



Environmental Laws: Application and efficacy in the context of business & human rights

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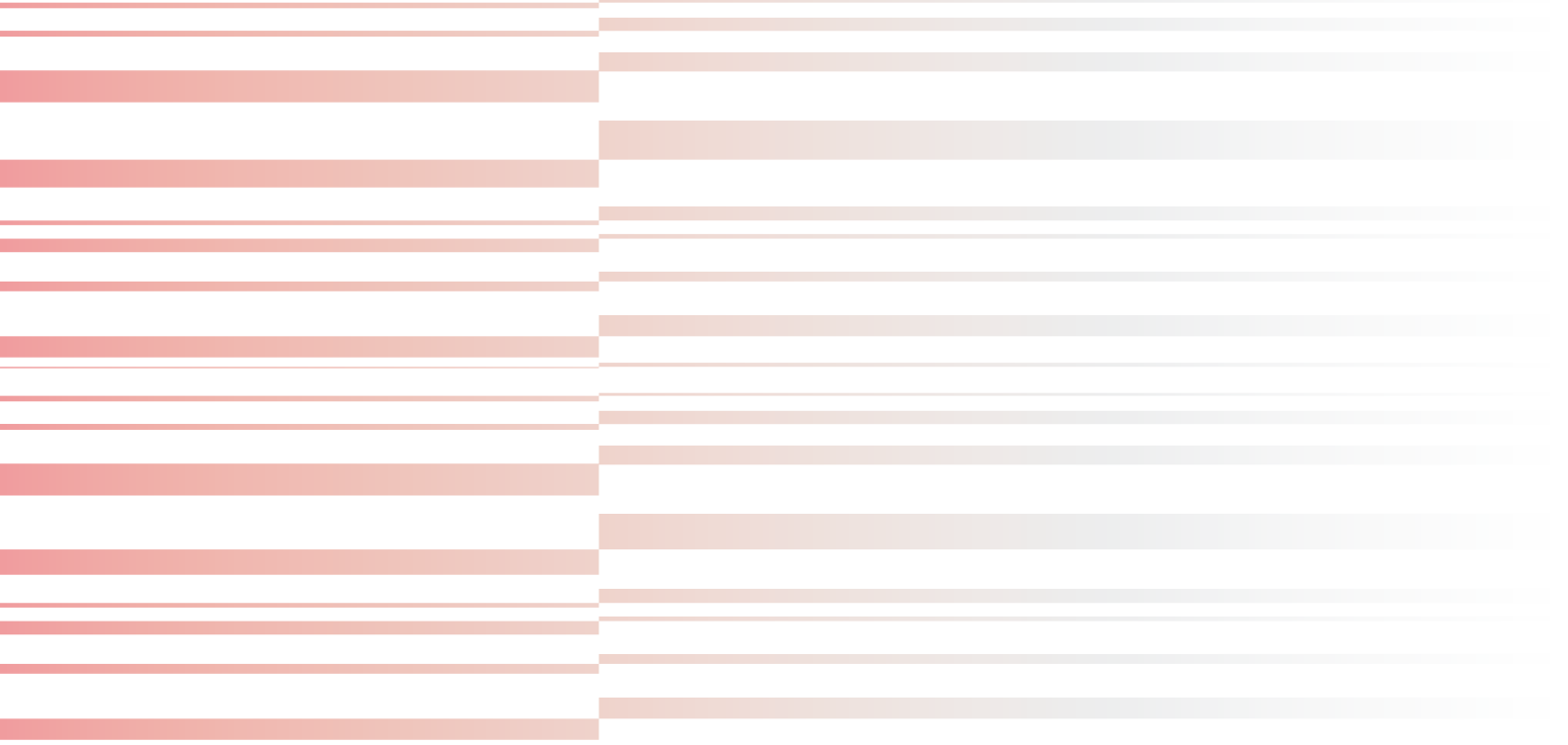
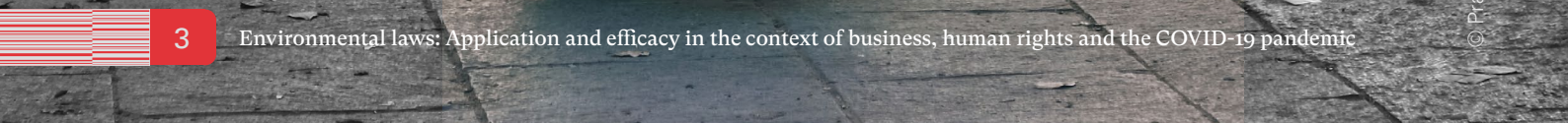


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Executive Summary

In this report we explore how India's environmental legal framework might be further strengthened and leveraged to advance implementation of the UN Guiding Principles on Business and Human Rights. Specifically, the report assesses the extent to which the regime of environmental laws in India is capable of implementing two of the three pillars of the United Nations Guiding Principles— the duty of States to protect human rights and the need for access to remedy when human rights are abused.

The first step in this assessment was to develop a methodology to conduct a review. This report used environmental rule of law as the standard against which key pollution control and natural resource management laws in India were assessed. Environmental rule of law is now an integral component of India's progressive environmental jurisprudence, which recognised the link between human rights and a healthy environment as early as the 1980s. This link has also recently been affirmed by the Human Rights Council, which recognises a clean, healthy and sustainable environment as a human right for the first time (resolution 48/13). The United Nations Environment Programme's (UNEP) First Global Report on the Environmental Rule of Law identifies its key components. These include fair and clear laws, access to justice, and accountability and integrity of decision-makers. This report identifies those UN Guiding Principles that correspond to these components of the environmental rule of law, and it develops indicators that may be used to assess the regime for the Indian environmental law. For instance, the report examines whether environmental obligations are clearly defined, analyses the State's capacity to enforce environmental law, reviews provisions on access to environmental



information and public participation in environmental decision-making, and makes observations on the effectiveness and equity of remedies for environmental harms. On the basis of this review, this report makes recommendations directed primarily at the Ministry of Environment, Forest and Climate Change (MoEFCC) to revise legal frameworks and build capacity internally.

India's environmental laws are multiple, scattered, contradictory and issue-specific. Although they cover a wide range of environmental issues and impose fairly stringent legal obligations on business enterprises, they can be difficult to understand and require far more resources to implement than are currently made available. The environmental laws themselves require updating to transition from a command-and-control regime to one that is able to articulate a vision for the environment it desires and the manner in which business enterprises can become partners in achieving such a vision.

The three key findings of the assessment are:

- Although courts in India have explicitly recognised the link between environmental violations and human rights abuse, this is not reflected to the same degree in the country's laws, rules and policies, which focus on prohibitions and penalties, without considering how the legal framework can be an instrument in requiring business enterprises to mainstream a rights-based approach to their environmental legal compliance.
- Several environmental laws in India are outdated, are in conflict with each other, and cover the same issues. This creates legal uncertainty among businesses, decreases administrative efficiency and ultimately weakens the protection of human rights and the environment. A key example of this is evident in the implementation of the Forest Rights Act, 2006, where a more modern rights-based regime clashes with a colonial Indian Forests Act, 1927.
- Access to remedies for environmental harms is heavily judiciary-dependent. There are no non-judicial grievance redressal mechanisms available. This causes delays in securing access to justice, given the inherent problems with the Indian judiciary.
- Keeping this in mind, the recommendations to the MoEFCC are as follows:
 - Undertaking a comprehensive review, rationalisation and streamlining of Indian environmental laws is necessary to update outdated, conflicting legal provisions. This in turn, leads to legal certainty for business, promoting economic activity among those seeking to enhance their environmental and human rights performance.
 - Enacting an overarching environmental protection statute will provide a good opportunity to mainstream human rights-related obligations and to expand the range of regulatory tools available to officials.
 - Legislation must go hand in hand with guidance documents, capacity-building and more resources to ensure effective compliance and enforcement. Greater efforts to promote and implement the UN Guiding Principles on Business and Human Rights may be an important instrument in this regard.



I Introduction

This report discusses the findings of a review of the Indian environmental legal framework seeking to identify and propose ways of strengthening current efforts to implement the United Nations Guiding Principles on Business and Human Rights in India. The review focused on two of the three pillars of the Guiding Principles:

- The state's duty to protect human rights
- Access to remedy for vulnerable populations affected by business related abuses

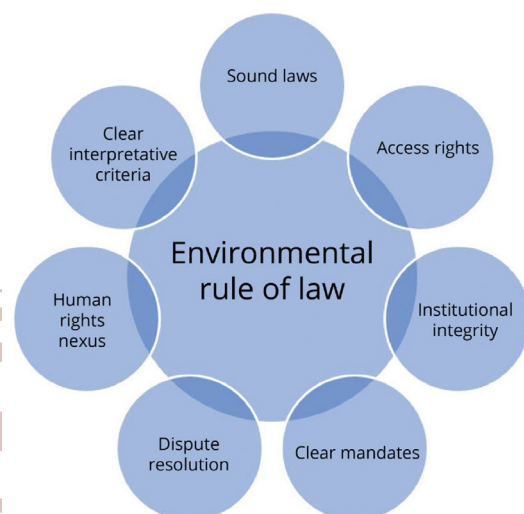
The report provides an analysis of key laws and policies that correspond to these pillars. The analysis is based on the UNEP's Environmental Rule of Law report. Key elements of environmental rule of law have been set out in the report and the corresponding foundational and operational principles under the Guiding Principles have been identified. On the basis of this, indicators have been developed to critically analyse India's environmental legal and regulatory framework.

Environmental Rule of Law

Established under the United Nations Environment Programme's First Global Report on the Environmental Rule of Law – the Environment Rule of Law framework provides guidance to governments to act authoritatively through fair and clear laws, sets a fair framework for businesses to operate sustainably and provides citizens meaningful access to justice and accountability. This framework offers a roadmap to states (1) for addressing the gaps between theory and practice in environmental legislation and (2) for achieving the Sustainable Development Goals.

UNEP's First Global Report identifies seven core elements of the Environment Rule of Law:

Figure 1: Core elements of the Environmental Rule of Law [figure reproduced from the UNEP First Global Report, p21]



As the figure above demonstrates, the components include: fair and clear laws; access to justice; and accountability and integrity of decision-makers. This report identifies those UN Guiding Principles that correspond to these three components of the environmental rule of law, and it develops indicators that may be used to assess the environmental legal regime in India.

Environmental rule of law is gaining prominence as a concept in Indian environmental jurisprudence and the judiciary has been at the forefront of expansively defining environmental rights and obligations and of incorporating international environmental legal principles into domestic jurisprudence. It has similarly embraced the idea of "environmental rule of law".

