ELR® अपडेट

ELR India Update™

Volume 1, Issue 1 | Environmental Law Institute with Kochhar & Co. | January-March 2010

Green Courts in India: The Proposed Bill

The government of India recently introduced the National Green Tribunal Bill 2009 in the Lok Sabha[1] in the hopes of fulfilling the recognized need for specialized environmental courts in India. It is also hoped that efforts to establish this specialized court system will not meet the fate of earlier, similar attempts to streamline the environmental judicial system in the country.

As early as 1986, the Supreme Court advocated for establishment of specialized environmental courts, keeping in view the expertise required in adjudication of environmental matters.[2] Three subsequent judgments of the Supreme Court reiterated this position.[3] The Supreme Court's observations were part of the judicial activism influencing growth of environmental governance in light of development needs taking place around that time. The elevation of "right to environment" to the status of "right to life" under Article 21 of the Constitution by the courts provided the much-needed impetus to progressive development of environmental jurisprudence in the country. Environmental jurisprudence was further strengthened by relaxation of the locus standi principle and application of globally accepted environmental law principles such as polluter-pays, sustainable development, and absolute liability by the courts. In light of the above and increasing environment-related litigation, the Supreme Court argued for establishing specialized environmental courts.

The Law Commission of India (LCI) undertook a detailed study on setting up specialized environmental courts that echoed the views of the Supreme Court.[4] However, it wasn't until 2009 that a formal draft of the legislation, the National Green Tribunal Bill, 2009, was introduced. The bill evoked mixed reactions. Although the concept of a green tribunal was welcomed, concerns were raised regarding efficacy of a single tribunal for the entire country, its composition, and its impact on environmental activism. The Union Cabinet addressed some issues in amendments approved on December 3, 2009, but many issues remain, including concerns that the bill, in its present form, may stifle environmental activism.

The proposed tribunal would have jurisdiction over civil matters only. These would include disputes involving a substantial question relating to the environment where such question arises out of the implementation of the environmental laws enumerated under the bill. The appellate jurisdiction of the tribunal primarily involves hearing appeals from the decisions of the State Pollution Control Boards (SPCBs). Currently, where a provision for appeal against such orders is provided for, such appeals lie before the concerned state government. The tribunal would not have jurisdiction on environmental criminal offenses; such offenses would continue to be dealt with by the regular criminal judicial system.

The National Green Tribunal, the National Environment Tribunal, and the National Environmental Appellate Authority

The bill must be viewed in the backdrop of its predecessors: the National Environment Tribunal (NET) and the National Environmental Appellate Authority (NEAA), which remained more or less non-functional on account of laxity on the part of the government. Whereas the NET and NEAA were created to discharge only limited functions, under the bill, the National Green Tribunal will address a wide range of environmental concerns.

The sprawling intention of the legislature is evident from the preamble of the bill:

> a bill to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection

Continued on page 3

1 The Lok Sabha (also known as the House of the People, by the Constitution) is the directly elected lower house of the Parliament of India.
2 M.C. Mehta vs. Union of India: 1986 (2) SCC 176.
3 Indian Council for Environmental-Legal Action v. Union of India: 1996(3) SCC 212. A.P. Pollution Control Board v. M.V. Nayudu: 1999 (2) SCC 718. A.P. Pollution Control Board v. M.V. Nayudu II: 2001(2) SCC 62.
4 186th Report of the Law Commission of India, *Proposal to Constitute Environment Courts* (Sept. 23, 2003).

About ELR India Update

ELR India Update is a quarterly newsletter analyzing the most relevant developments in Indian environmental law for international environmental lawyers, managers, policymakers, and thought leaders.

The goal of this service from the Environmental Law Institute is to report on these developments and analyze their implications. The *Update* also identifies and analyzes potential future developments for readers, so that they have advanced warning of risks and opportunities. The service covers environmental legal and policy developments at the national and state level regarding climate and energy policy, manufacturing, importation and exportation, natural resources, product safety, worker safety, and other major environmental issues such as water quality and supply.

We are very fortunate that *ELR India Update* is written by the attorneys at Kochhar & Co., a highly respected firm with significant environmental expertise and a thorough understanding of the ramifications of legal and policy developments. *ELR India Update* is edited by ELR attorneys in Washington, D.C.

ELI has a long history of working with partners in India to advance environmental law and policy. We hope this new partnership provides a service that meets your needs and expectations. We encourage any and all constructive feedback by contacting *ELR*'s Editor-in-Chief, Scott Schang, at schang@eli.org or 202-939-3865.

Kochhar & Co.

Kochhar & Co is one of the leading and largest law firms in India having full service offices in six prominent Indian cities—New Delhi, Gurgaon, Hyderabad, Bangalore, Chennai, and Mumbai—and a presence in Atlanta, Georgia, and in Singapore.

