the derivation of direct economic benefit must be subordinate to this principal aim. The Court noted that, to date, there has been no mechanism available to implement it. However, the Court has now made it mandatory for decision-making bodies to consider the provisions of the National Forest Policy, 1988 before granting project approvals.

**Establishment of independent Regulator:** Under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals, and to impose penalties on polluters. In a press





release, the MoEF stated that it has already initiated the process of appointment of the independent National Environmental Appraisal and Monitoring Authority and that it has circulated proposals for inter-ministerial consultations. It is expected that the regulator and the newly established National Green Tribunal will be able to stabilize and expedite the process of obtaining clearances and that there shall be fewer conflicts relating to environmental clearances in the future.

**Panel of Accredited Institutions:** Further, the Court observed and opined that the government and the courts are often confronted by contradicting reports of various authorities submitted by the project developer. This often creates confusion and delays in the clearance granting process. To avoid such confusion, the Court's view is that a regulatory mechanism should be put in place, in the mean time, the MoEF should prepare a Panel of Accredited Institutions from which alone the project proponent should obtain the environmental impact assessment report on the terms of reference formulated by the MoEF.

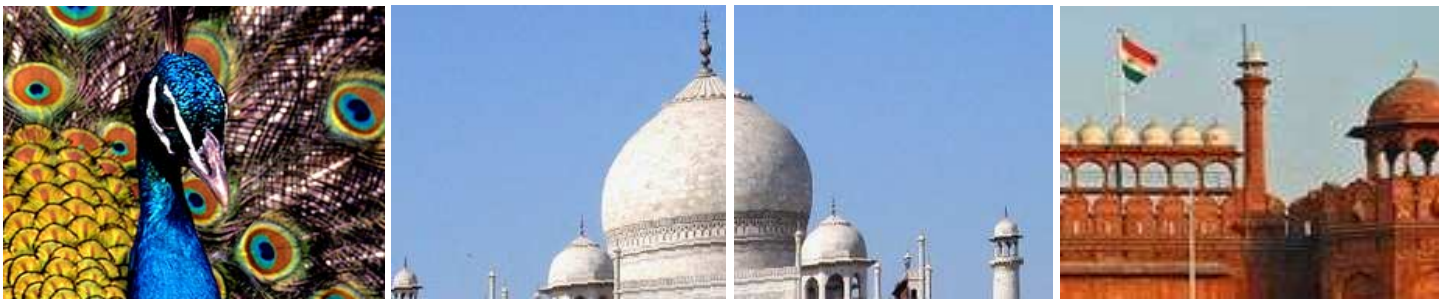
**Prior Site Inspection by MoEF:** To avoid future controversies regarding misrepresentation of the status of project land by the project developer, the Court held that if the project developer makes a claim that the land in question is not forest land, and if there is any doubt in the mind of the MoEF regarding the veracity of such claim, the site shall be inspected by the State Forest Department along with the Regional Office of MoEF to ascertain the status of the land. Upon inspection, if it is found that the "forest land" is involved, then the project developer will be required to apply for prior forest clearance. Further, there are several directions given to the MoEF to expand its internal infrastructure to better facilitate inspection, monitoring, and appraisal of proposals.

## CONCLUSION

In conclusion, the Court has taken bold steps to remove the various bottlenecks that plague development projects, while ensuring that the environmental agencies follow established directives and principles of protection of environment in granting environmental clearances. MoEF has hailed the following specific guidelines of the Court, namely, the emphasis of the National Forest Policy, 1988, in determining whether to grant environmental clearances and the establishment of an independent regulator, amongst other things.

In a welcome step since the passing of the judgment, the MoEF recently further streamlined environmental clearance norms for projects requiring forest land. By an order dated September 9, 2011, projects will now be eligible to be considered for site clearance even as their application for forest diversion is under consideration. However, as a safeguard against misuse, the order requires the project developer to submit certain supporting documents from the forest authorities at the state or central level stating that an application for forest clearance in place. Once the environmental appraisal committee makes a recommendation and the ministry takes a final decision on the environmental clearance for the project, the project developers would be informed of the decision. This reverses the earlier decision of MoEF to tighten guidelines in an effort to reduce the diversion of forests by making it a last resort option.

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## RELOCATING ENVIRONMENTAL REGULATORY POWERS

*By Kanchi Kohli and Manju Menon*

No one who has been following the environmental regulatory landscape in India for the last two decades could have missed the government's proposal to resolve the contested design and implementation of environment regulation in the country. This is especially related to impact assessment and pollution related norms and procedures. Twenty five years after it was set up, the Ministry of Environment and Forests ("MoEF") has admitted that it does not have the capacity to grant environmental approvals and monitor them thereafter. Therefore, what is needed is an independent expert authority to which a part of the MoEF's responsibility can be handed over, while MoEF continues to retain the law-making function.

On the 15th of August 2011, as part of his Independence Day speech, the Prime Minister of India reiterated the government's intention to constitute an environmental assessment and monitoring authority to streamline the process of environmental clearances in the country. This was important, as it was the same Prime Minister who had set the ball rolling when he announced the intention to establish a National Environment Protection Authority ("NEPA") at the National Conference of Ministers of Environment and Forests from all states of the country back in August 2009.

It was soon after this announcement that the MoEF had put out a discussion note on the NEPA. But even before the public could respond to the proposal, the government firmed up its commitment to NEPA by virtue of its mention in the "U.S.-India Green Partnership to Address Energy, Security, Climate Change, and Food Security." A 24th November 2009 press release of the U.S. Senate and Indian Prime Minister's office stated that, "the U.S. Environmental

Protection Agency will provide technical support for Indian efforts to establish an National Environmental Protection Authority focused on creating a more effective system of environmental governance, regulation and enforcement."