Two recent Supreme Court judgments have highlighted this. In *Hanuman Laxman Aroskar v. Union of India* [(2019) 15 SCC 401], while considering an appeal against a judgment of the National Green Tribunal granting environmental clearance to a greenfield airport in Goa, the Supreme Court discussed environmental rule of law in detail, using it as the basis for ordering the expert appraisal committee to revisit its recommendations for the granting of clearance. Specifically, the Court stated, "Fundamental to the outcome of this case is a quest for environmental governance within a rule of law paradigm." It also recognised that the "environmental rule of law provides an essential platform underpinning the four pillars of sustainable development – economic, social, environmental and peace", and that "[i]t imbues environmental objectives with the essentials of rule of law and *underpins the reform of environmental law and governance*" [emphasis supplied].

As recently as January 2021, a case concerning the legality of the construction of a bus stand complex in Himachal Pradesh (*Himachal Pradesh Bus Stand Management and Development Authority v. Central Empowered Committee*, AIR 2021 SC 657) also demonstrated how the environmental rule of law can serve as a

framework for analysis. The Supreme Court stated, "the environmental rule of law seeks to create essential tools – conceptual, procedural and institutional to bring structure to the discourse on environmental protection."

This suggests that environmental rule of law can serve as a useful basis for critical analysis of Indian environmental legal and regulatory framework in this report, in order to identify areas needing reform.

The following pages describe the key areas for reform that have been identified on the basis of this analysis.

Indian environmental laws in the context of business and human rights

India has an extensive network of environmental laws that operate at the central and state levels, although most major environmental laws have been centrally enacted. These can broadly be divided into pollution control laws and natural resource management laws. The table below lists the principal statutes under these two headings. And although the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, also known as the Forest Rights Act, might not strictly be classified as an environmental law, it has been included under natural resource management because the creation of individual and community rights for forest dwellers has implications for how forest resources are managed.

Table 1: Key central pollution control and natural resource management laws in India

Pollution control laws	Natural resource management laws
The Water (Prevention and Control of Pollution) Act, 1974	The Indian Forest Act, 1927
The Water (Prevention and Control of Pollution) Cess Act, 1977	The Wildlife (Protection) Act, 1972
The Air (Prevention and Control of Pollution) Act, 1981	The Forest (Conservation) Act, 1980
The Environment (Protection) Act, 1986	The Biological Diversity Act, 2002 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

A significant proportion of environmental regulation, particularly in the area of pollution control, takes place through secondary legislation or executive action under these principal statutes. This includes the Environment Impact Assessment Notification, 2006 (EIA Notification), which governs the environmental clearance process, a set of rules governing the management of different kinds of waste (biomedical, construction and demolition, electronic, hazardous, plastic and solid), as well as the Coastal Regulation Zone Notification, 2019, which places restrictions on development in coastal areas. Secondary legislation and executive action in the field of natural resource management includes the Wetlands Conservation Management Rules, 2017, and a large body of notifications demarcating eco-sensitive zones.

This body of primary and secondary legislation creates binding legal obligations for business enterprises in India. These obligations are ultimately aimed at creating a clean and healthy environment, the right to which has been recognised repeatedly by the Supreme Court of India as an integral part of the right to life, guaranteed along with other fundamental rights under Part III of the Indian Constitution. These obligations range from obtaining prior permission

from regulatory authorities before commencing certain activities to restrictions on others. Restrictions in turn may vary from blanket prohibitions on activities that are particularly harmful to the environment or on activities in environmentally sensitive areas, to limits on the scale of activities, usually in the form of binding emission or effluent standards for industries.

Principle 2 of the UN Guiding Principles requires States to set out clearly the expectations that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. Principle 3 states that States should enforce laws that are aimed at, or have the effect of, requiring businesses to respect human rights, and periodically to assess the adequacy of such laws and address any gaps. The laws in Table 1, along with the rules framed under them, are the State's primary way of fulfilling its duty to protect human rights in the context of the environment.

One of the most important environmental laws in the Indian framework is the National Green Tribunal Act, 2010. This Act sets up a tribunal with specialised environmental expertise and a wide jurisdiction to hear appeals against decisions by environmental regulatory authorities, to

entertain claims for compensation for environmental damage suffered, and to decide significant questions of law relating to the environment. While the Supreme Court and the high courts continue to entertain petitions on environmental issues, the National Green Tribunal has become the principal forum to adjudicate such matters. Offences under the key pollution control laws, however, continue to be tried in criminal courts.

As part of their duty to protect against business-related human rights abuse, Principle 25 of the UN Guiding Principles requires States to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy. The National Green Tribunal is the backbone of the State's duty to provide access to remedy for environmental violations, including those at the intersection of business and human rights.

While India has a set of laws that span most environmental issues, it lacks a dedicated climate change statute. The main policy intervention in this area is the National Action Plan on Climate Change, which was first released in 2008, with eight missions under it. Four new missions have since been added, of which the Mission on Health has created the National Action Plan on Climate Change and Human Health. This is particularly relevant in the context of the Covid-19 pandemic. However, all commitments by the State remain policies only and there is no domestic legal instrument that imposes binding obligations on government to meet greenhouse gas emissions targets. As a result, similar obligations have not been imposed on sector-specific or individual business enterprises either, apart from emission limits under existing pollution control laws.

Therefore, there is a gap in the environmental and legal regulatory framework regarding enforcement of laws on climate change for businesses. Principle 3(a) of the UN Guiding

Principles, requires States to address such gaps.

In the next chapter, the laws set out in Table I are analysed using the environmental rule of law framework, which is then linked to the relevant Guiding Principles.

Indian corporate laws in the context of business and human rights

Most binding legal obligations at the intersection of environment and human rights are imposed on business enterprises under the environmental laws set out in Table 1. However, there are also other factors shaping business behaviour, including the policies and regulations set out below.

Over the last decade, the Ministry of Corporate Affairs has undertaken several initiatives aimed at enabling businesses to fulfil their obligation to respect human rights under Pillar II of the Guiding Principles. Key initiatives are:

- The National Guidelines on Responsible Business Conduct;
- The National Action Plan on Business and Human Rights; and
- The Business Responsibility and Sustainability Reporting format proposed by the Committee on Business Responsibility Reporting.

Since 2012, the Securities and Exchange Board of India has also mandated disclosures regarding business and sustainability indicators for the top 500 listed companies by market capitalisation. The August 2020 report of the Committee on Business Responsibility Reporting recommends that the revised Business Responsibility and Sustainability Reporting format be a requirement for the top 1000 listed companies by market capitalisation, with the requirement to be

gradually extended by the Ministry of Corporate Affairs to unlisted companies above specified thresholds of turnover and/or paid-up capital. Below this threshold, the Committee recommends that smaller unlisted companies adopt a less detailed version of the reporting format, on a voluntary basis. These guidelines and recommendations must be read in the context of the statutory fiduciary duty of directors toward the protection of the environment, as set out in Section 166 of the Companies Act, 2013.

Section 166(2) of the Companies Act, 2013 requires the director of a company to “act in good faith to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, shareholders, the community and for the protection of environment”. Any contravention of the provisions of this section makes the director liable to punishment, with a fine of at least one lakh rupees and up to five lakh rupees.

These regulatory pieces broadly cover the universe of business and human rights considerations, with some guidance and policy directives focusing specifically on the environment.

National Guidelines on Responsible Business Conduct

The relevant obligations under these guidelines are:

Principle 2: *Businesses should provide goods and services in a manner that is sustainable and safe [emphasis supplied]*

Principle 6: *Businesses should respect and make efforts to protect and restore the environment*



Business responsibility and sustainability reporting format

Table 2: Relevant reporting requirements under the Business Responsibility and Sustainability Reporting format

Section	Corresponding reporting requirement
<p>Section A: General disclosures, point no. 17</p>	<p>Disclosure of the location of the top three plants or operations of the company in environmentally sensitive categories</p>
<p>Section B: Management and process disclosures, Point No. 4</p>	<p>Disclosures regarding codes/certifications adopted by the company, such as the Forest Stewardship Council, Fairtrade and the Rainforest Alliance</p>
<p>Section C: Principle-wise performance disclosure</p> <p>Principle 2: Businesses should provide goods and services in a manner that is sustainable and safe</p> <p>Principle 4: Businesses should respect the interests of and be responsive to all their stakeholders</p> <p>Principle 6: Businesses should respect and make efforts to protect and restore the environment</p>	<p>Allows businesses to demonstrate their performance in integrating Principles and Core Elements with key processes and decisions, with information categorised into Essential and Leadership indicators</p> <ul style="list-style-type: none"> • disclosure regarding whether Life Cycle Assessment was conducted in the relevant financial year • requirement to list three products or services whose design incorporated social or environmental concerns • disclosure regarding percentage of research and development and capital expenditure in technologies to improve the environmental impacts of products • requirement to describe processes in place to safely collect, reuse, recycle and dispose of products after sale and at the end of life <p>Disclosure regarding whether environmental issues were discussed by the company with key stakeholder groups</p> <p>Essential indicators (mandatory disclosure): Disclosure regarding whether the company has strategies to address global environmental issues, health pandemics and emergencies; whether it has projects related to the low-carbon economy; whether emissions or waste generated by the company exceed prescribed limits; details of environmental impact assessments undertaken by the company; details of mitigation measures adopted to address environmental risks; details of energy and water consumption; actual measured value of air emissions and liquid discharges at three major facilities, as well as the total solid waste generated; percentage of recycled waste to total waste and percentage of waste sent to landfill</p>

Section	Corresponding reporting requirement
	Leadership indicators (not mandatory but expected of businesses aiming at a higher level of social, environmental and ethical responsibility): Disclosures regarding carbon emitted per unit of production for each major product; percentage of renewable energy to total energy consumed; details of solid waste management practices; strategies adopted to reduce the usage of hazardous and toxic chemicals; innovative technologies used to lower the environmental footprint

II Framework for Review

The UNEP Global Report on the environmental rule of law offers a framework for addressing the gap between environmental laws on the books and in practice. This is of particular relevance in India, where, as noted earlier, there is a large body of law that is not effectively enforced. The UNEP Global Report identifies a set of indicators to assess the environmental rule of law and also makes recommendations to States to strengthen the rule of law in their jurisdictions. Therefore, the report is particularly helpful when read in the context of the Guiding Principles. The key elements of the report that have been used to assess existing Indian environmental laws are set out below.

- laws related to the environment must be fair, clear and implementable
- access to information and public participation
- access to justice and remedy
- accountability and integrity of institutions and decision makers
- linkages between the environment and human rights

This chapter identifies the key foundational and operational principles of the Guiding Principles that correspond to the key elements above. On this basis, indicators have been developed to critically analyse the environmental legal and regulatory framework in India.

Table 3: Foundational and operational principles under the Guiding Principles and corresponding indicators to analyse Indian environmental laws

Key element in UNEP Global Report	Corresponding foundational principle under the UN Guiding Principles	Corresponding operational principle under the UN Guiding Principles	Indicator(s)
Fair, clear and implementable laws	Pillar 1, Principle 2: States should clearly set out the expectation that all business enterprises domiciled in their jurisdiction respect human rights throughout their operations.	Pillar 1, Principle 3: Provide effective guidance to business enterprises on how to protect human rights throughout their operations.	<ul style="list-style-type: none"> • Have legal obligations been clearly defined? • Have guidance documents been prepared for enforcement authorities and business enterprises?

