ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

ELP KNOWLEDGE SERIES

India Update

Part 2 of 2022

TABLE OF CONTENTS

FOREWORD

Dear Reader,

'India Update – Part 2 of 2022' is the latest addition to the ELP Knowledge Series.

This document is intended to keep you updated on the latest legal, policy and regulatory developments in India. It is our endeavour to short-list, collate and analyze the available data in order to curate information that provides a succinct overview of selected topics and issues.

ESG, sustainability, and green investments are gradually becoming one of the major considerations for investors evaluating investment opportunities. This iteration of our series carries three articles on these issues – while one relates ESG compliance in India, another article covers the EU's carbon border adjustment mechanism and its impact on corporate India. Finally, we conclude this section on India's launch of the green hydrogen policy.

Our chapter on 'Realizing Decrees and Awards in India – A Classical case of Failed Execution' analyzes the difficulties faced by a decree-holder in reaping the fruits of the litigation – especially when viewed from the lens of investors. Another article from our dispute resolution and capital markets teams discusses a watershed judgement in the capital markets jurisprudence in India.

Articles by our tax team, cover the weakening of the structure and independence of the tax advance ruling authority in India. Our colleagues have also authored an article on the ambiguity in taxing virtual digital assets.

The India-United Arab Emirates Comprehensive Economic Partnership Agreement (CEPA) came into force recently. With a view to ensuring that domestic industry is not significantly affected, the government has brought in TRQ measures. Our trade team in their article have provided a high-level summary of these TRQ provisions and implications for industry.

This issue also covers India's legal framework regarding governing standards, QCOs and issuance of BIS licenses.

We hope you will find the information contained in the subsequent sections to be helpful. For any clarification or further information, please reach out to your point of contact at ELP or any member of our team who has contributed to this iteration of the 'India Update'.

Happy reading.

Regards,
Team ELP

The EU Carbon Border Adjustment Mechanism – Implications for India

Authors: Sanjay Notani, Partner – sanjaynotani@elp-in.com
Parthsarathi Jha, Partner – parthjha@elp-in.com
Harika Bakaraju, Senior Associate – harikabakaraju@elp-in.com
Naghm Ghei, Senior Associate – naghmghei@elp-in.com
Tetyana Payosova, Senior Associate & Joanna Redelbach, Associate, Van Bael & Bellis

On July 14, 2021 the European Commission (**Commission**) published its proposal for a regulation establishing a carbon border adjustment mechanism **(CBAM)**[1]. The core element of the CBAM is the obligation to pay for the greenhouse gas **(GHG)** emissions embedded in certain carbon-intensive products imported into the European Union **(EU)** through the purchase of so-called CBAM certificates.

The CBAM is conceived as a measure against the risk of carbon leakage, a phenomenon whereby companies move their production abroad to avoid the costs of complying with stringent environmental standards domestically or import cheaper foreign products that were not subject to a carbon price in their country of production. The EU fears that its increased climate ambitions and the rapidly increasing price of carbon under its domestic emissions trading scheme, having reached nearly 90 EUR/tonne CO2 in December 2021, may exacerbate the risk of carbon leakage and undermine the competitiveness of its domestic industry. This is where CBAM comes into play. By pegging the price of CBAM certificates to the price of emission allowances auctioned under the EU Emissions Trading System (**EU ETS**)[2] , the CBAM aims to ensure a playing field for both domestic and imported products by making sure that they bear comparable CO2 costs and thereby prevent domestic producers from relocating their production abroad.

Compliance with the CBAM will require monitoring and calculating the GHG emissions embedded in the products covered by the CBAM. This, however, is not a straightforward task and many details of the calculation methodology will only be determined in future implementing acts. The obligation to monitor, calculate, report and verify the emissions, in addition to the obligation to pay for them, will likely result in a significant administrative burden for foreign producers and importers and affect imports of the covered products to the EU.

As a major emerging economy, India is likely to be significantly impacted by the implementation of the CBAM[3]. While India has raised its concerns on the implementation of the CBAM with the EU[4], Indian exporters of the products covered by the CBAM should familiarize themselves with how the CBAM operates and take appropriate steps to mitigate the risk of losses arising from its implementation.

[1] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, COM (2021) 564 final, 14.7.2021 (Proposed Regulation), available at: *https://ec.europa.eu/info/sites/default/files/carbon_border_adjustment_mechanism_0.pdf.*

[2] The EU ETS is the world's first emissions trading system. See European Commission, Developing the carbon market, available at: https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en. The EU ETS works as a "cap and trade system", whereby a cap is set on the total amount of certain GHG emissions that can be emitted by the installations under the system. Within that cap, the installations can buy or receive free emission allowances, which can be subsequently traded among installations on a secondary market. See European Commission, A 'cap and trade' system, available at: *https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en.*

[3] UNCTAD, "EU should consider trade impacts of new climate change mechanism", 14 July 2021, available at: *https://unctad.org/news/eu-should-consider-trade-impacts-new-climate-change-mechanism.*

[4] Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change hosted by India on 8 April 2021 (BASIC Joint Statement), available at *https://www.gov.za/nr/speeches/joint-statement-issued-conclusion-30th-basic-ministerial-meeting-climate-change-hosted.*

INDIA'S INDUSTRIES LIKELY TO BE AFFECTED BY THE CBAM

Many of the CBAM goods, including unwrought aluminium, aluminium powder, iron and steel in their primary forms (including other processed products such as tubes and fittings, structures, and railway materials), are strategically important for India[5].

