



Background Paper for India's National Framework on Business and Human Rights

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By

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** This paper does not represent the views of ETI but rather, is intended to stimulate discussion.

Table of Abbreviations

ADR	Alternative Dispute Resolution
BHR	Business and Human Rights
BIT	Bilateral Investment Treaty
CAO	Compliance Advisor Ombudsman
CEC	Central Empowered Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CSOs	Civil Society Organisations
CSR	Corporate Social Responsibility
DPs	Directive Principles of State Policy
ECCJ	European Coalition for Corporate Justice
FACT	FICCI Arbitration and Conciliation Tribunal
FICCI	Federation of Indian Chambers of Commerce and Industry
FLA	Fair Labor Association
FRs	Fundamental Rights
GPs	Guiding Principles on Business and Human Rights
HRC	Human Rights Council
ICAR	International Corporate Accountability Roundtable
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
IFC	International Finance Corporation
ILO	International Labour Organization
INR	Indian Rupee
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational Corporation
MoU	Memorandum of Understanding
NAP	National Action Plan
NCP	National Contact Point
NCPCR	National Commission for Protection of Child Rights
NCSC	National Commission for Scheduled Castes
NCST	National Commission for Scheduled Tribes
NCW	National Commission for Women
NGOs	Non-governmental Organizations
NHRC	National Human Rights Commission
NGT	National Green Tribunal
NHRI	National Human Rights Institution
OECD	Organisation for Economic Co-operation and Development
PIL	Public Interest Litigation
PSUs	Public sector Undertakings
SC	Scheduled Caste
SEZ	Special Economic Zone
SIA	Social Impact Assessment
ST	Scheduled Tribe
TFD	Traditional Forest Dweller
TNC	Transnational Corporation
UN	United Nations
UNICEF	United Nations Children's Emergency Fund
UNWG	United Nations Working Group
US	United States

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Executive Summary

Backdrop

The United Nations (UN) Guiding Principles on Business and Human Rights (GPs), which were endorsed by the Human Rights Council (HRC) in June 2011, are built on three pillars: states' duty to protect human rights, corporate responsibility to respect human rights, and access to effective remedies. All three pillars of the GPs – especially Pillar 1 and Pillar 3 – require states to take a number of measures to ensure that business enterprises do not violate human rights and that effective remedies are available in cases of violation.

The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) 'strongly encourages all states to develop, enact and update' a national action plan (NAP) on business and human rights (BHR) as part of states' responsibility to disseminate and implement the GPs. In June 2014, the HRC passed a resolution calling upon states to develop NAPs. As of 29 February 2016, ten states have drawn up NAPs, while several others are in the process of doing so.

Against this background, this paper examines two broad questions: first, whether India needs a BHR framework at the national level to implement the GPs; second, assuming that such a framework is needed, what the content of such a framework should be and what principles should be followed to make the process transparent, inclusive and legitimate.

Need for a National BHR Framework for India

There are several reasons why the Indian government should initiate the process to put in place a national BHR framework. India has ratified a number of international human rights instruments that impose explicit or implicit obligations on the government to ensure that business enterprises operating within its territory or jurisdiction do not violate human rights. The GPs merely reiterate this international obligation. Developing a BHR framework would also be consistent with the mandate flowing from Article 51 of the Constitution, which provides that the state 'shall endeavour to ... foster respect for international law'. A national BHR framework would be useful even if a legally binding international instrument to impose human rights obligations on companies is adopted in future.

The process of drafting a BHR framework would allow the government to make an assessment of the current legal-cum-policy framework so as to identify what is working and what is not in terms of ensuring that companies respect human rights. India already has a vast legal framework that applies (albeit in a patchy manner) human rights norms to companies. Instead of adopting a piecemeal approach of reviewing different segments of this legal framework (such as labour laws or environmental laws), a holistic assessment that does not ignore the human rights impact of creating an environment conducive to private investment-driven development may be preferable.

Although the Supreme Court has developed some innovative constitutional principles, these cannot ensure full protection of human rights in a free market economy where the private sector has an all-pervasive role. The BHR framework would allow an informed debate as to whether a constitutional amendment may be desirable to extend the protection of fundamental rights (FRs) against companies – similar to the constitutional position in South Africa, for example.

The Indian government has adopted a number of significant corporate social responsibility (CSR) initiatives in recent years – e.g., the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011, and CSR provisions in the Companies Act 2013 and the Model

A BHR framework should also help in developing a model of economic development that is both sustainable and inclusive. For avoiding social conflicts, it is critical that the sufferings as well as the fruits of the development are shared fairly and proportionally among all sections of society.

Bilateral Investment Treaty (BIT) 2015. Developing a BHR framework would allow the government to build on these initiatives and encourage all types of companies to integrate respect for human rights into their business operations.

As numerous case studies have shown, if companies operating within India violate human rights, resistance from affected communities drastically slows down development projects. Conversely, Indian companies – including public sector undertakings (PSUs) – that operate overseas may be accused of violating human rights, as some of

these countries may not have adequate regulatory frameworks in place to safeguard the human rights of their communities. Therefore, India needs a BHR framework not merely for companies operating within its territory but also for Indian companies operating outside India's territory through subsidiaries or joint ventures. In fact, adopting a BHR framework would be in the long-term interests of India's development agenda as well as of its companies operating locally or internationally.

A BHR framework should also help in developing a model of economic development that is both sustainable and inclusive. For avoiding social conflicts, it is critical that the sufferings as well as the fruits of the development are shared fairly and proportionally among all sections of society.

Principles and Processes that should Underpin the Indian Framework

The UNWG's Guidance on NAPs outlines four essential criteria for effective NAPs, namely that they must: (i) be founded on the GPs; (ii) respond to specific challenges of the national context; (iii) be developed and implemented through an inclusive and transparent process; and (iv) be regularly reviewed and updated. The Guidance document also recommends that states keep in mind the following five sequential phases to adopt a NAP: (i) initiation; (ii) assessment and consultation; (iii) drafting of any initial NAP; (iv) implementation; and (v) update.

It would make sense for the Indian government to follow these good practice recommendations rather than reinventing the wheel. Special attention should be paid to ensuring that the drafting process is fully transparent and inclusive, so that the views of all stakeholders – especially those who are adversely affected by corporate activities or who come from disadvantaged backgrounds – are taken into account. It would be equally important to reach out to a range of business actors at all stages of the process, but without creating the perception of a 'corporate capture of the state'. In order to ensure that the participation of various stakeholders is meaningful, consultations must be conducted in diverse parts of the country in local languages. In addition, people should be given adequate time to digest the information and provide feedback.

Developing a BHR framework would require an assessment of India's existing legal regime (operating at both domestic and international levels) and developing reform options. Instead of creating new committees to perform these tasks, the government should consider using existing institutions, such as the Law Commission of India and the National Human Rights Commission (NHRC). These institutions in turn could collaborate with law schools and business schools in India to carry out the required research.

A few additional principles should also be relevant for developing India's national BHR framework. It may be desirable to look beyond the GPs, as in certain respects they may not reflect accurately states' obligations under international human-rights law. The extraterritorial human rights obligations of states are a case in point. Another aspect relates to Pillar 1: as states have tripartite obligations

under international human rights law, the duty to protect human rights under the first pillar should not mislead us into believing that states' obligations to 'respect' and 'fulfil' human rights would not be relevant in the context of business.

Moreover, the Indian government should build on forward-looking principles – such as the strict-/ absolute liability principle, the polluter pays principle and the precautionary principle – developed by the Supreme Court in holding companies accountable for breaching human rights norms. Similarly, the judicial leads on applying certain FRs against companies too should be embraced.

Since India is a federal country, it would be critical for the central government to build a broad consensus at the outset with state governments about the need for – as well the content of – the proposed national BHR framework. It may also be desirable for states to develop their own action plans to complement the national framework. Moreover, the third tier of governance bodies (such as Gram Sabhas) should also be brought on board, so as to have a shared understanding about the future of BHR discourse in India.

The proposed framework should respond to the full range of contexts in which human rights abuses could take place: (i) violations by Indian companies and/or their subsidiaries; (ii) violations by Indian subsidiaries of foreign companies; (iii) violations by government agencies, including during public procurement and development projects; (iv) violations by PSUs; (v) violations in situations of complicity between government agencies and private companies; (vi) violations by Indian companies – both PSUs and private companies – while operating abroad; (vii) violations within the supply chain of any of the above types of companies; and (viii) violations within the informal sector. While the framework should set the broad contours of the regulatory framework for all types of companies, some flexibility should be built into the process to allow for a differential treatment of small/medium-sized enterprises and the informal sector. In other words, despite having one framework, one size should not fit all.

Content of the Proposed Indian Framework

The content of India's national BHR framework

should be developed bottom-up through a process of inclusive and transparent consultation with all stakeholders, rather than being pre-defined. Nevertheless, some thematic thoughts are noted below to start the conversation.

Declaring an Unequivocal Commitment to Uphold Human Rights

Any viable BHR framework must offer a vision of how a balance between human rights and development priorities would be struck. The Indian government – through its national BHR framework – should send a clear message that all the human rights of everyone matter while pursuing the development agenda. This may entail reversing the 'development first' mind-set and changing the perception that the human rights of certain sections of society matter less. The government should reiterate its commitment to uphold FRs under the Constitution, implement the tripartite duties under international human rights law, and take seriously the duty to 'protect' human rights under the GPs. The human rights expectations of businesses operating within the territory and jurisdiction of the Indian government (the latter may include extraterritorial business activities) should be clearly set out. This may, for example, be done by mandating companies to conduct due diligence under Pillar 2 of the GPs.

Establishing Coordination Committees

The proposed framework should try to minimise the lack of coherence: (i) among different central ministries; (ii) between the central government on one hand and the state governments and Gram Sabhas on the other; and (iii) between the domestic legal framework and India's international obligations. One of the tools to achieve better coherence is to rely on coordination committees where diverse views are exchanged, disagreements are resolved in an amicable manner, and a broad consensus is built.

As the BHR framework would relate to a number of ministries and departments of the Indian government, a permanent inter-ministerial committee on BHR, chaired by the Prime Minister, should be established to achieve coherence on the levels of types (i) and (iii) described in the paragraph above. On the other hand, the Inter-State Council envisaged under Article 263 of the Constitution should be used to achieve type (ii) coherence,

as most of the BHR issues should fall within the existing mandate of this council.

Reviewing the Existing Regulatory Framework

Although India already has a well-developed legal regime to capture the intersection of human rights with business, a vital aspect of the proposed BHR framework should be to undertake a review of the existing legal framework in order to improve its responsiveness to pre-empt as well as address human rights abuses by business enterprises. Based on a systematic review, a number of improvements could be made to different branches of law. For example, by revising the definition of 'state' under Article 12 of the Constitution, the jurisdiction of the Supreme Court may be extended to take cognisance of at least certain FRs by non-state actors such as companies. Alternatively, the High Court rules could be amended to allow High Courts to deal with violations of FRs by companies under Article 226 of the Constitution. A special bench may perhaps be created in each High Court to deal with such matters.

New laws may be required to encourage the disclosure of non-financial information by companies and to protect human rights defenders from persecution. In certain areas of law (such as labour rights, social security, land acquisition and environmental rights), the need may be to change patchy, outdated or cumbersome regulations into a coherent framework that relies on a mixture of obligatory and voluntary strategies to encourage compliance, and not to see state regulation necessarily as an adversarial or hierarchical process. Any such reforms must also ensure that the goal of simplifying regulations is not driven solely by a desire to create an investment-friendly environment: rather, the human rights interests of the affected communities should be at the heart of such reforms, and the principle of free, prior and informed consent should be implemented in both letter and spirit.

Paying Special Attention to Vulnerable Groups and Specific Sectors

India's BHR framework should pay special attention to the unique circumstances and experiences of vulnerable or marginalised sections of society, such as women, children, migrant workers, minorities, people with disabilities, Scheduled Castes (SCs), and Scheduled Tribes (STs). As India already has special human rights institutions to safeguard the interests

of these sections of society, they should be involved in developing the BHR framework.

A related issue worth considering would be to develop sector-specific guidelines under the broad framework, as companies operating in different sectors face at least some uniquely different sets of human rights challenges, and it may not be feasible for 'one' national framework to respond to the specific needs of a diverse range of industries.

Offering Incentives and Disincentives to Business

The proposed BHR framework should outline what incentives and disincentives the government would offer to businesses to encourage them to take their human rights responsibilities seriously under both the GPs and the domestic legal framework. Apart from tax benefits, the government may establish responsible citizenship awards, create sector-specific labelling schemes, offer preferential loans to companies that embrace human rights, and integrate respect for human rights in public procurement policies.

In terms of disincentives, a range of civil, criminal and administrative sanctions should be contemplated against both companies and their executives found to be involved in human rights violations. The government should also create an environment in which 'social sanctions' can become effective. This could, for example, be done by requiring companies to disclose non-financial information. Companies could also be obliged to include on their websites information about past sanctions imposed on them for breaching human rights.

Strengthening Redress Mechanisms

As it is inevitable that some business enterprises might not respond to (dis)incentives, the government should provide a range of mechanisms that could be used by victims of corporate human rights abuses to seek access to justice. The first priority should be to reform the existing judicial as well as non-judicial mechanisms in order to make them more accessible, and more capable of dealing with private-sector violations of human rights. Such reforms may mean relaxing the constitutional or statutory provisions that deal with the jurisdiction of the Supreme Court, the High Courts and the NHRC; consolidating courts that deal with labour disputes (e.g., Labour Courts

and Labour Tribunals); and showing greater respect to determinations made by the National Green Tribunal (NGT) and Gram Panchayats.

Furthermore, the government should lay out the plan to support the development of non-state, non-judicial remedial mechanisms. These mechanisms should not be in lieu of – but rather in addition to – state-based judicial remedies. The potential of arbitration, mediation and conciliation should be harnessed to resolve BHR disputes, with due regard paid to the effectiveness criteria stipulated by the GPs. The role of civil society organisations (CSOs) may perhaps be institutionalised to fix the power asymmetry between companies and victims while using non-judicial grievance mechanisms, whether involving only companies or multiple stakeholders.

Removing Barriers in Access to Remedy

To avoid becoming merely a 'planning' document containing noble aspirational goals, the Indian BHR framework should not only identify concrete measures by which declared goals would be implemented, but also specify processes to monitor the efficacy of implementation and suggest ways of improvements.

The GPs identify a number of substantive, procedural and practical barriers that undermine access to judicial remedies. The proposed BHR framework should outline specific measures to be taken to reduce each of these barriers. For example, the Indian government should consider ways to overcome difficulties posed by the corporate law principles of limited liability and separate personality. Recognising a direct duty of care or imposing a due diligence requirement on parent companies may be an option to consider, so that victims could hold a parent company accountable in appropriate cases. While the

presence of class action and the well-developed system of public interest litigation (PIL) enable easier access to courts in cases involving a large number of victims, ways should be found to reduce the obstacles posed by the cost of litigation and endemic delays.

Building the Capacity of Various Stakeholders

The BHR framework for a developing country such as India should also list measures aimed at building the capacity of various stakeholders. Both

government officials and corporate executives would benefit from training workshops on how to resolve human-rights dilemmas and how to integrate the findings of human rights impact assessments into their decisions. The help of law schools and business schools should be solicited on this front. Communities adversely affected by corporate activities would also benefit from information-sharing about their legal rights and the remedies available to seek relief in cases of human rights violation. The relevant government departments could collaborate with CSOs and law students in empowering communities – a collaboration that would allow all participants to gain insights from the process.

Regular Monitoring and Periodic Update of the Framework

To avoid becoming merely a 'planning' document containing noble aspirational goals, the Indian BHR framework should not only identify concrete measures by which declared goals would be implemented, but also specify processes to monitor the efficacy of implementation and suggest ways of improvements. In addition, as BHR issues are dynamic in nature, any framework dealing with such issues must be revised and updated in line with changing needs. Putting in place a system of periodic review of the adopted framework (to take place every three to five years) may thus be desirable.

Conclusion

The GPs provide the Indian government an opportunity to assess its laws and policies that have a bearing on BHR and consider taking appropriate remedial steps. Doing so would ensure that India's path of economic development is not only sustainable and inclusive but also free from social conflicts. Developing a coherent BHR framework in a transparent and consultative manner is one key tool that should assist in achieving this goal. The presence of a stable politico-economic system, vibrant democracy, free media, robust civil society, independent judiciary and the rule of law means that India already has the basic ingredients necessary to develop and sustain a BHR framework at national level.

I Introduction

One of the major challenges that the international community faces in the 20th century is how to deal with human rights violations committed (directly or indirectly) by non-state actors such as corporations.

The challenge has become more daunting in the light of two interrelated factors: (i) the rise in the power, influence and sphere of activities of corporations; and (ii) the growth of multinational corporations (MNCs) that operate at the transnational level and through chains of suppliers.

This paper examines two broad questions: first, whether India needs a new BHR framework at national level to implement the GPs; and second, assuming that such a framework is needed, what its content should be and what processes should be followed to make it transparent, inclusive and legitimate.

Although both these factors together expose the limitations of the state-centric model of international human rights realisation, states – for valid reasons – continue to remain vital players in ensuring that companies respect human rights norms. In addition, it is increasingly felt that companies themselves should have human rights responsibilities. The GPs,¹ which were endorsed by the HRC in June 2011, incorporate both these elements. The GPs are built on three pillars: states' duty to protect human rights, corporate responsibility to respect human rights, and access to effective remedies.

All three pillars of the GPs, especially Pillars 1 and 3, require states to take a number of measures

in order to safeguard human rights in an era of free-market economy in a liberalised environment. The UNWG 'strongly encourages all states to develop, enact and update' a NAP on BHR as part of the state responsibility to disseminate and implement the GPs.² To guide this process, the UNWG has prepared a guide outlining a number of recommendations for states and other stakeholders.³

Several states have drawn up – or are in the process of drawing up – NAPs to implement the GPs⁴ Whereas the states from the Global North took the lead in launching NAPs, countries from the Global South are now being encouraged to follow suit. Against this background, this paper examines two broad questions: first, whether India needs a new BHR framework at national level to implement the GPs; and second, assuming that such a framework is needed, what its content should be and what processes should be followed to make it transparent, inclusive and legitimate.⁵

In order to examine these two questions, Part II provides a brief overview of the Indian government's response to the BHR discourse and the typology of corporate human rights violations in India. Part III then offers a critical review of the existing regulatory landscape. Part IV reviews

the potential as well as limitations of various institutional mechanisms to provide effective access to remedies for the victims affected by corporate activities. Building on this analysis and looking at the NAP experiences of other states, Part V makes a case for India to adopt a national BHR framework. It also outlines the potential content of such a framework, and the process that should be followed to make it workable. Part VI concludes the

paper with a number of recommendations for the Indian government to consider.

The term 'human rights' in this paper is used in a broad sense, so as to include not only human rights but also the labour rights and environmental rights recognised under various hard or soft international legal instruments. The terms 'companies' and 'corporations' are used interchangeably.

III Situating India Within the Business and Human Rights Discourse

This part outlines the context within which the position of Indian government vis-à-vis the BHR discourse could be analysed, and human rights abuse by the private sector takes place in India.

A. International Human Rights Treaties Ratified (and not Ratified) by India

It has been fairly well established that states have tripartite duties under international human-rights law: the duties to respect, protect and fulfil human rights. The duty to 'protect' human rights against the conduct of non-state actors is especially relevant in relation to corporate human rights abuses; this is acknowledged by the GPs as well.

India has ratified a number of human rights instruments which, among other requirements, explicitly or implicitly oblige the government to ensure that business enterprises operating

within its territory or jurisdiction do not violate human rights. As indicated in Table 1, the Indian government has ratified the two conventions that are part of the International Bill of Rights – the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) – as well as several other core international human rights instruments. At the same time, there are certain key instruments (including in the area of labour rights) that have not yet been ratified by the government.⁶ This situation would undermine the potential of the Indian government to exercise its duty to 'protect' human rights against corporate abuses under the first pillar of the GPs.