Kochhar & Co. is one of the very few firms in India having a specialized environmental law practice. The firm's experience ranges from active litigation, legal research and consultancy to opinion work. Kochar & Co. provides regulatory compliance advice and assistance to its clients on a wide gamut of environmental issues, including environmental impact assessment, management of hazardous waste, chemicals, and hazardous micro-organisms, solid waste management, forests, biodiversity, and clean development mechanism. The firm is also active in environmental litigation and in conducting due diligence on industries, processes, and operations from an environmental law perspective. For further information, please contact:

Mr. K.V. Singh, Partner
Kochhar & Co., Advocates & Legal Consultants
kv.singh@kochhar.com
Mobile: +91-9811334420

Ms. Shephali Mehra Birdi, Associate
Kochhar & Co., Advocates & Legal Consultants
shephali.mehra@kochhar.com
Mobile: +91-9958891038

ENVIRONMENTAL LAW • INSTITUTE®
www.eli.org

ELR Staff
Leslie Carothers, *Publisher*
Scott Schang, *Editor-in-Chief*
Rachel Jean-Baptiste, *Managing Editor*
Erin Webreck, *Associate Editor*
Desktop Publisher, *William J. Straub*

Subscription: $200 annually.
Contact orders@eli.org or 1-800-433-5120.
2000 L Street NW, Suite 620, Washington, D.C. 20036
www.eli.org

ISSN 2153-1420 (print) ISSN 2153-1439 (online)

ELR Update India is published quarterly by the Environmental Law Institute. ELI is a nationally recognized center for research and education on environmental policy, law, and management. An independent, tax-exempt, and nonpartisan institution, ELI provides information, research, and policy analysis to a broad constituency of professionals in law, government, finance, business, advocacy organizations, and academia.

Continued from page 1

and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

Needless to say, the National Green Tribunal must not end up being another NET or NEAA. In the words of LCI, "these two national environmental tribunals are today unfortunately non-functional. One had only limited jurisdiction to award compensation and never actually came into existence. The other came into existence but after the term of the first chairman ended, none has been appointed." Despite their limited jurisdiction and functions, the NET and the NEAA may have yielded the desired results had the government been serious about them. The NET was never constituted and, thus, remained a paper tiger, whereas the NEAA was a victim of government apathy in failing to appoint the requisite number of judicial and technical members even after a lapse of 12 years.

The possibility that the tribunal may suffer the same fate as the NET and the NEAA cannot be altogether rejected. The amended bill provides for the tribunal in each state as well as at the center. It is not clear whether state governments or the central government will fill the state tribunal positions, as the amended bill is not publicly available. Thus, some states may suffer if the authority to constitute the tribunal at the state level is vested in the state government. Another factor to consider is that no time limit has been prescribed under the bill for constituting the tribunal(s). Further, though the government has agreed to ensure a balance between expert members and judicial members, the exact number of such members is yet to be decided. Thus, it is critical that the government does not make the same mistakes regarding this bill that were made in the case of the NET and the NEAA.

The Brighter Side of the Green Tribunal Bill

The bill is surely a sign that things are finally moving in the right direction. The tribunals are expected to act as fast-track courts for speedy disposal of environment-related civil cases. The tribunals will adjudicate and decide all civil cases where substantial questions relating to the environment are involved. "Substantial questions relating to environment" has been defined to mean instances where there is a direct violation of a specific statutory environmental obligation by a person by which: (1) the community at large is affected or likely to be affected by the environmental consequences; (2) the gravity of damage to the environment or property is substantial; or (3) the damage to public health is measurable. It also includes instances where environmental consequences relate to a specific activity or point source of pollution. A "substantial question relating to environment" does not include instances where there is a direct violation of a specific statutory environmental duty by a person if such violation only affects an individual (as opposed to the community at large). The specific statutory duties covered under the bill include duties under the Water Prevention and Control of Pollution Act, 1974 (Water Pollution Act); Air Prevention and Control of Pollution Act, 1981 (Air Pollution Act); Water Prevention and Control of Pollution Cess Act, 1977; Environment Protection Act, 1986 (EPA); Forest Conservation Act, 1980; Public Liability Insurance Act, 1991; and Biological Diversity

National Environment Tribunal Act, 1995

The NET Act was enacted to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of the National Environment Tribunal (NET) for effective and expeditious disposal of cases arising from such accidents, with a view to giving relief and compensation for damages to person, property, and the environment and for matters connected therewith or incidental thereto. The liability under the NET Act is on the basis of "no fault." The NET has not been constituted to date. In the words of LCI, "Such an important environmental tribunal envisaged by Parliament has unfortunately not come into being. In fact, if there is tragedy like the Bhopal one, there is now no Tribunal which would grant damages expeditiously."

The National Environmental Appellate Authority Act, 1997

This Act was enacted to provide for the establishment of a National Environmental Appellate Authority (NEAA) to hear appeals from any person aggrieved by an order granting environmental clearance in the areas in which any industry, process, or operation is not permitted to be carried out or is to be carried out subject to certain safeguards. The NEAA has a very narrow scope of jurisdiction. The NEAA has remained ineffective for all practical purposes. After the completion of the term of the first Chairman, the government did not fill the resulting vacancy. The LCI had recommended repeal of the NET Act and the NEAA Act and transferring the functions of the NET and the NEAA to environmental courts. Standing before such environmental courts, in original jurisdiction, was proposed to be "as wide as it is today before High Court/Supreme Court in the writ jurisdiction in environmental matters."

