

The Legacy Outreach

Edition X



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A Critical Analysis of The Energy Conservation (Amendment) Act, 2022, in Light of India's Net-Zero Carbon Emission Goal

Introduction

The biggest impact of human activity in the Anthropocene[1] can be seen in the form of climate change and its effect on the planet. The threat of climate change in the early 90s prompted world leaders to meet at the Earth Summit (UNCED)[2] to discuss the possible strategies and policies to combat the worst effects of climate change. A product of the UNCED was the establishment of the UNFCCC[3], which is a multilateral international treaty designed to provide a legal framework to stabilize greenhouse gasses and prevent dangerous anthropogenic interference with climate systems.[4] The UNFCCC holds yearly formal conferences known as Conference of Parties (COP)[5] to assess the progress in dealing with climate change and develop laws and policies to control greenhouse gas emissions.

The Kyoto Protocol[6] and Paris Agreement [7] are some of the international treaties brought under the UNFCCC to ensure that environmental sustainability is maintained in light of climate change.

India is a signatory to the UNFCCC, Kyoto Protocol, and Paris Agreement and has subsequently been part of climate discussions at various COP meetings. As a developing country in the global south, India has a significant role in dealing with the climate change crisis, as the effects would have serious consequences on its people. In the last COP 26 held in Glasgow, the Prime Minister of India made the Panchamrit commitments, the most important being “achieving net-zero by 2070”. [8]

India is in the process of transforming its dependence on fossil fuels by adopting renewable sources of energy to achieve its commitment to net zero by 2070. The law and policy within the country are being developed to keep it in line with the aim to limit the increase in temperatures to below 2 degrees from pre-industrial levels as provided in the Paris Agreement.[9] India, irrespective of its historic contribution to carbon emissions, is actively adopting several climate action plans to mitigate the effects of climate change. In this regard, the Government of India has recently passed the Energy Conservation (Amendment) Act, 2022 to make amendments to the Energy Conservation Act, 2001 (“EC Act”) to empower the Central and State governments and facilitate the efficient use of energy and its conservation.[10]

The focus of this article is to provide a critical analysis of the Energy Conservation (Amendment) Act, 2022, in light of India's net-zero commitments. It would first provide a brief description of Energy Conservation (Amendment) Act, 2022 ("Amendment Act") and follow it up with a critical analysis by pointing at certain gaps and limitations in its operation. It would finally conclude by elaborating on the inadequacies of the Amendment Act and the need to reflect and develop better laws and policies to achieve its net-zero target.

Energy Conservation (Amendment) Act,
2022

The Energy Conservation (Amendment) Bill, 2022 ("Bill") was tabled by the Union Minister of New and Renewable Energy, Shri. R.K. Singh, who at the time described it as being "futuristic".[11] Subsequently, the bill was passed by both houses of Parliament, and through the assent of the President became law on the 20th December 2022. The Amendment Act provides for several changes in the existing Energy Conservation Act, 2001, through substitution and insertion in various sections.[12] The primary aim of the Amendment Act is to empower State and Central governments to develop a carbon trading scheme and also promote non-fossil fuel sources of energy so that the process of decarbonisation is in pace with India's commitment to net-zero.[13]

The Key Highlights of the Amendment Act
are provided below:

- In section 2, the definition of 'building' has been substituted to include a sustainable building code for buildings with a minimum connected load for commercial, office building, and residential purposes. The definitions like carbon credit certificate, carbon credit trading scheme, energy, energy auditor, energy conservation and sustainable building code, registered entity, vehicle, and the vessel have been inserted under the Amendment Act. [14].
- In section 4, the words 'twenty, but not exceeding twenty-six' have been substituted by the words 'thirty-one, but not exceeding thirty-seven' in relation to the Governing Council membership for the management of the Bureau of Energy Efficiency. In addition, the Governing Council members have been changed to include several persons as reflected in the insertion in sub-section 2 (ga) to (gg), (ma), (o), and (p).[15].
- In section 13 sub-section (2) (a), certain words have been inserted after the word section 14. In addition, certain words and figures have been inserted in sub-section (2), (d), (h) and (t). Further, a new clause below section 13 has been inserted as section 13A.

