

Dread of the Judiciary-Environment Law in India

Introduction

The market opportunities have made India a preferred destination for foreign investors. The flip side of economic growth is that it has led to depletion of natural resources which triggered a debate as to which is dearer to the nation, environment or development. The present newsletter reviews the judicial view adopted by the Indian courts when faced with the foregoing dilemma along with the latest proactive stand taken by the Indian government (“GOI”) with regard to developmental projects in order to assess its impact on potential investments in India.

1. Evolution of environment law in India

The development of environment related laws in India can be divided into two parts, pre and post Bhopal gas disaster.¹ A key environmental enactment passed in the pre Bhopal gas era was the Water (Prevention and Control of Pollution) Act enacted for the purpose of prevention and control of water pollution. Thereafter, in 1976 the Indian Constitution was amended to introduce environmental protection as part of the directive policy of the state². The year 1981 witnessed the creation of another specific pollution enactment in the form of the Air (Prevention and Control of Pollution) Act. In the wake of the Bhopal gas tragedy, the legislature felt the need for a single authority which could assume the lead role for environmental protection. This led to the enactment of the Environment (Protection) Act (“EPA”) in 1986. EPA is an umbrella legislation designed to provide a framework for GOI to control pollution and protect the environment and which foreign manufacturers keen on investing in India need to bear in mind. An Environment Impact Assessment (“EIA”) notification³ was introduced which necessitated securing an EIA clearance from the Ministry of Environment and Forests (“MoEF”) for developmental projects. In order to reduce its workload, MoEF in 2006⁴ introduced a new notification which allowed state government to clear projects listed in Category B.⁵ At present prior environmental clearance is required for any construction activities pertaining to new projects, expansion or modernization of existing projects.⁶

Environment clearance is compulsory for investment above US\$ 20 million. However, if investment is less than US\$ 20 million, clearance is not necessary unless it is for pollution intensive industries like pesticides, pharmaceuticals, asbestos, mining, distilleries, dyes, foundries and electroplating. After assessing if the proposed project requires clearance, an investor should prepare an EIA report stating the quality of effluents likely to be generated by the proposed unit and the effectiveness of the control measures proposed by the investor to meet the standards prescribed by the GOI. Thereafter, the investor needs to submit the EIA report along with the no objection certificate

¹Bhopal gas tragedy was the worst industrial catastrophe in the Indian history. It occurred in 1984 at the Union Carbide India’s pesticide plant in Bhopal, the capital of Madhya Pradesh.

² By introducing two very precise provisions of Articles 48A and 51A (g) to the India Constitution, the legislature cast an obligation on the state to protect environment.

³Notification dated January 27, 1994 issued by MoEF.

⁴Notification dated September 14, 2006 issued by MoEF. This notification superseded the earlier 1994 notification and presently is the law of the land.

⁵2006 notification categorizes projects under Category A and B depending on their size. For projects listed in Category A, the clearance to be given by the MoEF and Category B projects are cleared by the State Environment Impact Assessment Authority.

⁶ Supra Note 4.

from the respective State Pollution Control Board to the appropriate authority in a prescribed format.⁷ In 2009,⁸ the MoEF amended the 2006 notification by making it mandatory for the project proponent to advertise the terms of environmental clearance in 2 local newspapers. This was done to inform the public about the terms of the environment clearance and thereby enhance societal vigil of projects. The next sections examine case laws in order to determine the judicial trend of the Indian courts while deciding matters pertaining to environment violation.

2. Judicial trend

Failure on the part of the governmental agencies to effectively enforce environmental laws and non-compliance of statutory norms by polluters resulted in an accelerated degradation of the environment. This prompted environmentalists and residents of polluted areas, as well as NGO's, to approach the courts for suitable remedies. The main reason that paved the way for the involvement of judiciary with environment related issues was the relaxation of conventional rule of locus standi, through the introduction of the concept of Public Interest Litigation (“PIL”). PIL provided an avenue to the citizens to challenge projects that caused an adverse impact on the environment. The judiciary, in their quest to provide solutions to environmental matters within the framework of public interest litigation, looked to constitutional provisions to provide the court with the necessary jurisdiction to address this issue. Furthermore, the Supreme Court placed the right to a clean environment as part of the fundamental right of each citizen. In *Subhash Kumar v. State of Bihar*,⁹ the court observed that the right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to seek recourse under the Constitution. Through the foregoing interpretation of Article 21 (Right to Life) of the Indian Constitution, the court has expanded the ambit of Article 21 to include the right to healthy environment as a fundamental right.

2.1. Harmonizing act of the Indian judiciary

In an effort to balance environment with development, the Indian judiciary adopted the doctrine of sustainable development, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs.¹⁰ The first case on which the Supreme Court had applied the doctrine was *Vellore Citizen Welfare Forum v. Union of India*.¹¹ In the instant case, dispute arose over tanneries that were discharging effluents in a river, which was the main source of drinking water for the public. The court, while stating the importance of the leather industry to the economy, held that the industry has no right to destroy the ecology, degrade the environment and pose a health hazard. As remediation for the damaged environment, the court asked the polluter to fund the reversing process for the damaged ecology while directing the tanneries to install pollution control devices. While deciding this PIL, the court sought to strike a balance between pollution free environment on one side and development on the other side by not shutting the tanneries which, in turn, would have had adverse effect on the economy.