Supreme Court on Enviornmental Courts

While dealing with a petition filed as a public interest case seeking a prohibition on operation of a hazardous enterprise in a thickly populated area as well as compensation to victims of oleum gas leakage in Delhi from the hazardous enterprise, the Supreme Court observed that matters such as these require expertise at a high level of scientific and technical sophistication.[1] In this matter, the Supreme Court had to appoint several expert committees for necessary technical input and advice to understand the risks associated with carrying on a hazardous industrial activity in a thickly populated area. In view of the complexities involved, the Supreme Court observed that "… we would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up environment courts on the regional basis …" Thereafter, in subsequent judgments,[2] the Supreme Court reiterated this position. Interestingly, in *Indian Council for Enviromental Legal Action v. Union of India*,[3] the Supreme Court emphasized the need to vest such courts with criminal jurisdiction.

1 M.C. Mehta vs. Union of India: 1986 (2) SCC 176.
2 Indian Council for Environmental-Legal Action v. Union of India: 1996(3) SCC 212; A.P. Pollution Control Board v. M.V. Nayudu: 1999 (2) SCC 718; and A.P. Pollution Control Board v. M.V. Nayudu II: 2001(2) SCC 62.
3 1996(3) SCC 212.

Act, 2002. However, some important environmental legislation has been kept out of the purview of the bill, such as the Indian Forest Act, 1927, and the Wildlife Protection Act, 1972.

The tribunal will be empowered to provide relief and compensation to the victims of pollution and other environmental damages and restitution of damaged property or environment. The relief, compensation, and restitution of property and environment would be in addition to the relief payable under the Public Liability Insurance Act, 1991. In cases where the death or injury to any person (other than a workman) or damage to any property or environment has resulted from an accident or the adverse impact of an activity, operation, or process, the person responsible would be liable to pay the amount of compensation as determined by the tribunal.

The appellate jurisdiction of the tribunal extends to matters such as orders relating to stoppage of electricity or water connection or closure, prohibition or regulation of any industry, operation, or process under the EPA, orders of the SPCBs under the Air Act or Water Act, and orders of the National Biodiversity Authority/State Biodiversity Board relating to benefit-sharing.

The tribunal is not bound by the procedure laid down by the Code of Civil Procedure, 1908, or the rules of evidence under the Evidence Act, 1872. The tribunal is only required to follow the principles of natural justice. This would ensure that the matters are disposed of expeditiously without following the typical procedural requirements, which end up prolonging the litigation. On the flip side, principles of natural justice are broad, and the tribunal, in the absence of procedural guidance, may end up passing orders that could be challenged for violating principles of natural justice.

A significant feature of the bill is the quantum of fines prescribed for noncompliance with the orders of the tribunal. The bill would be the first environmental legislation prescribing a penalty of up to Indian Rupees 100 million (approximately USD 2.2 million) in the case of an individual and Indian Rupees 250 million (approximately USD 5.5 million) in the case of a company.

The Issues

A judicial body intending to change the face of environmental litigation in India is expected to be an independent, efficient, and specialized body having a vision of its own. Despite its good intentions, the bill faces significant criticisms.

Standing (Locus-Standi)

There are serious questions on standing as enshrined under the bill. In addition to the state and central government and the aggrieved party, a representative body or organization functioning in the field of environment would be able to file an application for relief. However, such application can only be filed by a representative body or organization "with permission of the Tribunal." No guidance regarding the grounds on which the tribunal may permit or refuse to entertain the application has been provided. The bill also fails to provide for an appellate mechanism in the event the tribunal refuses to entertain the application filed by a representative organization. The legislature's intention is surely regressive, particularly in view of the fact that over the years, the higher judiciary has liberalized the rules of standing, especially in environmental matters. Further, such regressive measures would not only stifle the civil society from raising critical environmental concerns

but may also make the tribunal redundant, as the regular courts could then be forced to hear such matters.

Independence of Judicial Bodies

Efficacy of any judicial body can be judged from the independence afforded to it, more so on account of clear separation of powers between the executive, legislature, and judiciary as provided under the Constitution of India. This is particularly critical in view of India's experience with the NET and the NEAA. One reason why these authorities could not reach their potential is because of excessive dependence on the executive. However, despite the lessons offered by the past, the same bureaucratic dependence is evident in the bill. The bill not only empowers the executive to appoint all members of the tribunal, but also to formulate rules concerning practices and procedure of the tribunal, including rules as to persons who can appear before the tribunal and procedures for hearing applications and appeals. Further, no guidance has been provided to the government on the principles to be followed while formulating such rules. In fact, the bill does not even specify the minimum number of full-time judicial members and expert members who will form the tribunal; these specifications have been left to the discretion of the government. No time line has been prescribed within which the tribunal is required to be constituted by the government. Thus, the bill fails to provide adequate safeguards to ensure that the executive laxity experienced with the NET and the NEAA will not be repeated.

Composition of the Tribunal

The higher judiciary has repeatedly observed that an expert body should consist of experts in relevant fields rather than bureaucrats. India's experience with similar judicial bodies like the NET and the NEAA, which were comprised of such bureaucrats, has not been encouraging. The bill, nonetheless, banks on bureaucrats. The expert members of the tribunal are required to have "administrative experience of 15 years including experience of five years in dealing with environmental matters in the central or state government or in a reputed national or state level institution." Thus, the bill is contrary to the directions of the courts.