Key element in UNEP Global Report	Corresponding foundational principle under the UN Guiding Principles	Corresponding operational principle under the UN Guiding Principles	Indicator(s)
<p>Access to information, public participation and access to justice</p>	<p>Pillar 3, Principle 25:</p> <p>States must take appropriate steps to ensure through judicial, administrative, legislative or other appropriate means that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.</p>	<p>Pillar 3, Principle 26:</p> <p>States should consider ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.</p>	<ul style="list-style-type: none"> • What obligations for disclosure of environmentally relevant information have been imposed on enforcement authorities and business enterprises? • What avenues of public participation are available? • How legitimate, accessible, predictable, equitable and transparent are existing remedies? • Are adequate legal aid services provided for the redressal of environmental harms?
<p>Accountability and integrity of institutions and decision-makers</p>	<p>Pillar 1, Principle 1:</p> <p>States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.</p>	<p>Pillar 1, Principle 3:</p> <p>States should enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and should periodically assess the adequacy of such laws and address any gaps.</p> <p>Pillar 1, Principles 4–8:</p> <p>States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State.</p>	<ul style="list-style-type: none"> • How effectively are environmental laws enforced? • Are State institutions and enterprises subject to the same requirements to respect human rights as other business enterprises?

Key element in UNEP Global Report	Corresponding foundational principle under the UN Guiding Principles	Corresponding operational principle under the UN Guiding Principles	Indicator(s)
		<p>They should exercise adequate oversight to meet their international human rights obligations when they contract with or legislate for business enterprises to provide services that may impact upon the enjoyment of human rights. They should also promote respect for human rights by business enterprises with which they conduct commercial transactions and ensure that business enterprises operating in contexts where the risk of gross human rights abuses is heightened (conflict-affected areas) are not involved with such abuses. Finally, they should also ensure that governmental departments and other State institutions that shape business practices are aware of and observe the State's human rights obligations.</p>	
<p>Clear and coordinated mandates and roles, across and within institutions</p>	<p>Pillar I, Principle 1: (see above)</p>	<p>Pillar I, Principle 3: States should ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights.</p>	<ul style="list-style-type: none"> • Are the roles of different authorities across environmental laws clearly defined?

Key element in UNEP Global Report	Corresponding foundational principle under the UN Guiding Principles	Corresponding operational principle under the UN Guiding Principles	Indicator(s)
<p>Accessible, fair, timely and responsive dispute resolution mechanisms</p>	<p>Pillar 3, Principle 25: (see above)</p>	<p>Pillar 3, Principle 26: (see above)</p> <p>Pillar 3, Principle 27: States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.</p> <p>Pillar 3, Principle 28: States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.</p>	<ul style="list-style-type: none"> • What non-judicial grievance mechanisms exist for the redressal of business-related human rights abuse? • What obligations have been imposed on business enterprises to create grievance mechanisms?
<p>Recognition of the mutually reinforcing relationship between rights and the environmental rule of law</p> <p>Specific criteria for the interpretation of environmental law</p>	<p>Pillar 1, Principle 1: (see above)</p>	<p>Pillar 1, Principle 3: States should provide effective guidance to business enterprises on how to respect human rights throughout their operations.</p>	<ul style="list-style-type: none"> • Does the law clearly recognise the link between environmental violations and human rights abuse?

This framework has been applied to the environmental laws set out in Table 1, with the objective of assessing the adequacy of the Indian environmental legal framework against the first and third pillars of the Guiding Principles.



The Framework of Environmental Law in India

III

This chapter is based on the indicators proposed in Chapter II as an assessment framework to demonstrate the extent to which the Indian environmental legal framework fulfils the State duty to protect human rights and to provide access to remedy under the first and third pillars respectively of the UN Guiding Principles. It focuses on the body of laws set out in Table 1.

A. Fair, clear and implementable laws

Legal clarity and consistency

Indian environmental law involves a web of central and state legislation, along with a vast body of executive orders that continually change legal obligations for regulated entities, especially in the context of the important EIA Notification. The lack of clarity regarding environmental legal obligations for business enterprises can take the following forms.

Inconsistent definitions of environmentally sensitive areas

There is inconsistency in the use of important terms and expressions across laws. For instance, the Environment (Protection) Rules of 1986 require the Central Government to take into consideration the proximity of industries to “closed areas” notified under the Wild Life (Protection) Act, 1972. The term “closed areas” is not defined in any other environmental legislation, with the term “protected areas” being used more commonly, especially in the EIA

Notification. The lack of clarity is compounded by the fact that there is a host of other terms used to refer to different areas that require varying degrees of protection, such as “eco-sensitive zones”, “eco-sensitive areas”, “biodiversity hotspots”, “critically polluted areas”, “nature reserves” and “biosphere reserves”. Some of these terms are not defined anywhere.

Overlapping forest clearance processes

Projects that involve forest land require clearance from the Forest Advisory Committee under the Forest (Conservation) Act, 1980, the Expert Appraisal Committee and the MoEFCC under the EIA Notification and the Standing Committee of the National Board of Wild Life under the Wild Life (Protection) Act, 1972, as well as specific consents to establish or operate from pollution control boards under the Water (Prevention and Control of Pollution) Act, 1974, also known as the Water Act, and the Air (Prevention and Control of Pollution) Act, 1981 (also known as the Air Act). Since the enactment of the Forest Rights Act, gram sabha clearance is also required. Some of these provisions are inconsistent with each other. A 2010 joint committee of the Ministry of Tribal Affairs and the MoEFCC released a report on the implementation of the Forest Rights Act, which highlighted inconsistencies in the provisions of the Forest Rights Act and the Wildlife Protection Act, and recommended amendments to the latter.

Ambiguous legal liability for industrial accidents

Overly broad or loosely-worded language used in the drafting of legal obligations and related reporting templates may contribute to poor implementation as well. An important obligation of business enterprises at the intersection of the environment and human rights is to contribute to the Environment Relief Fund under the Public Liability Insurance Act, 1991. This fund is to be used to provide relief to the victims of accidents in hazardous industries. However, a detailed study on the working of the fund demonstrated that it had not been appropriately utilised, in part because of the confusing nature of the form that business enterprises were required to submit to demonstrate compliance under the Act.

Contradictory penalties under the Air, Water and Environment Protection acts

The Air Act, the Water Act and the Environment Protection Act all punish similar environmental infractions, but they provide different penalties for them. For instance, Section 43 of the Water Act punishes the knowing discharge of polluting matter into a stream or well with imprisonment ranging from 18 months to 6 years and a fine (the amount has not been specified). Such an action, e.g., the discharge of polluting matter into a stream or well, would also constitute a violation of Section 7 of the Environment Protection Act. However, under Section 15 of the Environment Protection Act, a violation of this nature attracts imprisonment that may extend up to five years or a fine that may extend up to 1 lakh rupees.

A similar discrepancy is observed under the Air Act. Section 22 of this act states that persons operating industrial plants cannot discharge emissions in excess of the standards laid down by the relevant state Pollution Control Board. Like the provision above in the Water Act, a violation can attract imprisonment for a term that ranges from 18 months to 6 years and a fine. Again, the

amount of the fine is not specified. The penalty for the same offence under the Environment Protection Act is lower.

Section 24 of the Environment Protection Act states that where an offence is punishable under it as well as under another act, the person or company in question is to be tried under the other act. In the two examples cited above, the offending person or company would be liable to a higher penalty under the Water and Air acts.

Removing legal ambiguities and simplifying processes without compromising on environmental protection is the first step toward creating clearer legal obligations for business enterprises as part of the State's duty to protect human rights under Principles 2 and 3(c) of the UN Guiding Principles.

Recommendation I

MoEFCC to review and consolidate key environmental statutes to eliminate inconsistencies.

Action points:

- I. Comprehensively review the environmental laws in Table 1 to ensure uniformity of definitions, obligations and penalties.
- II. Remove inconsistencies across these provisions through amendment or repeal, as the case may be in accordance with Principle 8 of the UN Guiding Principles, which requires States to ensure policy coherence.
- III. Consolidate the Air Act, the Water Act and the Environment Protection Act into a single, overarching statute.
- IV. Repeal the Indian Forest Act, 1927. Incorporate suitable powers for forest officials under other natural resource management laws like the Wildlife (Protection) Act, 1972 and the Forest (Conservation) Act, 1980.

Unclear guidance for business enterprises

India's key environmental statutes require businesses to obtain prior permission in the form of a licence or permit before they can carry out certain activities. The process of obtaining such permission can be lengthy and can require a considerable amount of documentation. Thus, businesses would benefit from guidance documents that can help them navigate this process and help them comply with their legal obligations.

Various state pollution control boards have provided guidance documents with provisions that are sometimes inconsistent. For instance, the Maharashtra Pollution Control Board has provided a comprehensive list of the information that must be submitted by business enterprises to the Board to obtain consent to operate under the Air Act and the Water Act, while the Jharkhand State Pollution Control Board has an excellent set of standard operating procedures that explain to business enterprises the process that will be followed to obtain permission under the different rules issued under the Environment Protection Act. The Telangana State Pollution Control Board has a section titled "Industry Guide" on its website, to take business enterprises through their obligations. However, not all state pollution control boards are able to provide this information systematically – the Rajasthan State Pollution Control Board and the Madhya Pradesh Pollution Control Board, for example, provide only truncated information for business enterprises.

The information that these state pollution control boards provide can vary as well, and business enterprises desiring to operate in more than one state must bear the burden of ensuring compliance with a variety of different requirements. While states should have the flexibility to define their own requirements, these must be made easily available in the public domain, in a standardised format to make enterprises more aware of their legal obligations.

The MoEFCC also has user manuals for the online submission and monitoring of environment, forest and wildlife clearances. Like the guidance documents of state pollution control boards, these emphasise procedure rather than provide substantive guidance to business enterprises regarding their obligations. A human rights-based approach to environmental obligations is missing from these guidance documents.

Recommendation II

MoEFCC to create substantive guidance documents for business enterprises to facilitate the adoption of a rights-based approach to environmental compliance in accordance with Principles 2 and 3(c) of the UN Guiding Principles.

Action points:

- I. Identify key environmental statutes and obligations, violations of which are particularly likely to cause human rights abuse, such as the obligation to obtain forest and environment clearances or the obligation not to discharge effluents or emissions in excess of prescribed standards.
- II. Create guidance documents in consultation with civil society groups working on environmental and human rights issues as well as key representatives of business enterprises. These documents should assist enterprises in mainstreaming human rights-based approaches to their activities under environmental laws. For example, they should provide guidance to business enterprises regarding their interactions with local communities, particularly marginalised groups living in areas where industrial activity is proposed to be undertaken.