- All the changes above are to ensure that the Bureau is the competent authority to undertake its power and function in relation to the Act[16].
- In section 14 clauses (a), (b), and (c), certain words have been substituted to give a broader ambit to include ‘vehicles’ and ‘vessels’ that need to conform to energy consumption standards. In addition, section 14A has been amended and section 14AA has been inserted to mandate for the issuance of energy-saving certificates and carbon credit certificates.[17].
- In section 15, clause (a), (b) and (h) certain words have been inserted/substituted to give power to the State government to enforce some provisions for the efficient use of energy and its conservation. In addition, section 15A has been added to mandate for the budget of the designated agency.[18]
- In section 16, the whole section 16 has been substituted to provide for the Establishment of a Fund by the State government known as the ‘State Energy Conservation Fund’, mentioning definite sources, object & purpose, and administration procedure(s).[19]
- In section 26, the whole section has been substituted to incorporate penalties not exceeding ten lakhs rupees for violations in relation to sections 14 or 15. In addition, the section mandates for additional penalties for the violation under sections 13, 14, 15 and 52.[20]
- A new section 27A has been inserted in relation to the power of the State Commission to make regulations for discharging its functions under the EC Act.[21]
- In section 28, after clause (b), clause (c) the words ‘the loss caused to a consumer and amount of compensation thereof’ have been added to the factors to be taken into account by the adjudicating officer. [22]
- In section 52, words have been inserted to give power to the Bureau to obtain information.[23]
- In section 56, sub-section (2) clause (l) words ‘energy conservation building codes’ have been substituted to be in line with the changes in section 2 in relation to the words “energy conservation and sustainable building codes”.[24]
- In section 57, sub section (2) (a), words have been substituted similar to section 56. In addition, after clause (b), clause (ba) and (bb) have been inserted in relation to the power of the State government to make rules. In the same section clause (c) the word “section 3” has been substituted instead of the words “section 4”.[25]
- In section 58, sub-section (2) after clause (h), clauses (ha) and (hb) have been inserted pertaining to the power of the Bureau to make regulations. [26].

Critical Analysis

The Energy Conservation (Amendment) Act, 2022 although well-intentioned suffers from a range of limitations and gaps that can prove to be counterproductive in India's goal of reaching net zero by 2070. The various amendments to the principal Act, being the Energy Conservation Act, 2001, may not, in its current form, spur India's transition to non-fossil fuel dependence and would need further legislation to bring out its effect of establishing a carbon trading scheme within the country. The various limitations of the Amendment Act are listed below:

Firstly, when the Energy Conservation (Amendment) Bill, 2022 was debated in the Parliament, several points were raised pertaining to its validity and effect. Some members of parliament critiqued the Bill suggesting that the amendments are ultra vires of the EC Act which has a completely different objective and scope. [27] Some members have also suggested that the Ministry of Power is not the appropriate statutory body to roll out the carbon trading scheme, but instead it should be under the purview of the Ministry of Environment, Forest and Climate Change as decarbonisation as a concept is beyond the energy and power sector. [28] Further, it was suggested that the role of State and the level of coordination with the Centre is not adequately mentioned in the Amendment Act especially in its representation in the Bureau and the right to register its opinion. [29]

Secondly, the Amendment Act could have been introduced as a separate legislation instead of extensively chopping and changing existing Act that has a different objective and purpose. The Amendment Act seems to be a work in progress as insufficient operative clauses were inserted or substituted to develop a carbon trading market apart from the power to award carbon credit certificates. In addition, the pricing of carbon, verification, and enforcement for the award of carbon certificates is not mentioned adequately with clarity in the Amendment Act. The definition of what constitutes "non-fossil fuel energy" is not defined in the Amendment Act. With alternative energy sources still not properly developed in the country, such a strong mandate as envisaged by the Amendment Act can prove to be its biggest hurdle. [30]

Thirdly, with insertion and substitution to the definition of the word "building", "energy conservation building code", and bringing 'vehicles' and 'vessels' within its ambit, the onus of decarbonisation has shifted to the consumers, which will have ramifications to prices in the real estate and logistics sector. [31] The average consumer may not be aware or prepared for the ramification of the Amendment Act. Moreover, with a low rate of penalties for violation, some people may opt to pay the penalty instead of making required changes to transition to non-fossil fuel energy sources based on a cost and benefit analysis. [32]

Fourthly, the government already has a Perform Achieve and Trade (PAT) scheme under which Renewable Energy Certificates in energy-intensive industries are issued by the Ministry of Power. The link between the PAT scheme and the Carbon Credit Certificate is not mentioned in the Amendment Act, and there are overlaps between the issuances of such certifications.[33] The PAT scheme has not been a complete success as it has not transformed dependence on fossil fuel for energy requirements. Carbon markets as seen in other countries, may not be the best solution for rapid decarbonisation, as like any market instrument, is subject to crisis and periods of boom and bust. The Amendment Act tries to develop a domestic carbon trading mechanism but does not mention the effect of exporting carbon credits abroad on the domestic market.