Conclusion

The environmental courts are undoubtedly the need of the hour. India has seen several such attempts in the past, be it the NET or the NEAA. This time around, the government has attempted to recreate environmental courts having judicial powers and functions under various environmental legislation. This would surely be more efficient and effective when compared with multiple bodies with multiple functions. However, the reluctance on the part of the government to create an independent body and vest it with vital powers is evident. It is one thing to ensure accountability in judicial forums by providing adequate safeguards. On the other hand, the bill presents an example where the entire process of justice is sought to be controlled by the government, be it through appointment of members to the tribunal, the composition of the tribunal, the procedure to be followed by the tribunal, or other pertinent aspects. The apprehension is that this body may also result in an institution no more effective than the NET or the NEAA. Nevertheless, the bill has undergone certain positive changes during development and the final draft may turn out to be better than expected.

Hazardous Waste Management and Shipbreaking in India

The Ministry of Environment & Forests' (MoEF's) recent order prohibiting dismantling of a passenger ship from Dubai, the *Platinum II*, at Alang, Gujarat, is perhaps the first shipbreaking case in which the MoEF has taken such a strong and definitive decision. The *Platinum II* allegedly contained highly toxic and radioactive substances, such as asbestos and lead, and had entered India under a falsified flag and registry. Until now, the MoEF had been reluctant to consider concerns arising from the dismantling of ships laden with hazardous or toxic substances in India. But the *Platinum II* decision, based on the precautionary principle, has instilled hope in environmentalists regarding India's environmental governance.

The decision is significant in light of the fact that the shipbreaking industry has been controversial for many years. Despite ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and an explicit Supreme Court order laying down the safety measures to be followed by the shipbreaking industry, India's compliance with such principles has been under close scrutiny.[1] Through this order, the MoEF has set a laudable precedent for the executive branches of the government. Notably, had the MoEF not intervened, the breaking of the *Platinum II* would have not only been in breach of the Basel Convention but also U.S. maritime laws and the Hazardous Waste (Management, Handling and Transboundary Management) Rules, 2008 (Hazardous Waste Rules of 2008).

Platinum II : The Genesis

Shri Gopal Krishna of the Indian Platform on Ship Breaking and Media Reports filed a complaint with the MoEF alleging that the *Platinum II* contained toxic and radioactive substances. In response to this complaint, the MoEF formed a Central Technical Team (Central Team) on October 2, 2009, comprised of technical officials from the Ministry of Steel, the Central Pollution Control Board (CPCB), and the Atomic Energy & Regulatory Board (AERB) to conduct a joint inspection of the *Platinum II*.[2] The Central Team submitted its report to the MoEF on October 26, 2009. Though the Central Team's report did not provide a clear recommendation on whether the dismantling of the *Platinum II* should be permitted or not, it confirmed that radioactive material and hazardous waste were present in the ship's structure.

In the course of their investigation, the MoEF also received information that the *Platinum II* had violated the U.S. Toxic Substances Control Act[3] and that an order had been passed by the U.S. Environment Protection Agency against the owners of the ship.[4] Based on these facts and in keeping with the precautionary principle, the MoEF took a view that granting permission for breaking of the ship would not be advisable. Thus, the MoEF issued an office memorandum on November 9, 2009, prohibiting dismantling of the *Platinum II*.[5] The MoEF also observed that there were allegations that the *Platinum II* had been brought into India with a falsified flag and registry. The Central Team noted that the *Platinum II* did not have any national flag, though the U.S. flag was found painted on its chimney. Though the *Platinum II* was of American origin, it was last registered at Republic of Kiribati in September 2009, and its last port was Dubai. Accordingly, the Gujarat Maritime Board (GMB) was directed to investigate the matter further.

Shipbreaking in India: A Controversial Past

In India, shipbreaking grew into a full-fledged industry by 1979 when the government of India recognized it as a manufacturing industry.[6] Shipbreaking activities are carried out on various coasts of India, particularly at Alang-Sosiya (Gujarat) and Kakinada (Andhra Pradesh). The Alang-Sosiya Ship Breaking Yard, situated near Bhavnagar in Gujarat, is one of the largest shipbreaking yards in the world. There are almost 173 ports at the yard to carry out shipbreaking activities. A total of 4,451 ships have been dismantled at this shipyard from 1982 until the end of April 2008, representing a total of 31,958,225 light displacement tons (LDT) of material.[7]

The reckless dismantling of ships on Indian coasts caught the world's attention when three different ships—the *Riky*,[8]

1 Research Foundation for Science Technology National Resource Policy vs. Union of India & Anr. (With SLP (C) No. 16175/1997 & C.A. No. 7660/1997) order dated Oct. 14, 2003.

2 Office Memorandum No. 29-3/2009-HSMD, dated Oct. 16, 2009.

3 15 U.S.C. §§2601-2692.

4 Office Memorandum No. 29-3/2009 dated Nov. 9, 2009, issued by HSMD, MoEF, Government of India.

5 *Id.*

6 Gujarat Maritime Board Website, http://www.gmbports.org/alangship.htm.

7 *Id.*

8 *Riky* arrived for scrapping at Alang on April 23, 2005, from Denmark. Connie Hedegaard, Denmark's environment minister, had already alerted the government of India about the illegal movement of this asbestos-laden ship. The government of India determined that the ship could not be classified as "waste" within the scope of Art 2.1 of the Basel Convention. The MoEF was also of the view that the ship did not contain any objectionable material and has obtained all necessary permissions for breaking in India. The decision of the government was challenged in the Supreme Court of India via a public interest action. However, on June 2, 2005, the Supreme Court Monitoring Committee (SCMC) on Hazardous Waste permitted the dismantling of *Riky* subject to fulfillment of certain conditions.