The MoEF subsequently revised its discussion paper and presented three possible models for the proposed NEPA prior to a public consultation held in New Delhi on 25th May 2010. These three models represented roles for the NEPA with varying combination of roles for grant of environment clearance (under the EIA Notification, 2006), pollution mitigation and the overall enforcement and monitoring of the norms laid alongside these approvals. The third model was one where the NEPA would only have the function of monitoring and compliance of environment clearance conditions (explained in a later section) and no powers to grant environmental clearances. At the public hearing with limited participation held in New Delhi, there were many questions raised about the need, format, and mandate of all three frameworks. It was also stated that the NEPA is likely to be a non-solution to the vexed problems of environmental clearances and pollution mitigation in the country. The reasons for this are discussed later on in this article.

Later in 2010, the MoEF revised its note to propose a National Environment Assessment and Monitoring Authority ("NEAMA") that would manage approvals of industrial and infrastructure projects and monitor them thereafter. What this essentially meant was that the Ministry sought to outsource the functions of its Impact Assessment ("IA") division that looks after environment clearances under the Environment Impact Assessment notification, 2006, and the function of ensuring compliance of environment clearance conditions laid out at the time of approvals. According



to the MoEF, the NEAMA will be an autonomous institution with scientific and professional rigour which is what is missing in the current system of appraisals following which clearances are granted.

The NEAMA note states clearly that there has been tremendous pressure on the environment due to rapid industrialisation, infrastructure development, and population growth. Ironically however, the solution offered remains restricted within the scope of institutional reform. The justification of the Ministry continues to be within the limited realm of its lack of capacity to process the large number of environmental permit applications that are placed on the expert committee desks.

Previous reforms in the environmental regulatory area have also focused on this aspect substantially. The 2006 re-engineering of the Environment Impact Assessment ("EIA") Notification had brought on board the concept of State Level Environment Impact Assessment Authorities ("SEIAAs") as an institutional change to reduce the pressure and burden on the MoEF to administer and appraise environment clearance applications. As of September 2011, two of the otherwise 23 functional SEIAAs have closed down and all pending environmental clearances have been transferred back to the Ministry. However, it cannot be said with any confidence that the quality of assessment, monitoring and compliance, public participation and final appraisal has improved. The constant increase in the number and faulty processing of clearances has continued to put ecological landscapes and peoples' livelihoods under continued distress (Kohli and Menon, 2005; Kohli and Menon, 2009; Menon and Kohli 2009).

The problems with the NEAMA discussion paper can be understood through its five specific premises.

First, is its statement that the EIA notification, 2006 was a marked improvement over its 1994 version. The

2006 notification was pushed through despite strong opposition to both the content and the drafting process. As a result of that, we continue to deal with the repercussions of a limited public hearing process. In the 1994 version of the EIA notification the final EIA was to be completed and then presented before the public based on which responses were sought. In the 2006 law, this space has shrunk to one where a draft EIA is made available to the affected people so as to seek feedback on the same—the final version of which never reaches the affected people before it is appraised by the expert committees of the MoEF. It also weakens the clause for rejection of application on the grounds of misleading information, wherein the powers to summarily reject the project on the above grounds are now subject to a personal hearing to the project authority. This clause has hardly even been used by the MoEF, nevertheless. Further, it allows for no EIAs and special procedures for real estate and construction projects on grounds that they have fewer environmental impacts. Ironically, this is one of India's largest industries today where massive land-use changes are taking place, both in cities and also peripheries of villages and towns. Many of these are in ecologically and socially fragile regions.

Second is the issue of conditional clearances. Each time a project is granted approval under the EIA notification it is done with a list of general and specific conditions which range from pollution mitigation, organised dumping, felling of trees, following pollution parameters, labour issues, green belt and so on. The NEAMA note quotes the Minister of Environment, Jairam Ramesh, stating that the conditions levied at the time of clearance should be objective, measurable, fair and consistent, and should not impose inordinate financial or time costs on the proponents. But there is absolutely no mention of the fact that the conditions are often a medium of obtaining clearances rather than addressing environmental issues. The compliance of such conditions renders a *fait accompli* situation to whatever the result of post facto assessment of impacts





or damage might be, as by then, the projects are already well underway. The Lower Subansiri Hydro Electric Project in Arunachal Pradesh was approved with a condition that the downstream impact assessment will be carried out alongside the construction of the project. In the case of the Jaigad thermal power plant in Ratnagiri, Maharashtra the impact on the alphonso mangoes is being studied even as the first phase of the plant is already commissioned. While the NEAMA note sympathises with project authorities when it says that conditions should not add additional costs on them, it fails to recognise the absolute disregard that project authorities have previously shown to the compliance of conditions that are critical to mitigating environmental impacts. In its understanding of conditional clearances the NEAMA note is also oblivious to instances where clearances defy logic by, say, laying down 121 conditions, almost forcing an approval from the approving authority, which in this case was the State Environment Impact Assessment Authority. A detailed assessment with case studies has been carried out by Kalpavriksh in 2009 in their report *Calling the Bluff: Revealing the state of Monitoring and Compliance of Environmental Clearance Conditions* (Kohli and Menon, 2009).

Third is the manner in which MoEF interprets and presents the of issue conflict of interest in the note on NEAMA which is very different from the issues raised by civil society groups. The NEAMA note mentions that it is the dual role of the government in both appraisal as well as approval that results in a perception of conflict of interest. For instance the MoEF is both the authority which along with an expert committee appraises a project for impacts and it is also the Impact Assessment Agency which actually grants final approval giving the impression that there might be an element of bias. This premise completely ignores the broader understanding of the problem that questions the appointment of expert committee members who have a direct stake in promoting a particular sector, project or project proponents. The

current format of the NEAMA only replicates the existing structure of Expert Appraisal Committees ("EACs") prescribed under the EIA Notification, 2006 and locates them outside the MoEF in the form of Thematic Appraisal Committees ("TACs") prescribed under the draft NEAMA proposal, with no guarantee that the compositions will be any different than what they are today. There have been several instances that have been brought to the notice of the Ministry where the chairpersons of the expert bodies have had previous or current affiliations for the sectors like thermal power, hydro power or mining for which they are now appraising approvals. Until 2010, the chairperson of the mining EAC was a person who was on the Board of Directors of five mining companies. Officials retiring as heads of Power Ministry have almost immediately taken over as chairpersons of a committee looking at approvals of hydro-electric projects. Protests from civil society groups have pushed the Minister, Environment and Forests to take steps to remove one such member from the Chairperson after this was pointed out (Menon and Kohli, 2010; Kohli 2010). A litigation filed by Kalpavriksh and Ors is also pending before the High Court of Delhi where this issues has been highlighted (W.P.(C) 2667/2011).