Table 1: India's Ratification of Core International Human Rights Instruments⁷

Instrument Title	Signed on	Ratified on	Not Signed Not Ratified
International Covenant on Civil and Political Rights 1966		10.04.1979 (accession)	
International Convention on Economic, Social and Cultural Rights 1966		10.04.1979 (accession)	
Geneva Conventions	16.12.1949	09.11.1950	
Convention on the Prevention and Punishment of the Crime of Genocide 1948		27.08.1959	
International Convention on the Elimination of All Forms of Racial Discrimination 1965	02.03.1967	03.12.1968	
Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)	30.07.1980	09.07.1993	
Convention on the Rights of the Child 1989		11.12.1992 (accession)	
Convention on the Rights of Persons with Disabilities 2006 (CRPD)	30.03.2007	01.10.2007	
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000	15.11.2004	30.11.2005	
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000	15.11.2004	16.08.2005	
Convention for the Protection of All Persons from Enforced Disappearance 2006	06.02.2007		
Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishments 1984	14.10.1997		
Forced Labour Convention 1930		30.11.1954	
Equal Remuneration Convention 1951		25.09.1958	
Abolition of Forced Labour Convention 1957		18.05.2000	
Discrimination (Employment and Occupation) Convention 1958		03.06.1960	
Second Optional Protocol to the ICCPR aiming to the Abolition of the Death Penalty 1989			✓
Optional Protocol of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishments 2002			✓
International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families 1990			✓
Optional Protocol to the ICESCR 2008			✓
Optional Protocol to the CEDAW 1999			
Optional Protocol to the CRPD 2006			✓

Instrument Title	Signed on	Ratified on	Not Signed Not Ratified
Right to Organise and Collective Bargaining Convention 1949			✓
Freedom of Association and Protection of the Right to Organise Convention 1948			✓
Minimum Age Convention 1973			✓
Worst Forms of Child Labour Convention 1999			✓

Another problem is that the Indian government has made substantive reservations to some of the ratified instruments (i.e., declared that it will not be bound by certain provisions with them),⁸ something that has diluted the effect of these treaties. On the positive side, however, the Indian Supreme Court has taken an activist approach in that it has tried to interpret municipal laws (or fill gaps in such laws) in accordance with international treaties. For example,

In June 2014, India voted in favour of establishing an open-ended intergovernmental working group to negotiate a legally binding international treaty to impose human rights obligations on transnational corporations (TNCs) and other business enterprises.

in *Vishaka v State of Rajasthan*, a judgment delivered in August 1997, the Supreme Court observed that any 'International Convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee'.⁹ The Court in *Vishaka* laid down detailed guidelines to deal with sexual harassment at workplace, including in the private sector.

B. India's Position Regarding Recent International BHR Regulatory Initiatives

The Indian government has generally taken a reactive position domestically to deal with regulatory challenges posed by corporate human rights abuses. For instance, it enacted or amended a number of laws after the Bhopal gas disaster of 1984.

On the other hand, at international level, the position of the Indian government regarding the BHR regulatory initiatives has been determined by a number of considerations relating to foreign policy and international relations. We can see this in relation to the response of the Indian government to the GPs and the current push to negotiate a legally

binding international instrument in the area of BHR. The government was part of the group of states within the HRC that supported the process during 2006–2011 – spearheaded by Professor John Ruggie, the former Special Representative of the Secretary General on BHR – that led to the drafting and endorsement of the GPs.

However, in June 2014, India voted in favour of establishing an open-ended intergovernmental working group to negotiate a legally binding international treaty to impose human rights obligations on transnational corporations (TNCs) and other business enterprises. Although the GPs and the proposed treaty are often publicly presented as complementary processes, this turnaround may be partly due to the desire of India (and other emerging powers such as China) to play a key role in shaping the rules of the game to regulate the behaviour of TNCs. It is uncertain at this stage how treaty negotiations will unfold in future and whether the Indian government will continue to support the treaty idea. It is likely that the position of the government will evolve and become more mature by the second session of the intergovernmental working group in October 2016. Whether or not India continues to support the push for a legally binding international instrument and irrespective of whether a treaty is finally adopted or not, putting in place a BHR framework is one approach to making an assessment of current realities on the ground, as well as of what needs to be done in future to ensure that business actors too respect human rights.

C. Role of Companies in Economic Development

Private companies all over the world are playing a key role in economic development. India is no exception: the government has taken initiatives to encourage foreign direct investment or public–private partnerships to stimulate economic growth.

However, this dependence on the private sector to generate resources, coupled with the 'trickle-down' model of development, has meant that human rights protection has not always adequately featured in corporate-led economic development. The presence of *quid pro quo* corruption and the general lack of transparency in allocating public resources to the private sector have made the situation worse in that government agencies either lose out on vital tax proceeds or ignore human rights abuses committed by companies.¹⁰

Human rights abuses in India involving business enterprises fall into different categories. Understanding this typology of abuses is crucial, because the nature and modus operandi of human rights violations – as well as the regulatory responses required to deal with them – vary from one category to another.

This model of development has also raised concerns about the inclusiveness of economic development. Development projects are often decided at the top level with almost no real consultation with the community adversely affected by them. This development narrative is often underpinned by an implicit assumption that certain trade-offs in the form of the displacement of people or of environmental pollution are inevitable. While this may be true, the real problem is that members of the marginalised community suffer the most from these development projects, but often get fewest

benefits. Therefore, the suffering – as well as the fruit – of the development is not shared fairly and proportionally among all sections of society.

D. Corporate Human Rights Abuses: Typology and Selected Case Studies

Human rights abuses in India involving business enterprises fall into different categories. Understanding this typology of abuses is crucial, because the nature and modus operandi of human rights violations – as well as the regulatory responses required to deal with them – vary from one category to another. The following broad categories do exist in terms of 'who' violates human rights or 'where' corporate human rights abuses take place: (i) violations by Indian companies and/or their subsidiaries; (ii) violations by Indian subsidiaries of foreign companies; (iii) violations by government agencies, including during public procurement and development projects; (iv) violations by PSUs; (v) violations in situations of complicity (which could

be direct, indirect or silent¹¹) between government agencies and private companies; (vi) violations by Indian companies – both PSUs and private companies – while operating abroad; (vii) violations within the supply chain of any of the above types of companies; and (viii) violations within the informal sector.

It may be helpful to refer to brief snapshots of a few case studies illustrative of the above typology of corporate human rights abuses.

- The Bhopal gas disaster on the night of 2 and 3 December 1984 was perhaps the first major case in India involving corporations in violation of human rights, and environmental pollution on a large scale.¹² This case also exposed the power asymmetry between MNCs and developing countries, as well as obstacles faced by victims in transnational litigation. Even now, 32 years after the disaster, the legal battle to hold corporate actors accountable for the gas leak and to clean the Bhopal plant site continues before the courts both in India and in the United States (US).
- In the late 1990s, Enron's Dabhol power-plant project in the state of Maharashtra attracted a lot of civil-society attention on account of the alleged corruption and infringement of several human rights, e.g., freedom of speech and expression, freedom of peaceful assembly, and protection against arbitrary detention and excessive use of force.¹³ This was a case in which corporate complicity with the government also surfaced clearly, as the project company allegedly provided financial and other support to police.
- Coca-Cola's bottling plant in Plachimada in the state of Kerala has faced criticism and protests for not only extracting too much ground water (and thus causing a water shortage) but also polluting the environment including by the discharge of effluents.¹⁴ This has led to a battle, both inside and outside court, between the affected community and Coca-Cola's Indian subsidiary.¹⁵
- As analysed below in Part III, the refinery-cum-mining project run by Vedanta's Indian subsidiaries – in collaboration with the state-owned Odisha Mining Corporation – has proved very controversial, primarily because the mining

- site included the Niyamgiri Hills, which are regarded as sacred by tribal people for religious and cultural reasons.¹⁶ Concerns have also been raised that the environmental impact assessment and public consultations were not done properly. As the parent company, Vedanta, is incorporated in the UK, a CSO lodged a complaint against Vedanta under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.¹⁷ The UK National Contact Point (NCP) made a number of recommendations for Vedanta. The affected community, however, remains unsatisfied with the remedial responses, as well as with the actions of Vedanta's Indian subsidiaries.
- As discussed in Part III, the proposed integrated plant of the Pohang Steel Company (POSCO) in the state of Odisha has raised many human rights issues since the time the state government signed a memorandum of understanding (MoU) with this South Korean MNC in 2005.¹⁸ Apart from displacement of the affected community (including tribal people), the project also raises concerns about environmental pollution and ecological sustainability. Due to continued protests, the project could not really begin, despite the state government's support for POSCO. The affected community also approached the NCPs of the Netherlands and Norway against POSCO's investors based in these two jurisdictions.¹⁹
 - Jindal Steel and Power Ltd is a leading Indian MNC with extensive operations both within and outside India in mining, power, steel and infrastructure sectors.²⁰ Several of its mining projects in India have faced protests from people affected or displaced by its mining activities.²¹ Jindal has also been accused of violating community rights and polluting the environment in its overseas operations (e.g., in Mozambique).²²
 - Apart from the extensive prevalence of child labour in several industries,²³ it is not uncommon to see young children being employed in the informal sector, e.g., by tea shops, roadside restaurants, and grocery shops. The practice of child labour can also be seen in the form of domestic helpers in city homes, or of seasonal workers on agricultural farms in the rural part of India.
 - Women tea-picker workers employed by Kanan Devan Hills Plantations Company Ltd – a company that is partly owned but largely controlled by an Indian MNC, Tata – complained about low wages and lack of basic amenities.²⁴ An interesting aspect of the protest by these women (and of other similar protests) was their lack of trust in trade unions: they felt that trade union leaders often associate with company officials and do not keep workers' interests at the forefront.²⁵



Existing Regulatory Framework: A Critical Review

This part offers a critical review of some of the major legal regimes that have relevance in the context of corporate human-rights violations. This will allow us to assess both the possibilities and the inadequacies of the current legal initiatives in India at the national level.²⁶

A. Constitutional Law

Constitutional law has both a direct and an indirect bearing on the BHR discourse. Apart from the potential 'horizontal application'²⁷ of the provisions related to FRs and the directive principles of state policy (DPs), provisions dealing with constitutional remedies also have relevance for the conduct of business.²⁸ Besides, other provisions – such as those related to treaty making power or to the division of power among the central government, state government and local bodies – may be indirectly relevant to business actors.

Part III of the Indian Constitution contains an extensive list of FRs: the right to equality before the law; freedom of speech and expression; freedom to form associations or unions; freedom to assemble peacefully; protection against double jeopardy; right to life and personal liberty; right to education; freedom of religion; prohibition of discrimination; prohibition of trafficking of human beings and forced labour; prohibition of employment of children below the age of 14 in any factory, mine or hazardous employment; and protection against unlawful arrest and detention. Furthermore, the Supreme Court has read several other rights – such as to the rights to health, livelihood, unpolluted environment, shelter,

clean drinking water, privacy, legal aid and speedy trial – within the meaning of 'life' under Article 21 of the Constitution.²⁹

Part IV of the Constitution, on the other hand, contains a list of DPs, comprising mostly socio-economic rights such as the right to work, just and humane conditions of work, equal pay for equal work, maternity leave, living wages, dignified working conditions for workers, participation of workers in management, equitable distribution and control of material resources of the community for the common good, and protection of the environment. The DPs are non-justiciable. Nevertheless, they are 'fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.³⁰ Although the application of all the DPs is expressly confined to the 'state', they could become relevant for business in two ways: first, the state may enact a law to extend them to private business actors as well; and second, courts may read a DP into a FR, and then apply this FR horizontally.

Although the FRs under the Indian Constitution at first glance appear to aim to control the behaviour of state agencies,³¹ and thus have a predominantly vertical application (i.e., applied only against

state actors, as defined under Article 12 of the Constitution),³² the FRs are in fact applicable to business actors in at least four ways. First, even if we assume that the FRs are applicable only against the state, it is well established that the state has a duty to protect them from violations by private individuals within its territory or jurisdiction.³³ Taken in this sense, all FRs should have some indirect effect on business operations.

Second, some of the FRs not expressly tied to the state action requirement are arguably applicable to non-state actors as well. Austin cites three FR provisions (i.e., Articles 15(2), 17 and 23) that have been 'designed to protect the individual against the action of other private citizens'.³⁴ It seems that the protection of a few more FRs could be invoked against private individuals.³⁵ For instance, the Supreme Court, in *Vishaka v State of Rajasthan*,³⁶ extended the protection against sexual harassment

in the workplace to companies and private entities. In future, the reach of more FRs could be similarly extended to companies;³⁷ this may be desirable in order to keep FRs relevant in an era of privatisation.³⁸

Third, without explicitly extending FRs to private actors, the Court in certain PIL cases has made observations or given directions that applied to businesses. For example, in *Consumer Education*

and Research Centre v Union of India,³⁹ a PIL was filed in the Supreme Court to protect workers in the asbestos industry from occupational hazards. While acknowledging the enhanced role of business enterprises in the modern economy, the Court noted that Part IV of the Constitution is a catalyst to develop a new corporate philosophy. The obligation of private undertakings to observe FRs was stated as follows:

... [I]n an appropriate case, the Court would give appropriate directions to the employer, be it the State or its undertaking or private employer to make the right to life meaningful; to prevent pollution of work place; protection of the environment; protection of the health of the workman or to preserve free and unpolluted water for the safety and health of the people. The authorities or even private persons or industry are bound by the directions issued by

this Court under Article 32 and Article 142 of the Constitution.⁴⁰

Of the six directions issued in the *Consumer Education and Research Centre* case, three were directed towards private entities. On the issue of awarding compensation to affected workers, the Court held that compensation as remedy under Articles 32 and 226 is a settled law: it is a 'a practicable and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers, and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the Constitution or the law'.⁴¹

Fourth, the Supreme Court has given a wide interpretation to the term 'other authorities' in Article 12, which defines 'state' for the purpose of FRs. Any state 'agency or instrumentality' of the state will be regarded as state for the purpose of FRs. Justice Bhagwati in *Ajay Hasia v Khalid Mujib* observed that by handing over its functions and activities to other arms, 'the Government cannot be allowed to play truant with the basic human rights'.⁴² The Court in *Ajay Hasia* laid down several criteria for determining whether an entity is an instrumentality or agency of the state.⁴³

The effect of this liberal judicial interpretation of the term 'other authorities' is that the conduct of PSUs and other institutions falling within the state instrumentality test is made subject to the mandate of FRs.⁴⁴ At the same time, the approach of holding non-state actors liable for violations of FRs by including them within the ambit of 'other authorities' has not yielded consistent results: there are instances in which certain bodies have not been regarded as 'state' for the purpose of FRs.⁴⁵ Thus, the actions of the Supreme Court may not be enough to bridge the public-private divide in relation to FRs.⁴⁶ The solution may lie in either amending the definition of 'state' under Article 12 of the Constitution⁴⁷ or developing a new test that focuses more on the functions of private non-state actors.

B. Tort Law

Tort law, which often comprises principles developed by common law courts and/or statutory instruments, provides civil remedies to people who

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have suffered harm through a wrongful conduct of others. Depending upon the circumstances, tort law remedies can be compensatory, preventive, restorative or deterrent.

There is a close co-relation between tort law and human rights law in that both try to protect certain personal or proprietary interests. In human rights law, it is primarily the duty of the state to protect its citizens against violations of human rights.⁴⁸ Providing a remedy in tort is considered to be an efficient way to secure a remedy for such violations.⁴⁹ Although the rights of individuals in tort and human rights law are not the same, tort law is perhaps the 'most important private law enforcer of human rights', to the extent that it and human rights law are depicted as brothers in arms.⁵⁰

Although the rights of individuals in tort and human rights law are not the same, tort law is perhaps the 'most important private law enforcer of human rights', to the extent that it and human rights law are depicted as brothers in arms.

For these reasons, tort principles – especially of negligence and nuisance – have been creatively invoked in many jurisdictions to hold companies accountable for human-rights violations committed both domestically and transnationally.⁵¹ Companies can be held liable for torts committed by their agents or servants 'to the same extent as a principal is liable for the torts of his agent or an employer for the torts of his servant, when

the tort is committed in the course of doing an act which is within the scope of the powers' of companies.⁵² This is well accepted even if the agent's acts at issue were ultra vires to the company.⁵³ In theory, a foreign parent company may be held liable for a tort committed by its Indian subsidiary by piercing the corporate veil,⁵⁴ though this outcome is quite difficult to achieve in practice.

There are several strands of tort law in India that could usefully be invoked against companies to seek compliance with human rights norms. Realising consumer rights through tort litigation is a case in point. In fact, consumer protection law, which was eventually developed from tort law, is of immense significance to corporations and their activities.⁵⁵ For instance, the Indian government recently sued Nestlé India and

sought INR640 crores (6.4 billion) as damages for indulging in unfair trade practices, false labelling and misleading advertisements regarding its Maggi noodles.⁵⁶

Tort law has also enriched environmental law.⁵⁷ Traditionally, tort law principles were used to address environmental wrongs.⁵⁸ Although that situation has changed significantly with the introduction of specific regulatory laws intended to micro-manage different aspects of environmental harms,⁵⁹ tort law principles of negligence and nuisance remain relevant even today. In addition, Indian courts have developed and applied the absolute liability principle, the polluter pays principle, and the precautionary principle against corporate actors.

With the evolution of the notion of 'constitutional torts' – whereby human rights violations by the state and its agents are also perceived as torts – tort law has played a key role in developing the principles of constitutional law horizontally.⁶⁰ In India, the development of constitutional tort had its roots in a range of violations of the right to life under Article 21 of the Constitution.⁶¹ Some of the early constitutional tort decisions did not involve corporate wrongs. However, the Supreme Court subsequently developed principles concerning the right to life, the right to health, and the right to a pollution free environment, which have had a direct connection with corporations and their actions. The absolute liability principle,⁶² the polluter pays principle⁶³ and the precautionary principle⁶⁴ have been used to hold corporations accountable for breaching environmental law, constitutional law and human rights law.

Despite the Bhopal gas disaster, Indian tort law has yet to gear up to deal with mass tort actions.⁶⁵ Mass tort claims have not entered the Indian judicial arena, though there have been incidents in India that could be categorised as mass torts.⁶⁶ Mass tort actions are used not only to seek reparation for past acts and achieve corrective justice, but also as a means of public control of the actions of corporations.⁶⁷ Keeping the prolonged litigation experiences of the Bhopal gas tragedy in mind,⁶⁸ the need is to evolve new rules of procedure, evidence appreciation, and the burden of proof.⁶⁹

C. Labour Laws

India has the world's largest youth population, with 28 per cent of the total population falling within the range of 10–24 years.⁷⁰ For investors, this indicates the prospect of having a strong pool of workers,⁷¹ as human resources are a major component of manufacturing as well as service-based industries. The laws that govern labour relations and working conditions are, therefore, equally relevant both to business and the community.

India has a huge corpus of labour laws comprising 44 central and more than 100 state laws,⁷² dealing with varied aspects such as employment, wages and remuneration, working conditions, health and welfare, retrenchment and lay-offs, and post-retirement benefits. This labour law framework operates within the larger context of the International Labour Organization (ILO) conventions ratified by India,⁷³ as well as the provisions dealing with the FRs and the DPs in the Constitution. For example, the right to equality has been interpreted by the Indian judiciary to entail ensuring equal pay for equal work,⁷⁴ the right to form association,⁷⁵ and the right to livelihood to sustain life.⁷⁶

The labour laws in India are generally regarded as pro-labour because of the mixed economy that shaped most of it.⁷⁷ However, since India embraced the free market economy in the early 1990s, the existing labour laws have been considered to be a clog in the progress of the nation. The World Bank, for example, considers 'India as one of the most rigid labour markets in the world',⁷⁸ and there are calls for changes in the structure and fundamentals of labour laws in view of the changed economic situation.⁷⁹ In face of growing criticism, India has recently embarked on large-scale and wide-ranging proposals for revamping its labour laws.⁸⁰

Against this background, an overview of labour laws as well as pending proposals to reform them is presented here. It should be noted, however, that the legislation and policies discussed in this part are applicable to the labour force in the organised sector. Although employment in the informal sector of India is large, there are hardly any laws that regulate labour relations within it. Even the Unorganised Workers' Social Security Act

2008 is not capable of handling all the challenges faced by workers in the informal sector.⁸¹

Issue-Based Overview of Labour Laws

As noted above, child exploitation in India is extensive despite the constitutional norms and legal provisions prohibiting child labour. Apart from a few constitutional provisions dealing with the welfare of children,⁸² there are several laws in this field: the Child Labour (Prohibition and Regulation) Act 1986, the Factories Act 1948, the Mines Act 1952, the Juvenile Justice (Care and Protection of Children) Act 2000, the Minimum Wages Act 1948, and the Right of Children to Free and Compulsory Education Act 2009.⁸³ Moreover, courts have also expanded the ambit of the rights of children. For instance, the Supreme Court in *M C Mehta v State of Tamil Nadu*⁸⁴ gave wide-ranging directions intended to protect the health and welfare of children, including those employed in hazardous industries.

