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Green trails or trials?

Lawyers get to the root of corporate counsel's environmental concerns

Failures to demonstrate environmental compliance in India have damaged investors' reputations, sparked huge protests and derailed projects. Environmental activists criticize corporate India for a lack of awareness and poor attitudes towards green initiatives. Companies, meanwhile, argue that bureaucratic procedures and inefficiencies make compliance with water, forest and other regulations difficult. Seven specialists analyse tough questions from corporate counsel and offer legislative insights and practical tips on environmental law compliance.

Environmental, forest and wildlife clearance

Girish Gokhale, president of legal and group general counsel, JSW: *Both the environmental clearance and forestry clearance procedures for development projects which*

need be processed by the central Ministry of Environment and Forests (MoEF) are well established. Where is the need for each case being put up to the MoEF, after the case is recommended by the concerned Expert Appraisal Committee and Forest Advisory Committee, respectively?

Sudhir Mishra, senior consultant, Fox Mandal & Co: In India, environmental clearance, forest clearance and wildlife clearance are all separate issues.

Environmental clearances are processed and recommended by the Expert Appraisal Committee. In India, environmental clearances are granted by both the central and state governments after the Environment Impact Assessment (EIA) Notification, 2006. For certain sensitive projects – oil and gas, nuclear power, asbestos milling and asbestos-based products, soda ash, chemical

fertilizers, petrochemical complexes, etc. – the central government has the exclusive power to grant environmental clearance.

Forest clearance is obtained under the provisions of the Forest (Conservation) Act, 1980 (FCA), and the Indian Forest Act, 1927, and is again bound by various regulatory mechanisms and an expert panel.

Even wildlife clearances are not completely dependent on the MoEF as in order to process and grant clearances, the National Board of Wildlife deals with such matters and grants wildlife clearance on a case-to-case basis.

Also, it is not the MoEF which alone accords environmental clearances. State governments in certain cases are also empowered to accord environmental clearances under the EIA Notification.

In a nutshell, all three clearances are interlinked. The environmental jurisprudence in India hangs beautifully amid interpretations by the Supreme Court of India, the high courts of the different states and regulatory approvals on the part of the ministry.

KV Singh, senior partner, Kochhar & Co: The role of the MoEF in obtaining forest clearance and environmental clearance is envisaged under the applicable law.

As far as environmental clearance, or EIA, is concerned, the EIA Notification clearly distinguishes between project appraisal and project assessment and approval. Under the notification, the recommendations of the Expert Appraisal Committee or the State Level Expert Appraisal Committee, as the case may be, are required to be presented to a separate assessment authority, i.e. the MoEF for Category A projects and the State Environment Impact Assessment Authority for Category B projects. Thus, every case is not required to be presented to the MoEF for final approval.

Similarly, under the FCA, prior approval from the MoEF is essential for diversion of forest lands for non-forestry purposes. Under section 3 of the FCA, the role of the advisory committee is limited to advising the government on matters pertaining to forest clearances.

Obtaining licences

Sven Hettesheimer, legal counsel, KSPG: *It is not possible to transfer an existing licence to operate a site in an*

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KV Singh
Senior Partner
Kochhar & Co



asset deal. The acquirer must always apply for a new licence to operate. In order to prevent any interruption of production, the acquirer is forced to manufacture without a proper licence. Is there any way this problem can be overcome?

Sudhir Mishra, Fox Mandal & Co: It is not completely correct to suggest that an acquirer of an asset has to always apply for a new licence to operate. The permits to operate are held by an entity. Typically, an entity obtains permits for carrying out certain activities which are the subject matter of environmental and pollution-related laws that are applicable at a particular location.

Normally, on a case-to-case basis, within 15 days of the date of transfer of the asset, a notice has to be served on the relevant pollution control board, which must then advise the transferor and/or transferee and seek any other details it requires. The pollution control board will then transfer or revalidate the permit within three to six months in the name of the transferee entity. Accordingly, the transferee entity will not be required to obtain a fresh permit.

In certain cases the transfer or revalidation of a licence is only possible in a phased manner. In some instances, applications for fresh permits are required, depending on the nature of the industry and the sensitivity and use of the product.