Conclusion

The Energy Conservation (Amendment) Act, 2022 through changes to the principal Act, can only be described as a baby step towards a transition to non-fossil fuel dependence with a lack of clarity and conflicting operating principles.

The Amendment Act requires several supplementary legislation to meaningfully develop a carbon trading market in the country to drive it forward towards net zero.

The speed at which legislations are taking place, points to the lack of urgency shown by the government in meeting its climate commitments. Recent reports suggest that the effects of climate change are happening faster than first thought, and targets set in the Paris Agreement may be breached sooner rather than later. [34]

The Government of India should be in tune with the changing dynamics of climate change and develop meaningful law and policy that can give a fighting chance to deal with the biggest environmental crisis of this century. Law and policy developed in this current decade is crucial to ensure safe, healthy environment for future generations on this planet, and there is a need to push the narrative both internationally and domestically towards a greener future more quickly. The commitments of net zero from developed countries and even developing countries need to be preponed to ensure that the planet is sustainable and habitable for the upcoming generation. The Government should focus on efficient legislation instead of making incremental piecemeal changes to existing laws if the end goal is towards developing carbon trading markets. The Amendment Act shows positive intentions of transforming India's fossil-fuel dependence, however, the lack of clarity in its underlying insertion and substitution points out to various gaps and limitations in light of achieving net zero by 2070.

End-Notes:

[1] The term ‘Anthropocene’ is often used to describe a geological epoch where humans have become a dominant force in shaping Earth’s bio-physical composition and processes, leading to mass environmental degradation.

[2] The Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 1992, Volume I, Resolutions Adopted by the conference, United Nation, New York. Doc: A/RES/44/228; UNCED, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N92/836/55/PDF/N9283655.pdf?OpenElement>.

[3] United Nations Framework Convention for Climate Change 1992, https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

[4] UNFCCC, Article 2.

[5] Ibid, UNFCCC Article 17.

[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN, 1997; Kyoto Protocol, <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

[7] Paris Agreement, UN, 2015; https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[8] National Statement by Prime Minister Shri Narendra Modi at COP26 Summit in Glasgow, PMO Office dated 10 November 2022; <https://pib.gov.in/PressReleseDetail.aspx?PRID=1768712>.

[9] Paris Agreement, Article 2.

[10] The Energy Conservation (Amendment) Act, 2022; The Energy Conservation Act, 2001.

[11] Rajya Sabha passes ‘futuristic’ Energy Conservation Bill, The Hindu Bureau, 12 Dec 2022; <https://www.thehindu.com/news/national/parliament-passes-energy-conservation-amendment-bill-2022/article66254794.ece>.

[12] Supra note 9.

[13] Energy Conservation (Amendment) Bill envisages provision to develop India’s own carbon trading market, Ministry of Power, 9 Feb 2023; <https://pib.gov.in/PressReleasePage.aspx?PRID=1897773>.

[14] Ibid section 2.

[15] Ibid section 4.

[16] Ibid section 13.

[17] Ibid section 14.

[18] Ibid section 15.

[19] Ibid section 16.

[20] Ibid section 26.

[21] Ibid section 27.

[22] Ibid section 28.

[23] Ibid section 52.

[24] Ibid section 56.

[25] Ibid section 57.

[26] Ibid section 58.

[27] Supra note 10.

[28] Energy Conservation (Amendment) Bill, PRS Legislative Research, https://prsindia.org/billtrack/the-energy-conservation-amendment-bill-2022#_edn18.

[29] Supra note 10.

[30] Energy Conservation Bill 2022: Implications and next steps, The Economic Times, 28 Dec 2022; <https://economictimes.indiatimes.com/industry/renewables/energy-conservation-bill-2022-implications-and-next-steps/articleshow/96562493.cms?from=mdr>.

[31] Supra note 13.

[32] Supra note 19.

[33] PAT Scheme, Bureau of Energy Efficiency, Ministry of Power, <https://beeindia.gov.in/sites/default/files/PAT%20PPT%20%28Overview%29%20Regional%20Workshops.pdf>.