The health and safety of workers has been addressed in laws such as the Factories Act 1948, the Mines Act 1952, the Dock Workers (Safety, Health and Welfare) Act 1986, Workmen's Compensation Act 1923, and the Employees' State Insurance Act 1948. For example, the Factories Act has specific provisions to ensure that the factory premises are kept clean and hygienic;⁸⁵ the Act also regulates workers' rest, time of work, overtime and annual leave. Occupational safety in India is covered by various laws that encompass different industries⁸⁶ and different industry operations.⁸⁷ The Supreme Court, in a case relating to the health and safety of workers in the asbestos industry, held that the 'right to health, medical aid to protect the health and vigour to a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48A and all related articles ...'.⁸⁸ The duty to protect the health and ensure the safety of workers is not limited to the state and its instrumentalities; rather, it is equally applicable to private industries.⁸⁹

A woman employee who has prescribed minimum days of service is entitled to maternity leave as per the Maternity Benefit Act 1961. Employees of the Indian government are also eligible for paternity leave of 15 days.⁹⁰

Various aspects of workers' wages and remuneration are covered under the Payment of Wages Act 1936, the Minimum Wages Act 1948, the Payment of Bonus Act 1965 and the Payment of Gratuity Act 1972. On the other hand, the Employees' Provident Fund and Miscellaneous Provisions Act 1952 deals with the post-employment returns of the employees.

The freedom to establish unions and the right to collective bargaining are the backbone of labour rights. Two pieces of Indian legislation play a key role on this front: the Industrial Disputes Act 1947, and the Trade Unions Act 1926. The Industrial Disputes Act contains ways and means to settle industrial disputes, deals with lay-offs and retrenchments, tackles industrial protests (such as strikes and lock-outs), and establishes an institutional mechanism to deal with issues of industrial relations. The Trade Unions Act, on the other hand, deals with the registration of trade unions and related matters. However, as noted below, both these laws are up for change as part of a major review of labour laws in order to create an investment-friendly environment.

A brief review of the Indian labour law framework should make it clear that there is no dearth of rules and regulations covering almost all aspects of labour rights. Yet violation of labour rights is widespread in practice. Low awareness of rights, corruption, under-staffed regulatory bodies, unreliable or unsophisticated trade union leadership, and adjudicatory delays make the realisation of labour rights only a dream in many instances.

Labour Law Reforms

The pressing demand for reforms in labour law has the broader objective of creating a pro-business environment. One of the deregulation strategies within the existing legal framework is to establish Special Economic Zones (SEZs)⁹¹ with relaxed employment regulations. Some of the SEZs have liberal provision for termination of employment and grant limited rights to the employees.⁹²

The Indian government recently proposed a major revamp of labour law that cuts across different legislation. With this aim in mind, the Ministry of Labour and Employment introduced the Industrial Relations Bill 2015.⁹³ The main objective of the Bill is to consolidate laws relating to trade unions,

conditions of employment, and the investigation and settlement of disputes. Amending the respective provisions also falls within the mandate of the draft Bill. Chapter IX of the Bill addresses the controversial provisions of lay-off, retrenchment and closure in the Industrial Disputes Act. It proposes to ease retrenchment norms and to relax closure norms for firms employing up to 300 workers, with a provision for higher compensation in return for retrenched workers. Setting up trade unions will also be harder under the proposed new legal regime.⁹⁴ Moreover, the Bill offers an option for voluntary arbitration of industrial disputes:⁹⁵ strikes or lock-outs are prohibited when an industrial dispute is referred to arbitration.⁹⁶ Overall, the draft Bill attempts to align the labour law regime to fit the image of an investor-friendly labour market.⁹⁷ The entire spectrum of reforms, in essence, has the agenda of redrawing the labour-law regime by merging 44 central legislations under four headings: wages, industrial relations, social security, and safety and welfare.⁹⁸

Although it is too early to assess the impact of the proposed labour-law reforms on workers' rights in the organised sector, it is likely that post-reform laws will offer businesses more leverage and flexibility in negotiating employment terms with their workers.

D. Environmental Laws

The link between human rights and the environment is critical and well established. Having a healthy environment is a recognised human right in India,⁹⁹ as well as in several other jurisdictions.¹⁰⁰ International law has long identified the inevitability of the right to a clean environment. There are also a number of international instruments relating to the environment,¹⁰¹ which have contributed to the evolution of environmental norms and standards at the domestic level.

The Indian environmental law corpus, which received a boost after the 1984 Bhopal gas disaster, is quite extensive.¹⁰² Environmental laws at the central level include the following:

- Water (Prevention and Control of Pollution) 1974
- Forest Conservation Act 1980
- Air (Prevention and Control of Pollution) Act 1981

- Environment (Protection) Act 1986
- Hazardous Waste Handling and Management Act 1989
- Noise Pollution (Regulation and Control) Rules 2000
- Protection of Plant Varieties and Farmers' Rights Act 2001
- Biological Diversity Act 2002
- Wild Life (Protection) Amendment Act 2002
- Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006

As discussed below, these laws have been complemented by a number of principles developed by the Indian Supreme Court.

The entire environmental corpus applies to business activities directly or indirectly. For example, Section 16 of the Environment (Protection) Act deals with

Liability for offences committed by a company under the Act falls on every person who is directly in charge of and responsible for the conduct of its affairs.

offences by companies. Liability for offences committed by a company under the Act falls on every person who is directly in charge of and responsible for the conduct of its affairs. Moreover, if the officers of a company are proved to be at fault (e.g., negligent) in relation to committing an offence, they will be liable individually as well. The penalty for contravention of the

Environment (Protection) Act includes imprisonment, fine or both. Civil liability may also arise under the environmental tort principles developed by the courts.

CASE STUDIES

POSCO: The POSCO saga began in 2005, when the company signed an MoU with the government of Odisha to set up a multi-billion dollar steel plant along with a private port.¹⁰³ The project required massive land acquisition (including diversion of forest land). The clearance to use forest land for the project was upheld in principle by the Supreme Court in 2008, and India's Ministry of Environment, Forest and Climate Change granted permission to divert forest land for the project through an order in 2009. This resulted in a legal battle with twists and turns: in July 2010, the Odisha High Court cancelled POSCO's licence to mine iron ore, against which decision the state government appealed; in 2011,

the Ministry granted a conditional licence for the project, which was later revoked by the NGT in 2012; in 2013, the Supreme Court struck down the 2010 decision of the High Court and found in favour of POSCO;¹⁰⁴ and in 2014, the Ministry revalidated green clearance for the project. As the struggle of the affected communities against the project continues to date,¹⁰⁵ the project has been stalled and POSCO has shown signs of withdrawing from the project.¹⁰⁶ This case study shows the significance of a company needing not only a 'legal licence' but also a 'social licence' in order to succeed in projects that have an adverse impact on displaced communities.

Vedanta: Vedanta Resources is a company listed on the London Stock Exchange with interests in zinc, lead, silver, copper, iron ore, aluminium, power, oil and gas.¹⁰⁷ The government of Odisha has signed an MoU with Vedanta Aluminium Ltd, a subsidiary of Vedanta Resources, to set up mineral-based industries in the state.¹⁰⁸ Vedanta proposed to develop an aluminium refinery and bauxite mining plant in the Niyamgiri Hills, which have been occupied by a tribe – the Dongria Kondh – for generations. Apart from violating the cultural rights of the tribal community, the project has the potential to cause irreparable damage to an ecologically diverse and fragile region. In 2004, Vedanta applied to the Ministry of Environment, Forest and Climate Change for an allocation of forest land. The construction of the refinery commenced in 2004 after the Ministry granted environmental clearance for the refinery and mining projects.

Following a petition by the Wild Life Protection Society of India to revoke the clearance, the Supreme Court in November 2004 appointed a Central Empowered Committee (CEC).¹⁰⁹ In its report of 21 September 2005, the CEC recommended to the Supreme Court that the clearance be reversed. Despite this report, the Supreme Court issued its seal of approval to the clearance given by the Ministry in August 2008. However, public resistance against the project escalated after this judgment; consequently, the Indian government deputed an Expert Committee to study the issues in 2009. The committee, in its 2010 report, observed that the mining activities in the Niyamgiri Hills would be detrimental to the existence of the tribe and to the ecology of the

place.¹¹⁰ Therefore, the Ministry revoked its clearance in 2010. Meanwhile, the state of Odisha – through Odisha Mining Corporation – approached the Supreme Court to annul the mining ban on Vedanta. In April 2013, the Supreme Court rejected this petition in *Odisha Mining Corporation v Ministry of Environment and Forest*.¹¹¹ The Court gave decisive authority to the Gram Sabhas either to permit or refuse the corporate activities. In August 2013, all the designated Gram Sabhas voted against the mining project.

The turning point in Vedanta was the Supreme Court's judgment in *Odisha Mining Corporation*,¹¹² in which the Court gave primacy to the individual/community rights of forest dwellers,¹¹³ as well as to the customary and religious rights protected under Articles 25 and 26 of the Constitution. The Court reasoned that the right to religion and to manage religious affairs is not limited to propagation and

practice but extends to all 'those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja therefore has to be protected and preserved.'¹¹⁴ Granting of authority to Gram Sabhas either to permit or to deny permission for the continuance of the project was based on the reasoning that 'Gram Sabha has a role to play in safeguarding

At a wider level, these case studies indicate that economic 'development' and the protection of 'human rights/environment' often turn out to be binary opposites.

the customary and religious rights of the STs and other TFDs [Traditional Forest Dwellers] under the Forest Rights Act'.¹¹⁵ The Court also noted that the objective of Scheduled Areas under Constitution¹¹⁶ and the 'regulation made thereunder is to preserve tribal autonomy, their culture and economic empowerment to ensure social, economic and political justice'.¹¹⁷

As the case studies of POSCO and Vedanta show, despite an extensive environmental corpus, striking a balance between investment-driven development and environmental preservation is not easy in practice, especially because of how the development process excludes affected communities from having an effective say in decisions affecting their rights. The POSCO and Vedanta case studies reveal a non-transparent process of approval, with no effective or meaningful consultation with the affected communities, despite the proposed projects having

the potential to cause substantial damage to the environment and to the rights of tribal people. The state government in both cases adopted an investor-friendly stand, with scant regard to the environment or the interests of the tribal community. This left CSOs and tribal people to resist these projects in diverse forums, using multiple means. In both cases, there were allegations of highhandedness by corporate agents and/or police in handling protests. The continued long resistance – both inside and outside courts – also meant that POSCO and Vedanta suffered financially. At a wider level, these case studies indicate that economic 'development' and the protection of 'human rights/environment' often turn out to be binary opposites. In other words, more needs to be done to ensure that the notion of sustainable development is internalised by decision-making authorities as well as by companies.

Environmental concerns are not limited to the mining sector: rather, such concerns do arise in the context of a number of specialised industries, such as electricity generation, beverages, construction, fabric dyeing, sugar mills, garment factories, transportation, hazardous-waste disposal, ship dismantling, tourism and entertainment. In such cases, in addition to the general environmental framework noted above, specialised laws related to public safety may also be engaged. For example, the Atomic Energy Act 1962 is the umbrella legislation that regulates the field of nuclear energy in India. In 2010, this law was supplemented by the Civil Liability for Nuclear Damage Act 2010 to provide for compensation in cases of nuclear accidents.¹¹⁸ On the other hand, the pending Nuclear Safety Regulatory Authority Bill 2015 proposes to replace the Atomic Energy Regulatory Board with a new regulatory body, the Nuclear Safety Regulatory Authority.¹¹⁹

One of the regulatory tools widely used to prevent and deal with industrial disasters is the full disclosure of business activities that might cause environmental pollution, or risk to health and life. However, such a disclosure and transparency regime in relation to business is absent in India, as the Right to Information Act 2005 does not apply to private actors. More worrying, however, is the proposed revision of environmental laws to speed up the process of economic development. In August 2014, the central government had set up a High Level Committee 'to review these Acts and suggest

appropriate amendments to bring them in line with their objectives'.¹²⁰ The committee submitted its report with numerous recommendations.¹²¹ This report has attracted significant criticism because the committee did not conduct adequate consultations, and the report tends to perceive environmental law as an obstacle to development.¹²²

On a positive note, however, judicial development of several environmental law principles – such as the public trust doctrine, the absolute-/strict liability principle, the polluter pays principle and the precautionary principle – has created a framework to hold companies accountable for environmental pollution.

The public trust doctrine means that certain common properties – such as rivers, forests, sea-shore and air – are held by the government in trusteeship for use by the public. This doctrine was applied in *MC Mehta v Kamal Nath*¹²³ to quash the permission granted to establish a motel in an ecologically fragile zone, because the state as a trustee has a legal duty to protect natural resources. On the other hand, the polluter pays principle was recognised and applied by the Indian Supreme Court in *Vellore Citizen's Welfare Forum v Union of India*.¹²⁴ The Court held that absolute liability for harm to the environment extends not only to compensating the victims of pollution, but also to paying for the restoration of environmental degradation.

The precautionary principle calls for an absolute stop to a developmental activity if it causes irreversible damage to ecology. It was applied in *Vellore Citizens' Welfare Forum*.¹²⁵ The Court explained that the government 'must anticipate, prevent and attack the causes of environmental degradation, and that the onus of proof' is on the developer or industrial actor to show that its action is environmentally benign. In the *Oleum Gas Leak* case,¹²⁶ the Supreme Court developed the principle of absolute liability in the context of ultra-hazardous activities. It was later affirmed in *Indian Council for Enviro-Legal Action v Union of India*.¹²⁷ Unlike the strict liability principle, no defences are permitted under absolute liability. The absolute liability principle is an improvement over strict liability regarding the measure of damages too: under the strict liability principle, damages are compensatory, whereas the Court in the *Oleum Gas Leak* case awarded exemplary damage under the principle of absolute liability.

E. Land Acquisition Laws

The Land Acquisition Act 1894 was a pre-independence legislation. Under this Act, the principle of 'eminent domain' gave the state the right to take over privately owned land for a public purpose on the payment of compensation. One of the major criticisms of this law was that there was no definition of 'public policy' for which the government could acquire the land. There were also no resettlement policies in India until 2004. This can be seen from the fact that the National Rehabilitation and Resettlement Policy 2007 itself admitted:

Experience of implementation of this policy indicates that there are many issues addressed by the policy which need to be reviewed. There should be a clear perception, through a careful quantification of the costs and benefits that will accrue to society at large, of the desirability and justifiability of each project. The adverse impact on affected families – economic, environmental, social and cultural – needs to be assessed in a participatory and transparent manner. A national policy must apply to all projects where involuntary displacement takes place.¹²⁸

However, even the 2007 policy did not offer much relief to the displaced people. In 2007, a Bill was introduced in parliament to amend the 1894 Act. This Bill lapsed due to the dissolution of the Lok Sabha.¹²⁹ One of the key features of the 2007 Bill was an entire chapter devoted to social impact assessment (SIA) of projects for which land was being acquired.¹³⁰ By introducing the SIA requirement, the proposed legislation sought to ensure that the rights of displaced vulnerable people are adequately protected.¹³¹ In addition to having compensation provisions, the 2007 Bill also provided for the resettlement of displaced people, with the option of giving them shares in the company if the land is being acquired on behalf of a company that is authorised to issue shares (or debentures),¹³² or giving them money as a lump-sum compensation payment.¹³³

In 2011, a fresh Bill was tabled before the parliament. This Bill redefined 'public purpose' to restrict the scope of acquisition of land only for strategic purposes vital to the state and for infrastructure projects where the benefits accrue to the general public,¹³⁴ so that misuse of the 1894 Act by companies to get the government to acquire land

for them instead of negotiating with the owners of the land themselves could be mitigated. The 2011 Bill stated that the consent of at least 80 per cent of the project-affected people would have to be obtained through a prior informed process where the government was acquiring land in the public interest whereby the benefits accrued to the general public; or in case of public-private partnerships for the production of public goods or services; or 'the provision of land in the public interest for private companies for the production of goods for public or provision of public services'.¹³⁵ This piece of legislation also laid down detailed computation methods for the market value of the land being acquired.¹³⁶ The Bill also contained special provisions to ensure compliance with the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.¹³⁷

The new law based on the 2011 Bill came into effect in 2013 as the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act. However, when Narendra Modi's government took the reins of power in 2014, it changed the land acquisition law by an ordinance issued on 31 December 2014. One of the main changes brought about by this ordinance was to exclude 'infrastructure and social infrastructure projects including projects under public-private partnership where the ownership of the land continues to vest with the Government' from the SIA requirement.¹³⁸ The Ordinance also restricted the scope of the compensation, rehabilitation and resettlement entitlements of the displaced people.¹³⁹

Amidst massive protests by the opposition parties and CSOs, the Lok Sabha passed the Land Bill in March 2015 to replace the ordinance.¹⁴⁰ However, the Rajya Sabha, the upper house of the Indian parliament in which the Modi government lacked a majority, did not pass the Bill. Subsequently, the ordinance was re-promulgated, but the impasse over the amendments to the 2013 Act proposed by the Modi government continued until the government relented and made substantial concessions.¹⁴¹ A new Bill may be introduced after a political consensus across all political parties is built. But until then, the 2013 Act is the law that deals with land acquisition in India. This Act was intended to ensure, among other outcomes, that the process of land acquisition for certain purposes is carried out in as humane, participative, informed

and transparent a manner as possible, and that 'affected persons' are not only provided with just and fair compensation, but also rehabilitated and resettled.¹⁴²

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013

The 2013 Act changed the legal landscape that prevailed under the 1894 Act in several areas. First of all, it made compulsory SIA and a consultation with the relevant Panchayat, Municipality or Municipal Corporation before acquiring any land for a public purpose or for other purposes mentioned in Section 2(2) of the Act (e.g., public-private partnership projects).¹⁴³ Section 4(4) of the Act provides that SIA should look at whether the proposed acquisition serves a public purpose, an estimation of the number of people possibly affected and/or displaced, the extent of properties (including common properties) likely to be affected, and a cost-benefit analysis of the proposed project. Part B of Chapter II of the Act further provides for appraisal of the SIA report by an Expert Group.¹⁴⁴ If the Expert Group arrives at the conclusion that the acquisition must be abandoned, the government must comply with it, or if it decides to proceed with the acquisition, give reasons for this in writing.¹⁴⁵

Section 5 of the Act stipulates that the views of the affected families, including any objections, must be included in the SIA report. The consent of the displaced people then becomes crucial. As the Proviso to Section 2 provides, in the case of the acquisition of land for private companies, the prior consent of at least 80 per cent of the affected families must be obtained; meanwhile, in the case of acquisition for public-private partnerships, the prior consent of at least 70 per cent of the affected families must be obtained. As an additional safeguard, the Act provides that land that has remained unutilised for a period of five years from the date of taking over possession must be returned to the original owners (or their heirs), or to the land bank of the appropriate government.¹⁴⁶ This provision is intended as a check against indiscriminate or excessive acquisition of land. For example, in pursuance of an agreement between the Tata Iron and Steel Company and the Odisha government to set up a steel plant near Kalinga Nagar in 2004, the company got physical possession

of the land in 2005. However, due to protests and other factors, even the first phase of the steel plant was not operational until early 2015.¹⁴⁷

Section 2(3) of the 2013 Act lays down that the rehabilitation and resettlement provisions will apply in cases where (i) a private company purchases land beyond a specified limit, through private negotiations with the landowners; or (ii) a private company requests the government to acquire land for a public purpose as defined in the Act. Whereas Sections 16–19 of the Act set out procedural requirements for the resettlement and rehabilitation scheme, Chapters V–VII lay down the particulars of the awards, the procedure and manner of rehabilitation and resettlement, and the national monitoring of the rehabilitation and resettlement, respectively. The Second Schedule lays out the entitlement of the displaced people whose livelihoods were primarily

It is vital that the allotted land as compensation should not only be of a similar quality to that which has been acquired, but also not be too far away from where the displaced people lived.

dependent on the land; this is in addition to any compensation received. This includes, among other options, housing in case of displacement, land for land in certain cases, developed land of a value equivalent to the cost of acquisition and development, subsistence grant, and the choice of employment, annuity or lump-sum payment.