B. Access to information and public participation

The following section details some shortcomings and gaps in India's environmental legal framework and possible solutions, concerning (1) Access to Information and 2) Right to Participation

Access to information

Like the procedural right to public participation in environmental decision-making, the right to access environmental information is not uniformly guaranteed across key environmental laws. However, the Right to Information Act, 2005, has wrought change by imposing the overarching duty on all public authorities to make available in the public domain certain kinds of information. This duty naturally applies to environmental regulatory authorities as well, but its implementation has been far from uniform across different state pollution control boards.

Disclosure of information under the Water Act/Air Act by pollution control boards

Under the Water and Air Acts, pollution control boards must maintain publicly accessible registers of the consent to establish or operate that have been granted by them. However, a survey of the websites of some boards quickly demonstrated that this requirement is not universally observed, and where it is, there is no consistency in the format in which the information is made available. For instance, no details of consents granted were available on the websites of the pollution control boards of Assam, Gujarat, Haryana and Jharkhand, while the details on the website of the Goa State Pollution Control Board have not been updated since 2016. In Kerala, only industries are allowed to view the status of consent applications. The Karnataka State Pollution Control Board does not provide details of the conditions attached to these consents.

There is a similar lack of uniformity regarding the

availability of real-time information from continuous emission and effluent quality monitoring systems. These systems were introduced across 17 categories of highly polluting industries in 2014, but information from them is still not available on the websites of several pollution control boards, such as those of Andhra Pradesh, Chhattisgarh and Gujarat. If individuals are unable to access information about the emissions or effluents released, they cannot participate actively in the enforcement process in the manner required by Principle 25 of the UN Guiding Principles, although the key environmental statutes do contain provisions for them to make such complaints.

Disclosure of environmental information by business enterprises

Other environmental rules require business enterprises to submit many different kinds of information, which in turn must be consolidated and processed by the appropriate environmental regulatory authorities. For instance, under the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016, occupiers, defined under the rules as having control over the factory or premises, handling hazardous or other wastes must maintain records of their operations and submit annual returns to the state Pollution Control Board. In turn, the state Pollution Control Board must prepare an annual inventory of the waste generated, recycled, recovered, utilised and re-exported, which is then to be submitted to the Central Pollution Control Board. A consolidated review of the management of hazardous and other wastes is then to be submitted by the Central Pollution Control Board to the MoEFCC. While the aggregation and analysis of this information is commendable, there is no explicit requirement to make this available in the public domain, although it is likely to be subject to general disclosure requirements under the Right to Information Act.

Apart from this, Rule 14 of the Environment (Protection) Rules, 1986 requires all persons in charge of industries, operations or processes that are subject to permission under the Water Act, the Air Act or the Hazardous Wastes (Management and Handling) Rules, 1989 to submit an annual environmental statement in a particular form. This requires the submission of information on water and raw material consumption, the discharge of pollutants, hazardous wastes and solid wastes, as well as the impact of pollution abatement measures on the conservation of natural resources and other measures for protecting the environment or improving its quality.

There are two gaps in the legal framework regarding accessibility of environmental information. First, provisions for the submission of such information are scattered across statutes and rules, with several areas of overlap. For instance, information about hazardous wastes must be submitted both through returns under the Hazardous Waste Management Rules and through the environmental statement under the Environment (Protection) Act, 1986. Moreover, this information is not harmonised with reporting requirements under the Business Responsibility and Sustainability Reporting format.

Second, this information is to be submitted by business enterprises to regulatory authorities. There is no legal requirement to make this available in the public domain.

Therefore, there is a need to ensure that the different kinds of environmental information that are captured under the existing legal framework are consolidated into a larger, publicly accessible database.

Recommendation III

Principles 25 and 26 of the UN Guiding Principles require States to take appropriate steps to ensure that those affected by business-related human rights abuse have access to effective remedy and to ensure the effectiveness of domestic judicial mechanisms when addressing such abuses. Access to information is integral to an effective remedy. MoEFCC to create an accessible, online database of environmental information collected under the existing legal framework.

Action points:

- I. Identify provisions under the existing legal framework that require business enterprises to submit information or regulatory authorities to consolidate and maintain information.
- II. Where these provisions do not exist, assess the need for creating similar obligations.
- III. Harmonise such provisions across the existing legal framework to ensure that there is no duplication of processes. Ensure harmony with reporting obligations under business laws as well.
- IV. Create simple, uniform formats for the collection of such information that provide clear guidance to business enterprises.
- V. Create sector-specific formats for consolidating such information and ensure that they are made available in the public domain.
- VI. Use this information, as well as data collected by the National Crime Records Bureau, to create suitable parameters to address the adequacy of existing environmental laws.

The right to public participation

Procedural environmental rights, such as the right to access environmental information and the right to public participation in environmental decision-making, find explicit protection in a limited number of environmental legal instruments – the Coastal Regulation Zone Notification, the EIA Notification and the Forest Rights Act. However, the implementation of these rights is weak, with several challenges to environmental clearances in the National Green Tribunal arguing that the public hearing process set out in the EIA Notification was not appropriately carried out. Additionally, since the right to participate in environmental decision-making does not find explicit statutory protection, it has been weakened through executive action. This is illustrated in an example from an analysis of procedural environmental law by environmental legal scholars Lavanya Rajamani and Shibani Ghosh. It refers to a 2009 letter from the MoEFCC to state governments affirming the need for clearance from gram sabhas for non-forest projects on forest lands. However, since this protection was set out only in a letter, it was later diluted by the MoEFCC in 2014, when it issued guidelines exempting gram sabha consent for certain kinds of infrastructure projects.

Public participation in the Forest Rights Act

The Forest Rights Act was passed after the Indian Forest Act, 1927, the Wild Life (Protection) Act, 1972, the Forest Conservation Act, 1980, and the Biological Diversity Act, 2002. The definition of “forest land” provided by it comprises reserved forests, undemarcated forests, protected forests and protected areas. While there are instances of the Forest Rights Act being used successfully for the on-the-ground assertion of rights and for decentralised decision-making on forests, there are also many

reports of conflict with other laws, particularly the three laws related to forests and wildlife that predate the Forest Rights Act.

Conflicts in law arise where penalties are imposed on forest dwellers under older laws for the exercise of what forest dwellers now consider their legal rights under the Forest Rights Act. For instance, under the Indian Forest Act, the sale and transit of forest produce is under the control of state Forest Departments, whereas the Forest Rights Act recognises the rights of forest dwellers to collect, use and dispose of minor forest produce. As a consequence, there have been instances of confusion regarding the power to issue transit permits, with tussles between forest dwellers and the Forest Departments. Additionally, there have also been conflicts regarding the procedure for the granting of consent by gram sabhas as part of the forest clearance process, as well as with the notification of critical wildlife habitats and critical tiger habitats. The latter are the result of a direct conflict between the provisions of the Wildlife (Protection) Act and the Forest Rights Act.

Indigenous Peoples in India have the right to participate in the protection and management of their natural environments. However, these rights may also conflict with provisions across the Indian environmental legal framework.

Conflicts in forest management

Section 3(1)(i) and Section 5 of the Forest Rights Act impose on rights holders the duty to protect, regenerate and manage forests within their jurisdiction. The objectives of the village forest protection committees formed under the Forest Rights Act are the same as those of the Forest Departments. However, conflicts are likely to arise in situations where the management practices of a village committee, such as forest fires, shifting cultivation, coupe felling and plantation, contradict those of the responsible Forest Department. The 2012 rules issued under

the Forest Rights Act do little to resolve this confusion. They do not explicitly clarify whose plans are subject to modification: the working plans of the Forest Department or the gram sabha's management and conservation plans.

Recognition of forest rights within critical wildlife habitats and critical tiger habitats

Under the Forest Rights Act, the process for recognition of rights is initiated by the gram sabha and facilitated by the sub-divisional level committee and the district-level committee. At present there are four different procedures for recording rights in forests. One procedure relates to the settlement of rights under the Indian Forest Act by a forest settlement officer; a second similar procedure pertains to the acquisition of rights in national parks and sanctuaries under the Wildlife (Protection) Act by the district collector; a third exists under the same act, as amended in 2006, for the modification of rights in critical tiger habitats; and a fourth process exists under the Forest Rights Act for the modification of rights in critical wildlife habitats. These different processes present further conflicts in law.

Section 4 of the Forest Rights Act suggests that the recognition of forest rights is possible even within a critical wildlife habitat unless the government and experts feel that such rights might hamper the process for making the area inviolate for wildlife conservation. Therefore, according to the language of the Act, "relocation is possible only when it is established that coexistence is not possible and if the local communities give their informed consent".

However, in contrast to this provision, the critical wildlife habitat guidelines framed by the MoEFCC are still grounded in the belief that recognition of rights within protected areas is at odds with conservation goals. In January 2018, MoEFCC issued these guidelines to all state governments without consulting the Union Ministry of Tribal

Affairs, the nodal ministry for the Forest Rights Act. While the Forest Rights Act asks for consultations with, and the consent of, each gram sabha, in contrast, the 2018 guidelines require public hearings at a nearby location in lieu of gram sabha consent. These guidelines thus dilute the role of the gram sabha. The guidelines also do not specify the procedure to be followed upon obtaining comments and opinions from these public hearings.

The process of notification of critical tiger habitats has not been clear either. There has been no involvement of local gram sabha, consultation or consent in the identification or declaration of these habitats despite Section 38(v) of the Wildlife (Protection) Act and Section 4 of the Forest Rights Act. These require the involvement of local people in notifying a critical tiger habitat. Ensuring public participation in the management of critical habitats also requires a scientific assessment to prove that co-existence of people with wildlife is not possible and that exercising rights would lead to irreversible damage to the habitat or species.

Allocation of forest land for projects

Regulation of the diversion of forest land for non-forest use vests primarily with the central and state governments, through the forest clearance process, which is governed under the Forest Conservation Act, 1980. There is often significant overlap between diversion of forest land and infringement of forest rights. Forest clearance often affects tribal populations that live in forest areas. In this light, the gram sabha is empowered to "stop any activity which adversely affects the wild animals, forest and the biodiversity," under Section 5 of the Forest Rights Act. The Forest (Conservation) Rules, 2003 prescribe that rights of Scheduled Tribes and other traditional forest dwellers must be recognised and vested in the forest area sought to be diverted. Moreover, they prescribe that gram sabha consent must be obtained as part

of the forest clearance process. However, the guidelines do not provide for the possibility of gram sabhas refusing consent, nor do they emphasise the importance of consent being free and informed. This is a provision that can potentially lead to the exploitation of marginalised groups and consequently result in large-scale human rights violations, as can already be seen in the Dongria Kondh-Niyamgiri mining case [Orissa Mining Corporation Ltd. v. Ministry of Environment, Forest and Climate Change (2013) 6 SCC 476].