Fourth is the issue of autonomy. The NEAMA will be an authority under the Environment Protection Act, 1986. It has also been clarified in the note on NEAMA put out for comments, that it is the MoEF that will finally issue the environment and Coastal Regulation Zone ("CRZ") clearances (another important law for the management of India's coastline where additional approvals for projects located on specified coastal zones needs to be taken) based on the Authority's decision. Some part of the financial support may also come through the Central Government, presumably the MoEF itself, as was the case with the National Environment Appellate Authority ("NEAA") a redressal body now non-functional, and is with the National Biodiversity Authority ("NBA") set up as an independent authority under the Biological Diversity





Act, 2002. So, how can this authority be considered autonomous and independent? In all practical terms, the NEAMA will essentially be a relocation of the Impact Assessment Division of the MoEF, its regional offices and the EACs into what is being termed as a body with scientific rigour.

Fifth is the amalgamation of tasks of the MoEF's impact assessment division, monitoring tasks of the MoEF regional office, as well as the mapping and management functions of the Coastal Zone Management Authorities into one Authority called the NEAMA. The reasons explained relate to increased pressure on these Authorities and the plethora of responsibilities to which they are unable to attend. MoEF seems to find a solution by vesting this responsibility into one full time body dealing with multiple functions of appraising projects for clearances, monitoring their compliance, advising the central government on environmental policies as well as supervising and coordinating with state level authorities. Additional tasks include preparing coastal zone management plans, carrying out investigations, and researching and facilitating the creation of national databases of environmental information, and disseminating such information. The tasks of three functional set ups spread across different regions of the country are now being collapsed into one authority. With no clarity on the number of full time members, number of regional offices of the NEAMA and other issues related to staffing, MoEF's note prematurely assumes that the institutional structure envisaged will indeed be able put aside the woes of capacity shortfall which are being faced by a vast network of full time officials and part time experts.

The Prime Minister's words and also rulings by the Supreme Court of India continue to push for different versions of an expert body that they envisage. In a recent judgment allowing the continuation of limestone mining in the north eastern state of Meghalaya by the French company Lafarge, the

Supreme Court ordered the Central Government, i.e., MoEF, to appoint a "National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters". This judgement dated 6th July 2011 (in I.A. Nos. 1868, 2091, 2225-2227, 2380, 2568 and 2937 in Writ Petition (c) No. 202 of 1995, has given the government six months to act upon this direction .

What is ironic is no one seems to be interested in viewing the range of acknowledged problems of the environment clearance regime as being symptomatic of the regulatory framework in operation today. These are unlikely to be resolved only through the singular act of creation of new institutions as such bodies will face the same hiccups, similar road blocks and inherit the legacy of the faulty regulatory framework which would be difficult to maneuver away from. If environment protection and upholding peoples' livelihoods is truly the agenda of this reform process, then it cannot be done without a complete regulatory revamp of the legal framework through which projects are appraised and public participation in decision making ensured—a topic the MoEF continues to shy away from. Institutional restructuring is only a part of this process and is limited both in trying to locate the problem and also presenting a full solution.

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## MONSANTO'S BRINJAL BIOPIRACY: A SHOCKING EXPOSE OF CALLOUS DISREGARD FOR BIODIVERSITY LAWS IN INDIA

*By Leo F. Saldanha and Bhargavi S. Rao*

When Kaveri Seeds of India registered a variety of hybrid corn that it developed with the Indian Plant Registry, a move that would potentially provide the company with intellectual property rights over this plant product, it was surprised by legal opposition from Pioneer Overseas Corp., a subsidiary of DuPont, which claimed this was a case of gene piracy. The gene line of the plant sought to be registered by Kaveri is claimed to be identical to the one Pioneer developed in its Iowa lab. This case once more establishes the rigour with which corporations defend their claims over their products. Corporate success, it appears, is based on the capacity to defend ownership of its products.

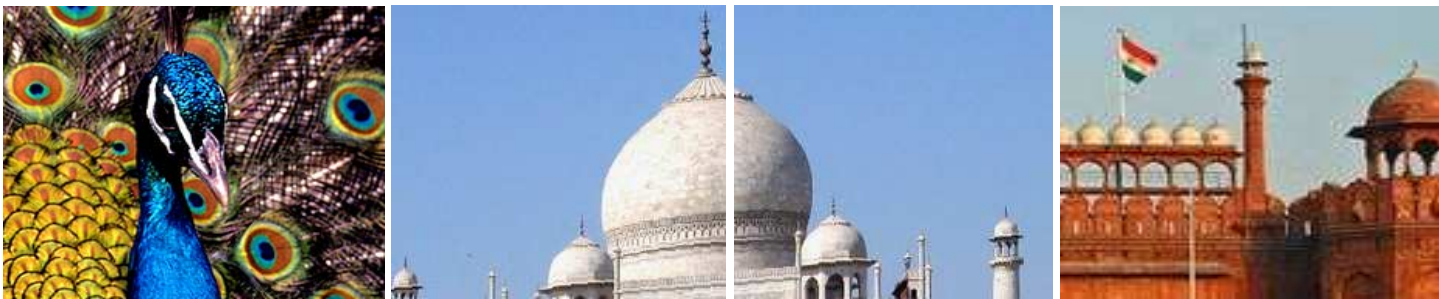
Corporations must equally rigorously comply with legal provisions that protect biodiversity protected as public commons, it would follow. This would involve absolute compliance with national and international legal regimes that protect biodiversity. In the case of India, this would involve rigorous compliance with the Biological Diversity Act, 2002, an enabling legislation enacted in compliance with India's obligations under the Convention on Biological Diversity, 1992.