[34] Global warming set to break key 1.5C limit for first time, Matt McGrath, BBC, 17 May 2023, <https://www.bbc.com/news/science-environment-65602293>; The uncomfortable reality of life on Earth after we breach 1.5°C, Madeleine Cuff, New Scientist, 7 June 2023, <https://www.newscientist.com/article/mg25834420-100-the-uncomfortable-reality-of-life-on-earth-after-we-breach-1-5c/>; Scientists ran a health check on the Earth — and the results are worrying, Victoria Bisset & Ellen Francis, Washington Post, 2 June 2023, <https://www.washingtonpost.com/science/2023/06/02/earth-commission-climate-pollution-limits/>.

About the Author

Mr Aditya Singh is an up and coming lawyer working in the General Corporate Practice Team at Legacy Law Offices LLP. With a rich background of working for a variety of prominent clients during his previous association with Cyril Amarchand Mangaldas. Aditya completed his Bachelor in Laws from the University of Warwick in the year 2018 and has even attained a Master in Laws from the Jindal Global Law School.

Greetings

Legacy Law Offices LLP extends its warm greetings for this Eid-Al-Adha, to all its readers.



Eid Al-Adha Mubarak!

June 28, 2023

Celebrating New Achievements

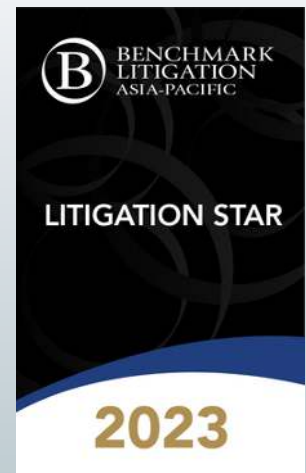
In June 2023, our Managing Partner, Mr Gagan Anand, expressed his pleasure in getting an opportunity to attend the Course on 'Leadership in Law Firms' at Harvard Law School.

During the course, he not only had the opportunity to enhance his law firm management skills but to also interact with other visionaries and leaders from Law Firms around the World.

Legacy Law Offices LLP has been pleased to have attained recognition as a **"Recommended Firm"** in the Benchmark Litigation rankings for the third consecutive year. The practice areas, which have been ranked in the Directory include the following:

- Construction;
- Labour and Employment; and
- Government and Regulatory.

To further our exhilaration, even Mr Gagan Anand has attained recognition as a **'Litigation Star'** for the second consecutive year, for his contribution to the Construction Law Practice Area.



The Advent of NFTs and the Surrounding Legal Implications

In the year 2009, the world was taken by storm after the launch of 'bitcoin', a currency which could be digitally mined by solving mathematical equations. Bitcoins gradually became the 'go-to' stock, and investment option until certain stringent regulations were introduced by various banking and financial authorities. Alongwith the development of bitcoin, a catalyzing reaction also took place through which various other forms of cryptocurrencies like Ethereum, DogeCoin, PIE, etc and certain other digital investment tokens, which included the 'Non-Fungible Tokens' or NFTs were introduced within the domain.

In layman's terms, NFTs may be defined to be those digital assets, which take the form of pictures, videos or even graphic-interchangeable formats (GIFs) and signify the underlying possession of other physical assets, or a percentage of such physical assets, including monies and paintings.

Available only through digital ledger technologies (DLT), NFTs provided for verifiable digital records of the possession of various forms of artistic collectables, wherein these NFTs were considered unique and non-transferable.

Due to such a steep growth curve posed by these tokens, a dire need arose, for legislative and regulatory updates at a global level, in order to protect the rights of the buyers and sellers, by preventing the anticipated misuse of technology and breach of trust.

Ownership Explained

As aforementioned, NFTs are digitally curated assets based on blockchain technology. The actual value of these tokens is derived from the metadata which describes the underlying physical assets, against which the NFT is issued.

Within such metadata, the NFTs also include a 'smart contract' which provides for the extent to which the owner shall have the right over the physical asset, wherein, in a majority of NFT sales, the purchasers are precluded from possessing any physical rights or even intellectual property rights over the actual assets.

Furthermore, while the purchaser of the asset may be entitled to keep the tokens in their digital wallets, they may not be entitled to actually show, promote or further use it in any other form.

These facts thus, make the possession of NFTs curious and worth exploring, while simultaneously giving rise to certain concerns in relation to the legality of such possessions.