Moreover, per the Forest Conservation Act, decisions regarding diversion of forest land are entrusted to the MoEFCC based on recommendations by the Forest Advisory Committee or the Regional Empowered Committee, depending on the size of forest land to be diverted. Neither of these committees includes local community representatives to weigh in on decision-making about the diversion of forest land. The right to participation is thus limited.

Recommendation IV

Principle 1 of the UN Guiding Principles requires States to protect against human rights abuse within their territory by third parties. Strengthening public participation mechanisms can be an important tool in protecting against such abuses. To give effect to this principle, the MoEFCC should harmonise the process of public participation under the Forest Rights Act with other natural resource management laws like the Wildlife (Protection) Act and the Forest Conservation Act.

Action points:

- I. Identify provisions in other natural resource management laws that contradict the spirit of public participation set out in the Forest Rights Act, as confirmed by judicial decisions.
- II. Amend or repeal these provisions.
- III. Train forest officials in administering such participatory processes.
- IV. Create awareness among local communities regarding their rights to public participation.



Public participation under the draft Environmental Impact Assessment Notification 2020

The draft Environmental Impact Assessment (EIA) notification restricts the categories of persons who can report or complain about non-compliance with the conditions of an environmental clearance. Currently, violations can be acted upon only if they are self-reported by the project proponent, through reporting by a government authority, or based on the findings of an appraisal committee or regulatory authority. It excludes reports by a person affected or concerned who gains knowledge of the fact of such non-compliance. The draft EIA notification has also done away with the requirement of public consultation when existing projects are proposed to be expanded or modernised, if such expansion or modernisation does not increase the capacity of the project beyond 50 per cent. This is an arbitrary limit.

Recommendation V

The draft notification should be broadened to encourage community-based monitoring and to protect the procedural right of affected persons to participate in environmental governance. Public consultation requirements should not be arbitrarily diluted.

Public participation under pollution control laws

There are limited provisions for public participation under pollution control laws. For example, Section 3 of the Water Act sets out the composition of the Central Pollution Control Board. The Board is to comprise a chairman with special knowledge in environmental protection, five Central Government officials, five members of state pollution control boards, three persons representing agriculture, fishery, industry, trade or other interests that the Central Government appoints to be represented, two persons representing companies controlled or managed by the Central Government, and a full-time member secretary with expertise in pollution control.

Public participation in the work of the Central Pollution Control Board may be compromised by several factors:

- a majority of board members are government-nominated;
- there is no specific guidance on the different kinds of environmental expertise that might be represented; and
- there is no provision for the representation of civil society groups.

There are thus limited provisions for public participation under the Water Act. As mentioned above, there is no public representation on the Central Board. Affected members of the public do not have the opportunity to oppose an application to discharge effluents or sewage, and it is unclear whether persons affected by the grant of consent to discharge effluents or sewage can file an appeal before the appellate authority under the Act.

The balance between technocratic expertise and public participation under the Water Act is therefore heavily skewed in favour of the former. Additionally, the technocratic expertise, which focuses only on the scientific, engineering or

management aspects of pollution control, requires updating. Therefore, these provisions of the Act may be flagged for reform.

Recommendation VI

MoEFCC to review the composition of pollution control boards as well as the processes for granting licenses, permits and permissions under pollution control laws to create more explicit avenues for public participation.

C. Access to justice and remedy

Access to remedy for environmental crimes or infractions is hampered by evidentiary burdens, delays related to the administration of justice, and limited availability of legal aid. There are three key judicial remedies for environmental harms in the Indian context:

- criminal convictions with accompanying fines or imprisonment for violations of key environmental statutes;
- applications before the National Green Tribunal; and
- writ petitions in the high courts and the Supreme Court.

Challenges in pursuing criminal complaints against perpetrators of environmental infractions have been exhaustively documented. As in many other countries, trials can involve a substantial period of time to conclude and the probability of conviction can be very low. For instance, the National Crime Records Bureau report of 2019 states that out of a total of 1,027 cases pending under the Environment (Protection) Act in that year, trials were completed in only 16 cases. For the Air Act and the Water Act, only 14 trials were completed out of a total of 251 cases. For all environment and pollution-related crimes recorded by the Bureau, there is a pendency rate of 61.4 percent.

Evidentiary Burdens

Conviction rates are low due in part to unfair evidentiary burdens suffered by communities when they seek remedies against perpetrators. Communities can take a proactive role in protecting their environment from degradation and are often in possession of critical evidence to build a strong case against offenders, particularly in instances of non-compliance with the conditions on which environmental clearances, forest clearances, and consent to establish or operate were granted. However, such physical evidence is not admissible or actionable in a court of law unless it is submitted by the prosecuting enforcement agency or body. Any evidence that may be held by members of the community or an ordinary citizen can only be submitted to court as a witness statement, which may not hold the same weight as physical evidence submitted by individuals.

Moreover, in the case of offences of pollution, Section 19 of the Water Act and Section 12 of the Air Act specifically empower only officers of the Pollution Control Board or other authorised officers to collect samples, thereby excluding samples that might have been collected by way of community-based monitoring. Section 19 of the Environment (Protection) Act, Section 55(c) of the Wildlife (Protection) Act, Section 43 of the Air Act, and Section 49 of the Water Act provide for a mechanism whereby citizens may submit a notice to the concerned authority alleging any violation. If no action is taken for 60 days thereafter, the individual may file a formal complaint with a designated court/authority, depending on the enabling legislation. Given the irreversible nature of environmental offences, such a system is not efficient in its ability to take cognizance of offences reported by communities and individuals.

Judicial Delays

Judicial delay is typical of matters in the high courts and in the Supreme Court as well, with matters taking several decades to conclude and judicial directions remaining only partially implemented. A prominent example is the case of industrial pollution in Patancheru-Bollaram, in Telangana, with the residents of the affected area still waiting for adequate compensation for damage to their health and environment after more than 20 years of litigation.

Although the National Green Tribunal has helped expedite the disposal of environmental cases and brought specialised expertise to their adjudication, as of 30 April 2021, there were 2,445 cases pending out of a total of 34,977 cases that have been instituted since the Tribunal was established. The following factors continue to hamper the effectiveness of the remedies that it provides:

- vacancies across the different benches of the Tribunal;
- lack of consistency in determining the quantum of environmental compensation to be awarded;
- appeals to the Supreme Court against large awards of environmental compensation; and
- very low disbursement rates from the Environmental Relief Fund to affected parties.

Given the nature of these barriers, the recommendations in this section are primarily targeted at the State to encourage it to bring about structural reforms to the judicial system.

Legal Aid Provision

In India, there is uneven access to legal aid for the purpose of addressing environmental harms. Without access to legal aid, vulnerable groups have little hope for remedy in environment-related, human rights abuses.

The provision of legal aid in India is governed by the Legal Services Authorities Act, 1987. Section 12 of the Act sets out the categories of persons who are entitled to legal services. This list of persons does not include persons who wish to file “environmental cases”. Instead, legal aid is available for “people of undeserved want” who are victims of floods, droughts, earthquakes or industrial disasters. Further, Section 12 also states that members of the Scheduled Castes and Scheduled Tribes are entitled to legal services. To the extent that the process of forest rights recognition under the Forest Rights Act requires legal services, forest-dwelling members of the Scheduled Tribes would be eligible for legal aid.

The National Green Tribunal Act, which is the principal legislation governing environmental remedies, does not contain any provisions regarding legal aid services. However, there are provisions to reduce the financial burden of filing an application or appeal before the Tribunal for persons who are unable to bear the costs. Rule 12 of the National Green Tribunal (Practices and Procedure) Rules, 2011 states that persons below the poverty line or those regarded as “indigent” in accordance with the provisions of the Code of Civil Procedure, 1908, are not required to pay fees for filing an application or appeal.

The Forest Rights Act vests individual and community forest rights in indigenous and traditionally forest-dwelling communities. The Act and the rules issued under it in 2008 lay down a detailed procedure for the recognition and vesting of such rights. And while recognition and vesting, does not involve redress for an

environmental harm per se, the Act itself was passed to undo the dispossession and displacement of traditional forest dwellers under colonial rule. Therefore, the obligations set out in the Act may be considered to be in a similar vein to legal aid services for redress of environmental harms, though admittedly, Rule 16 of the Forest Rights Rules only requires the state government to provide “post-claim support” and “handholding” to the holders of forest rights. There is no explicit obligation to provide such support and handholding through the process of rights recognition itself.

Non-judicial remedies

Ordinary citizens can approach the state and national human rights commissions with complaints of business-related human rights abuse. These bodies can hold inquiries into such abuse and make appropriate recommendations, but their jurisdiction is restricted to State abuse and does not extend to the activities of private actors. Further, their recommendations do not have any binding legal value, making this non-judicial mechanism not very effective.

There are no other non-judicial grievance mechanisms that exist for such redress.

Given that the recognition of the responsibilities of businesses in the context of human rights is relatively new in India, the law has not yet evolved to oblige enterprises to create grievance mechanisms.

Recommendation VII

In accordance with Principle 26 of the UN Guiding Principles, the MoEFCC to take steps to reduce the evidentiary burden on communities reporting violations of environmental laws, encourage the speedier disposal of cases, to assist in the development of a sound methodology for determining environmental compensation, to strengthen the monitoring and implementation of environmental directions, and to consider the creation of a fund for legal aid for environmental harms.

Action points:

- I. Allow prosecutions on the basis of community-based monitoring.
- II. Fill the vacancies in the various regional benches of the NGT.
- III. Amend rules under the National Green Tribunal Act, 2010, to introduce an appropriate method for assessing environmental damage and awarding environmental compensation.
- IV. Create a special cell of officers, distinct from pollution control boards, to monitor the implementation of judicial directions.
- V. MoEFCC to consider demarcating a proportion of the Environment Relief Fund for the legal costs incurred by vulnerable persons or groups in making claims under the National Green Tribunal Act for compensation for environmental damage.

In accordance with principles 27 and 28 of the UN Guiding Principles, which requires States to provide effective and appropriate non-judicial grievance mechanisms, as well as to facilitate access to non-State-based grievance mechanisms dealing with

business-related human rights harms, the MoEFCC to consider the following:

- I. Publish guidance for business enterprises on setting up an operation-level grievance redressal mechanism.
- II. Conduct a feasibility study on the use of Gram Nyaayalayas to resolve environment-related disputes.

D. Accountability and integrity of institutions and decision-makers

Ensuring that business leaders and other actors are held to account for environmental harms requires a review and reconsideration of investment of enforcement powers of agencies charged with protecting the environment. It also calls for India's government to update guidance to State Owned Enterprises (SOEs) to ensure greater compliance with environmental laws.

Enforcement

Regulatory officials have limited enforcement tools to ensure compliance with laws or remedies when laws are broken. Currently, the Pollution Control Board officials have the power to issue directives, including to close, prohibit or regulate any industry and to stop or regulate the supply of electricity, water or any other service. However, enforcing these directives is difficult.