Monsanto's compliance with Indian law has been called into question with its recent attempts to commercially release India's first GMO food product. Along with its subsidiary Mahyco (in which Monsanto holds over 30% equity), and in collaboration with USAID and Cornell University fronted by Sathguru Consultants (Sathguru) as part of the ABSP II project, the US agribiotech giant accessed a dozen varieties of brinjal (eggplant) that are endemic to India during 2005, in a maiden attempt to develop B.t. Brinjal. Local collaborating institutions involved were University of

Agricultural Sciences, Dharwar (Karnataka), Tamilnadu Agricultural University (Coimbatore) and Indian Institute of Vegetable Research, Lucknow (Uttar Pradesh). Mahyco took its patented B.t. gene product and inserted these into the brinjal varieties in its labs, and gave out packets of these seeds to local collaborating institutions to run field trials through 2009, under the supervision of the Genetic Engineering Approval Committee (GEAC) governed by the Ministry of Environment and Forest and Indian Department of Biotechnology. The product was approved for commercial release by GEAC in October 2009 in the face of widespread public protests against releasing GMO foods in India.

Yielding to public pressure, then Indian Environment Minister Jairam Ramesh stayed the decision. He then held a series of Public Hearings on this issue, which was participated by thousands across the country, to eventually order a moratorium on the environmental and commercial release of Bt Brinjal in February 2010. In so doing he acceded to the widely held scientific and public position that not enough was known about the potential health and environmental impacts of GMO foods – largely relying on the Precautionary Principle to formulate this decision.

During the Bangalore Public Hearing held by Minister Ramesh, the authors of this note/article submitted a detailed petition explaining how the entire process by which Monsanto/Mahyco and its collaborators accessed and genetically modified brinjal varieties endemic to India was in criminal violation of the Biological Diversity Act. The Minister acknowledged this submission in his moratorium decision in the first footnote, but only to ridicule it as a "wholly unjustified controversy." He curiously mixed



his reasoning with another submission that raised concerns over the careless manner in which the Ministry had a few months before de-listed 190 plants from the purview of the Act, if they were “normally traded commodities” (NTC). In so doing, the Minister not only sidestepped a major allegation of biopiracy against Monsanto and others in accessing brinjal varieties totally illegally, but also proceeded to trivialise an equally alarming situation of de-listing plants from the protection accorded by the Biodiversity Act if they were NTC. Subsequent research by ESG, confirmed by IUCN, has revealed that at least 15 plants so listed are critically endangered and should never have found their way into this list.

Disappointed with such trivialisation of critical concerns relating to corporate biopiracy by the highest custodian of India's biodiversity protection laws, the authors filed a complaint under the Act before the Karnataka Biodiversity Board (KBB) and independent regulator National Biodiversity Authority (NBA) soon after. The Board rigorously investigated the case, issued notices on all accused institutions, conducted workshops and hearings, visited the UAS Dharwad to investigate its role and sought repeatedly advise from the NBA on how to proceed, considering that foreign companies were involved. The NBA, in stark contrast, did nothing for over a year and half. The complainants had no option but to publicly campaign for appropriate action by the regulator. This campaign also reached the Parliament and several questions were raised about what action was being taken on the basis of our complaints. The NBA finally decided in June 2011 that it would investigate the allegations of biopiracy against Monsanto/Mahyco, a decision that was made public only in August. Soon after, the following statement was also made by current Indian Environment and Forest Minister Jayanti Natarajan on 5th September 2011 in the Rajya Sabha (the House of Elders in India's Parliament):

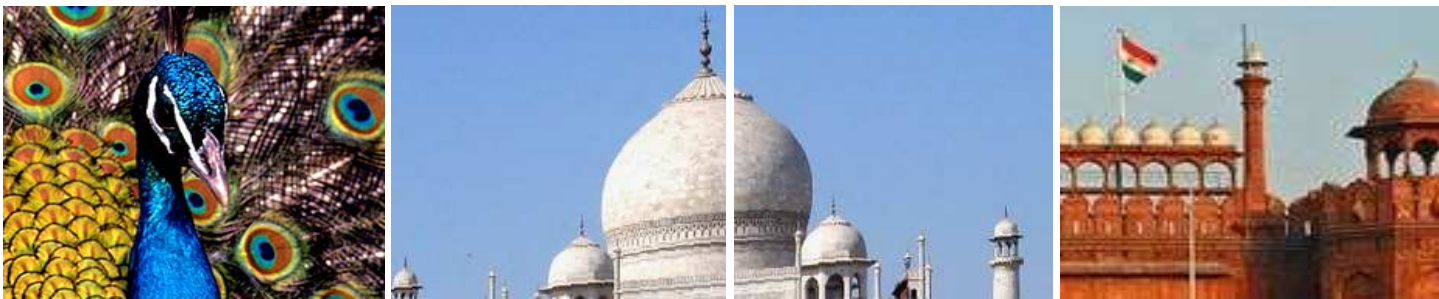
“National Biodiversity Authority (NBA) has received a complaint from M/s. Environment Support Group, an NGO on the alleged violation by M/s. Mahyco / M/s. Monsanto and their collaborators for accessing and using the local brinjal varieties for development of Bt Brinjal. NBA has decided to proceed as per law against the alleged violators on the basis of reports of the State Biodiversity Board for accessing and using the local brinjal varieties without prior approval of the competent authority”

### WHAT CAN WE EXPECT NOW?

Clearly this is not the only case of biopiracy in India. Jairam Ramesh himself admitted in a convention on biodiversity in September 2010 that “biopiracy is one of the biggest threats and concerns for India.” Shockingly though, the biopiracy case against Monsanto/Mahyco is indeed India's very first being tackled since NBA was set up in 2003. A troubling aspect here is that most agencies that monitored and finally cleared the B.t. Brinjal product in October 2009, were all working under the ambit of the MoEF, but chose not to insist compliance with the Biological Diversity Act. The case assumes importance not merely for the crime committed by Monsanto/Mahyco and their collaborators, but also to enquire into why several government regulatory bodies, and the NBA in particular, chose to look away from this crucial aspect of compliance.