According to the CBAM impact assessment conducted by the Commission, India was the eighth largest exporter of iron and steel and the twelfth largest exporter of aluminium to the EU in 2019[6]. Further, Italy and Belgium emerged as the two top destinations for India's finished steel exports in 2021[7].

The imposition of the CBAM will thus affect a significant share of India's exports to the EU, and Indian goods will run the risk of becoming less competitive in the EU market due to the financial and administrative burden imposed by the CBAM. In fact, the UNCTAD forecasts that India will lose USD 1-1.7 billion in exports of energy-intensive products such as steel and aluminium[8].

PREPARING INDIA'S INDUSTRY FOR CBAM IMPLEMENTATION

The Proposed Regulation envisages that foreign countries can be exempted from the CBAM, provided certain conditions are met. India has introduced various schemes such as Perform, Achieve and Trade (**PAT**)[9], Renewable Purchase Obligations (**RPO**)[10], a tax (a cess) on coal production and Gujarat Air Pollution Cap and Trade Program[11], that have been considered as applying an implicit price on carbon[12] in 2019. India also briefly discussed introducing a carbon pricing instrument, in line with the EU ETS, in the Micro, Small and Medium Enterprises (MSME) sector[13]. Beyond these initiatives, however, India currently does not have any explicit carbon pricing regulation in place, so no carbon tax nor any emissions trading system either[14]. It follows that, as things stand, India will not be exempted from the CBAM until it introduces a robust emissions trading system and links[15] it with the EU ETS. Until then, CBAM goods imported from India will be subject to the requirements of the CBAM. The key requirements and the timeline for the implementation of the CBAM are addressed below.

[5] Annex I of the Proposed Regulation.

[6] CBAM Impact Assessment Report, SWD(2021) 643, Part 2/2, 14 July 2021, p. 100, available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-EU-Green-Deal-carbon-border-adjustment-mechanism-_en.*

[7] "Europe Emerges as Leading Destination for Indian Steel Exports", Eurometal, 27 July 2021, available at: *https://eurometal.net/europe-emerges-as-leading-destination-for-indian-steel-exports/.*

[8] "EU should consider trade impacts of new climate change mechanism", UNCTAD, 14 July 2021, available at: *https://unctad.org/news/eu-should-consider-trade-impacts-new-climate-change-mechanism.*

[9] PAT Scheme is a regulatory instrument to accelerate improvements in energy efficiency in energy intensive industries. Further details on the PAT scheme are available at: *https://beeindia.gov.in/content/pat-read-more.*

[10] RPO requires electricity distribution licensees to purchase or produce a minimum specified quantity of their requirements from Renewable Energy Sources. Further details on RPO are available at: *https://anert.gov.in/node/114.*

[11] Gujarat Air Pollution Cap and Trade Program sets a cap on emissions from all industries but allows trade and selling of permits. PUTTING A PRICE ON CARBON Handbook for Indian Companies 2.0, The Energy and Resources Institute, 2019, available at: *https://6fecbb86e61af1b2fc4c70d8ead6ced550b4d987d7c03cdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/004/918/original /CDP_India_Second_Handbook_on_ICP.pdf?1580233115.*

[12] "Pricing carbon: Trade-offs and opportunities for India", 5 June 2021, available at: h*ttps://www.orfonline.org/expert-speak/pricing-carbon-trade-offs-opportunities-india/.*

[13] Konrad Adenauer Stiftung, "Perception of the Planned EU Carbon Border Adjustment Mechanism in Asia Pacific — An Expert Survey", March 2021, available at: *https://www.kas.de/documents/265079/265128/EU+Carbon+Border+-Adjustment+Mechanism.pdf/fed1d5a4-4424-c450-a1b9-b7dbd3616179?version=1.1&t=1615356593906.*

[14] The World Bank Carbon Pricing Dashboard, available at: *https://carbonpricingdashboard.worldbank.org.*

[15] The European Union prescribes certain conditions for other countries to link their emissions trading system with the EU ETS, namely: (i) system compatibility (the systems have the same basic environmental integrity, and a tonne of CO2 in one system is a tonne in the other system); (ii) the mandatory nature of the system; and (iii) the existence of an absolute cap on emissions – further details are available at: *https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/international-carbon-market_en.*

The Proposed Regulation envisages that the CBAM will apply starting from 1 January 2023[16]. From January 2026, the CBAM is expected to apply in full, including the obligation to purchase CBAM certificates.

The CBAM explicitly imposes obligations only on EU importers of CBAM goods. Those obligations, however, will necessarily require number of actions to be taken by foreign producers.

During the *transitional period*, EU importers will be required to report direct and indirect emissions embedded in the imported CBAM goods[17]. To comply with this obligation, importers will need to request foreign producers to provide information on such direct and indirect emissions and, to the extent possible, will likely seek to import only those CBAM goods for which such information on embedded emissions is made available by foreign producers. Foreign producers will thus need to implement an internal system to monitor the embedded GHG emissions and provide this information to EU importers. It should be noted that the Commission has not yet made available all relevant rules for calculating the embedded emissions. While general calculation rules are set out in Annex III to the Proposed Regulation, the Commission still needs to adopt implementing acts determining the system boundaries of production processes, emission factors, installation-specific values of actual emissions and calculation methods for indirect emissions[18].