Some of the major gaps in enforcement powers that have been identified over the years include the following:

The lack of powers to impose civil penalties and administrative fines

Although the requirement of bank guarantees is a widespread practice by several state pollution

control boards and has also been supported by the National Green Tribunal in 2014 (State Pollution Control Board v. M/s Swastik Ispat Private Limited, Appeal No. 68 of 2012), the Delhi High Court has held that a bank guarantee is effectively a penalty for damage to the environment. It has also held that the imposition of penalties is an essential legislative function that cannot be exercised by a body like a state pollution control board in the absence of specific powers having been conferred on it by a primary statute (Splendor Landbase Ltd. v. Delhi Pollution Control Committee). This suggests that existing rules, executive orders or directions that impose charges in the nature of penalties are legally invalid and must be revoked.

The absence of powers to enforce their own directions

Officials under various environmental laws have the power to revoke permissions, licences and clearances granted to business enterprises when they violate their legal obligations. Such revocation does not require judicial intervention, although enterprises have the right to appeal these decisions in court. Pollution control board officials can also issue directions (directives) to enterprises that violate their legal obligations, and they have the power to order water and electricity to be cut off. In cases of persistent non-compliance, they also have the power to order their closure. However, a weakness of this particular power is that state pollution control board officials do not have the power to enforce such directions themselves. This has been highlighted by the Vidhi Centre for Legal Policy as follows:

[Pollution control boards] must rely on other authorities or the courts to enforce their own closure directions. In some instances, [pollution control boards] "request" their own environmental engineers to exercise vigil over polluters; in others, they request the relevant state government to constitute coordination committees comprising district collectors,

revenue officers and police to enforce directions that they issue under Section 5 of the Environment (Protection) Act. In most cases, a copy of the closure direction is forwarded to an already overburdened district magistrate for action. In effect, unlike enforcement authorities under other laws, pollution control board officials do not have the power to seal units against which closure directions have been issued.

Limited environmental violations and punishments

Key environmental laws define only a very limited set of environmental violations and prescribe corresponding punishments. The same punishment applies to a wide range of environmental violations under secondary legislation or executive orders, without regard to the seriousness of the violation or the scale of environmental harm caused. For instance, the punishment for failing to file a report under the Plastic Waste Management Rules, 2016, would be the same as failing to meet conditions attached to the granting of an environment clearance under the current version of the EIA notification.

Lack of resources

There is a general lack of human and financial resources, with variations across different pollution control boards, to monitor the implementation of a wide range of environmental laws.

Lack of enforcement policies for Pollution Control Board officials

The key environmental regulatory authority in the United States of America, the Environment

Protection Agency (EPA), exercises a considerable amount of discretion in enforcing environmental laws. Not every violation that is technically punishable under the law is necessarily enforced by the Agency. Instead, there are enforcement policies to guide officials on the kind of action that they ought to pursue. This action depends, among other things, on the severity of the violation. In the case of civil penalties, it may be determined by a violator's ability to pay a penalty. Enforcement policies are useful because they place limits on the discretion vested in EPA officials and because they facilitate efficient use of resources – where enforcement actions are unlikely to be successful in court, they are not pursued.

There is no equivalent of an environmental enforcement policy in India and there are no similar guidance documents or policies for Pollution Control Board officials in the States or at the central level. There are 61 different divisions of the MoEFCC listed on its website, ranging from the Administration and Budget/Accounts units, to the National River Conservation Directorate, to the Green India Mission and Project Elephant. However, there does not appear to be a division dedicated wholly to enforcement. The lack of a comprehensive enforcement policy is also related, in part, to the absence of enforcement options. The key environmental statutes are of a command-and-control nature – any violations are punishable only as criminal offences. Officers must prosecute cases in criminal courts to bring offenders to justice. This can be a lengthy process given the delays inherent in formal adjudication. Furthermore, according to some observers, Pollution Control Board offices are chronically understaffed.

Uniformity in assessing environmental compensation

With the enactment of the National Green Tribunal Act, 2010, the imposition of environmental

compensation on violators has become an important enforcement tool. The Tribunal has delegated the power to assess and recover such compensation for environmental damage to Pollution Control Board officials. However, guidance for assessing environmental damage and calculating environmental compensation was missing until 2018, when an in-house Committee of the Central Pollution Control Board submitted a report on the methodology for assessing environmental compensation. However, this does not appear to be an exhaustive document.

The report from the Committee outlines a general method for assessing environmental compensation and then provides environmental compensation formulae for certain specific cases. While most pollution control boards appear to have adopted the guidelines laid down by the Central Pollution Control Board, there is room for different state boards to adopt different methodologies for different kinds of violations. For example, the Maharashtra Pollution Control Board has developed its own specific guidelines for the imposition of environmental compensation charges on healthcare facilities and common biomedical waste treatment facilities. If state boards were not to adopt the guidelines laid down by the Central Pollution Control Board, business enterprises might be subject to different compensation charges in different states. A more comprehensive and legally binding guidance document on the imposition of charges is therefore needed to guide officials more uniformly.

Absence of a legal mechanism to facilitate community-based monitoring

Communities often take a proactive role in ensuring the protection of their landscapes from environmental degradation. They might often be in possession of critical evidence to build a strong case against offenders. However, as mentioned earlier, such physical evidence is not admissible or actionable in a court of law unless it is

submitted by the prosecuting enforcement agency or body.

Numerous reforms to enhance enforcement powers have been proposed over several decades now, with suggestions ranging from the creation of a pan-India regulator to the introduction of draft bills proposing to amend the Environment Protection Act, 1986, and introducing adjudicating officers with the power to impose civil penalties. However, these proposals have been criticised by civil society groups for enabling already high levels of non-compliance by enterprises and for the failure of these enterprises to comply with established principles of administrative law that prevent the delegation of judicial functions to executive officials.

The draft EIA Notification 2020 also remains weak on enforcement tools according to observers. It defines “violations” only in terms of projects that commence activities without obtaining prior environmental clearance. The environmental rule of law is also weakened by the proposal in the draft notification to regularise industries that have commenced operations without obtaining prior environmental clearance, especially since the Supreme Court has held that such commencement of projects is a violation of the fundamental right to life of people living in the project-affected areas. Non-compliance with the conditions of the environmental clearance attracts a penalty that is limited to the maximum penalty amount of the bank guarantee deposited with the relevant pollution control board. The power to revoke the environmental clearance for non-compliance, which was specifically mentioned in clearances issued under the 2006 notification, does not find mention in the revised draft.

Recommendation VIII

MoEFCC to create a regulatory toolbox for different authorities across key environmental laws, to allow for a graded response to different kinds of environmental offences.

Action points:

- I. Constitute a committee to prepare a working paper on the different kinds of environmental regulatory tools that might be suited to the Indian context and which sets out the principles governing their use. These could include a range of restorative actions, including warnings, administrative fines, emission credits, and financial securities.
- II. Amend the relevant provisions in environmental laws to permit community-based monitoring.
- III. Across key environmental laws, identify and categorise different kinds of environmental violations according to their seriousness and the nature of the environmental harm that they will cause.
- IV. Prepare a guidance manual assigning different regulatory tools to different violations
- V. Identify provisions across key environmental laws that will require amendment to enable the use of the new regulatory tools. Specifically, amend the Air Act and the Water Act to allow pollution control boards to seal units that continue to operate even after closure directions have been issued. Frame rules under the Air Act and the Water Act to prescribe the procedure for such sealing, such as the officials that will be empowered and the opportunities for appeal. Avoid the use of financial securities to regularise projects that have commenced activities without obtaining prior environmental clearance. The decisions of the Supreme Court in this regard must be respected, and the appropriate enforcement action must be taken against such violations. The full range of enforcement actions must be available to address non-compliance with the conditions of the environmental clearance.
- VI. Train pollution control board officials in the use of these regulatory tools.
- VII. Frame an enforcement policy that guides officials regarding the implementation of key environmental statutes. The policy should help officials identify what kind of action should be undertaken for what kind of violation and against which kind of violator. The policy may vary depending upon the statute. For example, the enforcement guidance to a forest officer under the Wild Life (Protection) Act, 1972 may vary from that provided to a state Pollution Control Board official under the Water Act.
- VIII. Train relevant officers in implementing the enforcement policy.
- IX. Conduct periodic audits to assess the effectiveness of the enforcement policy. [Note: The Comptroller and Auditor-General of India periodically audits the functioning of key public institutions, and could therefore also audit the working of this policy].
- X. Assess the increases in financial and human resources that will be required to use the expanded set of regulatory tools effectively.



State-owned enterprises

The zero draft of the National Action Plan (NAP) on Business and Human Rights lists steps taken by the State to ensure that it protects against human rights abuses by corporations that are owned or managed by it. The zero draft NAP makes particular mention of guidelines issued by the Department of Public Enterprises, the Ministry of Heavy Industries and Public Enterprises, as well as the manuals for the procurement of goods and consultancy and other services.

The Guidelines on Corporate Governance for Central Public Sector Enterprises were issued in 2010 and are likely to require updating in light of the more recent initiatives on responsibility and sustainability reporting for businesses undertaken by the Ministry of Corporate Affairs. Environmental protection requirements are mentioned only briefly in the Guidelines. Environmental protection, conservation and renewable energy developments should also be a part of any analysis, which in turn should form part of the annual report. Additionally, the model code of business conduct and ethics for board members and senior management lists “general moral imperatives” that board members and senior management “must be alert to, and make others aware of, both a legal and a moral responsibility for the safety and the protection of human life and environment”. The Guidelines are therefore vague on specific details regarding the duty of public sector enterprises toward the environment.

On procurement manuals, both of the extant manuals incorporate environmental considerations by using concepts such as value for money, which means:

“...effective, efficient, and economic use of resources, which may involve the evaluation of relevant costs and benefits, along with an assessment of risks, non-price attributes, e.g., in goods and/or services that contain recyclable content, are recyclable, minimise waste and

greenhouse gas emissions, conserve energy and water and minimise habitat destruction and environmental degradation, are non-toxic etc. and/or life-cycle costs, as appropriate.”

By acknowledging that price alone does not necessarily represent value for money, an effort has been made to account for the intangible value of environmental goods and services.

Other environmental concerns are also incorporated in the manuals by requiring technical specifications to “comply with sustainability criteria and legal requirements of environment or pollution control and other mandatory and statutory regulations, or internal guidelines, if any, applicable to the goods to be purchased”. Emphasis is also laid on the use of environment-friendly materials, of eco-labels per ISO 14020 or other voluntary environmental standards, and compliance with the Standards and Labelling programme introduced by the Bureau of Energy Efficiency.

In general, the manuals appear to have given adequate weight to environmental concerns, although concepts like sustainability criteria might require more precise definitions and harmonization with indicators in the Business Responsibility and Sustainability Reporting format.