Shipbreaking Under the Basel Convention

The Basel Convention is the most comprehensive global agreement on issues concerning hazardous and other toxic wastes. The Basel Convention was adopted in 1989 at Basel, Switzerland, and came into full force on May 5, 1992. As of today, the Basel Convention has been ratified by 172 countries. India ratified the Basel Convention on July 24, 1992. In 1994, a coalition of developing countries and countries in Eastern and Western Europe passed by consensus what has come to be known as the Basel Ban. The Basel Ban decision effectively banned as of January 1, 1998, all forms of hazardous waste exports from 29 industrialized countries of the Organization of Economic Cooperation and Development (OECD) to all non-OECD countries. Subsequently, in 1995, an amendment was made to the Basel Convention to ban exports from the OECD, the European Union, and Liechtenstein to other countries.

The Basel Convention also applies to the transboundary movement of ships destined for final disposal or recycling when they contain materials defined as hazardous waste under the Basel Convention. The Basel Convention imposes obligations on all the Parties to prevent the movement and disposal of these ships as hazardous waste in contravention of the Basel Convention.

The Basel Convention ensures that Parties take responsibility for their own hazardous waste, minimize the generation of such waste, establish hazardous waste disposal facilities, and ensure that such waste is only transported to another country when such transportation does not pose any danger to human health or the environment.

Furthermore, the Basel Convention invokes the concept of prior informed consent. The Basel Convention recognizes the sovereign rights of nations to regulate entry of foreign hazardous waste into their territory, including imposing a complete moratorium on import if the importing country believes that the proposed import could pose a threat to the environment or human health or that the waste in question will not be handled in an environmentally sound manner. The importing country may also require the importer to take appropriate safeguards during transboundary movement.

the *Le Clemenceau*,[9] and the *Blue Lady*[10]—encountered complications as they were headed toward Alang for dismantling. While *Clemenceau* was eventually recalled by the French government when denied access by the Supreme Court of India, the *Blue Lady* and the *Riky* were permitted by the Supreme Court to be scrapped at Alang, provided strict safety measures were adopted to ensure workers' safety. The case of *Riky* highlighted concerns about India's approach toward shipbreaking as the Indian government ignored the advice from the Danish government, which indicated that the ship was laden with hazardous materials. Further, the government of India also argued that it had sufficient infrastructure to ensure environmentally sound dismantling of the ship in question. In the case of the *Blue Lady*, the decision of the Supreme Court was based entirely on the report from a technical committee comprised of members of the MoEF, CPCB, and the GMB, who were the respondents in the case.

Indian Hazardous Waste Management Regime and Shipbreaking

The aforementioned controversies regarding dismantling of ships at Alang arose not because of a lack of regulatory regime, but due to a lack of enforcement by the government. The shipbreaking industry at Alang provides employment to a large number of people, and the initial reaction of the government, when the concerns were highlighted, was to protect the industry and the workers' livelihoods.

A public interest lawsuit was filed before the Supreme Court of India raising concerns about hazardous waste (mis)management in India that could lead to irreversible damage to the environment as well as public health.[11] Interestingly, the petitioner relied on India's obligations under the Basel Convention as the basis for seeking judicial intervention. One of the issues before the Supreme Court was shipbreaking activities being carried out in the ports of Gujarat, particularly at Alang. In view of the grave environmental and health concerns raised in the petition, the Supreme Court created a High Powered Committee (HPC) to examine various issues, including decontamination of ships before they are exported to India for breaking. Though the Supreme Court did not suggest that the shipbreaking industry should be discontinued altogether, it stressed that the industry is subject to strict regulation.

The Supreme Court observed that since most major shipbreaking activity in India occurs at Alang, in the state of Gujarat, GMB and the Gujarat State Pollution Control Boards (GSPCB) should take responsibility for efficient handling and management of such activities.

The Supreme Court accepted HPC's recommendations that:

9 *Clemenceau* was a famous French warship. On December 31, 2005, *Clemenceau*, laden with toxins such as asbestos, PCBs, lead, mercury, and other toxic chemicals, left the French port of Toulon to be dismantled in Alang. However, in 2006, the Supreme Court denied access, as this was in violation of the Basel Convention.

10 *Blue Lady* was a Norwegian ship destined for scrapping at Alang. The ship was alleged to be laden with highly toxic materials. However, in September 2007, the Supreme Court permitted dismantling of *Blue Lady* at Alang.

11 Research Foundation for Science Technology National Resource Policy v. UoI (Writ Petition No. 657 of 1995).

(1) Before a ship arrives in a port, it should have proper consent from the concerned authority or the state maritime board, stating that it does not contain any hazardous waste or radioactive substances.
(2) The ship should be properly decontaminated by the ship owner prior to the breaking. This should be ensured by the State Pollution Control Boards (SPCBs).
(3) Disposal of waste material, e.g., oil, cotton, dead cargo of inorganic material such as hydrated and solidified elements, thermocole pieces, glass wool, rubber, broken tiles, etc., should be undertaken in a proper manner, utilizing effective technologies. Special care must be taken in the handling of asbestos waste, and total quantities of such waste should be made known to the concerned authorities. The GSPCB should authorize appropriate final disposal of asbestos waste.