Due diligence

Sven Hettesheimer, KSPG: *Indian laboratories sometimes have difficulties detecting volatile pollutants in the soil or the groundwater. Therefore, the results of environmental due diligence may sometimes not reflect the truth. What can be done to improve the laboratories' environmental due diligence standards and ensure that foreign investors do not bear the brunt of due diligence mistakes made by their Indian business partners?*

Sanjeev Kapoor, partner, Khaitan & Co: The MoEF has established or recognized certain laboratories which can be used by foreign investors for due diligence purposes. However if a foreign party finds diligence by the Indian laboratories deficient, it is welcome to bring in international consultants or use international laboratories to make the diligence process more robust.

To protect against due diligence mistakes, foreign investors may include representations, warranties and indemnity clauses in their agreements with their Indian business partners. Although statutory liabilities cannot be limited or altered, the parties can contractually provide for indemnities if liabilities are imposed on the foreign investor by the authorities for reasons of breach or violations of environmental norms.

Criminal liability under Indian law only applies to persons in charge and who are responsible for conducting company affairs at the time of the environmental breach and hence the foreign investor is not personally liable for any criminal liability for historic offences committed by its Indian partner.

Lira Goswami, partner, Associated Law Advisers: The problem of Indian laboratories having difficulty in detecting volatile pollutants is quite common and is not confined to pollutants in the soil or groundwater but extends to other areas as well. To avoid being a victim to the extent possible, it is useful to appoint an Indian lab which is a subsidiary of a global ILAC (International Laboratory

Certain states have enacted laws for groundwater management ... however, these laws ... do not spell out quality standards

Shephali Mehra Birdi
Senior Associate
Kochhar & Co



Accreditation Cooperation) accredited lab, so that there is scope for the findings of the Indian lab to be confirmed by their global counterparts.

Water pollution

Sven Hettesheimer, KSPG: *When doing an environmental due diligence in India, we had been advised that there are no official Indian rules concerning the allowed contamination in the groundwater. The only reference we could make use of was a UN standard which India accepted. Can we expect to see the introduction of specific Indian rules in this regard?*

Shephali Mehra Birdi, senior associate, Kochhar & Co: There are no clear standards for groundwater quality or contamination in India. Certain states have enacted laws for groundwater management – Himachal Pradesh, Andhra Pradesh, Karnataka, Kerala, etc. – however, these laws generally tend to regulate extraction of water and do not spell out quality standards.

In addition, the Bureau of Indian Standards determines national water quality standards for various purposes, including agriculture and drinking.

Having said that, it is important to understand that standards for discharge of effluents from various industries are laid down under the Environment (Protection) Rules, 1986. Pollution of rivers, water bodies and streams is also regulated under the Water (Prevention and Control of Pollution) Act, 1974. Therefore, under the current regulatory framework, the discharge of effluents or pollutants into land or water bodies, thereby impacting the groundwater, is addressed indirectly, to a certain extent.

A model groundwater law has been discussed for a long time. The Indian government put forward a Model Bill to Regulate and Control the Development and Management of Groundwater for adoption by the states as early as 1970. The model bill has been revised several times, most recently in 2005. Recently, the Planning Commission formulated the Model Bill for the Protection, Conservation, Management and Regulation of Groundwater, 2011.

Disposal process

Sung Min Wong, senior counsel, McDonald's Asia Pacific, Middle East & Africa Group: *A number of food service establishments, as a part of their green initiatives, instead of discharging waste oil in the drain, pass it on to disposers certified by the government, which helps the industry comply with the pollution control laws and maintain the stringent norms for such discharge. The certified disposers claim that they dispose of the waste at government-approved dumping grounds and sell the vegetable oil to soap manufacturers. However, the process is difficult to audit at the moment. What can be done about this?*

Piyush Joshi, partner, Clarus Law Associates: The Indian government, together with various state governments, needs to undertake projects to develop used oil refining capabilities in each state. There is a need to create a supporting framework to enable the growth of used oil refining capabilities. Present regulations seek to dictate the manner in which waste oil needs to be managed. However, there is a lack of corresponding capacity to manage and refine such used oil waste. These projects can be developed on a public-private partnership basis with support from the Indian government and state governments.