Starting from *January 2026,* only importers that are registered as authorized declarants with competent authorities of the EU Member States will be able to import CBAM goods into the EU. To apply for an authorization, an importer must be established in the EU[19]. Importers will be required to report direct emissions and surrender to the EU Member State competent authorities the number of purchased CBAM certificates corresponding to the amount of verified *direct* emissions embedded in the imported CBAM goods. If the embedded emissions were subject to a carbon price in the country of origin, the importer may claim a deduction in the number of certificates to be surrendered[20]. Considering that India does not have an explicit carbon pricing mechanism in place, EU importers of CBAM goods produced in India cannot claim any reduction in the number of CBAM certificates to be surrendered.

To surrender the required number of CBAM certificates, EU importers will need to calculate the *direct* embedded emissions[21] based on verified actual values or default values, if reliable actual emissions data is not available[22]. Based on the best available data, the Commission will determine default values at the average emission intensity of each exporting country and for each of the CBAM goods (except electricity) increased by a mark-up. If no reliable data for the specific exporting country or specific CBAM good is available, the default values will be based on 10% of the EU's worst performing installations[23]. The Proposed Regulation also provides that default values can

[16] Article 36(2) of the Proposed Regulation. Considering that the legislative procedure is currently still at an early stage, the deadline of January 2023 appears to be very ambitious. At the same time, the CBAM is among the top priorities on the EU agenda and thus, the Proposed Regulation could well be adopted shortly after or even in line with the set deadline.

[17] Under the CBAM, the direct emissions are the emissions from the production processes of goods over which the producer has direct control. The indirect emissions are emissions from the production of electricity, heating and cooling, which is consumed during the production processes of goods. See Articles 3(15) and 3(28) of the Proposed Regulation.

[18] Articles 7(6) and 35(6) of the Proposed Regulation.

[19] Article 5(1) of the Proposed Regulation.

[20] Article 9 of the Proposed Regulation.

[21] Pursuant to Article 30(2) of the Proposed Regulation, the Commission may extend the CBAM obligations also to indirect emissions based on the data collected during the transitional period.

[22] Article 7(2) of the Proposed Regulation.

[23] Section 4 of Annex III of the Proposed Regulation.

be adapted to particular areas and regions of countries where specific objective characteristics, such as market conditions, industrial production or energy mix, prevail[24]. While the exact mechanism of regional adaptation is unclear, it will likely be possible for Indian producers of CBAM products to contribute to the regional adaptation of default values. In most cases, however, default values, even when adapted, will likely result in a higher amount of embedded emissions than actual emissions and thus require more CBAM certificates to be purchased and surrendered. Default values will be particularly disadvantageous for those Indian producers that already implement cleaner production processes.

To be able to rely on actual emissions and avoid punitive default values, Indian producers will need to establish internal systems for monitoring embedded emissions in line with the CBAM requirements. Some of the companies in India have already implemented voluntary internal carbon pricing[25] to reduce emissions and encourage innovation in the field of a low-carbon economy[26]. While such Indian producers already monitor their production emissions, they will need to verify the extent to which their current monitoring systems comply with the CBAM requirements.

Finally, if the EU importer and the foreign producer wish to rely on actual values of embedded emissions, all such reported emissions must be verified by an EU-accredited verifier[27]. EU importers may also rely on the verified actual emissions reported by operators and installations in third countries that are registered in a central database established by the EU[28]. The advantage of using the central database is that the registration and the verified data will be valid for five years, and there will be no need to conduct an annual verification of embedded emissions. While not mandatory, it would thus be favourable for Indian exporters and producers to register in the EU central database, assess the actual emissions and ensure verification of those emissions by an EU-accredited verifier in good time for EU importers to rely on that data. Importantly, while the CBAM appears to provide an option for the Commission to expand the verification authority to foreign verifiers[29], Indian operators should prepare for verification of their actual emissions data by EU-accredited verifiers.

This article has been published in the EU Chamber of Commerce's newsletter

[24] Section 6 of Annex III of the Proposed Regulation.

[25] "An internal carbon price (ICP) is a voluntarily determined price used within a company to value the cost of a unit of CO2 e emission. This price tends to reflect the market prices of the regions where the company trades, although some companies may set theirs differently, based on their objectives." – PUTTING A PRICE ON CARBON Handbook for Indian Companies 2.0, The Energy and Resources Institute, 2019, see supra fn. 20.

[26] "Pricing carbon: Trade-offs and opportunities for India", 5 June 2021, see supra fn. 21; "What is India Inc's carbon footprint?", 9 July 2020, available at: *https://www.thehindubusinessline.com/opinion/what-is-india-incs-carbon-footprint/article32034375.ece.*

[27] Article 8 of the Proposed Regulation.

[28] Articles 8(2) and 10(1) of the Proposed Regulation.

[29] Article 18(2) of the Proposed Regulation.