Connie Hedegaard, the Environment Minister of Denmark, wrote to A. Raja, then-Environment Minister of India, on April 15, 2005:

"I write to you in a matter of great concern for me as Minister for the environment in Denmark—the illegal traffic of hazardous substances in ships. . . . Kong Frederik IX . . . left Denmark on 16 March 2005, allegedly to be put in service in the Middle East as a cargo ship. The ship is now transiting in the Suez, and it is on its way to the Red Sea. Several independent sources of information claim that the ship is now bound for the West-Indian coasts to be dismantled and it could arrive in India within a week. Therefore the information given by owners etc. could be false. … I believe our interests are joint - and I call on you to co-operate in this case by denying the ship to be dismantled in India - and refer the ship to return to Denmark to be stripped of the hazardous waste."

Responding to Hedegaard on April 28, 2005, Mr. A. Raja, the then-Environment Minister of India wrote:

"As you are aware India is a party to the Basel Convention since 1992 and has strengthened the national legislation Hazardous Wastes management notified in 1989 to ensure compliance of our obligations under the Convention. We have determined that the ship cannot be classified as "Wastes" within the scope of Act 2.1 of the Basel Convention."

Raja noted that a ship sailing under its own power is not "waste."

Source: Greenpeace, Denmark Asks India to Return Illegal Toxic Ship "Kong Frederik IX," *at* http://www.greenpeaceweb.org/shipbreak/news105.asp (last visited Jan. 21, 2010).

The Court categorically pointed out that the shipbreaking industry should be brought within the existing hazardous waste regulations. The court mandated that the shipbreaking industry should obtain an authorization for handling hazardous waste under the Hazardous Waste (Management and Handling) Rules, 1989 (Hazardous Waste Rules),[12] and such authorization should be granted only if the industry has facilities for disposal of hazardous waste in an environmentally sound manner. The SPCBs were directed to close all units that were not authorized under the Hazardous Waste Rules. The court observed that the plots where no activities are being currently conducted should not be allowed to commence any fresh shipbreaking activity without necessary authorization.

The Hazardous Waste Rules of 2008 require that industries or operations involved in handling, generation, collection, storage, use, destruction, or conversion of hazardous waste should obtain prior authorization from the concerned SPCB. Further, the import of ships containing hazardous wastes would also require prior permission from the SPCB. It is pertinent to note that the Hazardous Waste Rules of 2008 specifically require prior informed consent of the country the hazardous waste is imported into or exported from. There are, however, certain hazardous waste categories for which such prior informed consent is not required. Regardless, whether prior informed consent is required or not, permission from the MoEF is required for importing hazardous waste into India.

The state of Gujarat has also framed the Gujarat Maritime Board (Conditions and Procedures for Granting Permission for Utilizing Ship Recycling Plots) Regulations, 2006, under the Gujarat Maritime Board Act of 1981, which provide for the establishment, operation, and management of ship recycling plots at the ports of Gujarat.

The CPCB has also framed Environmental Guidelines for the Ship-Breaking Industry. The guidelines lay down measures for handling hazardous solid waste, air pollution, water pollution, noise pollution, and occupational health and safety.

Conclusion

It is not the lack of regulations that result in cases such as *Blue Lady* and *Riky*, but the reluctance of the government to enforce such regulations. This reluctance must be seen from the government's perspective of wanting to protect industry and the livelihood of workers employed in such

12 Hazardous Waste (Management and Handling) Rules, 1989, have been superseded by the Hazardous Waste (Management, Handling and Transboundary Management) Rules, 2008.

industry as well as the dismal infrastructure available in the country for hazardous waste treatment and disposal. However, this argument cannot be used as grounds for allowing hazardous and toxic waste to enter India, as it could cause irreparable damage to environment and health. The MoEF's order refusing dismantling of the *Platinum II* at Alang would definitely go a long way in establishing India's seriousness to comply with the obligations under the Basel Convention and to strengthen its national regulatory regime.

Renewable Energy Policy in India: An Overview

The energy sector in India has been witnessing a metamorphosis for more than a decade. Initial government efforts were concentrated in setting up an institutional structure,[1] but in recent years the government has vigorously pursued policies for development of renewable energy sources and their adoption in different sectors. Though the share of renewable energy in the total resource mix is still as small at 7.7%,[2] India has set an ambitious target of increasing the same to 10% by 2012.[3]

With these targets in mind, India is proposing a number of inititatives to be undertaken in the future and has announced incentives for the renewable energy sector.

India's regulatory framework contains various enabling provisions contributing to the growth of renewable energy resources. The Electricity Act, 2003, provides that co-generation and generation of electricity from nonconventional sources are to be promoted by the State Electricity Regulatory Commissions (SERCs) by providing suitable measures for connectivity with the grid. Further, the SERCs have also been advised to specify a certain percentage of power to purchase from renewable energy sources. As per the National Electricity Policy, 2005, such purchase by distribution companies shall be through a competitive bidding process. The policy further stipulates that the share of electricity from nonconventional sources must increase progressively.