Environment-related patents

CK Sehgal, head of intellectual property rights, Arch Pharmalabs: *One IP-related question in respect of patent law is compulsory/voluntary licensing of an environment-related patent. Under the Clean Air Act in the US, the government has the authority to use patents related to the environment without permission from the patent holder. Is there any such law in India?*

Pankaj Soni, partner, Remfry & Sagar: In theory, India has instituted a framework within the intellectual property regime which can create the right balance between environmental safeguards and patent protection. Section 3(b) of India's Patents Act, 1970, precludes from patentability, "an invention the primary or intended use or commercial exploitation of which ... causes serious prejudice ... to the environment". Hence, patent applications detrimental to the

The government can use patents related to the environment without permission from the patent holder

Pankaj Soni
Partner
Remfry & Sagar



India has established a National Green Tribunal, which ... can pass orders or directions to remedy any abuse of process

Sudhir Mishra
Senior Consultant
Fox Mandal & Co



environment can prima facie be rejected. For any that slip through, a revocation proceeding can be instituted “in public interest” under section 66 of the act.

For environmentally beneficial patents that may be underutilized or over monetized by the patentee, the act has at least two provisions that can ensure that the patented technology is put to good use by the government and/or a third party.

First, under section 47’s “merely for its own use” proviso, the government can use patents related to the environment without permission from the patent holder.

Second, the compulsory licensing provision in section 84 of the act can be used to make the invention available to the public by granting a compulsory licence to an interested third party. These options apply in the absence of any conditions with regard to any compulsory/voluntary licensing of any environment-related patent/technology in the Air (Prevention and Control of Pollution) Act, 1981.

However, given the above, the more pertinent questions are: Will the government do what is needed to protect and enhance the environment? Will it invoke section 47 to use patents related to the environment (at the cost of alienating certain vested interests)? And will it pass laws that provide incentives for inventions that protect or promote the environment?

That remains to be seen, but in essence, the journey of a thousand miles has begun and India has taken the first steps.

Project pressures

Girish Gokhale, JSW: *When timelines for each step in the process for obtaining both environmental clearance and forestry clearance for developmental projects are well laid out, why are these deliverables never adhered to by the state and central-level authorities, resulting in time and cost overruns for practically all projects?*

Lira Goswami, Associated Law Advisers: Although the steps in the processes of obtaining environmental and forest clearance for development projects are well established, projects often face delays and consequent overruns. One of the main reasons is a lot of opaqueness in interpreting the laws and regulations since several laws have “inclusive” definitions, leading to grey areas. This confers enormous

discretion on officers – who are not accountable for the delay – and creates an avenue for the arbitrary exercise of power and also for corruption.

To avoid project delays and consequent overruns, it is important to: (1) ensure consistency and transparency in interpreting laws and regulations (it will help if answers to commonly asked questions are provided on websites and officers are directed to consistently follow them); (2) there should be a prescribed period for considering applications, asking additional questions and also a provision for deemed approval within a specified period where there is complete inaction; and (3) officers should be made accountable for delays administratively (reporting file movement against prescribed time periods with names of erring officers on websites could also be considered as a deterrent).

Finally, the mind-set of officers must change; otherwise there is always scope for officers to delay.

Scope of power

TES Varadhan, Group CFO, CK Birla Group: *How much discretionary power do environmental authorities such as the pollution control board have under different laws to order the shutdown or closure of factories for alleged environmental non-compliance? Are these powers judiciously used? Are there clear procedures to present evidence of instances of non-compliance, seek a response and then proceed?*

Sudhir Mishra, Fox Mandal & Co: Environmental authorities have the duty to protect and maintain the environment and discharge duties mandated under the environmental laws of India. Various environmental authorities have been given powers under the Environment (Protection) Act, Water (Prevention and Control of Pollution) Act and Air (Prevention and Control of Pollution) Act to regulate, prevent, control and abate pollution.

The pollution control boards under section 33A of the Water (Prevention and Control of Pollution) Act, and section 31A of the Air (Prevention and Control of Pollution) Act, and the central government under section 5 of the Environment (Protection) Act, have the power to issue directions, which includes the power to direct the closure, prohibition or regulation of any industry or the stoppage or regulation of supply of electricity, water or any other service. These powers are

Delhi High Court pulled up the local municipal bodies in Delhi with regard to the poor drainage system in the city

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normally exercised with immense caution only after serving due notice requiring correction and giving the party an opportunity to show cause for mitigating the damages. However, in certain cases, when there is a misuse of such powers, the high court of the states and the Supreme Court are empowered to take remedial action.