'G' in ESG – The Steering Force of the Company

Authors: Manendra Singh, Associate Partner – manendrasingh@elp-in.com
Tanvi Goyal, Principal Associate – tanvigoyal@elp-in.com

E, S and G, just three random alphabets of English language, but when put together together have given businesses across the globe something to think about, especially in the wake of COVID-19 and the changing regulatory regime. ESG – Environment, Social and Governance factors are becoming increasingly important as investors are moving towards impact investing and sustainable development. This shift is evident from the number of ESG initiatives across the globe. Recently, several funds have also launched specific ESG related products for investments as a response to public demand for sustainable investments. The inflows in ESG funds increased 76% to INR 3,686 crores in financial year 2021 against INR 2,094 crores in financial year 2020 and ESG funds together had an asset base of nearly INR 9,900 crores as of March-end[30]. In another research publication by Bloomberg Intelligence, it stated that global ESG assets are on track to exceed USD 53 trillion by 2025, representing more than a third of the USD 140.5 trillion in projected total assets under management[31].

The ESG reporting in India has been recently revised by the Securities and Exchange Board of India (**SEBI**) and a new reporting format, the Business Responsibility and Sustainability Report (**BRSR**), has been introduced by SEBI on May 10, 2021. The concept of ESG, however, is not new in India. One of the first notable steps in the area of social responsibility of businesses was the release of the Corporate Governance Voluntary Guidelines in 2009 by the Indian Ministry of Corporate Affairs (**MCA**), which encouraged corporates to voluntarily achieve high standards of corporate governance. This was followed by the release of the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (**NVGs**) in 2011, which were subsequently used by SEBI, to frame the Business Responsibility Reports (**BRR**) in 2012. The BRR has now been replaced with BRSR, which will be implemented in a phased manner, and aims at further strengthening the social responsibility of businesses. The BRSR requires reporting on various Governance aspects and is likely to help business to be more organized and help in monitoring their compliances in a more effective manner. In this article we look at the Governance aspect of ESG reporting under the BRSR.

CORPORATE GOVERNANCE IN INDIA

Corporate governance is the system by which companies are directed and controlled[32]. There is no single legislation which presently predominates the corporate governance framework in India, but it is encompassed within various legislations including the key legislations such as Companies Act, 2013 (**CA2013**) and the Securities and Exchange Bord of India (Listing Obligations and Disclosure Requirement) Regulations, 2015 (**LODR Regulations**).

The concept of governance is however not new to India. Over the years various committees have been constituted to give recommendations for improving the governance of companies in India. One such major milestone was the report issued by the Committee on Corporate Governance under

[30] *https://www.thehindubusinessline.com/news/national/india-must-devise-its-own-esg-investment-strategy/article34861443.ece*

[31] ESG assets may hit $53 trillion by 2025, a third of global AUM | Bloomberg Professional Services

[32] Report of the Committee on The Financial Aspects of Corporate Governance, UK - *https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf*

the chairmanship of Shri Kumar Mangalam Birla based on which Clause 49 of the listing agreement was issued by SEBI in February 2000. This clause dealt with several aspects including board constitution and independent directors, constitution of audit committee, report on corporate governance, etc. Several other committees have been constituted over the years to review and recommend changes to the corporate governance framework, including those under the chairmanship of Mr. Narayana Murthy, Mr. Naresh Chandra, and Mr. Uday Kotak.

The report of the committee on corporate governance under the chairmanship of Mr. Uday Kotak dated October 5, 2017, *inter alia* delved into the need for corporate governance. The committee noted that based on the research it is evident that the companies that exhibit sound corporate governance generate significantly greater returns when compared to companies that exhibit poor corporate governance[33]. Mr. Uday Kotak had stated that the report is *"a sincere attempt to support and enable sustainable growth of enterprise, while safeguarding interests of various stakeholders. It is an endeavour to facilitate the true spirit of governance. Under the leadership of a vigilant market regulator -SEBI, and with the persistent efforts of key stakeholders, corporate governance standards in India will continue to improve. A stronger corporate governance code will enhance the overall confidence in Indian markets and in India[34]."*

The corporate governance framework under CA2013 (including the erstwhile Companies Act, 1956) has also over the years evolved to include directors' responsibility statement, from "voluntary" to "mandatory" corporate social responsibility spending, etc. Recently, SEBI overhauled the regulatory framework for independent directors which have come into effect from January 1, 2022, increasing their participation in composition of audit committee and nomination and remuneration committee, requiring approval of related party transactions to be given only by independent directors, etc.

UNDERSTANDING "G" - GOVERNANCE ASPECT UNDER ESG

G - governance, is an integral part of company's performance and effective leadership helps steering the company in the right direction. The Report of the CII Task Force on Corporate Governance chaired by Mr Naresh Chandra noted that *"Good corporate governance involves a commitment of a company to run its businesses in a legal, ethical and transparent manner - a dedication that must come from the very top and permeate throughout the organisation. That being so, much of what constitutes good corporate governance has to be voluntary. Law and regulations can, at best, define the basic framework - boundary conditions that cannot be crossed[35]."*

In many ways the G in the ESG is not new and has evolved and coupled into a reporting requirement of such existing obligations in an organized manner. Different regions around the globe have adopted different approaches to achieve sustainable development and impact investments. The European Commission in its Action Plan: Financing Sustainable Growth dated March 8, 2018[36] recognized one of the action points as fostering sustainable corporate governance and attenuating short-termism in capital markets. It recognizes that *"Corporate governance can significantly contribute to a more sustainable economy, allowing companies to take the strategic steps necessary to develop new technologies, to strengthen business models and to improve performance. This would in turn improve their risk management practices and competitiveness, thus creating jobs and spurring innovation."*