As any resettlement efforts will be incomplete without adequate compensation to prevent the

displaced people from becoming impoverished,¹⁴⁸ the Act provides for compensation for acquired land, based on market value.¹⁴⁹ Although this is a positive measure, several problems have been identified with this approach. The market price is to be determined based on the value of the land computed under the Stamp Act 1899 for the registration of the sale deeds in the surrounding areas, or the average sale price of land in a given area. This might be problematic because people often undervalue the land to reduce the payment of stamp duty on land transfer, thus giving a distorted picture of what the land is actually worth. Another problem is that a large number of land transactions in rural areas tend to be 'distress sales', thus leading to more inaccuracies in the calculation of the true value of the land.¹⁵⁰

It has also been observed that cash compensation may not be the most efficient method of re-

establishment. Unlike land, money may not offer a comparable return for generations. In fact, large-scale cash compensation may trigger excessive indulgence in gambling and drinking.¹⁵¹ Moreover, in addition to concerns related to corruption in its distribution, compensation often ignores those who lack ownership rights over any of the assets, such as sharecroppers, agricultural labourers and nomadic herders.¹⁵² Therefore, offering alternative land as a form of compensation may be a more effective form of rehabilitation for those who have lost the source of their livelihood. However, it is vital that the allotted land as compensation should not only be of a similar quality to that which has been acquired, but also not be too far away from where the displaced people lived.¹⁵³

It is not yet clear what the new land acquisition law would look like after the pending amendment Bill is passed by the parliament. It is, however, desirable that the farmers and tribal people should not be left entirely at the mercy of market forces to speed up overall development: they should be seen as equal partners rather than obstacles to the process of economic development. On the other hand, even companies should realise that if they did not have a 'social licence' for particular development projects from the affected communities, acquiring land by merely satisfying legal regulations might not suffice, as projects might be delayed due to continued protests from displaced people who feel excluded from the development narrative.

Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006

Many development projects in India, like elsewhere, involve activities on mineral-rich (forest) land, which displace tribal people inhabiting such land for generations. This 2006 legislation seeks to correct this historical injustice done to the traditional forest dwellers (TFDs) by taking away their ancestral lands and habitats – often without consent and/or adequate compensation – for development purposes. It recognises and vests 'the forest rights and occupation in forest land in forest-dwelling STs and other traditional forest dwellers'.¹⁵⁴ Sections 3 and 4 of the Forest Rights Act confer an extensive array of rights on these people, while Section 5 imposes duties on the rights holders (including village-level institutions) to protect the wild life, biodiversity and forest. A key feature of this law is

Section 6, which delegates authority to decide the nature and extent of individual or community forest rights to the relevant Gram Sabha.

The implementation of this legislation, however, has not been effective. Several states were recently chastised for not implementing the Act, and were asked by the Tribal Affairs Secretary to enforce the provisions of the law immediately. This was in light of the fact that only 1.6 million land titles had been issued by the end of February 2015 – against the 3.9 million individual and community claims apparently recorded.¹⁵⁵ But even if the land titles are issued, concerns are expressed about the quality of the lands being allocated or the linkages to the tribal people's livelihood.¹⁵⁶ Another issue with the implementation of the Forest Rights Act is how the government has 'nationalised' some of the more important 'minor forest produce'

If implemented in both letter and spirit, the Forest Rights Act 2006 has significant potential to empower tribal people to have a say on what types of development projects they would like to have in forest areas.

items, thus forcing the tribal people to sell these items to the government at prices below the support price.¹⁵⁷

If implemented in both letter and spirit, the Forest Rights Act 2006 has significant potential to empower tribal people to have a say on what types of development projects they would like to have in forest areas. This veto power could, however, be

undermined in practice in view of a potential collusion between the relevant state government – which has a primary responsibility to monitor the implementation of this law – and companies.¹⁵⁸

It is, therefore, crucial for the success of this law that all three levels of government (central, state and local) share the common goal of giving real ownership to tribal people, and that businesses forge collaborative partnerships with them.

F. Companies Act 2013

Building on the CSR Voluntary Guidelines 2009 and the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011, the Companies Act 2013 introduces several measures aimed at promoting responsible business.¹⁵⁹ The new law implements the recommendation of the Standing Committee on Finance, in its 57th report, that since corporations draw resources from the society to

function, they must contribute to the welfare of the society as well.¹⁶⁰

Section 166(2) imposes an explicit duty on company directors to 'act in good faith in order 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, the shareholders, the community and for the protection of environment'. This provision thus tries to take Indian corporate law beyond the 'shareholder primary' model. In addition to this general provision applicable to all companies, the Act also lays down special CSR provisions for big companies of certain sizes. Section 135(1) provides that any company having a net worth of INR500 crore (5 billion) or more, turnover of INR1,000 crore (10 billion) or more, or net profit of INR5 crore (50 million) or more during any financial year must constitute a CSR committee of the board, consisting of three or more directors, of which at least one must be an independent director.

A more radical provision, however, is Section 135(5), which mandates companies covered by Section 135(1) to spend at least 2 per cent of their average net profits made during the previous three financial years on CSR activities. Failing this, the board will be required to specify the reasons for such non-compliance in its report made in accordance with Section 134(3)(o). To ensure accountability, such companies are also required to publish their CSR policy (as finalised by the CSR committee) on their websites.¹⁶¹ The company can carry out these activities either with its own non-profit branch, by collaborating with a non-governmental organisation (NGO), through its own trusts and foundations, or by pooling its resources with those of another company.¹⁶² The CSR Rules 2014 clarified some of the ambiguities in the Act. The Rules, for example, provide that foreign companies are also required to contribute to CSR based on the profits of their Indian business operations.

Schedule VII of the Companies Act offers an illustrative list of various CSR activities that a company can include in its CSR policy: eradicating extreme hunger and poverty; promoting education; promoting gender equality and empowering women; reducing child mortality and improving maternal health; combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; ensuring environmental

sustainability; supporting the acquisition of employment-enhancing vocational skills; running social business projects; and contributing to the Prime Minister's National Relief Fund or any other fund set up by the central/state government for socio-economic development and relief.

The proposal for mandatory CSR spending backed by a 'comply or explain' approach can be regarded as a progressive step in sending a message that companies are not merely profit-maximising entities. Rather, business should also bear its share of societal responsibilities. The Companies Act 2013 has 'led to an increase in the average CSR spending of public sector firms', though the spending was still not as much as it should have been.¹⁶³

In February 2015, the Ministry of Corporate Affairs constituted a High Level Committee to 'suggest measures for improved monitoring of the implementation of CSR Policies by the companies under Section 135 of the Companies Act 2013'.¹⁶⁴ The committee was to recommend methodologies for monitoring compliance with the CSR-requirement mandate as well as methods for companies to evaluate their own initiatives, to facilitate feedback to the government regarding the efficacy of the expenditure and the quality of compliance, and to make recommendations (if required) for different monitoring mechanisms. In its September 2015 report, the committee made a number of recommendations to strengthen the monitoring of CSR spending by companies.¹⁶⁵ It generally found the relevant regulations (i.e., the Companies Act, coupled with the CSR Rules 2014) to be sufficient for monitoring purposes, especially because the main thrust of the legal framework is to encourage companies to conduct socially responsible business. However, the High Level Committee suggested that all the information related to the corporate implementation of CSR spending available with the Ministry could be placed in the 'public domain' for use by diverse stakeholders,¹⁶⁶ and that there should be a uniform tax treatment of eligible CSR expenditure.¹⁶⁷

Although the mandatory CSR spending regime is its infancy, it has the potential to change the current dominant corporate culture that often puts 'profit' before 'people' and the 'planet'. In addition to following some of the useful recommendations of the High Level Committee, measures should

be taken to ensure that the CSR spending is not seen as a means to 'offset' the negative impact of business activities caused elsewhere: rather, this should be taken by companies as an opportunity to integrate CSR throughout their operations. Moreover, the government should create incentives that the minimum threshold of 2 per cent CSR spending does not end up becoming the maximum limit of corporate engagement with societal needs. Collaboration between companies and CSOs should also be encouraged – this may allow companies, especially of smaller size, not to worry about creating an administrative structure in order to spend the required CSR funds. Last but not least, as socially responsible business is an imperative for companies of all sizes, types and sectors, ways should be found to bring all companies within the CSR framework in due course. To achieve this goal, small and medium-sized enterprises may need some capacity-building training and support.

G. Access to Information, and the Protection of Whistleblowers and Social Activists

Access to information is widely regarded as a critical tool to promote transparency in the governance and accountability of decision-makers. The same logic applies to the business operations of companies: the flow of information from companies to their stakeholders could enable the latter to protect their rights as well as hold companies accountable for breaches of human rights. The Right to Information Act 2005 enables any Indian citizen (rather than legal person) to seek information from a 'public authority'.¹⁶⁸

This law, which has been used extensively to expose corruption and improve governance in government departments generally, obviously does not apply to private companies. It may be ideal if the Indian government follows the lead taken, for example, by South Africa,¹⁶⁹ and either amends the 2005 Act or enacts a new law to allow people to seek information about corporate activities that might impinge on people's rights. Alternatively, the government could at least oblige Indian companies to disclose non-financial information about their operations that could be relevant to the general public. Such an obligation could be coupled with vesting a right in citizens to seek information from companies if the latter have not disclosed this.

The protection of whistleblowers and human-rights defenders is another area of law that is useful in holding companies accountable for human-rights violations. India's Whistleblowers Protection Act 2011, which came into effect in 2014, is intended to 'establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards

against victimisation of the person making such complaint'.¹⁷⁰ The Act also affords protection to whistleblowers against victimisation, as well as safeguarding witnesses.¹⁷¹ However, like the Right to Information Act, the scope of this law does not extend to protecting the disclosure of information related to wrongful conduct of private companies.¹⁷² Nor is there a law in India to protect human rights defenders who are exposing (or protesting against) corporate abuses of human rights.

IV Institutional Mechanisms for Access to Remedies: Potential and Pitfalls

An access to effective remedy in cases where human rights are impacted by business activities is a critical component of the GPs.

State-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance mechanisms (the last category includes operational-level mechanisms). Principle 31 also stipulates the following effectiveness criteria for non-judicial grievance mechanisms: legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.¹⁷³ Most of these variables are also relevant to judging the effectiveness of judicial remedies.

As Table 2 indicates, India already has a number of remedial institutions in place to match the range

of remedial mechanisms contemplated by the GPs. It appears that state-based judicial as well non-judicial mechanisms are more developed than non-state-based grievance mechanisms, though the latter also have potential because of multiple barriers in seeking effective remedies through the former. This part reviews both the potential as well as the limitations of selected existing institutional mechanisms in offering effective remedies to victims of corporate human-rights abuses.² This analysis should allow us to identify what institutional reforms might be desirable to provide access to remedy amidst the privatisation of human rights.

Table 2: Guiding Principles and Access to Remedy Mechanisms in India

Type of Remedial Mechanisms under the GPs	Examples of Mechanisms in India
State-based judicial mechanisms [Principles 25–26]	Supreme Court, High Courts, Civil/Criminal Courts, Labour Courts, Consumer Courts
State-based non-judicial grievance mechanisms [Principles 27 and 31]	NGT, Administrative Tribunals, NHRC, State HRCs, Special Commissions related to Women/Child Rights/Backward Classes, Gram Panchayats, NCPs under the OECD Guidelines
Non-state-based grievance mechanisms [Principles 22, 28–30, and 31]	Arbitration, mediation, International Finance Corporation's Compliance Advisor Ombudsman (CAO), World Bank's Inspection Panel, complaints to the Fair Labor Association (FLA) and Ethical Trading Initiative

A. Supreme Court and High Courts

The Supreme Court of India is at the apex of a unified judiciary with original, appellate and advisory jurisdictions. Article 32 of the Constitution, an FR in itself, guarantees the right to move the Supreme Court for the enforcement of FRs, as rights without an effective remedy are not of much value.¹⁷⁵ Under Article 32(2), the Court is empowered to 'issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights'. Under Article 226 of the Constitution, the High Courts enjoy a concurrent power to enforce FRs. There is one vital difference though: the High Courts' power is wider than that of the Supreme Court, because the former have the power 'to issue to any person or authority' (including the government) directions, orders or writs not only to enforce FRs but also to 'any other purpose'. Referring to a Supreme Court judgment,¹⁷⁶ the Kerala High Court in *Suter Paul v Sobhana English Medium High School* held that 'the words "any person or authority" used in Article 226 need not be confined only to statutory authorities and instrumentalities of the State' and should receive a liberal meaning.¹⁷⁷

The potential of Articles 32 and 226 to redress violation of FRs even by corporate actors has received impetus by a number of factors.¹⁷⁸ First of all, as already noted, the Supreme Court has given an expansive interpretation to the meaning of the term 'other authorities' in Article 12 of the Constitution, which defines 'state' for the purpose of FRs. This means that the higher judiciary could be approached for violation of FRs committed even by *certain* business actors such as PSUs and other organisations considered an instrumentality of the state.

Second, the judiciary has considerably expanded the scope of FRs by reading several DPs into the right to life under Article 21 of the Constitution. The right to life has been interpreted to include the right to health, livelihood, free and compulsory education up to the age of 14 years, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights of undertrials, convicts and prisoners.¹⁷⁹ This development would allow victims to frame most of the corporate human rights abuses as an infringement of FRs under the Constitution (provided of course that the Article 12 requirement is satisfied).

Third, while exercising its powers in a series of PIL cases, the Supreme Court has modified the traditional requirements of *locus standi*, has liberalised the procedure to file writ petitions, and has overcome evidentiary problems.¹⁸⁰ The Court, for example, has accepted mere letters or telegrams as writ petitions.¹⁸¹ To overcome evidentiary problems, it has appointed fact-finding commissioners and *amici curiae*.¹⁸² The relaxation of these procedural and substantive rules has significantly improved the access of impoverished sections of society to approach the Court for redress for a range of human rights grievances.¹⁸³

Fourth, the Supreme Court has developed innovative remedies to offer relief in diverse types of situations involving a violation of FRs.¹⁸⁴ By awarding compensation for the violation of FRs in appropriate cases, the Court has sent a clear message that its powers under Article 32 are not merely injunctive but also remedial to redress violations that have already taken place.¹⁸⁵ Compensation has been awarded in innumerable categories of cases – ranging from torture to custodial violence, rape of a woman, and environmental pollution caused by corporations.¹⁸⁶

Despite these judicial innovations, which open the door to seek redress from the higher judiciary against business enterprises, significant hurdles remain. Unlike the Bill of Rights under the South African Constitution, most of the FRs under the Indian Constitution cannot be invoked – in spite of a liberal reading of the definition of 'state' under Article 12 – against purely private companies. Even if this hurdle is overcome, the twin principles of corporate law (limited liability and separate personality) operate as a well-documented barrier in access to justice against corporate defenders.¹⁸⁷ The litigation experiences of Indian victims are unlikely to be different from those of their foreign counterparts. Then, there is a problem of endemic delay in the Indian judicial system.¹⁸⁸ More than 30 million cases are pending in Indian courts; in the Supreme Court itself, 61,300 cases were pending as of 1 March 2015.¹⁸⁹ Considering the abysmally low judge-to-population ratio prevailing in India,¹⁹⁰ this problem would get worse if the doors of the Supreme Court and High Court were opened to hear all cases of corporate human rights abuses.

B. Labour Courts

The Industrial Disputes Act 1947 – which envisages using various mechanisms such as collective bargaining, mediation, conciliation, arbitration and adjudication to resolve employment disputes¹⁹¹ – provides for the constitution of Labour Courts.

Section 7 of the Act empowers the Labour Courts to adjudicate on any industrial dispute relating to matters specified in the Second Schedule.¹⁹²

Exercising the power under Section 7A, the government can also constitute Industrial Tribunals, which have wider powers than the Labour Courts as they can exercise jurisdiction over matters specified in both the Second Schedule and the Third Schedule of the Act.¹⁹³ Section 9C of the Act stipulates that any industrial employer in which 50 or more workers are employed must establish a Grievance Settlement Authority – only those disputes that are not resolved to the satisfaction of the parties at this level can be

It will be critical that these reforms try to strike the right balance between the need to safeguard the rights of workers and the flexibility demanded by companies in a free-market economy.

referred to the Conciliation Board, Labour Court or Industrial Tribunal. Appeals against the decisions of Labour Courts/Tribunals could be made to the High Court as well as to the Supreme Court.

The Act also provides for a voluntary reference of the dispute to arbitration by the parties at any point before the dispute gets referred to the Labour Court or Industrial Tribunal, and any awards

made by the arbitrators will be submitted to the appropriate government.¹⁹⁴

The Industrial Disputes Act is applicable only to the 'workman', as defined in Section 2(s) of the Act: 'any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied'. For the purposes of an industrial dispute under this Act, the definition of 'workman' includes 'any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute'.

In view of the wide ambit of the powers of the Labour Courts and Industrial Tribunals, they definitely come across as a viable forum to resolve

labour disputes between companies and workers. However, in practice, several problems undermine their potential, e.g., complex procedures, presence of multi-layered forums, weak or non-independent trade unions, and long delay in settling disputes conclusively. Companies also often complain about the inflexible nature of Indian labour laws. Moreover, these dispute resolution mechanisms do not apply to workers in the informal labour sector.

As mentioned in Part III, the government is currently considering reforming labour laws by consolidating existing laws into five codes (covering wages, conditions, social security, industrial relations and training) and relaxing the rules regarding 'hiring and firing' of workers.¹⁹⁵ It will be critical that these reforms try to strike the right balance between the need to safeguard the rights of workers and the flexibility demanded by companies in a free-market economy.¹⁹⁶

C. National Human Rights Commission

The Protection of Human Rights Act 1993 established the NHRC as well as the State Human Rights Commissions in India. Section 12 of this Act specifies the scope of the NHRC's powers. It provides that the NHRC shall have the power to inquire – *suo motu* (on its own), following a petition by a victim, or on order to any court – into complaints of violation of human rights, and to intervene in any proceeding involving any allegation of violation of human rights pending before a court. Section 12 also empowers the NHRC to review the factors that inhibit the enjoyment of human rights and recommend appropriate remedial measures, undertake and promote research in the field of human rights, spread human rights literacy among various sections of society, encourage the efforts of NGOs working in the field of human rights, and perform such other functions as it may consider necessary for the protection of human rights.

The term 'human rights' under the Act means the rights relating to life, liberty, equality and dignity of the individual: (i) guaranteed by the Indian Constitution; or (ii) embodied in the international conventions (i.e., the ICCPR, the ICESCR and other conventions that the government may specify) and enforceable by courts in India.¹⁹⁷ The 1993 Act also gives the NHRC fairly wide powers of inquiry into and investigation of complaints (Sections 13 and 14), and requires it to submit annual and special reports to the central government (Section 20).