The Act requires that when any foreign (including that of a non-resident Indian) or Indian individual, corporate body, association, etc. is involved in accessing India's biodiversity for any use (defined in the Act as research or commercial utilization or bio-survey and bio-utilisation, including genetic modification) prior approval is required from NBA when foreigners are involved, and of the appropriate





State Board in the case of Indians. Each of these regulatory authorities is required to process applications to access India's biodiversity in consultation with Biodiversity Management Committees constituted under India's local elected Panchayats (rural) and Nagarpalika (urban) bodies. A decision is taken then based on the Access and Benefit Sharing regime, that extends monetary and other benefits to local benefit-claimers - communities who have protected local varieties for generations.

Clearly, Monsanto/Mahyco knew the existence of this law, considering that it is amongst the most aggressive companies in taking law suits to defend its products and heavily funds a special legal cell protect its rights. It even has a policy that bravely states "Why Does Monsanto Sue Farmers Who Save Seeds?" Why then did Monsanto not care to comply with India's biodiversity laws whose intent it is to protect India's biodiversity?

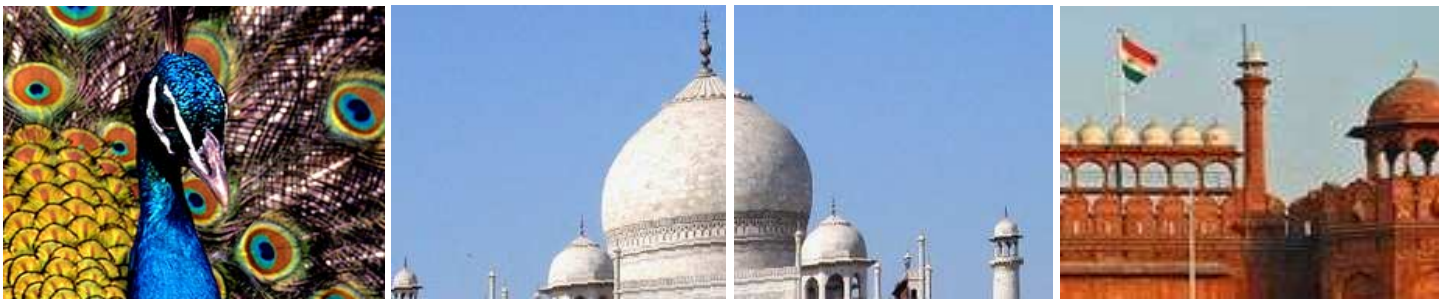
When officially investigated, answers have varied from Monsanto claiming it was not aware of the need to comply with India's Biological Diversity Act, and to the Universities claiming that the law does not apply to them at all as they are publicly funded. Sathguru, speaking for USAID and Cornell, has claimed that the intent is to provide pro-poor varieties of brinjal. Neither Monsanto nor Sathguru has acknowledged their intent to commercially exploit the products, that the agreements so vividly reveal.

Billions of dollars in agri-biotech exploration are at stake now considering that the moratorium on B.t. Brinjal, followed by this complication with criminal violation of biodiversity protection laws, is not an easy one to wriggle out of. India's major votary of biotechnology Kiran Majumdar recently stepped up in support of Monsanto and such other violators when she tweeted: "We urgently need to revamp the Biodiversity Bill in India - what were the authors

thinking when they drafted? Just realized what a Draconian Biodiversity Bill we have legislated - it will kill innovation in the Biotech sector in India. The Ministry of Environment prohibits any plant material from being researched without paying royalties to the GOI - the gist"

Majumdar's frustration is shared by many in the corporate sector who appear to value profit over behaving with corporate responsibility and protecting biodiversity.

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## INDIA'S ROLE IN MULTILATERAL CLIMATE CHANGE NEGOTIATIONS

*By Namrata Patodia Rastogi*

**I**n November of this year, South Africa will play host to the next round of multilateral climate negotiations in Durban. A central issue for many parties is the future of the Kyoto Protocol, whose first commitment period is set to expire at the end of 2012. Other key issues include establishing the Green Climate Fund and fleshing out the details for measurement, reporting and verification of actions by countries, agreed to by parties in Cancun last year.

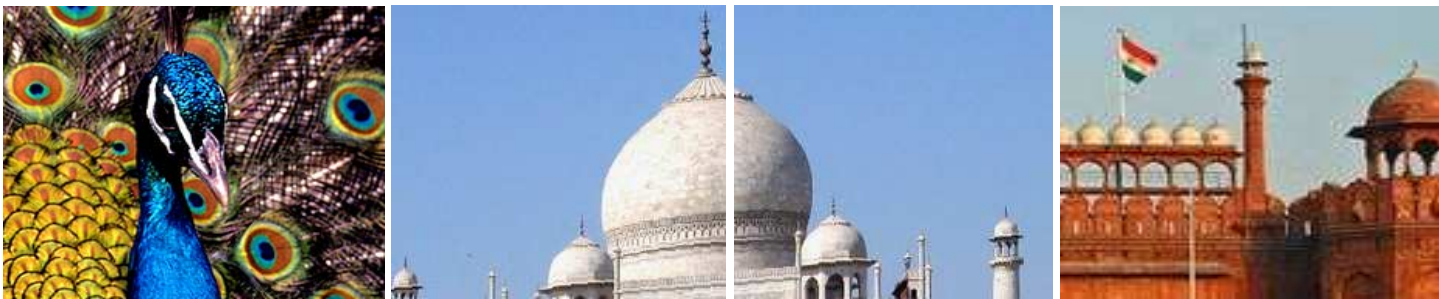
India's role remains critical at these negotiations. As an emerging economy ranked as a top-five greenhouse gas emitter and a key member of the "BASIC" negotiating bloc — which consists of the major developing economies of India, Brazil, China, and South Africa — India played a pivotal role in shaping the outcomes of the last two Conferences of the Parties ("COP") in Copenhagen and Cancun. Given the recent appointment of a new Environment Minister, however, it is unclear how India will approach Durban ("COP-17").