Recommendation IX

In accordance with Principle 4 of the UN Guiding Principles, which specifically requires States to take steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, the Ministry of Heavy Industries and Public Enterprises and Ministry of Corporate Affairs to coordinate to ensure harmonization between any applicable codes of conduct and guidelines for State-owned business enterprises and the 2020EN Business Responsibility and Sustainability Reporting format.

E. Linkages between the Environment and Human Rights

There is a clear distinction between Indian environmental legislation and Indian environmental jurisprudence. Key environmental statutes, in their substantive provisions, do not explicitly recognise the link between environmental protection and human rights. However, their preambles acknowledge that the laws have been enacted to give effect to India's international legal obligations, such as those expressed at the United Nations Conference on the Human Environment, 1972.

An exception to this is the Forest Rights Act, the preamble of which acknowledges that vesting forest rights in such peoples is linked to "sustainable use, conservation of biodiversity and maintenance of ecological balance". This is backed up by substantive provisions in the body of the Act.

However, the Indian Supreme Court, followed more recently by the National Green Tribunal, has recognised both procedural and substantive rights as integral components of the fundamental right to life under Article 21 of the Indian Constitution, thereby establishing a clear link between environmental violations and human rights abuses. This includes the right to access environmental information, the right to participate in environmental decision-making, as well as the recognition of environmental legal principles like the principle of sustainable development, the "polluter-pays" principle and the precautionary principle. This judicial understanding has been used, first, to protect the right to health of affected communities around limestone quarries in Uttarakhand (*Rural Litigation Entitlement Kendra v. State of Uttar Pradesh*), to recognise the religious and cultural rights of the Dongria Kondh tribes around bauxite mines in Odisha (*Orissa Mining Corporation Limited v. Ministry of Environment, Forest and Climate Change*), and, second, to acknowledge public consultation

as an important constitutional value in the context of the development of a greenfield airport in Goa (*Hanuman Laxman Aroskar v. Union of India*).

Environmental legal principles have been given statutory recognition in the National Green Tribunal Act, 2010, with Section 20 of the Act requiring the Tribunal to apply the principles of sustainable development, the precautionary principle and the polluter-pays principle while passing an order or decision.

However, in the absence of any specific guidance on the content of these principles, courts have applied them inconsistently, thereby weakening human rights protections. Some examples of this in the context of sustainable development are provided below, drawn from an analytical work on key concepts and principles in Indian environmental law (Ghosh, 2019).

- In *Narmada Bachao Andolan v. Union of India*, the Supreme Court, while considering a challenge to the construction of the Sardar Sarovar Dam project on the Narmada River, relied overwhelmingly on technocratic bodies appointed by the government, working from an understanding of sustainable development that would involve the mainstreaming of affected and displaced indigenous peoples into modern life with its developmental advantages in terms of water, education, roads and electricity, among others.
- In *Sterlite Industries India Limited v. Union of India*, the Supreme Court, while considering the health and environmental effects of a smelting plant in an ecologically sensitive area, relied more heavily on the principles of judicial review than the principle of sustainable development to defer to the Government's decision to continue mining operations in the area.
- In *Goa Foundation v. Union of India*, the Supreme Court used the principle of

sustainable development rhetorically to allow mining activities to continue provided a certain proportion of profits was earmarked for environmental protection.

Recommendation X

MoEFCC to create clearer links between environmental harms and human rights abuses by giving statutory expression to environmental rights and principles.

Action points:

- I. Amend Section 20 of the National Green Tribunal Act, 2010, to expand the content of the environmental legal principles that it gives effect to.
- II. Incorporate this expanded understanding of environmental legal principles in the Environment (Protection) Act, 1986, such that the principles are used as the underlying bedrock of all environmental legislation.
- III. Create explanatory guidance documents on the application of these principles for the different kinds of authorities created under Indian environmental law. For instance, how should expert appraisal committees assess projects for environmental clearance? Similarly, how should the National Green Tribunal use the polluter-pays principle to award compensation for environmental damage? How should pollution control boards use the precautionary principle to issue directions to industries to stop certain activities?
- IV. Incorporate the right to access environmental information and the right to participate in environmental decision-making in the Environment (Protection) Act, 1986, as overarching rights across all environmental legislation.

A specific example of the absence of the link between environmental harms and human rights abuses can also be seen in the draft EIA Notification 2020. The objectives of the Notification are only defined in terms of “rationalization” and “standardisation”. No objectives related to the achievement of a certain level of environmental quality or protection of the rights of affected communities are identified.

The preamble to the Notification should acknowledge and seek to protect the human rights of communities affected by large development projects, including their procedural rights to access information and participate in environmental decision-making, as well as their substantive rights to a clean and healthy environment.

Similarly, the draft notification misses specific criteria for the interpretation of environmental law. Key terms have been defined narrowly, failing to adopt an ecosystem approach. For instance, “eco-sensitive areas” and “eco-sensitive zones” are defined only as areas notified as such by the MoEFCC, without considering that there are other ecologically fragile landscapes such as reserve/protected forests, floodplains and wetlands that are also ecologically sensitive and that perform significant ecological functions.

The current draft allows activities like securing the land by fencing, erection of compound walls and levelling of the land to proceed without having environmental clearances in place. In addition to deviating from the EIA Notification, 2006, which specifically required appropriate permissions to be in place before commencing such work, this provision ignores the fact that permitting such activities could irreparably damage ecosystem functions.

The language of the Notification should focus less on artificial legal and administrative categories, and more on adopting a holistic, ecological approach while determining the scope and applicability of the EIA Notification.

Simultaneously, the Notification must also ensure coherence with terms used in other legal instruments. For instance, ecologically sensitive areas under the Indian Forest Act, 1927, the Wetland Conservation and Management Rules, 2017, the CRZ Notification, 2019, and rivers notified as waterways under the National Waterways Act, 2016, must also be protected.

The draft Notification also exempts most Category B2 projects from the entire process of screening, scoping, preparation of the EIA report, public consultation and appraisal. Instead, a diluted process called “prior environmental permission” has been introduced, which involves the preparation and scrutiny of an environmental management plan. This presupposes that an assessment of the ecological impacts of such a project is unnecessary and that the focus should only be on mitigation.

Such dilution, in the interests of standardisation, defeats the objectives of the EIA Notification. Determining whether or not a particular category of project ought to be exempt from certain aspects of the EIA process should require detailed scrutiny by experts, rather than the blanket procedures recommended by the EIA Notification.

Finally, the terms of reference for the conduct of environmental impact assessment are restricted to occupational health and baseline data of health, without a comprehensive health impact assessment. Specific assessments related to the climate change impacts of a project also do not find mention in the current draft Notification. These also point to the lack of the recognition of the link between the environmental violations and human rights abuse.

The Notification should incorporate health impact assessment as an integral part of EIA, including components like health inequalities, the impacts on public health, the effects on vulnerable groups and the burdens on health sector services.

The EIA report should assess the environmental and social consequences of climate change in

proposed project areas, keeping in mind India’s commitments under the United Nations Framework Convention on Climate Change.

A large number of submissions have already been made to the MoEFCC pointing out very specific and technical problems with the EIA Notification. As the MoEFCC analyzes and responds to these submissions, a more fundamental recommendation that is designed to uphold the environmental rule of law and reduce vulnerabilities to human rights abuse in the context of large development projects should be considered.

Recommendation XI

MoEFCC to enact a separate statute to govern the environmental impact assessment process to reduce legal uncertainty, to guarantee rights to access environmental information and participate in environmental decision-making, and to lay down guiding principles to govern complex decisions that require the balancing of competing interests.

MoEFCC to conduct human rights impact assessments for relaxations granted to business enterprises in 2020. These include the waiver of the public consultation requirement for oil and gas exploration projects in January 2020, the waiver of the requirement to amend environmental clearances for coal plants proposing to switch their source of coal, as well as the removal of the mandatory requirement for coal washing.





IV Summary

India has a large framework of environmental laws, regulations, and executive instruments that lay down an extensive set of obligations for businesses. In addition to this, it has a rich body of environmental jurisprudence that explicitly recognises the right to a clean and healthy environment as a human right. Together these constitute a solid foundation to prevent human rights abuses by enterprises. However, there is scope to strengthen this legal framework by creating an environment that fosters respect for this human right in the manner contemplated by the UN Guiding Principles, particularly in terms of pillars 1 and 3 of the Guiding Principles—the State duty to protect human rights, and access to remedy in the case of human rights abuses by business enterprises.

This report used the Foundational and Operational Principles under Pillars One and Three of the UN Guiding Principles to identify specific ways in which the Indian environmental legal and regulatory framework could be strengthened. This exercise was informed by using these principles in conjunction with key elements of the environmental rule of law, as set out in the United Nation Environment Programme's First Global Report on the Environmental Rule of Law, and as recently recognised by the Indian Supreme Court. The key criteria against which Indian environmental laws and regulations have been evaluated in this report are: the extent to which they are fair, clear and implementable; the manner in which they guarantee access to information and public participation; the effectiveness of remedies available under this legal and regulatory framework for business-related human rights abuses; the accountability and integrity of institutions and decision-makers;

and finally, the degree to which they are able to establish a link between the environment and human rights. On the basis of this evaluation, the UN Guiding Principles are then applied to help determine the form and direction of reforms to the Indian environmental legal framework.

Some of the key findings from this analysis are (1) the Indian environmental legal framework is fragmented and characterised by separate but overlapping regimes with inconsistent provisions and self-contained modes of operation, (2) it has outdated regulatory tools that weaken enforcement, and (3) there are limited remedies to redress business-related human rights abuses in the context of the environment. As a result of this, the existing legal framework falls short of the standards set by the UN Guiding Principles, in particular, Principle 3, which requires States to protect against human rights abuses within their territory by business enterprises, and Principle 26, which requires States to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses.

To address this, the theme running through this report is the rationalisation and streamlining of the fragmented legal framework, with the aim of removing inconsistencies across different legal regimes, thereby creating greater legal certainty for businesses. Another key theme that cuts through the recommendations in this report is the need for clearer extra-legal guidance, both for businesses and for the officials responsible for the implementation of environmental laws. Finally, more needs to be done to establish a clearer link between the obligations of enterprises under Indian environmental law and the softer codes of conduct promulgated by financial

institutions and the Ministry of Corporate Affairs.

The UN Guiding Principles provide the basis for specific amendments to the environmental legal framework in India. These include creating a wider array of regulatory tools, defining the content of environmental legal principles, and setting out methods for calculating environmental compensation. The Guiding Principles also demonstrate the need for the MoEFCC to guide and train its officials and to build greater capacity for enforcement. When read with the environmental rule of law, the Guiding Principles provide a clear roadmap for updating the existing legal framework (see annex) in a manner that recognises the intersection of the environment and human rights.

V

List of Recommendations

Recommendation I

MoEFCC to review and consolidate key environmental statutes to eliminate inconsistencies.