Taking these provisions together, it is clear that the NHRC has a wide mandate under Section 12, though it is not explicitly or specifically entrusted with the task of dealing with corporate human-rights abuses.¹⁹⁸ However, in practice, the NHRC has made interventions in cases related to companies, e.g., the employment of child or bonded labourers by companies,¹⁹⁹ and sexual harassment at the workplace. It also intervened in a case related to large-scale violence to protest against the acquisition of land to establish an SEZ in Nandigram, West Bengal.²⁰⁰ Similarly, when the NHRC received complaints about human rights violations in relation to POSCO's project in Odisha,

It is desirable that the jurisdiction of the NHRC (and the State Human Rights Commissions) is expanded to deal with human rights issues in the context of business – not only in relation to dealing with complaints about corporate human rights abuses, but also in relation to conducting research in this area and building the capacity of companies to avoid infringing human rights.

it made recommendations to the state government,²⁰¹ which were reportedly complied with.²⁰²

There are also other provisions in the Act that the NHRC *could* use to take cognisance of human rights violations by non-state actors. For instance, the NHRC may inquire into corporate human rights abuses on the request of a court,²⁰³ or under its power to review factors that might undermine the enjoyment of human rights. Of course, it could always undertake research and take steps to spread human rights literacy in the BHR area. Moreover, the NHRC also has the general residuary power to do whatever is necessary to protect human rights. Therefore, while dealing with instances of corporate human rights abuses, the

NHRC may, for example, 'take up the matter with concerned public authorities for enforcement'; in extreme cases, it may also 'take recourse to filing petitions in courts'.²⁰⁴

The positive contribution that National Human Rights Institutions (NHRIs) could make in promoting and protecting human rights is generally well recognised with reference to states.²⁰⁵ But they have a similar potential to promote human rights in relation to non-state actors such as companies,²⁰⁶ something which the GPs acknowledge. While the Paris Principles relating to the Status of National Institutions do not expressly mandate NHRIs to promote and protect human rights in the private

sphere, they also do not limit the mandate of NHRIs to human rights violations committed by states. It is, therefore, desirable that the jurisdiction of the NHRC (and the State Human Rights Commissions) is expanded to deal with human rights issues in the context of business – not only in relation to dealing with complaints about corporate human rights abuses, but also in relation to conducting research in this area and building the capacity of companies to avoid infringing human rights.

D. Special Commissions

There are several special commissions in India to protect the rights of vulnerable groups of society such as women, children, SCs, STs and Other Backward Classes. While a few of these commissions are envisaged in the Constitution itself,²⁰⁷ others have been established by statutory enactments. As the GPs demand that 'particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized' should be given,²⁰⁸ these special commissions offer the possibility of addressing corporate violations of the human rights of certain sections of society.

National Commissions for SCs and STs

The National Commission for SCs (NCSC) is empowered under Article 338(5) of the Indian Constitution to: (i) investigate and monitor all matters relating to the safeguards provided for the SCs under the Constitution or under any other law; (ii) inquire into specific complaints with respect to the deprivation of their rights and safeguards; and (iii) advise on the planning process of socio-economic development of the SCs. While investigating complaints,²⁰⁹ the NCSC has the powers of a Civil Court trying a suit, including the power to summon the attendance of any person and require the production of any document.²¹⁰

Article 338A of the Constitution confers similar powers to the National Commission for STs (NCST). The National Commission for the Scheduled Tribe (Specification of Other Functions) Rules 2005 defines further specific powers of the NCST. It may, for example, take measures to: (i) confer ownership rights in respect of minor forest produce to the STs living in forest areas; (ii)

safeguard rights to the tribal communities over mineral resources and water resources in line with the law; (iii) improve the efficacy of relief and rehabilitation measures for tribal groups displaced by development projects; and (iv) prevent the displacement of tribal people from land and effectively rehabilitate people for whom such displacement has already taken place.

Although so far the potential of these commissions has not been invoked to address the adverse impact of corporate activities on the rights of SCs/STs, it may certainly be useful in cases where, for instance, a private company discriminates against SCs/STs, or STs are displaced from their land for mining purposes.

National Commission for Women

The National Commission for Women (NCW) was established as a statutory body under the National Commission for Women Act 1990. Section 10 of the Act confers extensive powers on the NCW to: (i) investigate all matters relating to the safeguards provided for women under the Constitution and other laws; (ii) take up cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities; (iii) look into complaints and take *suo moto* notice of matters relating to deprivation of women's rights; (iv) undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres; and (v) fund litigation involving issues affecting a large body of women. The NCW has set up a complaints and investigation cell to deal with complaints, which could be related to criminal offences, domestic violence or workplace problems. While investigating complaints, the NCW has the powers of a Civil Court trying a suit.

Discrimination against women (including sexual harassment in the workplace) is one area where the NCW could play a really crucial role in dealing with breaches of the human rights of women. For example, despite the 1997 *Vishaka* judgment and the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act in 2013, a survey revealed that government departments²¹¹ and many Indian companies have not yet fully complied with the applicable legal framework.²¹²

National Commission for Protection of Child Rights

The Commission for Protection of Child Rights Act 2005 established a National Commission for Protection of Child Rights (NCPCR). This body, having started functioning in 2007, has been given the mandate to safeguard the rights of the child as enshrined in the Constitution of India, other statutory enactments and international instruments.²¹³ Apart from inquiring into violations of children's rights, recommending the initiation of proceedings in such cases, and undertaking research in the field of child rights, the NCPCR also monitors the implementation of a number of statutes concerning child rights – e.g., the Child Labour (Prohibition and Regulation) Act 1986, the Right to Education Act 2009, and the Protection of Children from Sexual Offences Act 2012.²¹⁴

An area where businesses are often accused of violating children's rights is the practice of child labour in the manufacturing industry or in service industries. In spite of steps taken by the NCPCR²¹⁵ and the Supreme Court²¹⁶ to abolish child labour, the statistics about the prevalence of child labour present a grim picture.²¹⁷ We perhaps need a different corporate approach in dealing with child labour: companies should be obliged not only to avoid employing children below the minimum age, but also to take positive measures such as providing education or suitable vocational training to such children, or offering employment to adult members of the children's families.²¹⁸

E. National Green Tribunal

The National Green Tribunal (NGT) was set up on 18 October 2010 under the NGT Act 2010. The NGT has been established 'for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to the environment and giving relief and compensation for damages to persons and property'.²¹⁹ The NGT Act has an overriding effect to the extent of any inconsistency with any other legislation.²²⁰ Apart from the Principal Bench in Delhi, the NGT has zonal benches for Eastern, Western, Central and Southern regions.

The NGT, which is meant to achieve 'environmental democracy', functions with the objective of

disposing of cases within six months of filing. The NGT replaces the National Environment Appellate Authority, which dealt with environmental disputes as well as environmental clearances.²²¹ The NGT has jurisdiction over all civil cases where the substantial issue is a question relating to the environment arising out of the implementation of legislation specified in Schedule I of the NGT Act.²²² The NGT can provide relief, compensation, or restitution of property damaged or of the environment for the area.²²³ In order to simplify the resolution of environmental disputes, the NGT is not bound by the normal rules of procedure laid down by the Civil Procedure Code 1908 or by the rules of evidence laid down by the Evidence Act 1872, but it should still follow the principles of natural justice.²²⁴

The NGT Act also provides for penalties for non-compliance with its orders, awards or decisions: imprisonment for up to three years, a fine of up to INR10 crore (100 million), or both; and, in the case of continued non-compliance, an additional fine that can extend to INR25,000 for each day of non-compliance.²²⁵ If the non-complying party is a company, the punishment is a fine of up to INR25 crore (250 million) and an additional fine for non-compliance of up to INR100,000 per day.²²⁶ Section 27 of the NGT Act deals with offences by companies: it provides that where an offence is committed by a company, 'every person who, at the time the offence was committed, was directly in charge of, and directly responsible to the company for the conduct of the business of the company, as well as the company' shall be held liable. Such people would not be liable if they could prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent the offence from being committed.²²⁷

As a 'one-stop forum' to deal with all types of environmental disputes, the NGT – being largely free from many legal trappings – offers significant potential in providing effective remedies in cases of environmental pollution caused by business activities. The NGT has given several important judgments in the last few years. For example, in *MP Patil v Union of India*,²²⁸ in which the National Thermal Power Corporation Limited was found guilty of misrepresenting facts to obtain environmental clearance, the Principal Bench of the NGT stressed the importance of a rehabilitation and resettlement policy that takes care of the displaced people's

needs adequately.²²⁹ It also observed that the burden of proving that the goals of sustainable development were duly considered in the project was on the party proposing the project.

In *Sudiep Shrivastava v State of Chhattisgarh*,²³⁰ the NGT dealt with a case in which the state government had approved the diversion of forests in the Tara, Parsa, and Parsa East and Kante Basan coal blocks, by disregarding a report submitted by the Forest Advisory Committee rejecting the request for this diversion. The NGT found that the relevant minister had acted arbitrarily by not passing a reasoned order; his rejection of the Committee's recommendation had no basis in any authoritative study or experience in the relevant fields.²³¹

The Southern Bench of the NGT in *Samata v Union of India* relaxed the *locus standi* requirement by expanding the scope of 'aggrieved persons' to include an association of people likely to be affected by the order and functioning in the field of environment.²³² Similarly, in *KK Royson v Government of India*,²³³ the Southern Bench held that the definition of the term 'aggrieved persons' could not be restricted only to those who were actually aggrieved since a matter regarding ecology and the environment concerns everybody directly or indirectly, thus giving them the right to initiate action.

As the NGT has the power to review and suspend/cancel environmental clearances granted by the Ministry of Environment, Forest and Climate Change, the government has sometimes taken a confrontationist approach with the NGT.²³⁴ It has also been reported that the central government may strip the NGT of its judicial powers and make it merely an advisory body.²³⁵ It would be unfortunate if the government started viewing the NGT as a hindrance to economic development and curtailed its powers or independence.²³⁶ Funding and administrative support to the NGT provided by the Ministry should not be taken to mean that the NGT is merely an arm of the executive.

F. Gram Sabhas and Gram Panchayats

Local self-government institutions as the third tier of government gained a new lease of life in India with the 73rd and 74th amendments of the Constitution in 1993. Article 243G empowers the state governments to confer on the Gram

Sabhas and Gram Panchayats crucial decision making powers about plans/schemes of economic development and social justice concerning a number of matters enumerated in the 11th Schedule of the Constitution – e.g., agriculture, water management, small-scale industries, social forestry, roads, education, health and sanitation, and public distribution systems.

The main object behind creating these institutions was to decentralise decision making power and empower local communities to take decisions affecting their day-to-day life. The Gram Panchayats offer an excellent opportunity to pre-empt and resolve human rights disputes involving business in

The main object behind creating these institutions was to decentralise decision making power and empower local communities to take decisions affecting their day-to-day life. The Gram Panchayats offer an excellent opportunity to pre-empt and resolve human rights disputes involving business in an informal, inexpensive and speedy manner.

an informal, inexpensive and speedy manner. At the same time, they might become a source of friction between villagers and companies if there is a mismatch between the development goals of the central/state government and the needs of the villagers. The Vedanta case study discussed in Part III is a case in point. The dispute about Coca-Cola's bottling plant in Plachimada in the state of Kerala (discussed below) also highlights how such tensions could develop between business and community.²³⁷

These case studies have at least two lessons for us. First, the government should have meaningful consultations with the relevant Gram Sabhas before initiating development projects and granting licences to

companies. This would demand adopting a bottom-up approach of decision making in substance, rather than using these local governance institutions as merely authorities to 'rubber stamp' top-down decisions. Second, businesses should understand that unless they get the concerned villagers on board, legal approval or a licence might not be enough in itself for the success of their projects.

Case Study: Coca-Cola Bottling Plant in Plachimada²³⁸

Hindustan Coca-Cola Beverages Pvt. Ltd, a subsidiary of Coca-Cola, established a bottling plant at Plachimada in the state of Kerala in 2000. Within a few months of its operation, the local people felt

the strain on environment, specifically on water availability and quality. There were also complaints about the improper disposal of toxic waste. As a result of public protest against the plant, the Perumatty Gram Panchayat, in which the plant is located, decided in 2003 not to extend the licence to the company. The state government stayed the decision of the Perumatty Gram Panchayat. This resulted in a long legal battle and tussle between the company, people of Plachimada and government of Kerala.

The Kerala State Pollution Control Board later issued a stop order to the company as it was contaminating ground water; in 2005, the Kerala Ground Water (Control and Regulation) Act declared Plachimada an 'over-exploited area' and prevented any further ground-water extraction. Subsequently, the government of Kerala proposed a tribunal to assess the damage caused by the operation of the company, and to compensate for damages suffered by the people and environment. In 2011, the Kerala Legislative Assembly passed the Palchimada Coca-Cola Victims Relief and Compensation Claims Special Tribunal Bill. In March 2013, a High Power Committee of the state government held that Coca-Cola should be liable to pay compensation to the tune of US\$48 million for the 'damages [it caused] to the community and the environment around its bottling plant in Plachimada'.²³⁹ In the end, the company had to shut down its Plachimada plant, though the struggle to receive compensation and restore the environment continues.

G. Diverse Non-State Remedial Mechanisms

There are a number of non-state remedial mechanisms that allow a non-judicial resolution of disputes. In terms of operating body, these mechanisms could take various forms: business-led, civil-society-led, multi-stakeholder-led, or set up by international lending institutions such as the International Finance Corporation (IFC) and the World Bank. Companies and affected communities could also resolve disputes through arbitration, mediation and conciliation. Compared to state-based judicial and non-judicial mechanisms, the non-state redress mechanisms in India are less well developed and also less frequently used. However, this may change in future because of the limitations inherent in state-based mechanisms: desperate victims and CSOs are likely to try whatever options

they have to hold companies accountable for human-rights violations.

IFC's Compliance Advisor Ombudsman

The IFC's Compliance Advisor Ombudsman (CAO) is an independent recourse mechanism for the IFC and Multilateral Investment Guarantee Agency (MIGA), which are the private sector lending arms of the World Bank Group.²⁴⁰ Operating under its 2013 Operational Guidelines,²⁴¹ the CAO performs several functions related to dispute resolution, compliance monitoring and advice provision. The 'CAO strives to be an independent, transparent, credible, accessible, and equitable mechanism that provides a predictable process.'²⁴²

The CAO adopts a number of approaches to resolving disputes: joint fact-finding, dialogue and negotiation, mediation and conciliation. It follows a six-step timeline for handling a complaint: acknowledging the receipt of a complaint; eligibility screening of the complaint; assessment; dispute resolution and compliance; monitoring and follow-up; and conclusion of involvement.

Anyone who believes that they are 'affected, or potentially affected, by the environmental and/or social impacts of an IFC/MIGA project' may lodge a complaint to the CAO.²⁴³ The complaint must pertain to a project that the IFC/MIGA is participating in or actively considering; concern environmental and social impacts of the projects; and be lodged by someone who is or may be affected by these impacts. The CAO adopts a number of approaches to resolving disputes: joint fact-finding, dialogue and negotiation, mediation and conciliation.²⁴⁴ It follows a six-step timeline for handling a complaint: acknowledging the receipt of a complaint; eligibility screening of the complaint; assessment; dispute resolution and compliance; monitoring and follow-up; and conclusion of involvement.²⁴⁵

The CAO mechanism has been used by victims based in India in some cases. For example, in the case of the Allain Duhangan Hydro Power Project,²⁴⁶ some villagers from Himachal Pradesh lodged a complaint regarding the impact of the hydroelectric power plant on their water supplies, the inadequacy of the environmental impact assessments and SIAs by the project proponents, and concerns regarding future compliance with project commitments. After the complaint was filed in 2004, the CAO facilitated an initial agreement between the parties

in 2005. But then the agreement was flouted, which led to further complaints and finally to the CAO undertaking monitoring. Over six months later, after periodic supervision reports from the IFC and continuous monitoring, the CAO filed the Conclusion Report in March 2008, highlighting the improvements that had been brought about by the implementation of some practical solutions by the company.

In another case where the IFC has a project with Lafarge Surma Cement in Bangladesh, the complainants (who are from India but wished to remain anonymous) filed a complaint in July 2013 regarding the acquisition of the land of some people in the state of Meghalaya (India), which is where the limestone for the cement plant is sourced.²⁴⁷ The complaint raised concerns about the legitimacy of the land acquisition and land-use process, since indigenous people were being deprived of their land, livelihood, and customary rights and systems pertaining to the land. However, the CAO did not pursue an investigation because there was no complaint from a 'broader group of project-affected people'. Although questions were raised about the preparation and supervision of the project, these were not of sufficient systemic importance, so the case was closed in October 2014.²⁴⁸

Fair Labour Association

The Fair Labor Association (FLA) is a collaborative initiative of universities, CSOs and companies that aims to ensure that all goods are produced fairly and ethically.²⁴⁹ The FLA, which promotes adherence to international labour standards, started with a focus on the apparel and footwear industries, but has subsequently expanded to include other products as well. All companies that wish to become members of the FLA are required first to submit an application that consists of a monitoring plan,²⁵⁰ system of remediation,²⁵¹ and agreement by the applicant to adhere to all the standards and compliances set out in the FLA Charter.²⁵² The charter sets out a third-party complaint mechanism that can be initiated after the party has exhausted local remedies to investigate allegations of non-compliance with the FLA Workplace Code or Monitoring Principles in the facilities of participating companies.²⁵³ The procedure of dealing with such complaints is set out in Section XI of the charter as a four-step process: preliminary assessment of the complaint by FLA; internal assessment of the complaint by the

concerned company; assessment by a FLA-appointed assessor; and the remediation process.

The use of the FLA process in a few cases in India shows a (limited) potential of a multi-stakeholder initiative in redressing labour rights violations. The case study concerning Syngenta's procurement prices in India is a case in point.²⁵⁴ In December 2014, a Danish CSO released a documentary called 'Seeds of Debt', which dealt with the issue of exploitative high-interest money-lending to farmers in rural Andhra Pradesh, and included farmers' testimonial accounts. Some of the farmers featured in the documentary were producing seeds for Syngenta, an FLA affiliate. Syngenta therefore requested that the FLA conduct its own investigation into the supply chain in India, which revealed that minimum wage is often not paid to the farm workers in Syngenta's supply chain. Syngenta based its wage payment calculations on the locally prevalent minimum wage standards rather than the legal standards, and the former was around 25 per cent below the latter. Therefore, the FLA recommended, among other actions, that Syngenta take the statutory minimum wage into account. The FLA report also notes Syngenta's next steps, including its commitment to the multi-stakeholder consultation process in India in 2015 on fair compensation to farm workers. In October 2015, the FLA approved the accreditation of Syngenta's compliance programme in India, based on proven adherence to the FLA's Workplace Code of Conduct and the provisionally approved Principles of Fair Labor and Responsible Sourcing for companies with agricultural supply chains.²⁵⁵

In another case, a third-party complaint was received following the death of a young child in a day-care facility run by the Gokaldas India factory in Bangalore (a supplier for Adidas, an FLA affiliate).²⁵⁶

The FLA engaged a doctor based in the city to conduct the investigation, and it was found that there were several violations of the FLA Workplace Code of Conduct and the regulations for factories applicable to the state of Karnataka. The FLA asked Adidas to regularly monitor the steps and ensure that its other suppliers were complying with all the requisite standards, and also recommended that Adidas engage an independent actuary or forensic economist to review the adequacy of the compensation paid by the factory to the deceased child's family. In November 2014, Adidas

requested the FLA to conduct an unannounced assessment of its supplier factory (Paragon Apparels Pvt. Ltd in Noida, India) to check the progress on issues identified in previous assessments. While the assessors found that remediation had been achieved in several of the health and safety issues of the workers, there were still some areas where compliance had not been observed, and some violations of the FLA and Adidas Code of Conduct pertaining to hours of work. Following this assessment, Paragon developed a detailed remediation plan, which is to be monitored by Adidas.²⁵⁷

Alternative Dispute Resolution

Negotiation, mediation, conciliation and arbitration are the major forms of alternative dispute resolution (ADR); this offers multiple advantages over judicial mechanisms, which are usually adversarial. For instance, instead of creating a win-lose situation, conflicts in ADR are sought to be resolved by methods of amicable interventions, which could craft a win-win scenario. The Indian Supreme Court itself has suggested making ADR 'a part of a package system designed to meet the needs of the consumers of justice'.²⁵⁸

Mediation, wherein a neutral third-party mediator attempts to reach a mutually agreeable solution for the dispute in issue, is both voluntary and non-adversarial. The concept of mediation got statutory recognition in India for the first time under Section 4 of the Industrial Disputes Act of India 1947, which provides for appointment of conciliators to mediate industrial disputes. After the amendment of the Code of Civil Procedure 1908 in 1999,²⁵⁹ court-annexed mediation is slowly becoming more common. The Supreme Court has prepared a Mediation Training Manual.²⁶⁰

In solving business disputes, arbitration is preferred over litigation for a number of reasons: speed, cost, greater control, predictability, expert decision-makers and confidentiality.²⁶¹ Use of arbitration as an alternative method to resolve disputes started becoming popular in India after the adoption of the new Arbitration and Conciliation Act in 1996, which builds on the Model Law on International Commercial Arbitration 1985, introduced by the UN Commission on International Trade Law. Apart from the Indian Council of Arbitration, the Federation of Indian Chambers of Commerce and Industry

(FICCI), the largest Indian business organisation, has established the FICCI Arbitration and Conciliation Tribunal (FACT) to resolve both domestic and international business disputes.²⁶² There are many other such bodies offering arbitration services.