Since agreeing to the UN Framework Convention on Climate Change ("UNFCCC") in 1992, India has been a staunch defender of the principle of "common but differentiated responsibility" ("CBDR"). India, along with other developing countries, has long argued that the responsibility of addressing climate change rests with those developed countries that have historically been the largest global greenhouse gas ("GHG") emitters. While India continues to support the CBDR principle, it has shown greater flexibility in recent years as to the roles and responsibilities of developing countries. For the first time, at the COP in Bali in 2007, India and other developing countries acknowledged the growing significance of emissions from developing countries and their responsibility to

act to reduce GHG emissions. This acknowledgment came to be reflected in the Bali Action Plan, which called for an "agreed outcome" by COP-15 in Copenhagen that would include commitments or actions by developed country parties, as well as "nationally appropriate mitigation actions" to be undertaken by developing country parties.

In 2009, prior to the much-hyped Copenhagen Climate Summit, India began to reposition itself as a "deal maker," largely due to proactive engagement by then-Environment Minister Jairam Ramesh. One of the first signs of departure from India's traditional stance was seen at the Major Economies Forum (MEF) in L'Aquila, Italy in July of that year. The MEF countries, of which India is a part, agreed that the increase in global average temperatures above pre-industrial levels should not exceed 2 degrees Celsius. To many, this language implied that India as well as other emerging developing countries would need to undertake mitigation actions. Prior to the Summit, India announced a voluntary pledge to reduce its emissions intensity (emissions per unit GDP) between 20 to 25 percent below 2005 levels by 2020. This marked a shift not only because India agreed to undertake mitigation actions, but more so because it agreed to do so without any international financial support — a clear indication that India understood and acknowledged its own responsibility, and was ready to engage constructively.

The Copenhagen summit was viewed by many as a failure because it did not deliver a legally-binding climate change agreement, even though it was evident well before the summit that such an outcome was highly implausible. It did, however, produce the Copenhagen Accord, a political agreement brokered by U.S. President Barack Obama and leaders of the



BASIC countries. The Copenhagen Accord has since then been endorsed by more than 100 countries. Though the Accord was only “taken note of” by the UN body — and as such has no legal standing in the UN framework — it was able to strike the delicate balance between the needs of both developed and developing countries.

The principal elements of the Copenhagen Accord were:

1. A goal to limit global temperature increase to 2 degree Celsius;
2. A process by which developed and developing countries enter their mitigation pledges;
3. A commitment by developed countries to raise \$30 billion in international climate finance between 2010-12 and a goal to mobilize \$100 billion per year by 2020 from various sources to address developing country needs;
4. Broad terms for ensuring transparency of countries’ mitigation pledges (also known as “monitoring, reporting and verification” (MRV)) and;
5. Establishment of various institutions including a new fund (now called the Green Climate Fund), a Technology Mechanism and an Adaptation Committee. These main elements of the Accord were adopted a year later by the UN body as part of the Cancun Agreements at COP-16.

Apart from India’s active participation as a member of the BASIC bloc in Copenhagen, it played a crucial role as a facilitator between the two largest GHG emitters, China and the United States. An important issue for the United States and other

developed countries in the multilateral negotiations has been to establish a process to ensure transparency of the unilateral actions being pledged by countries — what is known in negotiator’s speak as “measurement, reporting and verification” (MRV). Establishing such a process, developed countries argue, helps to build trust and confidence among parties that countries’ mitigation pledges are being met. Leading up to the Copenhagen summit, there was significant tension around this issue primarily since China, and to some extent India, expressed concern about potential infringements of their national sovereignty related to “verification” of their unilateral actions. India helped to find a middle ground between the United States and China by introducing the concept of “international consultations and analysis,” which was agreeable to both.

In the aftermath of Copenhagen the international community tempered its expectations for the next round of negotiations in Cancun in 2010. Leading up to the conference, countries made it clear that the Cancun outcome had to be a “balanced package,” i.e., one that captured progress on all the issues under consideration. Incremental progress was being made on many key issues such as finance, technology, adaptation, and forestry. However, the issue of MRV — critical to the developed countries — remained at an impasse. Again, India played a pivotal role in reaching a compromise. A proposal detailing the process of “international consultations and analysis” presented by Minister Ramesh at the Major Economies Forum a month before the Cancun conference broke open the deadlock over MRV, mostly because it came from a member of the BASIC bloc, and was welcomed by developed countries as the path forward. Ramesh’s proposal provided details on how such a process could work and made clear that it would be facilitative and without any punitive implications. In Cancun, India was applauded by other parties as a “bridge builder” and credited for its





instrumental role in the success of the Cancun Agreements.

Having established itself as a constructive and valuable broker at the Copenhagen and Cancun COPs, India has the opportunity to continue to play this role in the upcoming negotiations in Durban.

Keeping the Kyoto Protocol alive, however transitional that might be, is critical to achieving success when parties meet in Durban in November. While developing countries are championing a legally-binding second commitment period for Annex I parties to the Kyoto Protocol (developed countries except the US), Japan, Russia and Canada have made it abundantly clear that they will not sign on to a second commitment period under the Kyoto Protocol. The European Union on the other hand, has said that it is prepared to do so but only with assurances that the US (which is not a party to Kyoto) and other major economies (including India) will agree to a comprehensive legally-binding treaty in the near future.

Negotiators are attempting to find creative ways to address this politically charged issue. The most realistic option on the table is one where the EU and some other Annex I parties agree to a political second commitment period under the Kyoto Protocol (as opposed to a legally-binding one), coupled with agreement among parties on the objective of working toward future binding outcomes. Gaining assurance of such a future agreement wherein other key GHG emitters are included is key to breaking this deadlock. Figuring out such an option will help avert a failure in Durban.

With newly appointed Indian Environment Minister Jayanthi Natarajan in office, and recent proposals that indicate India may be hardening its negotiating stance, it is an open question whether India will revert to its more traditional stance or continue to work proactively to bridge differences between developed and developing countries.

Durban provides another opportunity for India to play the role of deal maker. Helping to help find middle ground on the future of the climate regime — one that is able to bring other major developing economies on board — would be invaluable. Such constructive engagement by India would help bring parties closer to success in Durban.

