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Environment Laws (Amendment) Bill, 2015: A Sisyphean Challenge

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The Draft Environment Laws (Amendment) Bill, 2015 was published by the Ministry of Environment, Forest and Climate Change (MoEFCC) on October 7, 2015. The objectives of the Draft Bill are to provide for "effective deterrent penal provisions" and to introduce "the concept of monetary penalty for violations and contraventions."

Among the many amendments to the existing Environmental Protection Act (1986), two sections that deserve special attention are discussed below.

Categorization of Environmental Damages

The Draft Bill has classified environmental damages into three categories:

- Minor Violation
  - A violation is considered minor if damage caused is not a substantial damage or a non-substantial damage.
- Non-substantial damage
  - A damage is non-substantial if it is neither a minor violation nor a substantial damage
- Substantial damage
  - Substantial damages are damages to environment due to direct violation, negligence, or any project, activity or process, which affect it adversely.

Establishment of Adjudicating Authority

The Bill envisages creation of a two member Adjudicating Authority to adjudicate and impose penalty on any matter relating to environmental violation. The members of this authority will possess degree in law and either have to be presently or in the past a District Judge or, qualified to be one. Otherwise the members will have to be at least at or equivalent to the Director level in the Central Government or at Joint Secretary equivalent level under the State Government.

One Step Forward

The strongest aspect of this amendment is that the Government has good intentions and is serious about addressing environmental issues. The publication of the Draft Bill establishes the fact that the current environmental regulations require revision and that the Government acknowledges the need of the hour.

Two Steps Back

The Draft Bill has more of the same lackadaisical approach to understanding environmental issues at hand. Firstly, it lacks the scientific foundation that international environmental laws are based on. This is reflected in the arbitrary categorization of environmental damage. Without a scientific

basis for distinction, the three categories of environmental damage are a confounding Boolean puzzle of AND, OR and NOT. Also, a damage that is deemed minor in one region may be a substantial damage in another region adding to further confusion and uncertainty in the implementation of the Act.

Secondly, by establishing a separate adjudicating authority for decisions on environmental violations, the Bill only adds another layer of the red tape bureaucracy. It is unclear whether the adjudicating authority would be part of the NGT or a separate body and if it is a separate body, whether the two function independently or separately?

These questions will only create confusion and increase the complexity of legal procedures between the NGT and District Courts. While the appellants wait for the court decisions, the issues of the environment will still not be addressed. Moreover, this proposal comes at a time when the Government is reportedly looking at streamlining the various quasi-judicial tribunals and reducing the total number of tribunals to less than 10.

In essence, the Bill is backward looking in that it focuses on damages and correction after the event rather than preventing future damage. Excoriating polluters after the damage does not redress the environmental violation and neither does it prevent future pollution. Instead it has the opposite effect of transforming polluter pays principle to pay and pollute principle with an extra layer of red coating.

Moving Forward

What would be more beneficial for the MoEFCC and ultimately for the environment is better capacity and resources to implement intelligent and achievable policies. Understanding the scientific basis of environmental issues is indispensable for meaningful environment protection. The goals and objectives of MoEFCC will be better served if instead of adding another layer of government authority, the MoEFCC looks to expanding its capacity in technical and judicial competence as well as a viable implementation infrastructure.

Currently, the MoEFCC appears to taken a myopic view of environmental issues. It needs to embrace a more panoramic ideology in which environment, economy and society reinforce each other instead of clashing and impeding the other. Economic development at the cost of environment cannot be a sustainable growth and consequently adversely affects the society. Similarly, environmental damage control at the cost of economic development cannot sustain an aspirational society.

Understanding the underlying socioeconomic issues in policy design will not only strengthen MoEFCC's efforts but will also create a more stable economy that will invite future investments and be harmonious with the Government's Make in India initiative.

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Notifications & Circulars

The Arbitration and Conciliation (Amendment) Ordinance, 2015: The Union Cabinet has approved the Arbitration and Conciliation (Amendment) Ordinance 2015 ('Ordinance') and the same was promulgated by the President of India on 23rd October, 2015. The Ordinance introduces several changes to the Arbitration & Conciliation Act 1996 ('Arbitration Act'). Few of the important changes brought forth by the Ordinance are:

(i) The Definition of the term 'Court' provided in Section 2(1)(e) has been substituted with a new definition in order to enable the parties to an international commercial arbitration to approach the High Court and not the Principal Civil Court.