On February 25, 2019, the European Parliament and Member States agreed on a new generation of low-carbon benchmarks needed to help boost investment in sustainable projects and assets. On June 18, 2020, the Taxonomy Regulation for climate change mitigation and adaptation was published by the European Commission which establishes the criteria for determining whether an economic activity qualifies as environmentally

[33] Introduction – Report of the Committee on Corporate Governance - https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html

[34] Preface – Report of the Committee on Corporate Governance - https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html

[35] Introduction to the Report of the CII Task Force on Corporate Governance chaired by Mr Naresh Chandra dated November 2008 - https://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf

[36] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN

sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable[37]. The Taxonomy Regulation deals with various aspects of sustainable economic activities, including requiring transparency of environmentally sustainable investments in pre-contractual disclosures and in periodic reports, transparency of financial products that promote environmental characteristics in pre-contractual disclosures and in periodic reports, contribution towards climate and climate adaptation.

In the Indian context, the Indian regulators, MCA and SEBI have in recent years increased focus on sustainable investment and reporting with the introduction of corporate social responsibility (**CSR**) norms under CA2013 and the recent replacement of the BRR (Business Responsibility Report) with BRSR.

Some of the key governance related disclosures under BRSR read with the guidance note for ESG reporting format released by SEBI have been discussed below.

Grievance redressal mechanism for stakeholders

The National Guidelines on Responsible Business Conduct (**NGRBC**)[38] defined the term "Stakeholder" as an *"Individual or group concerned or interested with or impacted by the activities of the businesses and vice-versa, now or in the future. Typically, stakeholders of a business include, but is not limited to, its investors/shareholders, employees (and their families), customers, communities, value chain members and other business partners, regulators, civil society actors, and media."* Grievance Redressal Mechanism refers to a mechanism for any stakeholder individually or collectively to raise and resolve reasonable concerns affecting them without impeding access to other judicial or administrative remedies[39]. A transparent and unbiased grievance mechanism often helps in reducing legal disputes and makes the company more accessible and connected with its stakeholders.

The BRSR reporting requires disclosure of the grievance redressal mechanism adopted by the company for each of the stakeholders, disclosure of comprehensive data on the total number of complaints received in the financial year and number of such complaints resolved or pending.

The BRSR reporting requires a statement to be provided by the director responsible for the business responsibility report, highlighting ESG related challenges, targets, and achievements[40]. Even details of the highest authority responsible for implementation and oversight of the business responsibility policy(ies) is required to be reported. Even before BRSR, in many mergers and acquisition transactions we have seen investors/ purchaser insisting on ESG diligence on the target companies before investment.

Ethical, Transparent and Accountable Conduct

Principle 1 of the National Guidelines for Responsible Business Conduct (**NGRBC**) incorporated under BRSR requires businesses to conduct and govern themselves with integrity and in a manner that is ethical, transparent, and accountable. Under this segment, the company is required to disclose inter alia details of fines/penalties/punishment/award/compounding fees/settlement amount paid in proceedings (by the entity or by directors/key managerial

[37] Regulation (EU) 2020/852 of the European Parliament and of the council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R0852

[38] Meaning of "Stakeholders" at Page 9 of the NGRBC - https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf

[39] Meaning of "Grievance Redressal Mechanism" at Page 8 of the NGRBC - https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf

[40] Section B, Paragraph 7 of Business Responsibility & Sustainability Reporting Format issued by SEBI - https://www.sebi.gov.in/sebi_data/common-docs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure1_p.PDF

personnel) with regulators/law enforcement agencies/judicial institutions, in the financial year. This requirement to disclose details of fines/ penalties/punishment/award/compounding fees/ settlement amount is to be made based on materiality specified under Regulation 30 of LODR Regulations. Now, companies will need to revisit their materiality policy drafted under Regulation 30 of LODR and accordingly, collate such information relating to fines/penalties/awards, etc[41].

In addition, under this principle, companies are also required to make disclosures on the anti-corruption or anti-bribery policy, which may include details of risk assessment procedures and internal controls, mechanisms to deal with complaints on bribery/corruption and details of trainings on anti-corruption issues and make available a web-link to the policy. Today, companies are required to take efforts and ensure compliance with the anti-corruption and anti-bribery laws of India, however, now the anti-corruption and anti-bribery policy will need to be drafted in a manner to specifically cover aspects of risk assessment procedures and internal controls, mechanism to deal with complaints on bribery/corruption and details of trainings on anti-corruption issues undertaken by the company.