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*By Sean G. Kulkarni*

### *New Jersey Appellate Court Rejects Economic and Spiritual Injury Claims against Restaurant that Served Meat-Filled Samosas to Vegetarian Diners*

A craving for hot samosas could prove difficult to satisfy in many parts of the United States, both in small towns and some large cities. Edison Township, New Jersey, however, is not one of those places. A virtual mecca for seekers of modern-day Indian fashion, jewelry and delicacies, Edison delivers to American samosa eaters what Philadelphia offers to cheesesteak fans or what only New Orleans could provide for a devout beignet lover.

For one group of sixteen samosa lovers, however, Edison may come to symbolize that nightmarish conjecture feared by vegetarian restaurant diners throughout the nation: a truly perverse form of caveat emptor.

#### **Background**

On August 10, 2009, plaintiffs Durgesh Gupta and Sharad Agarwal placed an order for vegetarian samosas at Edison's Moghul Express ("Moghul"). Agarwal specifically advised the clerk that he was placing the order on behalf of a larger group of strict vegetarians. The clerk informed the men that Moghul did not make meat-filled samosas at all, and for the avoidance of doubt, went ahead and wrote "VEG samosas" atop the food tray at the time of delivery. At the time of pickup, Agarwal asked for, and received, further assurance of the meatless contents of the snacks.

After consuming some of the samosas, the larger group of plaintiffs expressed concern that they were in fact eating meat (samosas are stuffed pastries, and so the underlying meat or vegetable content becomes visible only upon biting into or splitting apart the pastry shell). Upon receiving further telephone assurance from Moghul as to the meatless content of the samosas, the group continued eating for a time, but they decided eventually to return the remaining

samosas to Moghul to verify the content. Once there, a different clerk advised the group that indeed, the samosas contained meat.

In filings before the New Jersey Superior Court (Law Division, Middlesex County), plaintiffs offered a copy of the restaurant's menu that did in fact list "Vegetable Samosa" as an option and did not list a meat-filled alternative. A Moghul representative explained to the Court that a separate customer had placed an order for meat samosas at approximately the same time as Agarwal, and that the orders had been mixed up upon delivery. Upon realizing the mistake, Moghul staff prepared a fresh order of vegetable samosas for delivery to Agarwal, who accepted it without payment.

#### **Injury Claims**

Plaintiffs decided to sue Moghul for negligence, negligent infliction of emotional distress ("NIED"), consumer fraud, products liability, and breach of express and implied warranties in connection with the samosa mix-up. In elaborating the nature of their "spiritual injury," plaintiffs told the trial court: "Hindu vegetarians believe that if they eat meat, they become involved in the sinful cycle of inflicting pain, injury and death on God's creatures, and that it affects the karma and dharma, or purity of the soul. Hindu scriptures teach that the souls of those who eat meat can never go to God after death, which is the ultimate goal for Hindus. The Hindu religion does not excuse accidental consumption of meat products." Plaintiffs further explained that the religious violation of meat consumption requires participation in a religious purification ceremony along the Ganges River in Haridwar, Uttaranchal, India.

In addition to compensation for emotional distress, plaintiffs sought economic damages for the amount they would incur by virtue of having to participate in the required religious cleansing ceremony in India. On presentation of the evidence described above, the motion judge converted the Defendant's initial motion to dismiss for failure to state a claim into a motion for

summary judgment, determined that further discovery was not necessary to her decision, and granted the motion. Plaintiffs appealed, and the Superior Court, Appellate Division affirmed in part, reversed in part, and remanded.

### Analysis and Decision

The Appellate Court first analyzed plaintiffs' claims under the New Jersey Products Liability Act ("PLA"). Writing for the Court, Judge Edith K. Payne acknowledged that food cooked and sold by restaurants falls under the PLA, but explained that the PLA did not provide grounds for recovery because the plaintiffs' claims were "not related to a defect in the samosas themselves." Rather, the samosas were "safe, edible and fit for human consumption." In other words, the PLA does not provide a recoverable basis where plaintiffs are simply provided with the wrong product, as a result of the defendant's negligence or otherwise.

Plaintiffs also attempted recovery of damages under the New Jersey's Consumer Fraud Act ("CFA"), alleging that Moghul "fraudulently and/or deceptively advertis[ed] the sale of vegetarian food to the Plaintiffs and instead, provid[ed] Plaintiffs with non-vegetarian food containing meat products." The Court reversed the motion judge's finding in part by ruling that Moghul's clerk had in fact affirmatively misrepresented the contents of the purchased samosas, both orally and in writing on the food tray. Since an affirmative misrepresentation under the CFA does not require knowledge of its falsity or intent to deceive, no further discovery was required as to the clerk's knowledge or motive in describing the content of the samosas to Agarwal.

However, plaintiffs' CFA claim was dismissed because plaintiffs were unable to demonstrate any "ascertainable loss" (including, for example, "loss of moneys or property") within the meaning of the statute. The Court noted specifically that Agarwal accepted a substitute order of conforming samosas without cost. Furthermore, the cost to cure an alleged spiritual injury (in the form of a purification ritual at the Ganges River) resulting from Moghul's erroneous samosa delivery could not be categorized as either a loss of money or property under the CFA.

Furthermore, the Appellate Court dismissed plaintiffs' negligence and NIED claims on the basis that plaintiffs had failed to offer evidence of physical injury, or even any demonstrable "severe mental or emotional harm," as a result of the spiritually damaging samosa incident.

On a bright note for plaintiffs, the Appellate Court held that Moghul did breach its express warranty of fitness regarding the requested vegetarian samosas. The Appellate Court remanded to the lower court the question of whether the consequential damages claimed by plaintiffs — including the costs of Ganges purification — were in fact foreseeable by Moghul at the time its clerk assured Agarwal of the meat-free content of the karmically questionable samosas.

*Gupta, et al. v. Asha Enterprises d/b/a Moghul Express & Catering, Co.*, 2011 WL 2749630 (N.J. Super. App. Div. 2011).