(ii) A new Proviso to Section 2(2) has been inserted to ensure that Section 9 (Interim Measures by the Court), Section 27 (Court assistance for taking evidence during the arbitration proceedings) and Section 37(3) (prohibiting a second appeal being filed against an order passed under Section 37) are applicable to an international commercial arbitration even when the place of arbitration is outside India. Furthermore, it is also stated that the award passed in such arbitral proceeding is enforceable and recognized under the provisions of Part II of the Arbitration Act.

(iii) Section 8 has been amended to enable the Court to refer not only the parties to an arbitration agreement to arbitration proceedings, but also any person claiming through or under a party to an arbitration agreement to arbitration proceedings if an application is filed with the Court seeking such direction. Further, the amendment to also requires the judicial authority to compulsorily refer parties to arbitration irrespective of any decision by the Supreme Court or any other court, if the judicial authority finds that a valid arbitration clause exists.

(iv) Sub-section (2) has been inserted in Section 9 to provide that in a case where an interim order is passed by a Court prior to the commencement of the arbitral proceedings, then, the arbitral proceedings should be initiated within a period of 90 days from the date of such order. Sub-section (3) inserted in Section 9 prohibits a Court from entertaining an application under Section 9(1). The Court may entertain the application if it finds that the existing circumstances may not render the remedy provided under Section 17 efficacious.

(v) Amendments made to Section 11 require the appointment of an arbitrator by the courts to be completed expeditiously, preferably within a period of sixty (60) days. It may be

noted that the Court can examine only the validity of the arbitration clause of the Agreement.

(vi) Section 12 has been amended to elaborate the obligation upon the prospective arbitrator to make an express disclosure (in a form specified in Sixth Schedule) on any conflicts he may have with the dispute at hand. Further, the courts, at the time of appointing an arbitrator,have been empowered to demand for a full disclosure on conflicts. It may also be noted that Schedule V & VII to the Ordinance contain an exhaustive list of grounds which may assist in determining all issues of conflict as and when the same is disclosed. However, the amendment enables the parties to waive any objections of conflict by mutual consent.

(vii) Section 29A as introduced in the Arbitration Act makes the arbitration proceedings time bound. A Tribunal is obligated to deliver the final award within a period of 12 months and the said period may be extended by the consent of parties for an additional 6 months. However, any further extensions will require court consent. It is pertinent to note that the said Section also empowers the courts to reduce the fee payable to an arbitrator by up to 5% for each month of delay and can also substitute one or all the arbitrators when approached for an extension of time beyond the time limit of 18 months from the date of initiation of the proceedings.

(viii) Fast track procedurefor arbitration has been introduced by new Section 29B, wherein, if the Parties agree to follow the procedure, it is obligatory for the arbitrator to complete the proceedings within a period of 6 months.

(ix) New Section 31A introduces an expansive cost regime. It is pertinent to note that the costs directed to be paid by the Tribunal is to be paid along with an interest at a rate of two percent higher than the current rate of interest prevalent on the date of award (Section 31 has been amended in this regard). Further, the costs are not compulsory and are at the discretion of the tribunal. Section 31A also lays down various factors to be considered by the tribunal at the time of determining the quantum of costs and such factors include the result of the case and the conduct of parties.

(x) Section 34 of the Arbitration Act enables the Court to set aside an arbitral award on the grounds referred therein. *Explanation* inserted in this regard states that an award is in conflict with the public policy of India, only if,:

i) The making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

ii) It is in contravention with the fundamental policy of Indian law,

iii) It is in conflict with the most basic notions of morality and justice.

According to another *Explanation*, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(xi) Section 36 of the Arbitration Act has been amended to the effect that mere filing of an application for challenging the award would not automatically render the award unenforceable. It is pertinent to note that as per the said amendment, the Award can only be stayed where the Court passed any specific order on an application filed by the party.

SEBI (Issue of Capital and Disclosure Requirements) Rules, 2009 amended: The Securities Exchange Board of India (SEBI) has amended the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 by Notification SEBI/LAD-NRO/GN/2015-16/025, dated 27-10-2015. According to the said amendment which is scheduled to come into force on 1-12-2015, Form for 'Disclosures in Abridged Prospectus' has been modified to include the information that is material and appropriate to enable the investors to make an informed decision. Further, it is to be noted that a company making a public issue of specified securities shall make the disclosures in the abridged prospectus as per the format specified by SEBI. General instructions with respect to the prospectus have also been amended.