The government already provides support to the renewable energy sector through a mix of fiscal and financial incentives. Central Financial Assistance ranging from 30% to 90% of costs of various types of renewable energy systems and devices is provided depending on the technology employed, location, and user category. Fiscal incentives include accelerated depreciation, nil/concessional excise, and customs duties. Further, benefits under §80-1A of the Income Tax Act, 1961, are available to ventures set up to generate and distribute renewable power in India. In addition, most states are awarding preferential tariffs for grid-interactive renewable power.[4]

The renewable energy sector has been granted an exemption from obtaining industrial clearances for setting up operations: no clearance is required from the Central Electricity Authority for generation projects up to Rupees 1 billion [$21 million USD]. For industries engaged in equipment manufacturing for the renewable energy sector, soft loans are available through the Indian Renewable Energy Development Agency. Low import tariffs have been provided for capital equipment and for most of the materials and components.

Sector-specific incentives have also been provided. For example, in the wind energy sector there is a provision for 80% accelerated depreciation in the first year, a 10-year tax holiday, an income tax waiver on power sold to utilities, and favorable tariffs. For small hydro projects, incentives include concessions on customs duty, a 10-year tax holiday, and capital subsidies. For biomass energy, incentives include accelerated depreciation, import duty concessions, excise duty exemption, a 10-year tax holiday, and capital subsidies. With respect to projects relating to energy recovery from municipal waste, the state governments offer provisons for allotment of land on a long-term basis at token lease rent and supply of garbage service free of cost at the project site.

Foreign Direct Investment in the Renewable Energy Sector

Foreign direct investment is permitted subject to the provisions of the Electricity Act, 2003. Foreign investors may set up renewable energy-based Power Generation Projects either alone or in joint venture with an Indian partner. There is a liberalized approval regime to facilitate foreign investment and transfer of technology. Further, the government encourages foreign investors to set up renewable energy-based power generation projects on a "build, own, and operate" basis.

1 In 1981, the government of India set up a Commission for Additional Sources of Energy. In 1982, a separate Department of Non-Conventional Energy Sources was created. In 1992, this department was upgraded into a separate Ministry of Non-Conventional Energy Sources to develop various areas of renewable energy. The ministry was renamed as Ministry of New and Renewable Energy Sources in 2006.

2 As of October 31, 2009. http://www.powermin.nic.in/JSP_SERVLETS/internal.jsp.

3 Integrated Renewable Energy Development Project: India, http://pid.adb.org/pid/TaView.htm?projNo=41613&seqNo=01&typeCd=2.

4 Press Release, Ministry of New and Renewable Energy Resources (Aug. 3, 2009).

Legal and Regulatory Updates

Judgments

Villianur Iyarkkai Padukappu Maiyam v. Union of India
(2009) 7 Supreme Court Cases 561

The project for development and privatization of the Pondicherry port was challenged on many grounds, including on the ground that the project was awarded without obtaining environmental clearance and in violation of the coastal regulation zone (CRZ) notification as it amounted to permitting the contractor to conduct real estate business in the garb of the development of a port.

The Supreme Court found no substance in the appeal and held that it is wholly misconceived and incorrect to contend that environmental clearance must precede the award of the project. The court observed that mere submission of a detailed project report is not the end of any decisionmaking process. The project exceeded Rupees 50 crores (approx. USD 11 million) and, hence, required clearance from the Ministry of Environment & Forests (MoEF). Prior to a grant of clearance by the MoEF, a full environmental impact assessment is to be undertaken, during which concerns raised by the public would have to be heard and taken due note of by the authorities concerned. The implementation of the project as per the detailed project report is therefore dependent on the clearance to be given by the MoEF. The government has authority to stop the project if it violates environmental safeguards. Further, the court observed that the objective of the project was to build the port, which may necessitate provision of certain infrastructural facilities for passengers, shipping crew, port staff, etc., as a part of port development activity. As the plans are submitted for clearance, the competent authority can always decide upon the desirability of the construction that does not fall within the specific development of the port. However, the ancillary activities to be undertaken while developing a port cannot be stopped by merely naming them as real estate business.

Rules and Notifications: Amendments to Environment Protection Rules, 1989

Revised National Ambient Air Quality Standards

The MoEF has revised the national ambient air quality standards (NAAQS) by an amendment to the Environment Protection Rules, 1996 (EPR), notified in the official gazette on November 16, 2009.[1] The NAAQS provide a legal framework for the control of air pollution and the protection of public health.

These revised standards include initiatives that have been developed in consonance with global best practices and in keeping with the latest advancements in technology and research. Suspended particulate matter (SPM) as a parameter has been replaced by fine particulate matter, which is more relevant for public health. Other new parameters, such as ozone, arsenic, nickel, benzene, and benzo(a)pyrene, have been included for the first time under the NAAQS based on government research, World Health Organization guidelines, and European Union limits and practices.

The revised standards have been made applicable uniformly with the only exception that more stringent standards for nitrogen dioxide and sulphur dioxide (SO_2) be provided for in the case of ecologically sensitive areas. The revised standards no longer rely on area classification based on land use; therefore, the industrial areas have to conform to the same standards as residential areas.

The earlier NAAQS were notified by the Central Pollution Control Board in 1994 under the Air (Prevention and Control of Pollution) Act, 1981, for seven parameters: SPM, respirable particulate matter, SO_2, oxides of nitrogen, carbon monoxide, ammonia, and lead. Thereafter, the government again announced NAAQS for six parameters in 1996 under the Environment (Protection) Act, 1986.