Another aspect that is required to be disclosed under Principle 1 is details of number of complaints received in relation to issues of conflict of interest of the directors and key managerial personnel[42]. Conflict of interest - simply put - refers to a situation where an individual is confronted with choosing between the requirements of his or her function and his or her own private interests. Presently, Section 166 of CA2013 requires directors to act in the best interest of the company and to not involve himself/herself in a situation in which he/she may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company[43]. Section 184 of CA2013 has further mandated that every director of the company has to disclose, at the first meeting of the board in which he/she participates as a director and thereafter at the first meeting of the board in every financial year or whenever there is any change in the disclosures already made, his/her concern or interest in any company or companies or bodies corporate, firms, or other association of individuals[44]. In addition, the section also requires directors of a company to disclose nature of his/her concern or interest at the meeting of the board in which the contract or arrangement in which he/she is directly or indirectly concerned or interested is being considered. As apart from directors, As key managerial personnel also play a key role in the management and governance of the company, details of complaints in relation to issues of conflict of interest of key managerial personnel under the BRSR reporting will help in increasing transparency in management decisions.

Safeguarding interest of all stakeholders

Another governance aspect incorporated under the BRSR reporting relates to Principle 4 of NGRBC which requires businesses to respect the interest of and be responsive to all its stakeholders. Under this segment, the company is required to disclose the process for identification of key stakeholders, identification of vulnerable and marginalized groups, using stakeholder consultation to support the identification and management of environmental, and social topics, etc.

Over years, we have seen a shift - from a shareholder centric need to protect the interest of various stakeholders involved with a company. The duties of directors were for the first time

[41] Principle 1 in Section C of Business Responsibility & Sustainability Reporting Format issued by SEBI - *https://www.sebi.gov.in/sebi_data/commondocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure1_p.PDF* [42]

Principle 1 in Section C of Business Responsibility & Sustainability Reporting Format issued by SEBI - *https://www.sebi.gov.in/sebi_data/commondocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure1_p.PDF*

[43] Section 166 of Companies Act, 2013

[44] Section 184 of Companies Act, 2013

codified under Section 166 of CA 2013, which *inter alia* requires director of a company to act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment. Even the code for independent directors provided under CA2013 requires independent directors to *inter alia* safeguard the interest of all stakeholders.

Now under the BRSR reporting, engagement by the company with each stakeholder group will need to be disclosed by the company. Such disclosures will help all stakeholders, especially the potential investors in identifying the key concerns raised by the stakeholders and how the company has responded to the same, thus indulging more faith in the company's internal controls and management.

"G" – SUPPORTING THE "E" AND "S" IN ESG

While "E" and "S" in ESG are important aspects, they cannot function without an effective and efficient "G" and all are intertwined with each other.

The E – Environmental reporting of the company is aimed at ensuring that the company is contributing towards sustainable development and is committed to reducing discharge of pollutant in the environment. Under this segment, various disclosures are covered such as resource usage (energy and water), air pollutant emissions, green-house emissions, waste generated and waste management practices, biodiversity etc.

The S – Social related disclosures cover the workforce, value chain, communities, and consumers. For employees/workers, one needs to disclose the gender and social diversity including measures for differently abled employees and workers, turnover rates, median wages, welfare benefits to permanent and contractual employees/workers, occupational health and safety, trainings etc. It also includes disclosures on Social Impact Assessments, Rehabilitation and Resettlement, Corporate Social Responsibility, disclosures on product labelling, product recall, consumer complaints in respect of data privacy, cyber security, etc[45].

However, the E and S aspect cannot be achieved without an effective *"Governance"*. To put it simply, there needs to be in place an effective corporate governance framework requiring board and management to promote sustainable business conduct, encourage sustainable research projects, adopt environment friendly business policies, implement worker/employee centric benefits and measures, etc, thus making corporate governance the key aspect of ESG compliance.

Closer look required at Governance requirements and the way forward

Although the BRSR is presently applicable to the top 1000 listed entities (by market capitalization calculated as on 31st day of March of every financial year), to report on a voluntary basis for financial year 2021 –22 and on a mandatory basis from financial year 2022 –23, the attraction that ESG holds globally is huge and one should not get deluded by selective enforcement on specified companies by SEBI. Even the corporate social responsibility spending under CA2013 which started as a voluntary requirement, has with time been made mandatory.

In the ESG sector, many countries are moving towards mandatory ESG disclosures, and this is likely to become one of the major considerations for investors evaluating investment opportunities. Transparency through reporting and disclosure gives comfort to stakeholders and it is imperative that companies evaluate to what extent they can comply with BRSR reporting. This will not only reflect highly on the transparent conduct of the organization but also attract more stakeholders to partner with the company.

This article has been published in Journal on Governance: Edition on Corporate Law and Governance

[45] SEBI Circular dated May 10, 2021 on Business responsibility and sustainability reporting by listed entities - *https://www.sebi.gov.in/legal/-circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html*

India's Regulatory Landscape needs to get Green Hydrogen Ready

Authors: Aakanksha Joshi, Partner – aakankshajoshi@elp-in.com
Pranaav Gupta, Associate – pranaavgupta@elp-in.com

India has set an ambitious target of manufacturing 5 million tons of green hydrogen by 2030. The launch of the first phase of the Green Hydrogen Policy (**Policy**) on February 17, 2022 marks an important milestone in India's renewable energy (**RE**) journey. The success in implementing this Policy hinges on certain important revamps that are currently underway in India's RE sector.

The use of hydrogen as a raw material can help decarbonize sectors that include fertilizers, steel and petrochemicals. Stored hydrogen can also serve as a flexible energy source to manage the intermittent nature of RE. If India can replicate its solar energy success in the hydrogen field, it would contribute to India's energy security and the goal of being carbon neutral by 2070.