Copyright Troubles

Provided by the concept of the tokens and the way in which they are issued, the transfer of copyrights existing in the underlying physical assets is a rare occurrence. However, in the cases where such transfer does take place, the only method of enlisting the terms and conditions of the assignment is through their addition in the form of 'smart contracts' which are embedded in the metadata of the NFTs.

This method of agreement may, however, create an issue for the sale of NFTs in India, where Section 19 of the Indian Copyright Act, 1957 requires the valid assignment of copyright to compulsorily be in writing and signed by the assigner or his duly authorized agent.

Another complication created by smart contracts pertains to the limitation exhibited by the way and the kind of data which may be entered into them. Owing to the unique nature of the NFT coding, the purchasers and the sellers may be unable to include any special or exclusive arrangement or clauses within the contracts, even if the same may lead to a mutual benefit.

Money Laundering

Since its inception, various regulatory agencies have been wary about the use of cryptocurrencies and other digital assets including NFTs, due to their proven accessibility for money laundering and other illegal utilization.

This caution is also drawn from the absolute lack of a verifiable source of popular cryptocurrencies like the bitcoin itself and their added ability to be used to purchase unlawful items, the least dangerous of which are narcotic and psychotropic substances.

In terms of NFTs, the fear is derived from the factum of physical artefacts being used as devices for laundering money. Owing to this, tokens which exhibit the features of having a completely digital presence, being purchased by way of other cryptocurrencies, and existing as a code, can only act as an enabler for the malefactors to hide money from the authorities.

National Regulations and Legal Decisions

In the year 2022, the Government of India enforced the Finance Act, by way of which Section 115BBH was inserted in the Income Tax Act, 1961. This Section sought to impose a taxable liability over the transfer of 'virtual digital assets' (VAD) at the rate of 30%.

Furthermore, under Section 47A, VADs were defined to include any information/code/numbers/ tokens, "generated through cryptographic means or otherwise, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions, as a store of value or a unit of account including its use in any financial transaction or investment."

Through clause (b) of this Section, the authorities had also included NFTs or any other tokens of a 'similar nature' within the definition of VADs, thus, making all such cryptocurrencies and NFTs taxable under the law.

Other than such addition, even the Reserve Bank of India issued a circular, restraining Banks and other Financial Institutions from dealing in cryptocurrencies. Such blanket ban was, however, removed in the case of Internet and Mobile Association of India vs. Research Bank of India, when the Hon'ble Supreme Court, while setting the order aside, held that,

“There is still a whole world outside of these new obliged entities under AMLD5. It goes without saying that this may sound particularly interesting for criminals seeking for new ways to launder money, finance terrorists or evade taxes. If a legislator does not want to outright ban these cryptocurrencies - and for not imposing such a ban a good argument is that cash is also fully anonymous and lawful - the only way to find out who uses them is to require users to register mandatorily. For reasons of proportionality, it could then be considered to make the registration subject to a materiality threshold.”

It is pertinent to mention that other than the aforementioned tax legislation, NFTs are yet to be included within the ambit of the Indian Intellectual Property Domain.

Envisioning the Future – Conclusion

The world is going through a drastic transition from a substantial physical presence to a rather virtual presence, whether in terms of payment methods or in terms of asset possessions.

Following the advent of NFTs, we are also observing a gradual development of the Metaverse, which may completely change the way in which human beings interact with their surroundings. Owing to such an absolute transition to the world of virtual reality, it is needless to mention that the money exchanges and other ways will also require needful updates. Such updates may only be possible through the acceptance, albeit regulated, of NFTs and cryptocurrencies.

While it is undisputed that these tokens pose a probable misuse, however, such misuse cannot form the basis of rejecting the concept of NFTs altogether. As held in the case of the Internet and Mobile Association of India, the aforementioned argument is also valid in the case of physical currency.

A calculated step, may however, be taken, by way of bringing relevant amendments to various applicable laws, including the Copyrights Act and the Information Technology Act, 2005, through which a better regulation of the use of NFTs may be brought within the nation. Through such measures, India may be able to succeed in reducing the anticipated financial frauds and increasing the chances of attaining the 'Digital Bharat' dream.

About the Author

Ms Vidhi Koolwal, Senior Associate at Legacy Law Office LLP is a widely experienced advocate by profession.

She is a highly organized and proactive member with a team-oriented mentality and has written/co-authored some of the best articles and write-ups of the Firm. She is an integral part of the procurement team and completed her Bachelor in Laws in the year 2019.