One of the concerns about the working of the 1996 Act has been extensive judicial intervention at initial and final stages of arbitration, which defies the very logic of resorting to arbitration.²⁶³ The Arbitration and Conciliation (Amendment) Ordinance 2015 tries to 'restrain judicial intervention in arbitration and tackle inordinate delay with arbitration-related court actions'.²⁶⁴ However, some other concerns about arbitration remain: the high costs, impartiality

of arbitrators, and confidentiality of proceedings in public-interest matters – thus raising questions whether such 'privatisation of justice' could create challenges to the rule of law.²⁶⁵

The use of mediation and arbitration in resolving human-rights disputes related to business has not yet become very popular in India. Having said this, these ADR tools could prove useful if properly employed: power asymmetry between companies and victims is countered, the cost of proceedings can be kept low, ADR is used only in appropriate types of disputes, the impartiality of arbitrators/mediators is ensured, and transparency in the entire process is maintained.

V Indian National Framework: Need, Process and Content

There are several reasons why the Indian government should initiate the process to put in place a national framework on BHR.²⁶⁶ First of all, this process would allow the government to make an assessment of the current legal-cum-policy framework so as to identify what is working and what is not in terms of ensuring that companies respect human rights.

A. Does India Need a New National Framework on BHR?

Instead of adopting a piecemeal approach of reviewing different segments of legal framework (such as labour laws or environmental laws), a holistic assessment that does not ignore the human rights impact of creating an environment conducive to private investment-driven development may be preferable.

Second, as noted above, some FRs under the Indian Constitution apply to non-state actors, or their application has been extended to companies by the Indian Supreme Court. While these constitutional developments are useful, they cannot ensure full protection of human rights in a free market economy where the private sector has an all-pervasive role. A debate about the BHR framework would allow an informed debate as to whether a constitutional amendment may be desirable to extend the protection of FRs against companies, similar to the constitutional position in South Africa.

Third, in the last few years, India has taken a number of CSR initiatives, the most notable being requiring big companies each year to spend 2 per

cent of their three-year average net profit on CSR activities.²⁶⁷ Developing a BHR framework would allow the government to build on these initiatives and encourage *all* types of companies to integrate respect for human rights as part of their business operations.

Fourth, considering India's role as one of the key supporting states behind the GPs, it is logical for the government to implement the GPs at the domestic level. Apart from the HRC's resolution of June 2014 calling upon states to develop NAPs,²⁶⁸ the mandate of this flows from Article 51 of the Constitution, which provides that the state shall endeavour to 'foster respect for international law'. Developing a national BHR framework would be useful even if a legally binding international instrument to impose human rights obligations on companies is adopted in future.

Fifth, India is no longer a country that is merely a recipient of foreign investment by MNCs. Indian companies (including PSUs) are investing and operating in a number of overseas jurisdictions. However, as some of these countries may not have adequate regulatory frameworks in place to safeguard the human rights of their communities,

Indian companies may be accused of violating human rights while operating overseas. Therefore, India needs a BHR framework not merely for companies operating within its territory but also for Indian companies operating outside India's territory through subsidiaries or joint ventures. In fact, in the long term, it would be in the interests of Indian companies operating overseas to take a proactive and strategic responsible approach towards human rights; a BHR framework may encourage them to adopt such an approach.

B. Lessons from Existing NAPs and NAP Projects

Every state has certain unique social, economic and cultural conditions that should be taken into account when drafting its NAP. Moreover, states' political environments and legal traditions would also have some bearing on their NAPs. Nevertheless,

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states could draw insights from the NAP experiences of their peers. Whenever the Indian government embarks on the path to drafting a national BHR framework, it would be desirable to look at the existing NAPs, even if most of these belong to the states from the Global North with significantly different socio-economic conditions.

As noted earlier, ten states have already adopted NAPs. What lessons – both in terms of the process and

the substance – can the Indian government learn from these existing NAPs? An assessment of the six of the existing NAPs (the UK, the Netherlands, Denmark, Finland, Lithuania and Sweden) by the International Corporate Accountability Roundtable (ICAR) and European Coalition for Corporate Justice (ECCJ) is a useful resource for gathering some insights.²⁶⁹ For example, this study highlights that multiple government agencies were involved in the drafting process, that the relevant governments did not take any steps to facilitate the disempowered sections of society in the consultation process, that no baseline assessment was conducted, and that the plans generally either did not outline future action plans or lacked information about concrete steps to be taken to achieve these goals.²⁷⁰

In addition to NAPs developed by other states, there are toolkits or guides produced by certain

organisations that should prove useful during the NAP drafting process. Two such initiatives are worth looking at. The first is the NAP Toolkit, developed by the Danish Institute for Human Rights (DIHR), ICAR and United Nations Children's Emergency Fund (UNICEF).²⁷¹ Developed after regional consultations with a range of stakeholders, the NAP Toolkit has three key components: the National Baseline Assessment Template, the NAP Guide, and Monitoring and Review of NAPs.²⁷² The overall goal of the NAP Toolkit is to promote the implementation of the GPs at national level 'by providing a set of easy-to-use resources that allow for a systematic, comprehensive, and human rights-based analysis of how far a given State is already implementing the GPs and relevant business and human rights frameworks'.²⁷³

The three-step process proposed by the NAP Toolkit should allow states to identify gaps within their existing BHR-related policies and laws vis-à-vis the GPs and in turn, facilitate the development of a remedial response to these gaps in the form of an NAP. To ensure efficacy, NAPs should have provisions and processes in place not only to monitor the implementation of declared targets but also to conduct a periodic review of NAPs.

The UNWG's Guidance on NAPs is the other useful document for states to consider.²⁷⁴ It outlines four essential criteria for an effective NAP, which must: (i) be founded on the GPs; (ii) respond to specific challenges of the national context; (iii) be developed and implemented through an inclusive and transparent process; and (iv) be regularly reviewed and updated.²⁷⁵ The Guidance document also recommends a number of steps that states should take as part of five sequential phases to adopt an NAP: initiation, assessment and consultation, drafting of any initial NAP, implementation and update.²⁷⁶ The four normative criteria – along with the recommended concrete practical steps – offer a sound framework for states to put in place NAPs that could make some difference to the condition of victims adversely affected by corporate activities, rather than merely being a tick-box exercise to implement the GPs. The UNWG framework also offers states the necessary flexibility to design NAPs that are tailored to their specific circumstances, but that at the same time satisfy minimum international standards.

C. What Principles and Processes should Underpin the Indian Framework?

The UNWG Guidance on NAPs outlines, as noted above, four essential criteria and five sequential phases that states should follow. It would make sense for the Indian government to follow these good practice recommendations rather than reinventing the wheel. Special attention should be paid to ensuring that the drafting process is fully transparent and inclusive, so that the views of all stakeholders – especially those who are adversely affected by corporate activities or who come from disadvantaged backgrounds – are taken into account. Equally important would be to reach out to a range of business actors at all stages of the process, but without creating the perception of a 'corporate capture of the state'. In order to ensure that the participation of various stakeholders is meaningful, consultations must be conducted in diverse parts of the country in local languages. In addition, people should be given adequate time to digest the information and provide feedback.

The plan to adopt a new BHR framework at national level should also reflect a sense of seriousness on the part of the government in changing the status quo in at least three respects: (i) constituting a committee that could coordinate among different government ministries and departments dealing with BHR issues; (ii) outlining concrete reform proposals to address the identified governance gaps within a specific timeframe; and (iii) putting in place an institutional mechanism to monitor the implementation of proposed measures as well as conduct a periodic review of the adopted BHR framework.

Developing a BHR framework would require an assessment of India's existing legal regime (operating at both domestic and international levels) and the development of reform options. Instead of creating new committees to perform these tasks, the government should consider using existing institutions such as the Law Commission of India and the NHRC. These institutions could in turn collaborate with law schools and business schools in India to carry out the required research.

In addition, a few additional principles may be relevant for developing India's national BHR framework. It may be desirable to look beyond the GPs, as in certain respects they may not accurately reflect states' obligations under international

human rights law. The extraterritorial human rights obligations of states are a case in point.²⁷⁷ Another aspect relates to Pillar 1 of the GPs: as states have tripartite obligations under international human rights law, the duty to protect human rights under the first pillar should not mislead us into believing that states' obligations to 'respect' and 'fulfil' human rights would not be relevant in the context of business.

Moreover, the Indian government should build on forward-looking principles – such as the strict/absolute liability principle, the polluter pays principle, and the precautionary principle – developed by the Supreme Court in holding companies accountable for breaching human rights norms. Similarly, the judicial leads on the horizontal application of certain FRs should be embraced.

Since India is a federal country, it would be critical for the central government to build a broad consensus at the outset with state governments about the need for as well the content of the proposed national BHR framework. In fact, it may be desirable for states to develop their own action plans to complement the national framework. Moreover, the third tier of governance bodies (such as Gram Sabhas) should also be brought on board, so as to have a shared understanding of the future course to be taken. If no common understanding is reached among the three tiers of government, there would be a danger of the national framework, even if it were adopted, not being implemented in both letter and spirit by the state governments and/or Gram Sabhas.

Last but not least, while the framework should set the broad contours of regulatory framework for all types of companies, some flexibility should be built into the process to allow for the differential treatment of small/medium-sized enterprises and the informal sector. In other words, despite having one framework, one size should not fit all.

D. What should be the Content of the Proposed Indian Framework?

The content of India's national BHR framework should be developed bottom-up through a process of inclusive and transparent consultation with all stakeholders, rather than being pre-defined. Nevertheless, in order to start the conversation, some thematic thoughts are mentioned below.²⁷⁸

Declaring an Unequivocal Commitment to Upholding Human Rights

BHR issues, in essence, raise fundamental questions about the relationship between human rights and development. Could (economic) development be pursued in a way that human/labour rights and environmental rights are not undermined? Any viable BHR framework should offer a vision of how this balance between human rights and development would be struck, or alternatively what level of normative hierarchy would be enjoyed by human rights in the process of accomplishing development.

The Indian government – through its national BHR framework – should send a clear message that *all* the human rights of *everyone* matter while pursuing the development agenda. This may entail reversing the 'development first' mind-set and changing the perception that the human rights of certain sections of society matter less. The government should reiterate its commitment to uphold FRs under the Constitution, implement the tripartite duties under international human rights law, and take seriously the duty to 'protect' human rights under the GPs. The human rights expectations of businesses operating within the territory and jurisdiction of the Indian government (including extraterritorial business activities) should be clearly set out. This may, for example, be done by mandating companies to conduct due diligence under Pillar 2 of the GPs.

Establishing Coordination Committees

The proposed framework should try to minimise, if not remove altogether, the lack of coherence: (i) among different central ministries; (ii) between the central government on one hand and the state government and Gram Sabhas on the other; and (iii) between the domestic legal framework and India's international obligations. One of the tools to achieve better coherence is to create coordination committees where diverse views are exchanged, disagreements are resolved in an amicable manner, and a broad consensus is built.

The BHR framework would relate to a number of ministries and departments of the Indian government: External Affairs; Corporate Affairs; Housing and Urban Poverty Alleviation; Road Transport and Highways; Law and Justice; Commerce and Industry; Water Resources; Environment, Forest and Climate Change; Drinking Water and Sanitation;

Consumer Affairs, Food and Public Distribution; Women and Child Development; Health and Family Welfare; Chemicals and Fertilisers; Tribal Affairs; Agriculture; Social Justice and Empowerment; Labour and Employment; Micro, Small and Medium Enterprises; and Rural Development. The interests of these diverse ministries do not always converge. Nor does one department or ministry always know what other department and ministries are doing. Therefore, it would be desirable to create a nodal committee, chaired by the Prime Minister and comprising selected cabinet ministers. This committee should try to achieve coherence on two levels: types (i) and (iii) described in the paragraph above.

The Inter-State Council envisaged under Article 263 of the Constitution should be used to achieve type (ii) coherence described above, as most of the BHR issues should fall within the existing mandate of this Council.

Reviewing the Existing Regulatory Framework

As the analysis in Part III indicates, India already has a well-developed legal regime to capture the intersection of human rights with business. Nevertheless, a vital aspect of the proposed BHR framework should be to undertake a review of the existing legal framework to improve its responsiveness to pre-empt as well as address human rights abuses by business enterprises. Based on a systematic review, a number of improvements could be made to different branches of law. For example, by amending the definition of 'state' under Article 12 of the Constitution, the jurisdiction of the Supreme Court may be extended to take cognisance of at least certain FRs by non-state actors such as companies. This outcome may also be achieved by developing a test that focuses more on the functions of a private non-state actor to determine whether or not it is a 'state instrumentality'. Alternatively, the High Court rules could be amended to allow High Courts to deal with violations of FRs by companies under Article 226 of the Constitution. A special bench may perhaps be created in each High Court to deal with such matters.

In certain areas of law (such as labour rights, social security, land acquisition and environmental rights), the need may be to change patchy, outdated or cumbersome regulations into a coherent framework that relies on a mixture of obligatory and voluntary strategies to encourage compliance, and not to see

state regulation necessarily as an adversarial or hierarchical process. Any such reforms must also ensure that the goal of simplifying regulations is not driven solely by a desire to create an investment-friendly environment; rather, the human rights interests of the affected communities should be at the heart of such reforms.

While new laws may be required to encourage the disclosure of non-financial information by companies and to protect the human rights

Apart from creating tax benefits, the government may also establish responsible citizenship awards, offer preferential loans to companies that embrace human rights, and stipulate respect for human rights as a prerequisite for public tenders and public procurement.

defenders from persecution, areas such as corporate law could be used to encourage all types of companies to do business in a humane manner. The Indian government's Model BIT 2015 rightly tries to secure the regulatory space needed to protect human rights in dealing with investment or trade-related disputes with companies. Negotiating an international legally binding instrument may further empower states in holding powerful business enterprises accountable for human rights abuses.

Paying Special Attention to Vulnerable Groups and Specific Sectors

India's BHR framework should also pay special attention to the unique circumstances and experiences of vulnerable or marginalised sections of society such as women, children, migrant workers, minorities, people with disabilities, SCs and STs. For example, a toolkit jointly developed by the DIHR, ICAR and UNICEF shows the need and importance of paying special and specific attention to children's rights during the NAP process.²⁷⁹ The same could be said about the rights of women, tribal people and people with disabilities. As India already has special human rights institutions to safeguard the interests of these sections of society, they should be involved in developing the BHR framework.

A related issue worth considering would be to develop sector-specific guidelines under the broad framework, as companies operating in different sectors face (at least some) uniquely different sets of human rights challenges, and it may not be feasible for 'one' national framework to respond to the specific needs of a diverse range of industries.

Offering Incentives and Disincentives to Business

The BHR framework should outline what incentives and disincentives the Indian government would offer to businesses to encourage them to take seriously their human rights responsibilities under both the GPs and the domestic legal framework.²⁸⁰ Apart from creating tax benefits, the government may also establish responsible citizenship awards, create sector-specific labelling schemes, offer preferential loans to companies that embrace human rights, and stipulate respect for human rights as a prerequisite for public tenders and public procurement.

In terms of disincentives, a range of civil, criminal and administrative sanctions should be contemplated against both the company and its executives found involved in human rights violations. The government should also create an environment in which 'social sanctions' can become effective. This could, for example, be done by requiring companies to disclose non-financial information. Companies may also be obliged to state information on their websites about the past sanctions imposed on them for breaching human rights.

Strengthening Redress Mechanisms

As it is inevitable that some business enterprises might not respond to (dis)incentives, the government should provide a range of mechanisms that could be used by victims of corporate human rights abuses to seek access to justice. The first priority should be to reform the existing judicial as well as non-judicial mechanisms in order to make them more accessible and better equipped in dealing with private sector violations of human rights. Based on the analysis of the working of some of these mechanisms in Part IV, the reforms may mean relaxing the constitutional or statutory provisions that deal with the jurisdiction of the Supreme Court, the High Courts and the NHRC; consolidating courts that deal with labour disputes (e.g., Labour Courts and Labour Tribunals); and showing respect to determinations made by the NGT and Gram Panchayats.

Furthermore, the government should lay out the plan to support the development of non-state, non-judicial remedial mechanisms. These mechanisms should not be in lieu of but rather in addition to state-based judicial remedies. The

potential of arbitration, mediation and conciliation should be harnessed to resolve BHR disputes, with due regard paid to the effectiveness criteria stipulated by the GPs.²⁸¹ The role of CSOs may perhaps be institutionalised to address the power asymmetry between companies and victims while using non-judicial grievance mechanisms, whether involving companies only or multiple stakeholders.

Removing Barriers in Access to Remedy

The GPs identify a number of substantive, procedural and practical barriers that undermine the access to judicial remedies.²⁸² The proposed BHR framework should identify specific measures to be taken to

reduce each of these barriers.²⁸³ For example, the Indian government should consider ways to overcome difficulties posed by corporate law principles of limited liability and separate personality. Recognising a direct duty of care or imposing a due-diligence requirement on parent companies may be an option to consider, so that victims could hold a parent company accountable in appropriate cases. While the presence of class

action and the well-developed system of PIL enable easier access to courts in cases involving a large number of victims, the cost of litigation and endemic delays still operate as serious obstacles. Enforcement of court orders – whether for the payment of compensation or an injunction prohibiting certain hazardous activity – is another area that would require remedial attention, especially if it involved overseas defendants.

Building the Capacity of Various Stakeholders

The BHR framework for a developing country such as India should also list measures aimed at

building the capacity of various stakeholders. Both government officials and corporate executives would benefit from training workshops on how to resolve human rights dilemmas and how to integrate the findings of human rights impact assessments into their decisions. The help of law schools and business schools should be solicited on this front. Other existing institutions could also help companies in different ways. For example, the Institute of Chartered Accountants of India has issued a guidance note to assist Indian companies in accounting properly for their CSR expenses, as part of the 2 per cent compulsory spending under the Companies Act.²⁸⁴

Communities adversely affected by corporate activities would also benefit from sharing information about their legal rights and the remedies available to seek relief in cases of human rights violations. The relevant government departments/institutions could collaborate with CSOs and law students in empowering communities – a collaboration that would allow each of the constituents to gain insights from the process.

Regular Monitoring and Periodic Update of the Framework

NAPs would hardly serve their purpose if they end up becoming 'planning' documents containing noble aspirational goals. The Indian framework should, therefore, not only identify concrete measures by which declared goals would be implemented, but also specify processes to monitor the efficacy of implementation and suggest possible improvements. In addition, as BHR issues are dynamic in nature, any framework dealing with such issues has to be revised and updated in line with changing needs. Putting in place a system of periodic review of the adopted framework (to take place every three to five years) may thus be desirable.

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VI Conclusion and Recommendations

A review of the existing Indian legal framework relating to BHR reveals that it is incomplete, fragmented and reactive. The lack of effective mechanisms to monitor, implement and enforce the relevant laws makes the deficiencies of the system worse.

The GPs provide the Indian government an opportunity to assess its laws and policies that have a bearing on BHR and consider taking appropriate remedial steps. Doing so would ensure that the path of economic development is both sustainable and inclusive. Developing a coherent BHR framework in a transparent and consultative manner should help in moving forward in a legitimate way. The presence of a stable politico-economic system, vibrant democracy, civil society, independent judiciary and the rule of law means that India already has the basic ingredients necessary to develop and sustain a BHR framework at national level.