Action points:

- I. Comprehensively review the environmental laws in Table 1 to ensure uniformity of definitions, obligations and penalties.
- II. Remove inconsistencies across these provisions through amendment or repeal, as the case may be in accordance with Principle 8 of the UN Guiding Principles, which requires States to ensure policy coherence.
- III. Consolidate the Air Act, the Water Act and the Environment Protection Act into a single, overarching statute.
- IV. Repeal the Indian Forest Act, 1927. Incorporate suitable powers for forest officials under other natural resource management laws like the Wildlife (Protection) Act, 1972 and the Forest (Conservation) Act, 1980.

Recommendation II

MoEFCC to create substantive guidance documents for business enterprises to facilitate the adoption of a rights-based approach to environmental compliance in accordance with Principles 2 and 3(c) of the UN Guiding Principles.

Action points:

- I. Identify key environmental statutes and obligations, violations of which are particularly likely to cause human rights abuses, such as the obligation to obtain forest and environment clearances or the obligation to not discharge effluents or emissions in excess of prescribed standards.
- II. Create guidance documents in consultation with civil society groups working on environmental and human rights issues as well as key representatives of business enterprises. These documents should assist enterprises in mainstreaming human rights-based approaches to their activities under environmental laws. For example, they should provide guidance to business enterprises regarding their interactions with local communities, particularly marginalised groups living in areas where industrial activity is proposed to be undertaken.

Recommendation III

Principles 25 and 26 of the UN Guiding Principles require States to take appropriate steps to ensure that those affected by business-related human rights abuse have access to effective remedy and to ensure the effectiveness of domestic judicial mechanisms when addressing such abuses. Access to information is integral to an effective remedy. MoEFCC to create an accessible, online database of environmental information collected under the existing legal framework.

Action points:

- I. Identify provisions under the existing legal framework that require business enterprises to submit information or regulatory authorities to consolidate and maintain information.
- II. Where these provisions do not exist, assess the need for creating similar obligations.
- III. Harmonise such provisions across the existing legal framework to ensure that there is no duplication of processes. Ensure harmony with reporting obligations under business laws as well.
- IV. Create simple, uniform formats for the collection of such information that provide clear guidance to business enterprises.
- V. Create sector-specific formats for consolidating such information and ensure that they are made available in the public domain.
- VI. Use this information, as well as data collected by the National Crime Records Bureau, to create suitable parameters to address the adequacy of existing environmental laws.

Recommendation IV

Principle 1 of the UN Guiding Principles requires States to protect against human rights abuse within their territory by third parties. Strengthening public participation mechanisms can be an important tool in protecting against such abuses. To give effect to this principle, the MoEFCC to harmonise the process of public participation under the Forest Rights Act with other natural resource management laws like the Wildlife (Protection) Act and the Forest Conservation Act.

Action points:

- I. Identify provisions in other natural resource management laws that contradict the spirit of public participation set out in the Forest Rights Act, as confirmed by judicial decisions.
- II. Amend or repeal these provisions.
- III. Train forest officials in administering such participatory processes.
- IV. Create awareness among local communities regarding their rights to public participation.

Recommendation V

The draft notification should be broadened to encourage community-based monitoring and to protect the procedural right of affected persons to participate in environmental governance. Public consultation requirements should not be arbitrarily diluted.

Recommendation VI

MoEFCC to review the composition of pollution control boards as well as the processes for granting licenses, permits and permissions under pollution control laws to create more explicit avenues for public participation.

Recommendation VII

In accordance with Principle 26 of the UN Guiding Principles, the MoEFCC to take steps to reduce the evidentiary burden on communities reporting violations of environmental laws, encourage the speedier disposal of cases, to assist in the development of a sound methodology for determining environmental compensation, to strengthen the monitoring and implementation of environmental directions, and to consider the creation of a fund for legal aid for environmental harms.

Action points:

- I. Allow prosecutions on the basis of community-based monitoring
- II. Fill vacancies on the various regional benches of the NGT.
- III. Amend rules under the National Green Tribunal Act, 2010, to introduce an appropriate method for assessing environmental damage and awarding environmental compensation.
- IV. Create a special cell of officers, distinct from pollution control boards, to monitor the implementation of judicial directions.
- V. MoEFCC to consider demarcating a proportion of the Environment Relief Fund for the legal costs incurred by vulnerable persons or groups in making claims under the National Green Tribunal Act for compensation for environmental damage.

In accordance with Principles 27 and 28 of the UN Guiding Principles, which requires States to provide effective and appropriate non-judicial grievance mechanisms, as well as to facilitate access to non-State-based grievance mechanisms dealing with business-related human rights harms, the MoEFCC to consider the following:

- I. Publish guidance for business enterprises on setting up an operation-level grievance redressal mechanism.
- II. Conduct a feasibility study on the use of Gram Nyayaalayas to resolve environment-related disputes.

Recommendation VIII

MoEFCC to create a regulatory toolbox for different authorities across key environmental laws, to allow for a graded response to different kinds of environmental offences.

Action points:

- I. Constitute a committee to prepare a working paper on the different kinds of environmental regulatory tools that might be suited to the Indian context and which sets out the principles governing their use. These could include a range of restorative actions, including warnings, administrative fines, emission credits and financial securities.
- II. Amend the relevant provisions in environmental laws to permit community-based monitoring.

- III. Across key environmental laws, identify and categorise different kinds of environmental violations according to their seriousness and the nature of the environmental harm that they will cause.
- IV. Prepare a guidance manual assigning different regulatory tools to different violations
- V. Identify provisions across key environmental laws that will require amendment to enable the use of the new regulatory tools. Specifically, amend the Air Act and the Water Act to allow pollution control boards to seal units that continue to operate even after closure directions have been issued. Frame rules under the Air Act and the Water Act to prescribe the procedure for such sealing, such as the officials that will be empowered and the opportunities for appeal. Avoid the use of financial securities to regularise projects that have commenced activities without obtaining prior environmental clearance. The decisions of the Supreme Court in this regard must be respected, and the appropriate enforcement action must be taken against such violations. The full range of enforcement actions must be available to address non-compliance with the conditions of the environmental clearance.
- VI. Train pollution control board officials in the use of these regulatory tools.
- VII. Frame an enforcement policy that guides officials regarding the implementation of key environmental statutes. The policy should help officials identify what kind of action should be undertaken for what kind of violation and against which kind of violator. The policy may vary depending upon the statute. For example, the enforcement guidance to a forest officer under the Wildlife (Protection) Act, 1972 may vary from that provided to a state Pollution Control Board official under the Water Act.
- VIII. Train relevant officers in implementing the enforcement policy.
- IX. Conduct periodic audits to assess the effectiveness of the enforcement policy. [Note: The Comptroller and Auditor-General of India periodically audit the functioning of key public institutions, and could therefore also audit the working of this policy].
- X. Assess the increase in financial and human resources that will be required to use the expanded set of regulatory tools effectively.

Recommendation IX

In accordance with Principle 4 of the UN Guiding Principles, which specifically requires States to take steps to protect against human rights abuses by businesses that are owned or controlled by the State, the Ministry of Heavy Industries and Public Enterprises and Ministry of Corporate Affairs to coordinate to ensure harmonization between any applicable codes of conduct and guidelines for State-owned business enterprises and the 2020EN Business Responsibility and Sustainability Reporting format.

Recommendation X

MoEFCC to create clearer links between environmental harms and human rights abuses by giving statutory expression to environmental rights and principles.

Action points:

- I. Amend Section 20 of the National Green Tribunal Act, 2010, to expand the content of the environmental legal principles that it gives effect to.
- II. Incorporate this expanded understanding of environmental legal principles in the Environment (Protection) Act, 1986, such that the principles are used as the underlying bedrock of all environmental legislation.
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- IV. Incorporate the right to access environmental information and the right to participate in environmental decision-making in the Environment (Protection) Act, 1986, as overarching rights across all environmental legislation.

Recommendation XI

- I. MoEFCC to enact a separate statute to govern the environmental impact assessment process to reduce legal uncertainty, to guarantee rights to access environmental information and participate in environmental decision-making, and to lay down guiding principles to govern complex decisions that require the balancing of competing interests.

MoEFCC to conduct human rights impact assessments for relaxations granted to business enterprises in 2020. These include the waiver of the public consultation requirement for oil and gas exploration projects in January 2020, the waiver of the requirement to amend environmental clearances for coal plants proposing to switch their source of coal, as well as the removal of the mandatory requirement for coal washing.

References

- Centre for Science and Environment (2009), *Turnaround: Reform Agenda for India's Environmental Regulators*.
- Debadityo Sinha, Vidhi Centre for Legal Policy (2020), *The Management of Environment Relief Fund*, <https://vidhilegalpolicy.in/research/tracking-funds-to-provide-relief-to-victims-of-environmental-hazards/>
- Ghosh, Shibani (2015), Reforming the Liability Regime for Air Pollution in India. Centre for Policy Research working paper.
- Ghosh, Shibani, ed. (2019), *Indian Environmental Law: Key Concepts and Principles*. New Delhi: Orient Blackswan.
- Ghosh, Shibani, Sharachchandra Lele and Nakul Heble (2018), Appellate Authorities under Pollution Control Laws in India: Powers, Problems and Potential. *Law, Environment and Development Journal*, vol. 14, no.1.
- India, Department of Expenditure, Ministry of Finance (2017), *Manual for Procurement of Consultancy and Other Services*.
- India, Department of Expenditure, Ministry of Finance (2017), *Manual for Procurement of Goods*.
- India, Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises (2010), *Guidelines on Corporate Governance for Central Public Sector Enterprises*.
- India, Ministry of Corporate Affairs (2018), *National Guidelines on Responsible Business Conduct*.
- India, Ministry of Corporate Affairs (2020), Report of the Committee on Business Responsibility Reporting.
- India, Ministry of Health and Family Welfare (2018), *National Action Plan for Climate Change and Human Health*.
- Kreilhuber, David and Angela Kariuki (2020), Environmental Rule of Law in the Context of Sustainable Development. *Georgetown Environmental Law Review*, vol. 32.
- Mehta, Dhvani (2017), The Environmental Rule of Law in India. Thesis for Doctorate of Philosophy in Law, University of Oxford.
- Rajamani, Lavanya, and Shibani Ghosh (2016), Public Participation in Indian Environmental Law. *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities*, Barrera-Hernandez, Barry Barton, Lee Godden, Alastair Lucas and Anita Ronne, eds. Oxford University Press.
- Sinha, Debadityo (2020), *The Management of Environment Relief Fund*. Vidhi Centre for Legal Policy.
- United Nations (2011), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.
- United Nations Environment Programme (2019), *First Global Report on the Environmental Rule of Law*. United Nations.
- Vidhi Centre for Legal Policy (2019), *Towards the Rule of Law in India: 25 Legal Reforms for India*.
- Vidhi Centre for Legal Policy (2020), *Submissions on the Draft Environment Impact Assessment Notification 2020*.
- Vindhyan Ecology and Natural History Foundation (2020), *Comments and Objections on Draft EIA Notification 2020*.



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