India has established a National Green Tribunal, which is empowered to entertain any petition or application which involves a substantial question relating to the environment provided the question arises out of the implementation of environmental statutes. The tribunal can pass orders or directions to remedy any abuse of process.

Accountability of civic authorities

Girish Gokhale, JSW: *Why are the civic authorities never held accountable for continuously violating with impunity the statutory norms related to plastic waste management, municipal solid waste management, bio-medical waste management, sewage treatment and discharge, etc., despite having elaborate regulations?*

Sanjeev Kapoor, Khaitan & Co: It is not strictly true that civic authorities are not held accountable for environmental violations. There is no special status or immunity granted to government bodies under the law for flouting prescribed environmental norms. The courts in India are actively involved in cases of environmental law violations including laws relating to waste management and sewage treatment by the state. Recently, Delhi High Court pulled up the local municipal bodies in Delhi with regard to the poor drainage system in the city. However, environmental protection, particularly with regard to waste management and sewage treatment, is still at a nascent stage in India and environmental consciousness among civic authorities is still developing. Hence the tendency of the courts is to give directions to civic authorities instead of imposing penalties. Recent trends indicate, however, that stricter approaches are being adopted by the courts.

KV Singh, Kochhar & Co: The Indian regulations for plastic waste management, bio-medical waste management, sewage treatment, etc., have been framed with a view to regulating the activities of industry, private bodies or individuals. The government's role is that of an enforcement agency and the question of the government violating regulations does not really arise. The only exception is the Municipal Solid Wastes (Management and Handling) Rules, 2000, which carve out specific obligations and responsibilities for municipal authorities.

Nonetheless, I understand that the real question is the accountability of the enforcement agency where it fails to enforce the law in letter and spirit. Unfortunately, our regulations neither envisage nor address such a failure on the part of the enforcement agencies. However, the civic agencies are not above the law. Under the constitution of India, the government is duty bound to protect and improve the environment and natural resources. Often, in cases of serious inaction, negligence or blatant violation of the environmental principles and law on the part of government authorities, the higher judiciary takes action on its own or pursuant to a public interest litigation. While respecting the principle of "separation of powers" and refraining from treading on the executive's domain, the courts issue appropriate directions to the authorities in such cases.

There is too much flexibility in the legal framework for projects to be challenged at every stage on grounds of environment protection

Piyush Joshi

Partner

Clarus Law Associates



Tackling bureaucracy

Sung Min Wong, McDonald's Asia Pacific, Middle East & Africa Group: *While the food service industry deals with state pollution control boards/committees, the respective environmental departments are more often than not highly bureaucratic. Despite the appropriate compliance efforts done by the industry, the bureaucratic behaviour of the boards is so non-cooperative that it may take months (sometimes years) for the industry to obtain approvals and clearances from environmental departments. What can be done about this?*

Piyush Joshi, Clarus Law Associates: Under section 25(7) of the Water (Prevention and Control of Pollution) Act, consent is deemed to have been granted four months from the date of application for a clearance to discharge, unless it has either been given or refused in writing before that time. However, this section has not been implemented or utilized clearly. There is therefore a need for the Indian government to issue a direction under the water act, providing a clear framework for the operation of this deeming provision. Furthermore, a similar provision needs to be made part of the Air (Prevention and Control of Pollution) Act as well as the Environment (Protection) Act.

Also, there is a clear need to rationalize the various approvals required as well as the terms and conditions associated with the approvals. For example, if a project has obtained an environmental clearance under the EIA Notification pursuant to the Environment (Protection) Rules, there should be no need to again go for the same project to the state pollution control board and obtain additional approval under the water and air acts to undertake activities cleared in the environment clearance.

Furthermore, the ability of vested interests to challenge projects on environmental grounds needs to be limited to bona fide cases and cases where there has been a clear transgression of applicable law. Presently, there is too much flexibility in the legal framework for projects to be challenged at every stage on grounds of environment protection. ■