⁷An application seeking prior environmental clearance should be made in the prescribed Form 1 and Supplementary Form 1A.

⁸ Notification dated January 19, 2009 issued by MoEF.

⁹ AIR 1991 SC 420.

¹⁰ This definition is from the report of the Brundtland Commission on Environment and Development, cited from *JSW Steel Ltd. vs. MSPL Limited*, [MANU/KA/0247/2009](#).

¹¹ AIR 1996 SC 2715.

Even prior to the *Vellore Citizen's case*, the court in *Rural Litigation and Entitlement State of U.P.*¹² without using the term sustainable development, tried to maintain the equilibrium between ecology and development. In this case, a PIL was filed against a large number of lessees of limestone quarries on the allegation that mining is destroying the ecological balance of Mussoorie hills. The court allowed the mines to operate on the condition that the land would be subjected to afforestation by the developer. In *Tarun Bharat Sangh vs. Union of India*¹³ a voluntary organization interested in protection of environment, filed a PIL complaining that widespread illegal mining activity in the area declared as tiger reserve was affecting the ecology. The court issued directions ceasing mining work within the forest area. Even in this case it would be unwise to hold that the court favoured environment without giving any significance to the development aspect as the court only ordered ceasing of mining work in areas inside the tiger reserve forest and not in totality. For areas outside the tiger reserve, the court allowed mine owners to continue operation pending permission from the MoEF.

In *M.C. Mehta vs. Union of India*¹⁴ the landmark case where “deep pockets” and “absolute liability” principles were laid down, a PIL was filed, seeking closure of the pollution causing stone crushing activities in Delhi. While ordering the closure of stone crushing industry in Delhi, the court issued further directions for allotment of sites for new crushing zones realizing that the closure will lead to loss of employment. In the case of *Research Foundation for Science Technology and Natural Resources Policy vs. Union of India*¹⁵ pertaining to the ship recycling industry in Gujarat, a PIL was filed against the dismantling industry on the ground that it did not have the capability to dismantle ship in a safe and environmentally friendly manner. The court allowed the dismantling industry to continue. This decision was made in the background of the fact that closure would affect the livelihood of the large number of employees.

From the above decisions it can be inferred that the courts in India while being judicially active in the environment sphere have attempted to provide a balanced view factoring in the needs for the business community as well as local population and the opportunities for them. Depending upon the facts and circumstances of the case, the court has tried to integrate development with ecology as an alternative to stalling development.

3. The perception of the problem and solution

From an investment perspective the risk to projects is not limited to alleged judicial activism. Lately, MoEF's decision of denying environmental clearance to projects like Posco and Vedanta¹⁶ has resulted in shaking the confidence of investors. Is that really true? The data released by the MoEF¹⁷ states that the ministry cleared 535 of 769 pending projects from August 2009 to July 2010 and rejected only six. This ratio shows that the concern of the investors is unfounded, the rate of rejection reflect India's commitment towards development. Nonetheless, in case an environmental clearance is denied due to non compliance of environment norms and the project gets axed, the investors could:

¹² (1985) 2 SCC 431.

¹³ AIR 1992 SC 514.

¹⁴ 1986(2) SCC 176.

¹⁵ (2007) 9 SCR 906.

¹⁶ In the two mining projects the environmental clearances were cancelled due to alleged violation of environmental norms. For details see article *Vedanta, Posco have to Follow the Law*, <http://www.deccanherald.com>, visited on April 10, 2011.

¹⁷ This information was provided by the MoEF under the Right to Information Act in 2010. For details see article *MoEF Rejection Rate hasn't been Reined*, <http://www.hindustantimes.com>, visited on April 19, 2011.

- Seek to plug the loopholes concerning non-compliance, as was done by the investors of the Mumbai airport who undertook the task of preserving the water bodies located on the proposed site while undergoing expansion of the airport.
- Seek judicial remedy, as was done by Lavasa¹⁸ resulting in MoEF granting conditional permission to Lavasa to complete its under-construction buildings.
- Engage in settlement negotiations with the MoEF. This has resulted in reviving the Posco mining project in Orissa.

Every project that produces significant amount of pollutants or effluents needs to be assessed for its impact on the ecology. That is why we have an EIA processes in place. As far as obtaining environment clearances for development projects are concerned, the investors can face problem in obtaining the clearance within a reasonable time frame. This problem can be addressed with the assistance of able legal help.

Conclusion

Environmental concerns must not be taken so far that they end development and development is not possible without some degree of environmental damage. The Indian courts have also understood that development comes at a price and their decisions reflect their strong intent to balance both the environment and development. Therefore, the investors can stop dreading the Indian judiciary as well as local activist organizations for being overtly pro environment.

The judicial trend can be best captured by the following words of the court in the case of *Vellore Citizens* “the society shall have to prosper, but not at the cost of the environment and in the similar vein, the environment shall have to be protected but not at the cost of development of the society. The need of the hour is to strike a balance between the two i.e., development on one side and pollution free environment on the other.”

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¹⁸ This group is building India’s first hill station near Pune in Maharashtra. For details see <http://www.lavasa.com>, visited on April 20, 2011.