FDI Reforms announced in various Sectors: The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, India, has on 10th and 24th of November, 2015, issued Press Notes to further ease, rationalise and simplify the process of foreign investments in the country. The threshold limit for FIPB approval has now been increased from Rs. 3000 crores to Rs. 5000 crores. A company incorporated outside India and owned and controlled by non-resident Indians has been allowed to invest in India with the special dispensation as available to Non-resident Indians under the FDI Policy. Some other relevant changes in FDI Regime are as follows:

(i) Construction and Development sector:

- Conditions of floor area restriction of 20,000 sq. mtrs. In construction and development projects and minimum capitalization of US $5 million to be brought in within 6 months of commencement of business, have been deleted. Each phase would be considered as a separate project.
- Subject to a lock-in of 3 years for each tranche of investment, foreign investor will be permitted to exit before the completion of the project. Transfer of state involving only non-residents will not be subject to lock-in (or)

governmental approval. Nonetheless, before the exit project (or) trunk infrastructure is completed.

- FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferrable development rights (TDRs). Earning of rent/lease of the property not amounting to transfer will not amount to real estate business.
- 'Transfer' for the purpose of this sector is defined to include those transfers which are more (or) less similar to what has been defined under Section 2(47) of the Income Tax Act, 1961, however, with the addition that transaction of acquisition of shares (or) otherwise, which has the effect of transferring (or) enabling the enjoyment of any immovable property will also be treated as transfer. 100% FDI under automatic route is permitted in completed projects.

(ii) *Defense sector:* Foreign investment upto 49% shall now be under the automatic route and proposals for foreign investment in excess of the above amount shall be considered by Foreign Investment Promotion Board (FIPB). Portfolio investment and investment by FVCIs will be allowed under the automatic route. In case of change in ownership pattern or transfer of stake by existing investor to new foreign investor within 49%, governmental approval shall be required.

(iii) *Broadcasting sector:* New sectoral caps and entry routes have been provided for this Sector.

(iv) *Banking-Private Sector:* FIIs/FPIs/QFIs can now invest upto 74%, provided there is no change of control and management of Investee Company.

(v) *Plantation Sector:* Plantation activities like coffee, rubber, cardamom, palm oil tree and olive oil tree plantations have been allowed fully (100%) under the automatic route.

(vi) *Companies/Trusts/Partnerships Owned and Controlled by NRIs:* Companies, trusts and partnership firms owned and controlled by Non Resident Indians (NRIs) shall be treated at par with NRIs for investment in India, thereby attracting special dispensation.

(vii) *Wholesale and Retail:* A manufacturer shall now be permitted to sell its product through wholesale and/or retail, including through e-commerce, without Government approval.

(viii) *Single brand retail trading (SBRT) and Duty Free Shops:*

- Sourcing of 30% of the value of the goods purchased has to be reckoned from the opening of first store. Also, in case of 'state-of-art' and 'cutting edge technology', sourcing norms can be relaxed subject to Government approval.

- Entities that are allowed to understate SBRT will be permitted to undertake e-commerce activities.
- For products to be sold under the same brand internationally and investment by non-resident entity/entities as the brand owner, or under legally tenable agreement with the brand owner, certain conditions of the FDI policy will not be made applicable for FDI in Indian brands. An Indian manufacturer is permitted to sell its own branded products in any platform. Indian brands should be owned and controlled by resident Indians.
- 100% FDI is now permitted under automatic route in Duty Free Shops located and operated in the Customs bonded areas.

(ix) *Same entity to carry out both Wholesale and SBRT:* A single entity shall be permitted to undertake both the activities of SBRT and wholesale provided that the conditions of FDI policy for each of them must be complied by both the business arms separately.

(x) *LLPs:* 100% FDI is now permitted under the automatic route in LLPs operating in sectors/activities where 100 % FDI is allowed through the automatic route and there are no FDI-linked performance conditions. An LLP having foreign investment will be permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions.

(xi) *Air transport service:*

- Regional Air Transport Service shall be eligible for foreign investment upto 49% under the automatic route.
- Foreign equity caps of certain sectors like Non-Scheduled Air Transport Service, Ground Handling Services, establishment and operation of Satellites and Credit Information Companies have now been increased from 74% to 100%.

(xii) *Companies without operations:* For undertaking foreign investment by an Indian Company which does not have any operation and downstream investments, Government approval will not be required for undertaking activities under the automatic route where there are no FDI-linked performance conditions.

(xiii) *Establishment and transfer of ownership and control of Indian Companies:* A Company operating in sectors/activities which are under Government approval route, not being capped sectors, Government approval will now be required. For investment in automatic route sectors by way of swap of shares, no Government approval is required.