Celebrating New Achievements

In May 2023, the team of Lawyers of Legacy Law Offices LLP, led by Ms Shalini Munjal, our Co-Managing Partner, acted as Legal Advisors and successfully provided legal due diligence services to a leading company, for facilitating their **"Initial Public Offering"** (IPO). This marks an important milestone for the Firm. We congratulate all the Team Members on this achievement!

In the month of March 2023, Mr Gagan Anand authored an article titled 'The Revolutionary Chat GPT and Its Legal Policies', where he sought to cover the various intricacies surrounding the use of this technology. Legacy Law Offices LLP takes pride in announcing that this article received the tag of the 'Most Read Article' of the month, owing to which, the Mr Anand received recognition as a 'Thought Leader'.



Proposed Amendments to Current Corporate Social Responsibility (CSR) Laws to Promote Corporate Action towards India's Climate Goals

India has been ranked among the top ten affected countries, vulnerable to extreme climatic events according to the Global Climate Risk Index 2021[1]. One of the reasons for such concerning rankings is the unhinged increase in industrialisation and urbanisation, wherein these have been considered to be substantial contributors to the emission of greenhouse gases.

To achieve and demonstrate international consensus upon unified climate action plans and measures, the United Nations (UN) has repeatedly emphasized upon the consequences of human activities threatening the sustainability of life and the ecosystem in the near future.

Given the projected contribution to climate change and environmental sustainability challenges, the Indian Government has periodically taken initiatives in the form of various policies and actions for promoting climate mitigation measures. Furthermore, the historic Paris Agreement has further encouraged the measures which seek to decrease Greenhouse Gas Emissions and have further proved to be an intrinsic basis for the new net-zero carbon emission goal of the country.

In line with the proposed initiatives, the Climate Change Performance Index 2023 displayed positive results highlighting India amongst the top five countries according to the 2023 rankings. Additionally, in line with the projections made by the United Nations Policy Brief No. 153 [2], India has surpassed China to become the most populous country in the world and the need for a dedicated climate action plan has become the need of the hour. Therefore, consistent efforts are required to balance the growth and ensure environmental sustainability to achieve set goals for greenhouse gas (GHG) emissions, renewable energy use, and mitigate climate change policies.

To inculcate climate change measures and policies in the corporate sphere, the Reserve Bank of India (RBI) recently developed and proposed a one-of-a-kind approach to promote climate change initiatives and activities within the Indian Corporate Social Responsibility (CSR) framework. On May 3, 2023, RBI published the Annual Report on Currency and Finance with the theme, "Towards a Greener Cleaner India". It proposed a well-thought-out strategic roadmap to promote climate improvement initiatives within the ambit of compulsory CSR activities undertaken by corporate entities in India.

The Currency and Finance Report (2023) published by RBI was divided into four chapters showcasing the backdrop and impact of extreme climate change in India. After analysing and examining posed climatic challenges and their consequences on livelihood and sustainability, the RBI report provided a five-fold strategy to promote corporate action and investment in the climate sector through corporate CSR funds in response to the above-posed sustainability challenges.

According to The Companies Act, 2013, any corporate entity or company with a net worth of INR 500 Crores or more, turnover of INR 1000 Crores or more or net profit of INR 5 Crore or more is obligated to allocate 2% of its net profit towards CSR activities. RBI has proposed separate amendments to this statute while keeping a strict focus on Section 135 which governs the CSR activities to promote climate improvement initiatives within the ever-growing corporate sector of India.

The Report emphasized on the need to amend the old CSR policies provided under the aforementioned proviso of the Act and provides recommendations to align the corporate and business strategies with the country's climate goals. With several significant initiatives taken up by companies and corporate entities within the scope of CSR, the Authority intends to encourage the corporate sector to take up similar projects and initiatives within the climate sector of India.

According to the statistics provided by the National CSR Exchange Portal [3], it is estimated that Companies have spent a tremendous amount of INR 1.27 trillion on CSR activities in the last five years. Even though this amount has been utilized by a total of 29 sectors, most of its use has been focused on the healthcare and education sector, while the bare minimum share has been devoted to attaining sustainability. An analysis of the data on the aforementioned CSR Portal also highlighted the concentrated spending of funds in specific parts of India, including a majority of expenditure being restricted to Maharashtra, Gujarat, Tamil Nadu and Karnataka.

In line with this observation, it may be reasonable to state that the primary motive behind RBI's initiative is to suggest amendments to geographically diversify and align corporate action and to promote a more uniform approach towards the achievement of the net-zero carbon emission goal.