While adopting a new national BHR framework, the Indian government should keep in mind a number of recommendations:

1. Achieving coherence – both at the horizontal and vertical levels – in laws, policies and decisions of the government would be critical. Establishing a permanent inter-ministerial committee on BHR could be one institutional mechanism to achieve such coherence amongst different central ministries. Such a committee should also advise Indian delegations involved in negotiating international instruments that could have some bearing on the domestic BHR regulatory space. The Inter-State Council should be used to achieve coherence between the central government on one hand and the state government and Gram Sabhas on the other.
2. It would be critical to strengthen various judicial and non-judicial mechanisms to improve access to justice. The current judicial system suffers from delays, high cost and corruption. Steps would have to be taken to minimise these obstacles. In addition, the government should encourage non-state non-judicial mechanisms that could offer faster and cheaper relief to victims, especially in cases dealing with non-serious abuses. Legal aid should also be made available to the people or communities affected by corporate operations so that they could seek appropriate judicial and non-judicial remedies.
3. The central government should consider amending Article 12 of the Constitution – which contains a definition of the 'state' for the purposes of Part III of the Constitution – so as to ensure that the protection of at least certain FRs is available against business enterprises. In this regard, Section 8(2) of the South African Constitution could be a good option to follow,

which provides: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' An amendment of Article 12 would allow the development of other common law principles consistent with this constitutional ethos. In addition, the High Court rules may be amended to allow High Courts to deal with violations of FRs by companies under Article 226 of the Constitution.

4. Considering that NHRIs have a key role to play in ensuring that companies respect their human rights responsibilities, it may be desirable to amend the Human Rights Act 1993 to confer

explicit jurisdiction on the NHRC as well as the State Human Rights Commissions to deal with the BHR agenda in diverse ways. These institutions could, for example, not only take up complaints of corporate violations of human rights, but also build the capacity of the affected community to seek redress and develop tools to assist companies to comply with their human rights responsibilities.

5. Although the 2013 Companies Act incorporates several provisions that aim to encourage large companies to fulfil their social responsibilities, the next step should be to consider ways in which all companies – irrespective of their size or turnover – are encouraged to do business in a manner that is consistent with national as well

as international human rights norms. Measures should also be taken to enhance gender diversity on corporate boards. Another area of corporate law that would require reform is the liability of a parent company for human rights violations by subsidiaries. As the judicial approach to piercing the corporate veil does not really work for victims, other alternatives should be explored. A statutory recognition of the direct duty of care on the part of parent companies may be an option. Alternatively, a parent company may be held accountable for human rights violations by its subsidiaries as a matter of principle unless it

could show that the violations took place despite it taking appropriate due diligence measures.

6. The much-needed reform and consolidation of labour, environmental and social security legislation should be done, keeping in mind the impact of such reforms on the protection of human rights by the private sector. It would be critical to try to strike a balance between the needs of companies to do business in a hassle-free environment and the realisation of human rights guaranteed under both the Indian Constitution and international human rights law.
7. Appropriate revisions should be made to the relevant laws and policies so that the process of development is more inclusive and the interests of the affected community are adequately taken into account. The principle of free, prior and informed consent should be implemented in letter and spirit, and the process of impact assessment should not be allowed to become merely an exercise to grant approval to development projects.
8. Special attention in the national BHR framework should be paid to those sections of society – such as children, women, people with disabilities, migrant workers, SCs and STs – that are not only more vulnerable to corporate human rights abuses but also often lack the legal and economic capacity to seek access to justice if their rights are violated.
9. It is critical to put in place measures aimed at protecting human rights defenders as well as whistleblowers from persecution. As the threat to human rights defenders in some cases stems from government agencies, it would be vital to allow recourse to courts and other independent institutions (e.g., the NHRC) against repressive actions.
10. As transparency and the integration of human rights considerations in public procurement are fast emerging as critical tools to push the BHR agenda, this element should be explicitly embedded in the Indian BHR framework, including in the public tender process for issuing licences for the exploitation of natural resources and for awarding service contracts for public goods. A related issue is the extension of the right to information in situations involving

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- public–private partnerships and private projects with a public-interest element.
11. In terms of the process for putting in place a national BHR framework, transparency and inclusiveness in consultations should be maintained to cover all sections of society: otherwise, the framework might not enjoy the required legitimacy. It would also be fundamental to set measurable targets, conceive means to monitor the implementation of these targets, and have in place a system for periodic review of the framework.
 12. In view of the division of powers between the central government and state governments, the legal competence to revise/enact laws as well as to introduce appropriate policy measures does not lie solely with either level of government. Therefore, cooperation and collaboration between these two tiers of government and local governance bodies in developing the national BHR framework would be essential. In fact, in addition to a national BHR framework, states in India might need to develop complementary plans. An appropriate role, in both sets of frameworks, should be accorded to the local institutions of governance such as Gram Sabhas.
 13. Indian Model BIT of 2015 may address some concerns about the impact of BITs on the capacity of the government to take suitable human rights measures despite limiting the economic interests of investors. Nevertheless, the Indian government should also take a proactive role in building an international legal order which safeguards the normative hierarchy of human rights norms over rules governing trade and investment.

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²⁴ Justin Rowlett, 'The Indian women who took on a multinational and won', *BBC News* (19 October 2015), <http://www.bbc.com/news/world-asia-india-34513824>.

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²⁶ As India is a federal country, there may be some laws/regulations at the state level that have a bearing on human rights violations by companies. But this paper focuses only on laws and measures adopted by the central government.

²⁷ 'Horizontal' application means that human rights under a given constitution could also be invoked against non-state actors such as companies.

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²⁹ See Mahendra Pal Singh, *Shukla's Constitution of India*, 12th edn. (Lucknow: Eastern Book Company, 2013), 207–15.

³⁰ Constitution of India, Art 37.

³¹ *Ibid*, Art 12.

³² *PD Shamdasani v Central Bank of India* AIR 1952 SC 59; *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632.

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³⁴ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966) 51.

³⁵ Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back

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³⁷ Singh argues that 'several other fundamental rights such as Articles 19, 20, 22, 25, 26, 29(1), 30(1) and 32, which have no reference to state, may acquire that distinction in due course'. Mahendra P Singh, 'Fundamental Rights, State Action and Cricket in India' (2006) 13 *Asia Pacific Law Review* 203, 204.

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⁴² *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487, para 6.

⁴³ *Ibid*, 496.

⁴⁴ See *Electricity Board, Rajasthan v Mohan Lal* (1967) 3 SCR 377; *Sukhdev Singh v Bhagtram* (1971) 3 SCR 619; *R D Shetty v International Airport Authority*, AIR (1979) SC 1628; *Ajay Hasia v Khalid Mujib* AIR (1981) SC 487; *Pradeep Kumar v Indian Institute of Chemical Biology* (2002) 5 SCC 111.

⁴⁵ *Tekraj Vasandi v Union of India* AIR 1988 SC 469; *Chander Mohan Khanna v National Council Of Educational Research and Training* AIR 1992 SC 76; *Zee Telefilms Ltd v Union of India* (2005) 4 SCC 649.

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⁴⁹ *Ibid*.

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⁵¹ Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1; Richard Meeran, 'Access to Remedy: the United Kingdom Experience of MNC Tort Litigation for Human Rights Violation' in Surya Deva, David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) 378.

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⁸⁰ 'Labour Laws Set for Big Overhaul', *The Hindu* (10 June 2015) <http://www.thehindu.com/business/Economy/labour-laws-set-for-big-overhaul/article7298994.ece>.

⁸¹ Paromita Goswami, 'A Critique of the Unorganised Worker's Social Security Act' (2009) 44:11 *Economic and Political Weekly* 17.

⁸² Constitution of India 1950, Articles 24, 21 A, 39 (e), 39 (f), 45.

⁸³ For a general discussion on legislative and judicial responses, see Usha Ramanathan, 'Evolution of the Law on Child Labor in India' International Environmental Law Research Centre' (2009), <http://www.ielrc.org/content/a0905.pdf>.

⁸⁴ *MC Mehta v State of Tamil Nadu* in Writ Petition (Civil) No. 465/1986.

⁸⁵ Factories Act is due for amendment soon. Factories Act (Amendment) Bill 2014, available at <http://www.prsindia.org/billtrack/the-factories-amendment-bill-2014-3353/>. See Anumeha Yadav, 'Factories Act Amendment Bill Being Revised', *The Hindu* (29 January 2105) <http://www.thehindu.com/business/Industry/factories-act-amendment-bill-being-revised/article6834598.ece>.

⁸⁶ See, for example, the Civil Liability for Nuclear Damage Act 2010, the Plantations Labour (Amendment) Act 2010 to amend the Plantation Labour Act 1951, and the Atomic Energy (Radiation Protection) Rules 2004.

⁸⁷ Some of the recent legislative actions are cited as example: the Indian Boilers (Amendment) Act 2007, the Rules for Manufacture, Use, Import, Export and Storage of Hazardous Micro Organisms, Genetically Engineered Organisms or Cells Amendment Act 2006.

⁸⁸ *Consumer Education Research Centre v Union of India* (1995) 3 SCC 42, para 27

⁸⁹ *Kirloskar Brothers Ltd v Employees' State Insurance Corporation* (1996) 2 SCC 682.

⁹⁰ All India (Service) Rules 1955 (India), Rule 18(B).

⁹¹ See the Special Economic Zones Act 2005 (India). Certain states have their respective enactments. For an overall picture, see the website of the Ministry of Commerce and Industry on Special Economic Zones, <http://sezindia.nic.in/state-policies-ssa.asp?id=2>.

⁹² For example, the government of Gujarat in 2004 amended the Industrial Disputes Act 1947 and inserted Chapter V-D for SEZs.

⁹³ The draft released in April 2015, <http://www.prsindia.org/uploads/media/draft/Labour%20Code%20on%20Industrial%20Relations%20Bill%202015.pdf>.

⁹⁴ *Ibid*, Chapter III.

⁹⁵ *Ibid*, Chapter VI.

⁹⁶ *Ibid*, Clause 50(7).

⁹⁷ See Dinesh Narayanan, 'Labour Laws: Modi Government's effort to Unilaterally Push Through Reforms Delaying Process', *The Economic Times* (14 July 2015), [http://www.business-standard.com/article/economy-policy/govt-s-labour-reforms-remove-shield-for-workers-ilo-115061700045_1.html](http://articles.economictimes.indiatimes.com/2015-07-14/news/64406199_1_labour-laws-deendayal-upadhyay-shramev-jayate-indian-labour-conference; Somesh Jha, 'Govt's Labour Reforms Remove Shield for Worker: ILO', <i>Business Standard</i> (17 June 2015) <a href=).

⁹⁸ Surabhi, 'Labour Reform: On Track But Tough Job Ahead', *The Indian Express* (6 July 2015) <http://indianexpress.com/article/india/politics/labour-reforms-on-track-but-tough-job-ahead/>.

⁹⁹ *Rural Litigation Entitlement Kendra v State of Uttar Pradesh* AIR (1985) SC 652; *MC Mehta v Union of India* AIR (1998) SC 1037. Article 48A of Indian Constitution enjoins the state to protect and improve the environment and to safeguard the forests and wild life.

¹⁰⁰ Constitution of the Republic of South Africa 1996, Sec 24; Constitution of the Portuguese Republic 2005, Art 66. According to Boyd, since the mid-seventies, ninety-five countries have granted constitutional status to this right. David R Boyd, 'The Effectiveness of Constitutional Environmental Rights', Yale UNITAR Workshop (26–27 April 2013).

¹⁰¹ See International Environmental Database for international environmental treaties, conventions and other agreements, <http://iea.uoregon.edu/page.php?file=home.htm&query=static>.

¹⁰² ICJ, *Access to Justice*, note 18, 19.

¹⁰³ This case study draws on Dilip Satapathy, 'Green Node isn't the End of POSCO's Problems', *Business Standard* (22 January 2014).

- ¹⁰⁴ See the decision here: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=40411>.
- ¹⁰⁵ Tamanaya Swain, 'Development and Displacement in Odisha: A Study of Anti-POSCO Movement in Jagatsinghpur District', *Odisha Review* (February–March 2014), <http://www.orissa.gov.in/e-magazine/orissareview/2014/Feb-March/engpdf/91-98.pdf>.
- ¹⁰⁶ In-Soo Nam and Biman Mukherji, 'POSCO Suspends Steel Plant Project in India', *Wall Street Journal* (17 July 2015), <http://www.wsj.com/articles/posco-scrap-steel-plant-project-in-india-for-now-1437103789>.
- ¹⁰⁷ See 'About Us', <http://www.vedantaresources.com/about-us.aspx>. This case study is developed with the help of Anjali George, 'Claiming Niyamgiri: Dongria Kondh's Struggle Against Vedanta', *Ritimo* (18 December 2014), <http://www.ritimo.org/Claiming-Niyamgiri-the-Dongria-Kondh-s-Struggle-against-Vedanta>.
- ¹⁰⁸ Government of Odisha, 'Geology and Mineral Resources of Odisha', *Odisha Annual Reference* (2014) 27, <http://odisha.gov.in/e-magazine/orissaannualreference/2014/pdf/26-27.pdf>.
- ¹⁰⁹ *TN Godavarman Thirumalpad v Union of India* (2002) 10 SCC 606.
- ¹¹⁰ NC Saxena et al, Report of the Four Member Committee for Investigation into the Proposal Submitted by the Odisha Mining Company for Bauxite Mining in Niyamgiri (16 August 2010), http://envfor.nic.in/sites/default/files/Saxena_Vedanta-1.pdf.
- ¹¹¹ *Odisha Mining Corporation v Ministry of Environment and Forest* (2013) 6 SCC 476.
- ¹¹² *Ibid.*
- ¹¹³ Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, Sec 3.
- ¹¹⁴ *Odisha Mining Corporation v Ministry of Environment and Forest* (2013) 6 SCC 476, para 55.
- ¹¹⁵ *Ibid.*, para 56.
- ¹¹⁶ Constitution of India, Art 244(1) and Schedules V and VI.
- ¹¹⁷ *Odisha Mining Corporation v Ministry of Environment and Forest* (2013) 6 SCC 476, para 33.
- ¹¹⁸ This Act and the Civil Liability for Nuclear Damage Rules 2011 have come under heavy criticism for their attempt to limit the liability of operators and suppliers. Rule 24 caps the supplier's liability to the extent of the operator's liability or the value of the contract, whichever is less.
- ¹¹⁹ 'New atomic regulator: Nuking the autonomy red flag', *Indian Express* (29 July 2015), <http://indianexpress.com/article/india/india-others/new-atomic-regulator-nuking-the-autonomy-red-flag/>.
- ¹²⁰ Ministry of Environment, Forest and Climate Change, 'Office Order No. 22-15/2014-IA.III', <http://www.moef.nic.in/sites/default/files/OM-dtd-25.08.14.pdf>.
- ¹²¹ For a summary of recommendations, see Preeta Dhar, 'Recommendation of the High Level Committee to Review Environmental Laws in India', *The Access Initiative* (25 November 2014), <http://www.accessinitiative.org/blog/2014/11/recommendations-high-level-committee-review-environmental-laws-india>.
- ¹²² Ramaswamy R Iyer, 'A Hasty, Half-baked Report on Environment', *The Hindu* (13 February 2015), <http://www.thehindu.com/opinion/op-ed/a-hasty-halfbaked-report-on-environment/article6887747.ece>.
- ¹²³ *MC Mehta v Kamal Nath* (1997) 1 SCC 388.
- ¹²⁴ *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647.
- ¹²⁵ *Ibid.*
- ¹²⁶ *MC Mehta v Union of India* AIR 1987 SC 1086.
- ¹²⁷ *Indian Council for Enviro Legal Action v Union of India* (1996) 3 SCC 212.
- ¹²⁸ National Rehabilitation and Resettlement Policy 2007, Chapter 1, para 1.3. <http://www.dolr.nic.in/NRRP2007.pdf>.
- ¹²⁹ See <http://www.prsindia.org/billtrack/the-land-acquisition-amendment-bill-2007-109/>.
- ¹³⁰ Rehabilitation and Resettlement Bill 2007, Chapter II.
- ¹³¹ *Ibid.*, Statement of Objects and Reasons.

¹³² Ibid, Section 42.

¹³³ Ibid, Section 48.

¹³⁴ Land Acquisition, Rehabilitation and Resettlement Bill 2011, Sec 3(za).

¹³⁵ Ibid, Proviso to Section 3(za).

¹³⁶ Ibid, Sec 26

¹³⁷ Ibid, Statement of Objects and Reasons.

¹³⁸ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance 2014, Sec 10A(e)

¹³⁹ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, Sec 105(3); Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance 2014, Sec 10(1)

¹⁴⁰ Gargi Parsai, 'President gives nod to re-promulgation of land ordinance', *The Hindu* (31 May 2015), <http://www.thehindu.com/news/national/president-gives-nod-to-repromulgation-of-land-ordinance/article7267398.ece>.

¹⁴¹ Smita Gupta, 'U-turn by BJP could help Land Bill clear House hurdle', *The Hindu* (4 August 2015), <http://www.thehindu.com/news/national/uturn-by-bjp-could-help-land-bill-clear-house-hurdle/article7496661.ece?ref=relatedNews>.

¹⁴² Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, Preamble

¹⁴³ Ibid, Sec 4

¹⁴⁴ Ibid, Sec 7(2)

¹⁴⁵ Ibid, Second Proviso to Section 2(4).

¹⁴⁶ Ibid, Sec 101

¹⁴⁷ Dilip Satapathy, 'Tata Steel Kalinganagar plant commissioning to be delayed' *Business Standard* (13th April 2015), http://www.business-standard.com/article/companies/tata-steel-kalinganagar-plant-commissioning-to-be-delayed-115041000923_1.html.

¹⁴⁸ Brigitte Refuslund Sorensen, *Relocated Lives: Displacement and Resettlement within the Mahaweli Project, Sri Lanka* (Amsterdam: VU University Press, 1996) 211.

¹⁴⁹ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, Sec 26.

¹⁵⁰ Baibhaw Gahlaut, 'Land Acquisition and Resettlement and Rehabilitation Bill 2011—A Bane or Boon?' (2013) 34:2 *Statute Law Review* 175, 177.

¹⁵¹ Jagdish C Pokharel, 'Population displacement and compensation planning in Kulekhani Hydroelectric Project, Nepal' in Hari Mohan Mathur and Michael M Cernea (eds.), *Development, Displacement and Resettlement: Focus on Asian Experiences* (New Delhi: Vikas Publishing House) 27.

¹⁵² Hari Mohan Mathur, 'Making Resettlement Work: Policy, Planning and Management' in Hari Mohan Mathur (ed.), *Resettling Displaced People: Policy and Practice in India* (New Delhi: Routledge, 2011) 40–41.

¹⁵³ For example, the resettlers from Madhya Pradesh were asked to accept compensatory land in Gujarat, which had no resemblance to the land they had been shown on an earlier visit. See Catherine Caufield, *Masters of Illusion: The World Bank and the Poverty of Nations* (London: Macmillan, 1997).

¹⁵⁴ Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act 2006, Preamble

¹⁵⁵ 'Nine states asked to "immediately" implement Forest Rights Act', *The Economic Times* (21 June 2015), <http://economictimes.indiatimes.com/news/politics-and-nation/nine-states-asked-to-immediately-implement-forest-rights-act/articleshow/47757117.cms>.

¹⁵⁶ NC Saxena, 'Are tribals really benefitting from the Forest Rights Act?', *The Economic Times* (9 August

2015), <http://economictimes.indiatimes.com/news/economy/policy/are-tribals-really-benefitting-from-the-forest-rights-act/articleshow/48405433.cms>.

¹⁵⁷ Ibid.

¹⁵⁸ See ICJ, *Access to Justice*, note 18, 45–46.

¹⁵⁹ See Surya Deva, 'Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?' (2012) 41:4 *Common Law World Review* 299.

¹⁶⁰ Standing Committee Report on Companies Bill, 2011, Part II, para 13, http://www.prsindia.org/uploads/media/Company/Companies_Bill_%20SC%20Report%202012.pdf.