The production of green hydrogen requires the hydrolysis (splitting) of water using RE. As the cost of the RE is one of the key determinants of the price of hydrogen, affordable RE is of prime concern.

OPEN ACCESS PRICING AND ACCESSIBILITY

The Policy states that green hydrogen plants will be granted open access for sourcing RE within 15 days of the receipt of the application. Procuring RE through open access means that a hydrogen manufacturing plant can procure RE via the market at a lower price than what is offered by the local electricity distribution company (**DISCOM**). The Policy also states that RE can be procured from a RE plant that is either co-located at the place of hydrogen manufacture or is remotely located. RE can also be procured from an energy exchange.

If a RE plant is located in the same state as the hydrogen manufacturing entity, the open access charges will be determined under the regulations framed by the concerned State Electricity Regulatory Commission (**SERC**). Intra-state open access has not really taken off, as SERCs on applications filed by state DISCOMS, levy surcharges, additional surcharges, and cross-subsidy fees on open access applicants. This is because shifting to open access results in lower revenue for DISCOMS. However, with falling RE tariffs these charges can certainly be offset – and ultimately provide an impetus to hydrogen manufacturing plants.

If a RE plant is in a different state from where the hydrogen manufacturing plant is present, inter-state open access charges will be applicable. In this regard, the Central Electricity Regulatory Commission (**CERC**) had on December 16, 2021 framed the draft CERC (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2021. These regulations aim at creating a more market friendly open access environment where power plants are not required to specify their target beneficiaries at the time of applying for inter-state open access connectivity.

To move towards more market-based pricing as against PPAs with fixed RE costs, the Government has also announced a goal to deepen India's power market through trading of electricity via energy exchanges from the current 5.5% of total volume to the targeted volume of 25% by 2024-25. This may reduce disputes on unilateral terminations or tariff amendments by power purchasers which is currently a hot-button issue.

ADDED IMPETUS OF RPO'S

A related issue is of Renewable Purchase Obligations (**RPO**). Under relevant State ERC regulations, certain entities (open access consumers, captive users and DISCOMS) are required to procure RE or purchase renewable energy certificates in lieu thereof in such amounts

as are prescribed. Such obligations are known as RPOs. RPOs have ensured that obligated entities procure RE and at the same time have provided a market and returns to RE producers. Under the Policy, RE power consumed to produce green hydrogen will count towards the RPO of the consuming entity.

The Policy also marks a great leap forward for DISCOMs, who are wary of offering open access. The Policy states that if a hydrogen generator consumes RE in excess of the RPO, this will be considered as the RPO obligation of the DISCOM in whose area the hydrogen generator is located. Thus DISCOMS will now have an incentive to follow the Policy with regard to making affordable RE available to hydrogen manufacturing plants. The Policy gives an option to DISCOMS to procure and supply RE to the manufacturers of green hydrogen at a price which reflects only the procurement cost, the wheeling charge and the margin that is determined by the SERC.

THE HYDROGEN ECONOMY PUSH

Without adequate availability of RE power, transition towards a green hydrogen economy would be difficult. Therefore, the issues that plague the RE sector such as laxity of enforcement of RPO obligations by SERCs, operational constrains in availing open access and absence of rules that deal with disposal of solar waste would need resolution.

To decarbonize certain sectors, the government is also considering mandating the use of green hydrogen in certain energy intensive industries. The Government has proposed to amend the Energy Conservation Act, 2001 via the Energy Conservation (Amendment) Bill, 2022. Under this Act, 509 designated consumers are required to meet energy consumption norms and standards that are allocated individually to them. The Government has also stated that this amendment will facilitate the **promotion of green hydrogen as an alternate to the existing fossil fuels** used by these industries. It is important that the government finds a balance between such mandates without compromising on the competitiveness and profitability of these industries.

Finally, on January 27, 2022 the Ministry of Power stated that a draft policy on Energy Storage Systems is in the pipeline. The storage of green hydrogen as green ammonia has significant export potential and the Policy recognizes it. Given the Government's recent initiative of building India's Strategic Petroleum Reserves under Public Private Partnership in rock caverns, similar initiatives for the storage of hydrogen must be considered.

With necessary regulatory amendments, creation of demand by mandating use and resolution of long-standing issues, an ecosystem for deployment and export of green hydrogen can be created. This is an important transition that can have significant positive consequences on sustainability and India's climate change commitments under the Paris Agreement.

This article has been published in ET Energy World

Realizing Decrees and Awards in India – A Classical case of Failed 'Execution'

Authors: Naresh Thacker, Partner – nareshthacker@elp-in.com
Samarth Saxena, Associate – samarthsaxena@elp-in.com

INTRODUCTION

As a lawyer practicing in Indian courts one is often asked, almost regularly in fact, *"how long before the decree is enforced?"*. To that one question there is a standard answer *"I do not know"*.