Proposed Five-Fold Strategic Amendments

- *Firstly*, due to the concentration of CSR activities and climate change initiatives in certain parts of the country, the Authority intends to obligate corporate entities /companies with large CSR budgets to geographically diversify their CSR spending and activities in different parts of the country.

- *Secondly*, the Authority has proposed to allow companies /corporate entities to pursue or undertake CSR activities in their business operation domains to enable them to employ their natural expertise to deliver CSR activities.
- *Thirdly*, the companies/corporate entities are provided with an indicative list of CSR activities (grouped in specific broad categories) which must be included within the scope/ambit of the necessary CSR activities undertaken within applicable CSR laws in India.
- *Fourthly*, RBI has further proposed to increase the duration of multi-year projects provided within the current framework to enable companies /corporate entities to take up long-term projects, which may require extended CSR funding over a long time.
- *Lastly*, RBI has proposed that the companies/corporate entities must be allowed to use their CSR funds to buy and use climate-friendly technologies and machinery within the ambit of necessary CSR activities.

The proposed amendment has been welcomed by various stakeholders, environmentalists and other civil society organisations, which are actively working to implement and adopt climate change initiatives.

The above RBI initiative will further push corporate action in the climate sector and is likely to achieve greater impactful results.

The following amendment has come in response to the increased demand of shareholders and investors for upholding and promoting environmental sustainability. However, it will be interesting to witness the practical aspect and execution of the proposed changes to the CSR framework and its suitability to the economic condition of India.

End-Notes:

[1] Since the publication of Global Climate Risk Index 2021, no further publication was updated in the year 2022. The Global Climate Risk Index Report 2021 is available on <https://www.germanwatch.org/en/197777> at

[2] Sara Hertog, Patrick Gerland and John Wilmoth, *India overtakes China as the world's most populous country*, FoTW 1, 1 (2023), <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/PB153.pdf>.

[3] NATIONAL CSR EXCHANGE PORTAL, <https://csrxchange.gov.in/> (last visited Jun. 29, 2023).

About the Author

Ms Shraddha Korekar has grown to be an integral part of the Firm. She has been described to be an avid writer and researcher by the Team and has gained a reputation for being a hard worker. She completed her Bachelor in Laws in the year 2022.

Coal India Judgment: A Case Analysis

Introduction

On June 15, 2023, in one of its landmark judgment, the Hon'ble Supreme Court of India held Coal India Limited (CIL) to be governed by the provisions of the Competition Act, 2002 (Competition Act), irrespective of the application of the Coal Mines (Nationalization) Act, 1973 (Nationalization Act).

This judgment gave precedence to the Rule of Harmonious Construction, which presumes that the Legislature, while enacting a law is aware about the existence and applicability of all the previous enactments.

Furthermore, the Hon'ble Court also upheld the recommendations which were given by the Raghavan Committee before the enactment of the Competition Act, wherein it was provided that "State Monopolies must fall in line and operate in the midst of forces of competition"[1].

Thus, by the present decision, the Hon'ble Court has set a new precedent in the way State Undertakings function.

Facts

An Appeal was preferred before the Hon'ble Supreme Court after the Competition Appellate Tribunal upheld the order of the Competition Commission of India (CCI), whereby CIL was held to be liable for abusing its dominant position in the industry.

The ground taken for filing of such an appeal was that the Appellants, being governed by the Nationalization Act, cannot be made subject to the provisions of the Competition Act.

Arguments and Deliberations

The case before the Hon'ble Court posed an important issue, vis-à-vis, whether the Nationalization Act, which contained an exclusivity provision would preclude the applicability of the Competition Act, which was subsequent legislation. Even though the former Act stood repealed in 2007, it was essential to deal with the said issue as the contracts in question, predated the matter at hand.

The Hon'ble Court analysed both the statutes, their objectives behind them as well as their present relevance in the Nation and observed that the Nationalization Act was enacted in an era when coal was considered to be a material resource and formed part of the Essential Commodities Act, 1955, however, post the removal of the resource from the latter enactment, the circumstances had changed.

It was also observed that the case of **Ashoka Smokeless Coal India (P) Ltd. & Ors. vs Union of India & Ors.**[2], which was relied upon, by the Appellants, had been decided prior to such removal, and was, thus, not relevant to their case.