¹⁶¹ Companies Act 2013, Sec 135(4)(a).

¹⁶² Companies (Corporate Social Responsibility Policy) Rules 2014.

¹⁶³ Shachi Rai and Sangeeta Bansal, 'An Analysis of Corporate Social Responsibility Expenditure in India', *Economic and Political Weekly*, Vol. XLIX No. 50 (13 December 2014), <http://www.epw.in/web-exclusives/analysis-corporate-social-responsibility-expenditure-india.html>.

¹⁶⁴ Ministry of Corporate Affairs, 'General Circular No. 1/2015', http://www.mca.gov.in/Ministry/pdf/General_Circular_01_2015.pdf.

¹⁶⁵ Ministry of Corporate Affairs, 'Report of the High Level Committee', http://www.mca.gov.in/Ministry/pdf/HLC_report_05102015.pdf.

¹⁶⁶ Ibid, paras 2.2.4 and 4.20.

¹⁶⁷ Ibid, para 4.8.

¹⁶⁸ Right to Information Act 2005, Sec 3.

¹⁶⁹ Section 3 of South African's Promotion of Access to Information Act 2000 provides that this law applies to 'a record of a private body'.

¹⁷⁰ Whistle Blowers Protection Act 2011, Preamble

¹⁷¹ Ibid, Secs 11–13.

¹⁷² The amendments proposed to this law in 2015 may further undermine the usefulness of this law. Prianka Rao, 'The Whistleblowers Protection Act, 2014: Comparison of the 2015 Bill with the 2013 amendments' (11 May 2015), <http://www.prsindia.org/administrator/uploads/media/Public%20Disclosure/whistleblowers%20bill-%20comparison%20of%202013%20and%202015%20amendments.pdf>.

¹⁷³ Operational level mechanisms should also be based 'on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances'.

¹⁷⁴ Some institutions designed to deal solely with issues relating to business such as the Competition Commission of India and the Securities and Exchange Board of India are not reviewed in this paper, as they have lesser potential of being directly relevant to address corporate human rights violations.

¹⁷⁵ *Common Cause v Union of India* AIR 1999 SC 3020.

¹⁷⁶ The Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v VR Rudani* AIR 1989 SC 1607 noted that as Article 226 confers power on the High Courts to issue writs for enforcement of the FRs as well as non-FRs, the words 'any person or authority' used in Article 226 should not be confined only to statutory authorities and instrumentalities of the state.

¹⁷⁷ (2003) 3 KLT 1019.

¹⁷⁸ Business activities have come under scanner of the judiciary through PIL in a number of cases related to, for example, the Oleum gas leak in a factory in Delhi, bonded labourers, child labour in carpet industry, relocation of hazardous industries, pollution caused by tanneries, and corruption in allocation of public resources such as 2G spectrum and mining licenses. Svetlana Correya, 'Domestic Litigation' in Gabriella Wass (ed.), *Corporate Activity and Human Rights in India* (New Delhi: Human Rights Law Network, 2011) 157, 162–165.

¹⁷⁹ See Singh, *Shukla's Constitution of India*, note 29, 207–15, 222–28; and generally S P Sathe, *Judicial Activism in India* (New Delhi: OUP, 2002).

¹⁸⁰ Jeremy Cooper, 'Poverty and Constitutional Justice: The Indian Experience' (1993) 44 *Mercer Law Review* 611, 616–32; Vijayashri Sripati, 'Human Rights in India-Fifty Years after Independence' (1997) *Denver Journal of International Law and Policy* 93, 118–25. See also Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28 *Civil Justice Quarterly* 19.

¹⁸¹ See, for example, *Sunil Batra v Delhi Administration* AIR 1980 SC 1579; *Dr Upendra Baxi v State of UP* (1982) 2 SCC308.

¹⁸² Ashok H Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems' in B N Kirpal et al (eds.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: OUP, 2000) 159, 165–67.

¹⁸³ See SP Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 *Washington University Journal of Law & Policy* 30.

¹⁸⁴ The Court observed: [T]his Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. ... The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases.' *MC Mehta v Union of India* AIR 1987 SC 1086, 1091.

¹⁸⁵ See *Rudul Sah v State of Bihar* AIR 1983 SC 1086; *Bhim Singh v State of J & K* (1985) 4 SCC 677; *Nilabati Behra v State of Orissa* (1993) 2 SCC 746; *Chairman, Railway Board v Chandrima Das* AIR 2000 SC 988.

¹⁸⁶ *Bodhisatwa v Subdhra Chakroborty* (1996) 1 SCC 490; *Chairman, Railway Board v Chandrima Das* AIR 2000 SC 988; *MC Mehta v Union of India* (2001) 9 SCC 520; *MC Mehta v Kamal Nath* AIR 2000 SC 1997.

¹⁸⁷ See Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy* (London: Amnesty International, 2014).

¹⁸⁸ Supreme Court of India, *National Court Management Systems Policy and Action Plan Report* (New Delhi: National Court Management Systems Committee, 2012) 11.

¹⁸⁹ Tariq Anwar, 'Justice Delayed Again: Former Chief Justice of India Explains Why Cases Like Salman Khan Drags On' (08 May 2015), <http://www.firstpost.com/india/justice-delayed-again-former-chief-justice-of-india-explains-why-cases-like-salman-khan-drag-on-2234398.html>; 'More than 3 Crore Court Cases Pending Across Country', *NDTV* (7 December 2014), <http://www.ndtv.com/india-news/more-than-3-crore-court-cases-pending-across-country-709595>; Dipti Jain, 'The Slow Moving Wheels of Indian Judiciary', *Livemint* (6 August 2014), <http://www.livemint.com/Opinion/VlqmTLJ1UzNtmKd7BuRVbM/The-slow-moving-wheels-of-Indian-judiciary.html>.

¹⁹⁰ India's ratio of fifteen judges for every one million population is lower than neighbouring Bangladesh. See 'Judge Population Ratio Lowest in India: CJI', *The Hindu* (3 March 2013), <http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/judgepopulation-ratio-lowest-in-india-cji/article4470825.ece>.

¹⁹¹ See Lalit Bhasin, 'Labour and Employment Laws of India' (24 August 2007), <http://www.mondaq.com/india/x/50440/employee+rights+labour+relations/Labour+And+Employment+Laws+Of+India>.

¹⁹² The following matters fall within the jurisdiction of Labour Courts: 1. The propriety or legality of an order passed by an employer under the standing orders; 2. The application and interpretation of standing orders; 3. Discharge or dismissal of workmen including re-instatement of, or grant of relief to, workmen wrongfully dismissed; 4. Withdrawal of any customary concession or privilege; 5. Illegality or otherwise of a strike or lock-out; and 6. All matters other than those specified in the Third Schedule.

¹⁹³ Matters falling within the jurisdiction of Industrial Tribunals are: 1. Wages, including the period and mode of payment; 2. Compensatory and other allowances; 3. Hours of work and rest intervals; 4. Leave with wages and holidays; 5. Bonus, profit sharing, provident fund and gratuity; 6. Shift working otherwise than in accordance with standing orders; 7. Classification by grades; 8. Rules of discipline; 9. Rationalisation; 10. Retrenchment of workmen and closure of establishment; and 11. Any other matter that may be prescribed.

¹⁹⁴ Industrial Disputes Act 1947, Sec 10A

¹⁹⁵ 'Labour Laws set for big overhaul', *The Hindu* (10 June 2015), <http://www.thehindu.com/business/Economy/labour-laws-set-for-big-overhaul/article7298994.ece>.

¹⁹⁶ Reforms were mooted earlier too. See Report of the National Commission of Labour 2002, <http://www.prsindia.org/uploads/media/1237548159/NLCII-report.pdf>.

¹⁹⁷ Human Rights Act 1993, Sec 2(d) read with clause (f).

¹⁹⁸ This probably led Justice Malimath, a former member of the NHRC, to state categorically that the NHRC 'cannot entertain complains of violation of human rights against non-State actors.' V S Malimath, 'Report of the National Human Rights Commission of India' in Kamal Hossain et al (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2002) 211, 213.

¹⁹⁹ Case No. 663/19/1999–2000; Case No. 513/7/1998–99; Case No. 22/212/96-LC (FC), <http://nhrc.nic.in>.

²⁰⁰ Case No. 872/25/2006-07. NHRC, 'Commission's Order on Nandigram Issue' (8 February 2008), <http://nhrc.nic.in/disparhive.asp?fno=1527>; NHRC, '13th Annual Meeting of APF', <http://nhrc.nic.in/disparhive.asp?fno=1634>.

²⁰¹ See CASE NO. 703/18/23/07-08, http://nhrc.nic.in/Documents/Reports/report_on_posco_project.pdf.

²⁰² 'Response to Questionnaire: UN Special Rapporteur on the Situation of Human Rights Defenders, Question 4', <http://www.ohchr.org/Documents/Issues/Defenders/LargeScale/NHRIs/NHRIIndia.pdf>.

²⁰³ The Supreme Court, for instance, had already requested the NHRC to monitor the implementation of the Bonded Labour (Abolition) Act by its order in WP (Civil) No. 3922 of 1985.

²⁰⁴ NHRC, 'UN Special Representative's Visit to NHRC', <http://nhrc.nic.in/disparhive.asp?fno=1750>.

²⁰⁵ UN General Assembly, *National Institutions for the Promotion and Protection of Human Rights*, GA Res 48/134 (4 March 1994). See also Linda C Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights protection' (2000) 13 *Harvard Human Rights Journal* 1.

²⁰⁶ See Surya Deva, 'Corporate Human Rights Abuses: What Role for the National Human Rights Institutions?' in Hitoshi Nasu and Ben Saul (eds.), *Human Rights in the Asia Pacific Region: Towards Institution Building* (London: Routledge, 2011) 234; Asia Pacific Forum of National Human Rights Institutions, *ACJ Reference on Human Rights, Corporate Accountability and Government Responsibility* (2008).

²⁰⁷ See, for example, National Commissions for Scheduled Castes and Scheduled Tribes under articles 338 and 338A of the Constitution of India.

²⁰⁸ Guiding Principles, note 1, General Principles. See also commentary on Principle 12.

²⁰⁹ Complaints can be registered and tracked online: <http://ncscmis.nic.in/NCSCCMIS/Welcome1.do>.

²¹⁰ Constitution of India, Art 338(8).

²¹¹ Amrita Madhukalya, 'Two-thirds of Government Departments Don't Have Sexual Harassment Committees', *DNA* (12 July 2015), <http://www.dnaindia.com/india/report-two-thirds-of-government-departments-don-t-have-sexual-harassment-committees-2103799>.

²¹² 'Corporate India Is Yet To Fully Comply With Sexual Harassment Norms', *DNA* (7 May 2015), <http://www.dnaindia.com/money/report-corporate-india-is-yet-to-fully-comply-with-sexual-harassment-norms-2084008>.

²¹³ Commission for Protection of Child Rights Act 2005, Sec 13.

²¹⁴ NCPCR, 'Bare Acts related to Children', <http://ncpcr.gov.in/index1.php?lang=1&level=0&linkid=18&lid=588>.

²¹⁵ NCPCR, 'Guidelines on Abolition of Child Labour and Preparation For World Day Against Child Labour-June 12, 2008', <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=235&lid=326>.

²¹⁶ *Bachpan Bachao Andolan v Union of India* (2011) 5 SCC 1; *M C Mehta v State of Tamil Nadu* (1996) 6 SCC 756.

²¹⁷ Ashwaq Masoodi, '10 Alarming Statistics on Child Labour in India', *Livemint* (8 September 2015), <http://www.livemint.com/Politics/ZPALzgwvOLhyMfxWsobcHM/10-alarming-statistics-on-child-labour-in-India.html>.

²¹⁸ Deva, 'Child Labour', note 23.

²¹⁹ National Green Tribunal Act 2010, Preamble

²²⁰ *Ibid*, Sec 33.

²²¹ National Environment Authority Act, 1997, Sec 11.

²²² National Green Tribunal Act, Sec 14(1).

²²³ *Ibid*, Sec 15(1).

²²⁴ *Ibid*, Sec 19.

²²⁵ *Ibid*, Sec 26.

²²⁶ *Ibid*, Sec 26(1), Proviso.

²²⁷ *Ibid*, Sec 27(1), Proviso.

²²⁸ Appeal No. 12/2012 (13 March 2014).

²²⁹ *Ibid*, paras 40–58

²³⁰ Appeal No. 73/2012 (24 March 2014).

²³¹ *Sudiep Shrivastava v State of Chhattisgarh*, Appeal No. 73/2012 (24 March 2014), paras 19–22.

²³² *Samata v Union of India*, Appeal No. 9/2011 (13 December 2013), para 29.

²³³ Appeals Nos. 172, 173, 174 of 2013 (SZ) and Appeals Nos. 1 and 19 of 2014 (SZ) and Appeal No. 172 of 2013 (SZ) dated 28-5-2014, paras 148–149.

²³⁴ For instance, the affidavit submitted to the Supreme Court claiming that the Tribunal had exceeded its brief and caused the Ministry embarrassment in Parliament. See Ritwick Dutta, 'Law of the Jungle', *The Hindu* (18 October 2013), <http://www.thehindu.com/opinion/op-ed/law-of-the-jungle/article5244600.ece>. See also 'Pollution Tax on Trucks: Salve, Dave question NGT's Jurisdiction; SC summons order copy' (8 October 2015), <http://www.livelaw.in/pollution-tax-on-trucks-salve-dave-question-ngts-jurisdiction-sc-summons-order-copy/>.

²³⁵ Jayashree Nandi, "'Toned-down" National Green Tribunal may no longer be the green crusader' (2 September 2014), <http://timesofindia.indiatimes.com/india/Toned-down-National-Green-Tribunal-may-no-longer-be-the-green-crusader/articleshow/41462226.cms>.

²³⁶ Pallavi Polanki, 'National Green Tribunal asserts independence, is Environment Minister listening?' (19 July 2014), <http://www.firstpost.com/india/national-green-tribunal-asserts-independence-environment-minister-listening-1625527.html>.

²³⁷ See Hills, note 14.

²³⁸ See 'The Plachimada Struggle against Coca Cola in Southern India', <http://www.ritimo.org/The-Plachimada-Struggle-against-Coca-Cola-in-Southern-India>; Ruchi Sree, 'Plachimada Against Coke: People's Struggle For Water', <http://conflicts.indiawaterportal.org/sites/conflicts.indiawaterportal.org/files/Ruchi%20Shree-%20Plachimada%20against%20Coke-sh.pdf>; CR Bijoy, 'Kerala's Plachimada Struggle: A Narrative on Water and Governance Rights' (2006) 41 *Economic and Political Weekly* 4332.

²³⁹ Narayan Lakshman, 'Coca-Cola's Response Disappoints Plachimada Activists', *The Hindu* (23 April 2013), <http://www.thehindu.com/opinion/op-ed/cocacolas-response-disappoints-plachimada-activists/article408788.ece>.

²⁴⁰ 'About the CAO: Who We Are', <http://www.cao-ombudsman.org/about/whoweare/index.html>.

²⁴¹ CAO Operational Guidelines 2013, http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf.

²⁴² *Ibid*, 5.

²⁴³ Ibid, 10.

²⁴⁴ Ibid, 18.

²⁴⁵ Ibid, 15.

²⁴⁶ 'India / AD Hydro Power Limited-01/Himachal Pradesh', Filed 1st October 2004, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=75

²⁴⁷ 'India / Lafarge Surma Cement -01', http://www.cao-ombudsman.org/cases/case_detail.aspx?id=211.

²⁴⁸ Ibid.

²⁴⁹ 'Protecting Workers' Rights Worldwide', <http://www.fairlabor.org/our-work>.

²⁵⁰ 'Monitoring Plan' shall mean the monitoring plan submitted to the Association by each Applicant that describes with specificity the Applicant's proposed internal compliance program, including the implementation of internal monitoring and remediation processes. FLA Charter, Section I, http://www.fairlabor.org/sites/default/files/fla_charter_2-12-14.pdf.

²⁵¹ 'FLA Charter', Section IX (The Monitoring Process) http://www.fairlabor.org/sites/default/files/fla_charter_2-12-14.pdf.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ 'FLA Summary Report: Investigation of Procurement Price and Credit Practices in Syngenta Hybrid Seeds Supply Chain in India' (20 July 2015), http://www.fairlabor.org/sites/default/files/documents/reports/summary_report_and_next_steps_july_2015.pdf.

²⁵⁵ 'Accreditation Assessment of Syngenta's Social Compliance Program in India' (12 November 2015), <http://www.fairlabor.org/report/accreditation-assessment-syngentas-social-compliance-program-india>.

²⁵⁶ 'FLA Summary Report: Gokaldas India, Bangalore, India; Third Party Complaint' (8 May 2015), http://www.fairlabor.org/sites/default/files/documents/reports/gokaldas_final_report_summary_may_2015.pdf.

²⁵⁷ 'FLA Summary Report: Paragon Apparels Pvt. Ltd, Noida, India: Special Investigation' (12 May 2015), http://www.fairlabor.org/sites/default/files/documents/reports/final_summary_report_paragon_apparels_may_2015.pdf.

²⁵⁸ *FCI v J Mohinderpal* AIR 1989 SC 1263, 1266; *Salem Advocates Bar Association v Union of India* (2005) 6 SCC 344, 375–379.

²⁵⁹ Amended Section 89 of the Code provides: 'Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for – (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.' For mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

²⁶⁰ Supreme Court of India, 'Mediation Training Manual', <http://supremecourtsofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>.

²⁶¹ Thomas J Stipanowich, 'Arbitration: The "New Litigation"' (2010) *University of Illinois Law Review* 1, 4.

²⁶² 'About FACT', <http://www.ficci-arbitration.com/htm/about.htm>.

²⁶³ Badrinath Srinivasan, 'Arbitration and the Supreme Court: A Tale of Discordance Between the Text and Judicial Determination' (2011) 4 *NUJS Law Review* 639.

²⁶⁴ Vikas Mahendra, 'Arbitration in India: A New Beginning' (6 November 2015), <http://kluwerarbitrationblog.com/2015/11/06/arbitration-in-india-a-new-beginning/>.

²⁶⁵ Jean R Sternlight, 'Is Alternative Dispute Resolution Consistent With The Rule Of Law? Lessons From Abroad' (2006) 56 *De Paul Law Review* 569.

²⁶⁶ For general benefits of a NAP, see DIHR and ICAR, *National Action Plans on Business and Human Right: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human*

Rights Frameworks (June 2014), 14.

²⁶⁷ See Deva, 'Socially Responsible Business in India', note 159.

²⁶⁸ Human Rights Council, A/HRC/26/L.1 (27 June 2014).

²⁶⁹ ICAR and ECCJ, *Assessment of Existing National Action Plans (NAPs) on Business and Human Rights* (November 2015).

²⁷⁰ *Ibid*, 3–5.

²⁷¹ DIHR and ICAR, *NAP Toolkit*, note 266.

²⁷² *Ibid*, 24.

²⁷³ *Ibid*, 22.

²⁷⁴ UNWG, *Guidance on National Action Plans*, note 5.

²⁷⁵ *Ibid*, 3–4.

²⁷⁶ *Ibid*, 5–10.

²⁷⁷ See Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41, 45–46.

²⁷⁸ The UNWG has provided useful guidance on the substance of NAPs. UNWG, *Guidance on National Action Plans*, note 5, 11–33.

²⁷⁹ DIHR, ICAR and UNICEF, *Children's Rights in National Action Plans (NAPs) on Business and Human Rights* (2015).

²⁸⁰ See Deva, *Humanizing Business*, note 12, 220–31.

²⁸¹ Guiding Principles, note 1, Principle 31.

²⁸² *Ibid*, Commentary on Principle 26.

²⁸³ See Amnesty International, *Injustice Incorporated*, note 187.

²⁸⁴ Lubna Kably, 'ICAI issues norms for CSR accounting by cos', *Times of India* (20 May 2015), <http://timesofindia.indiatimes.com/business/india-business/ICAI-issues-norms-for-CSR-accounting-by-cos/articleshow/47349754.cms>.



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