### *Art of Living Foundation Seeks Damages and Injunctive Relief from Critical Former Students on Defamation and Trade Secrets Claims*

The U.S. chapter of the international Art of Living Foundation ("AoLF") — based in Bangalore, India and directed by the popular spiritual leader Sri Sri Ravi Shankar — has filed suit in the Northern District of California against two former adherents of the organization. The former students became highly critical of AoLF and Shankar after leaving the organization, and have since taken to the blogosphere under anonymous pseudonyms "Skywalker" and "Klim" to press their case. *Art of Living Foundation v. Does 1-10*, 2011 WL 2441898 (N.D. Cal. 2011). Specifically, AoLF alleges that defendants have posted defamatory statements on their blogs, and illegally published trade secrets of the Foundation (trade libel and copyright infringement are also alleged in plaintiff's complaint). In its prayer for relief, AoLF asked the Court for monetary damages and injunctive relief "restraining Defendants from operating the blogs and requiring that the blogs be removed from the Internet."



## Defamation

AoLF first claims that the defendants use the blogs titled “Leaving the Art of Living” and “Beyond the Art of Living” — to intentionally disparage and defame both the Foundation and its leader. For example, one blog states: “The truth is more disgruntled people should come out to do something about all the illegal activities that occur through and in his organization, ranging from exploitation, to swindling, to cheating, to physical abuse, to sexual harassment and fondling, etc.” Another statement adds: “the answer is obvious, the master is a charlatan (is a person practicing quackery or some similar confidence trick in order to obtain money) in disguise.”

The defendants initially sought protection for their statements as constitutionally protected criticism of a religious organization. However, writing for the Court, Judge Lucy H. Koh concluded that it was “unclear” whether AoLF was an actual religious organization. Judge Koh noted that AoLF’s mission as a non-profit corporation carried an arguably secular character: that is, to offer “courses that employ breathing techniques, meditation, and yoga, focusing on ‘Sudarshan Kriya,’ an ancient form of stress and health management via rhythmic breathing.” Moreover, to the extent that AoLF is in fact a religious organization, Skywalker and Klim appeared to direct their statements at AoLF’s business and financial practices, and alleged criminal activity, rather than at any particular religious conduct or religious ideology. As a result, the Court was free to analyze the dispute using “neutral, secular principles, without impermissible entanglement into religious doctrine.”

In assessing the defamatory quality of the statements, the Court was first tasked with resolving the legal question of whether the statements were actual assertions of fact or were instead “pure opinions,” as the latter garner First Amendment protection. In evaluating the broad context of the statements, the Court held that defendants’ overall blog content should be treated as constitutionally protected opinions rather than verifiable fact. Judge Koh explained that the overall tenor of the blogs was “obviously critical” of AoLF. The blogs offered such heated discussion and criticism of the Foundation and Ravi Shankar that readers would likely view the

statements as opinion, rather than assertions of fact. While defendants’ criticisms of “fraud,” “embezzle[ment],” and “abuse” (e.g., “[n]one of this money goes toward helping any poor or disadvantaged people”) bear indicia of factual assertions, the Court found the overall character of these assertions to be figurative and hyperbolic. Reasonable readers of the blog would not confuse the accusations with particularized assertions of fact. For example, the statement “I am fully convinced that [AoLF] is front-end name for a group of fraudulent NGOs” would likely be viewed by readers as a single blogger’s opinion with respect to the Foundation’s financial transparency practices, and not a factual allegation of wrongdoing.

Based on this analysis, the Court granted defendants’ motion to strike the defamation claim, although AoLF was granted leave to amend its complaint.

## Trade Secrets

AoLF intentionally withholds its “Sudarshan Kriya” breathing technique from written publication, but has prepared written materials on other topics for didactic and internal study purposes. AoLF claims that certain materials — including the Breathe Water Sound Manual — were the subject of a copyright registration claim, had independent economic value, and were wrongfully published by defendants on their blogs in June and July, 2010. Defendants, in turn, told the Court that the manuals were not actually trade secrets because the underlying techniques are well-known in the yoga community, and are generally not kept confidential.

In evaluating the trade secrets claim, the Court first noted that defendants’ decision to publish the materials had arisen from their protected freedom of expression on a “public issue” (i.e., the issue of whether AoLF is “basically a cult and a sham,” as generally claimed by defendants in their blogs). Nevertheless, Judge Koh pointed out that the “spiritual” nature of the works does not render the works ineligible for trade secrets protection. The Court confirmed that AoLF derives independent economic value from the secret teaching manuals (for example, by collecting course fees from students eager to learn the content of the manuals), and

employs reasonable efforts to keep the manuals confidential, such as using password-protected electronic files and restricting circulation.

Regardless of whether the manuals and lessons are generally known to the public (either within or without the yoga community) the Court expressed skepticism as to whether the teaching manuals and lessons actually contain any “secret aspects.” After reviewing the manuals under seal, the Court pointed out that parts of the manuals contain simple biographical information about Ravi Shankar and the Foundation.

While the Court chose to deny defendants’ motion to strike the trade secrets claim, the Court held that AoLF could not obtain discovery with respect to that claim until it identifies, with reasonable particularity, the genuine secret aspects of its teaching lessons and manuals.

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## SUBMISSION REQUESTS

### Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee’s jurisdiction. These submissions are then compiled as respective committee’s *Year-in-Review* articles and typically published in the Spring Issue of the Section’s award-winning quarterly scholarly journal, *The International Lawyer*. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee’s Year-in-Review by emailing the [Co-Chairs](#) and requesting submission guidelines.

### India Law News

*India Law News* publishes articles and recent case notes on significant legal or business developments in India that would be of interest to international practitioners. The Winter 2011-2012 issue of *India Law News* will carry a special focus on Indian competition law. Submissions are due on **December 15, 2011**. Please read the Author Guidelines available on the [India Committee website](#). Note that, *India Law News* does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the [Editorial Board](#).

## INDIA COMMITTEE

The [India Committee](#) is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-US relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the US, as well as other countries, in an effort to support the global Rule of Law.

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### UPCOMING EVENTS

#### U.S. and India: Key Legal Aspects of Cross Border Business

January 19–21, 2012

Mumbai, India

Format: Conference

#### Anti-Corruption: Perspectives on Legal Implications for India

November 16, 2011

10:00 AM - 11:30 AM EST

Format: Teleconference

### LEADERSHIP (2011-2012)

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