Effluent Standards for the Hotel Industry

The MoEF announced effluent standards for the hotel industry via notification G.S.R. 794 (E), dated November 4, 2009. These standards have been inserted into Schedule I to the EPR, which enumerates effluent standards for more than 100 different industries. Separate standards have been prescribed for hotels having more than 20 bedrooms and less than 20 bedrooms, as well as for banquet halls (with minimum floor area of 100 m^2) and restaurants (with a minimum seating capacity of 36).

In addition to laying down effluent standards for pH, grease and oil contents, phosphate, etc., the notification also provides that if effluents are being discharged into municipal sewers leading to a sewage treatment plant, the hotel, restaurant, or banquet hall shall provide a proper oil and grease trap for the effluents arising from its kitchen and laundry and comply with the General Standards for Discharge of Environmental Pollution Part A: Effluents Notified Under Schedule-VI of the EPR.

1 G.S.R. 826 (E).

Draft Plastics (Manufacture, Usage, and Waste Management) Rules, 2009

The government of India (the MoEF) issued the draft Plastics (Manufacture, Usage, and Waste Management) Rules, 2009, under the Environment (Protection) Act, 1986, to replace the existing Recycled Plastics Manufacture and Usage Rules, 1999. The draft rules were published in the official gazette on September 17, 2009, via S.O. 2400 (E), inviting objections and suggestions from the public.

The draft rules permit use of carry bags for purposes other than handling foodstuff. The size and thickness of such carry bags have also been prescribed. The draft rules prohibit manufacture, distribution, use, or sale of non-recyclable plastic materials. Under the draft rules, the State Pollution Control Boards and Pollution Control Committees are proposed to be the enforcement agencies.

Executive Orders, Reports, and Papers

Committee to Examine Dispute/Clarification/Import-Export Applications Relating to Hazardous Waste Management

The MoEF has established a Technical Review Committee to examine the proposals, issues, or any disputes relating to Hazardous Waste Management, including import-export applications and to give appropriate recommendation to the MoEF for consideration.

Discussion Paper on Effective Environmental Governance

The MoEF issued a *Discussion Paper on Effective Environmental Governance* on September 17, 2009. The paper proposes establishment of a National Environment Protection Authority (NEPA) for effective enforcement of environmental laws in India. The paper contemplates the environmental governance structure in India to consist of three different bodies: the MoEF (for legislation and policymaking); NEPA (for regulation, monitoring, and enforcement of environmental laws); and the proposed Green Tribunal (for adjudication of disputes). The paper proposes that the existing SPCBs will continue to play their respective roles in environmental management at the state level; however, some functional adjustments may be required by the Central Pollution Control Board.

Climate Change Agenda for Delhi 2009-2012

The Chief Secretary of State of Delhi prepared a Climate Change Agenda for Delhi 2009-2012. The monograph has been prepared in line with the Prime Minister's National Action Plan for Climate Change. The action points identified by the monograph include enhanced energy efficiency, sustainable habitat, green water, strategic knowledge, and solar mission. Sixty-five important climate change activities have been identified for the city of Delhi to be implemented by the various departments of the Delhi Government between 2009-2012.

India's Key Voluntary Domestic Initiatives Related to Climate Change

The Indian government has been promoting adoption of renewable energy sources across the country for many decades. However, these efforts were undertaken mainly to reduce dependence on fossil fuels. The focus has now shifted to mitigating climate change. In June 2008, the Prime Minister's Office released the National Action Plan on Climate Change (NAPCC) highlighting eight priority national missions: enhanced energy efficiency, sustainable habitat, sustainable agriculture, green India, water mission, national solar mission, national mission for sustaining the Himalayan ecosystem, and national mission on strategic knowledge for climate change.

Out of the aforesaid missions, the government of India released the National Solar Mission and the National Mission on Enhanced Energy Efficiency in August 2009. The National Solar Mission aims to generate 20,000 megawatts of solar power by 2022. The National Mission on Enhanced Energy Efficiency contemplates an innovative "Perform, Achieve, and Trade" mechanism that would assign energy efficiency improvement targets to the country's most energy-intensive industrial units.

While the details of the other missions under the NAPCC are being finalized by the government of India, there are several other initiatives being undertaken and facilitated to address the issue of climate change. The MoEF has issued a summary of 20 such key initiatives that were undertaken by the government. These initiatives are classified under five different sectors: Forestry, Energy and Clean Development Mechanism, Research Agenda, Outreach, and Key Events.

Recognizing the role of forests as a carbon sink, India is promoting afforestation on an unprecedented scale. The need to focus on forestry to mitigate climate change was reflected in the recent statement of the Minister of Environment & Forests, Mr. Jairam Ramesh, during climate negotiations in Copenhagen, where the Minister argued that afforestation should be recognized as a climate change mitigation initiative just as protection of existing forests in Brazil is recognized as an important mitigation initiative.

On energy efficiency, the government has announced a road map for fuel economy standards for all vehicles within the next two years. The government is also in the process of setting up energy efficiency standards for buildings and implementing a standards and labeling system for all appliances.

India is also an active participant in the Clean Development Mechanism (under the Kyoto Protocol), with the second highest number of projects registered for any country, estimated to offset almost 10% of India's total emissions per year by 2012.

The government has also released the results of a range of rigorous studies that estimate the greenhouse gas emissions profile of India for the next two decades. The studies predict that India's total and per capita emissions over this period will remain modest.