The Relevance of the Competition Act

It was pointed out by the Respondents that the Competition Act was enacted on the basis of the recommendations made by the Raghavan Committee, which was a high-level committee set up by the Government of India.

Within such recommendations, it had been observed that the State Monopolies were not conducive to the best interests of the Nation and should therefore, be disallowed to operate in a state of inefficiency.

On the basis of such recommendations, the Respondents had also contended whether CIL could be justified to supply sub-standard goods merely on the ground of the exclusivity of the Nationalization Act.

The Hon'ble Supreme Court, while answering this issue in the negative, observed that the Competition Act was enacted with the objective of keeping up with the economic development of India and preventing those practices which proved to have an adverse impact on the competition within the markets.

Other than the aforementioned objective, the Court also took note of the three filters, as enshrined under the Competition Act, which sought to establish whether an enterprise could be held to have abused its dominance over the market.

These filters included the following tests:

- Determining the description of the enterprise as under Section 2(h) of the Competition Act;
- Whether such enterprise occupied a dominant position, as under Section 19 (4) of the Act; and
- Whether such an enterprise abused the dominant position.

In case an enterprise fell well within the ambit of all such filters, it could be held liable under the Act. Furthermore, another noteworthy observation was made to the effect that the determination over such tests were conducted by a group of subject matter experts and was thus difficult to be faulted.

The Decision and The Analysis

On account of such observations, the Hon'ble Supreme Court primarily held that the Appellant Body was merely a Government Company and not a Department of the Government, thus it could not fall out of the ambit of the definition of an 'enterprise' as provided under the Competition Act. Upon conducting a further study of the provisions, the Hon'ble Court also found the Appellant Body, being liable for abusing their dominance and held that,

“The novel idea, which permeates the (Competition) Act, would stand frustrated, in fact, if State monopolies, Government Companies and Public Sector Units are left free to contravene the Act.”

The Analysis

Both the Nationalization and the Competition Acts were enacted for achieving the goals enshrined under the Constitution of India and to attain the 'common good'. While the former statute sought to achieve an adequate distribution of a material resource, the latter one sought to make such a distributor, accountable. This 'common good' like the law of the state, is dynamic in nature, and thus, evolved with time.

Thus the observation of the Hon'ble Court, to the effect that,

“Each generation of people have the right as also the duty to revisit economic policies which found favour with the past. The present cannot put posterity in chains. Equally, the past cannot hold the present hostage to ideas which would then degenerate into what was once original and suitable into dogma which no longer can serve the people.”

was not only justifiable but meant to uphold harmonious applicability of such 'common good', while aptly upholding the fundamental objective of the Competition Act in relation to the economic development of the nation.

End-Notes:

[1] Coal India Ltd vs. Competition Commission of India, 2023 SCC OnLine SC 740.

[2] Ashoka Smokeless Coal India (P) Ltd. & Ors. vs Union of India & Ors, (2007) 2 SCC 640.

The article has been contributed by Ms. Vidhi Koolwal

A Glimpse of the Recent Landmark Judgments

- **Tata Motors Limited vs. The Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & Ors. - Hon'ble Supreme Court of India**

Facts: The Petition was filed in relation to a tender floated by Respondent No. 1 where certain conditions were imposed in relation to the operation and maintenance of the Electric Buses. It was alleged that certain points raised by the Petitioner during the pre-bid meeting were not considered by Respondent no. 1 and when a slightly deviated bid was submitted, the Petitioner was declared to be 'technically non-responsive.'

Judgment: The Hon'ble Court answered the question in the negative. It was observed that the tender had already been awarded to another technically qualified tender, whereafter the latter had even submitted a performance guarantee.

- **Tomorrow Sales Agency Private Limited vs. SBS Holdings, Inc. & Ors. - Hon'ble High Court of Delhi**

Facts: A Petition under Section 37 of the Arbitration and Conciliation Act, 1996 was preferred against the impugned order of the Single Judge Bench, whereby the Petitioner and the Respondents 2 to 5 were directed to disclose their fixed assets and bank accounts by way of an affidavit alongwith the credit balance held by them in India alongwith other jurisdictions. The Petitioner alleged that it was not a party to the arbitration and had merely funded the claimants to pursue the arbitration proceedings.

Judgment: The Hon'ble High Court of Delhi answered in the negative. It was observed that consent is the cornerstone of arbitration and that third-party funding is essential to ensure access to justice. However, such third-party funders cannot be mulcted with liability, which has not been undertaken by them.

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