(xiv) *Agriculture and Animal Husbandry and Mining:* Certain conditions of FDI policy on Agriculture and Animal Husbandry and Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities have been simplified.

(xv) *Manufacture defined:* Term 'manufacture' has been defined to mean a change resulting in transformation of an object or bringing into existence new and distinct object.

Restructuring the process of Public Issue of Equity Shares and Convertibles: SEBI has issued a Circular CIR/CFD/POLICYCELL/11/2015, dated 10th November, 2015 to streamline the process of Public Issue of Equity Shares and Convertibles, which shall be applicable for all public issues opening on or after 1st January, 2016. Through the Circular, SEBI has reduced the time taken for listing after the closure of issue to 6 working days as against the present requirement of 12 working days. All investors applying in a public issue shall only use 'Application Supported by Blocked Amount' (ASBA) facility for making payment. In addition to the Self Certified Syndicate Banks (SCSBs), Syndicate Members and Registered Brokers of Stock Exchanges, the Registrars to an Issue and Share Transfer Agents (RTAs) and Depository Participants (DPs) registered with SEBI are now permitted to accept application forms in public issues.

Stock exchanges will have to develop systems on their websites, by which investors will be enabled to view the status of their public issue applications and shall also enable the stock exchanges to send alerts and details of applications and allotments to the investors. The amount of commission payable to RTA/DP shall be determined on the basis of applications eligible for allotment. The details of commission and processing fees payable to each intermediary and the timelines for the same shall now be disclosed in the offer document. The Circular includes indicative timelines and instructions for the issuer / intermediaries / stock exchanges / merchant bankers / registrar relating to the compliance of various activities for the public issue of securities.

Ratio Decidendi

Appeal against failure of SEBI to act under the provisions is maintainable under Section 15T of SEBI Act, 1992: The Securities Appellate Tribunal (SAT) has held that if SEBI fails to perform its duties under the securities law and such inaction causes prejudice to any person in the securities market, then, the person being an aggrieved party, will be entitled to file an appeal under Section 15T of the SEBI Act, 1992 before it.

In the present case, an application was forwarded to SEBI by the Appellant through

the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE), along with their respective recommendations, seeking waiver or relaxation from obtaining permission of SEBI for listing under Rule 19 (2) of Securities Contract (Regulation) Rules, 1957. The Tribunal held that SEBI was not justified in withholding the said application, especially when the *prima facie* allegation of SEBI that the Appellant had obtained sanction of the Arrangement and Amalgamation by practicing fraud (material suppression of facts) on the Andhra Pradesh High Court and the Bombay High Court, was rejected by the Bombay High Court and the same has not been stayed by any higher Court. It was held that the fact that SEBI in its discretion may refuse relaxation / waiver,cannot be a ground for SEBI to refuse to exercise that discretion one way orthe other.The Tribunal finally directed SEBI to pass an order within 12 weeks of the date of the present order. [*Nagarjuna Fertilizers & Chemicals Ltd. v. Securities and Exchange Board of India,* Appeal No. 89/2013, decided on 30-10-2015, SAT]

Competition law - Existence of an agreement causing appreciable adverse effect on competition may be inferred from various practices: A complaint was filed by the Informant, alleging that the five domestic Airlines (Opposite Parties- "OPs") have colluded in fixing Fuel Surcharge rates (FSC), to the detriment of the interests of freight companies and burdening the consumers with high prices. The CCI, taking cognizance of the DG's report, that imposition of FSC was not in conformity with market conditions, has held that 3 OPs out of 5 have operated in a concerted manner in fixing FSC, thereby violating the provisions of Section 3(1) read with Section 3(3) of the Competition Act, 2002.

It interpreted the definition of "agreement" under Section 2(b) of the Act as inclusive and requiring *inter alia* any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The CCI further held that, an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement. According to CCI, the factors which confirm the fact that the 3 OPs were acting in a concerted manner were- increments of the rates on same dates or nearby dates, the unreasonable explanation of increase of FSC rates clubbed with the fact that there was no data on cost analysis, evasive replies and lack of documents despite admitting to the fact that meeting/ discussions took place with regard to FSC rate. It was held that such conduct has in turn resulted in indirectly determining the rates of air cargo transport in terms of provisions contained in Section 3(3)(a) of the Act.

Finally, exercising its powers under Sec 27(b), CCI imposed a penalty of 1% of average turnover of the past three years for Opposite Parties. [*Express Industry Council of India v. Jet Airways (India) Ltd.* - Case No. 30 of 2013, decided on 17-11-2015, CCI]

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