Instances of the Indian courts sympathizing with the difficulties faced by a decree-holder in reaping the fruits of the litigation are abundant. This sentiment was first echoed by the Privy Council in 1872 in *General Manager of the Raj Durbhunga v. Coomar Ramaput Sing* **[(1871-72) 14 Moo IA 605:20 ER 912]** and has most recently been reiterated by the Supreme Court (SC) in 2022 in *Air Liquide Deutschland GmbH v. Goyal MG Gases (P) Ltd* **[2022 SCC OnLine SC 97].**

ENFORCEMENT OF AWARDS/MEDIATED SETTLEMENTS: THE DILEMMA

The Government, in its zeal to simplify doing business in the country, has pursued various steps, one of which is improving the alternate dispute resolution mechanism. The belief is, and rightly so, that implementation of a quicker dispute resolution mechanism helps in fostering a healthy business environment. Thus, since 2015, the Arbitration Act, 1996 (**1996 Act**) has seen frequent upheaval. This however does not address the most important aspect of alternate dispute resolution - "enforcement". This is where the words of the Privy Council, uttered 150 years ago, and that of the SC in the modern era, ring true. Enforcement, be it of a foreign award or that of a domestic award, is eventually conducted under the execution mechanism provided for decrees under the Code of Civil Procedure, 1908 (**Code**). The anomaly then is stark - an award, even if pronounced within the timelines stipulated under the 1996 Act, languishes in the courts, waiting to be enforced, while the judgement-debtor gleefully arranges his affairs to escape the noose.

PROTECTING INVESTOR'S INTERESTS: CONSIDERATIONS AND SUGGESTIONS

India's huge growth ambitions cannot be achieved if investors are unable to ring fence or protect their investments. After successfully surviving a hard and long litigious battle, or post arduous and time-consuming negotiations, if an investor is not able to enjoy the fruits of his labor, he sees it as a failing on the part of the state machinery, including courts, to provide adequate protective support.

Pertinently, the SC in *Shub Karan Bubna v. Sita Saran Bubna* **[(2009) 9 SCC 689]** had suggested that the Law Commission should consider moving away from separate execution proceedings altogether and instead implement a continuous civil dispute resolution process. However, the suggestions put forth in Shub Karan Bubna too remain unimplemented and consequently, in *Rahul S. Shah v. Jinendra Kumar Gandhi* **[(2021) 6 SCC 418]** the SC has been constrained to take matters in its own hands.

Exercising its powers under Articles 141, 142 and 144 of the Constitution of India, in *Rahul S. Shah,* the SC issued 14 directions to *"end the unnecessary ordeal of litigation faced by parties awaiting fruits of decree"*. Of utmost importance amongst these 14 directions is the direction to executing courts to dispose of all execution proceedings within 6 months from the date of filing, which period can only be extended by recording reasons for delay. Since the judgement in *Rahul S. Shah* was pronounced only on April 22, 2021, it is still early days to gauge the actual effect it has had on the pendency of execution proceedings.

India is the 6th largest economy in the world after USA, China, Japan, Germany and the United Kingdom (https://bit.ly/3D46WEi). Having said that, its civil justice system still ranks at an abysmal 110 out of 139 nations (https://bit.ly/3D46Nke).

The problems that mar the judiciary are not at all difficult to narrate. At a macro level some of these issues can be identified as an exhausted and overworked judicial machinery, lack of state support and will to build and maintain adequate court/judicial infrastructure, inadequate budgetary allocations for courts, outdated systems, antiquated laws (more particularly the provisions of the Code), unwillingness on the part of the lawyers, litigants, and courts alike to change with times, etc. At the micro level these problems translate into long winded court hearings, the all too familiar adjournments, frequent objections by judgement-debtors under Section 47 of the Code, delayed disclosure of assets, never-ending appeals against orders of attachment and sale of assets, non-inclination of the courts to resort to penal measures such as imprisonment and lack of statutory timelines, cumbersome procedural road blocks, inefficient and inadequate support staff to carry out court directions, resistance to use newer technologies and to generally move on with times. It has become fashionable to speak about the problems that keep us behind but nobody, without any exception, is willing to put the money where the mouth is. Then, there are times when the "elephant in the room" syndrome takes over.

If Indians are to achieve their dream of financial inclusiveness, amongst others, they need the world to consider them as "the" investment hub. Businessmen do not suffer any illusions; they recognize that disputes in business are a given. They are not averse to fighting a legal battle, but what they want is protection of investment. Indian courts and the Government have done precious little to address this concern of investors. In a recent address, Justice D.Y. Chandrachud of the SC said, *"Court is yet another service which is provided by the State to all its citizens".* This is an extremely important observation since it is about time that the Government and judiciary wake up to the reality – that there is a deficiency in providing this service.

CONCLUSION

If the Indian dream is to be realized, it is imperative that the Government invests in court infrastructure, nay overhauls it and that the courts expedite the rate of disposal of cases, more particularly execution/enforcement proceedings. As a matter of practice, courts should resist the temptation to entertain pleas against enforcement especially those that are technical in nature. This will also mean overhauling the Code. Changes that reflect the need of the hour *inter alia* such as simplification and streamlining of the law on enforcement proceedings[46], reducing procedural hurdles and weaning off unnecessarily time-consuming bureaucratic processes[47], imposing strict timelines at various stages of a proceeding, ought to be brought in.

Further as observed by the SC in *Shub Karan Bubna*, consolidating execution proceedings with suits is something which the legislature must sincerely assess. It goes without saying nothing will be achieved if the other stake holders in this arena, namely the lawyers and the litigants, do not play ball.

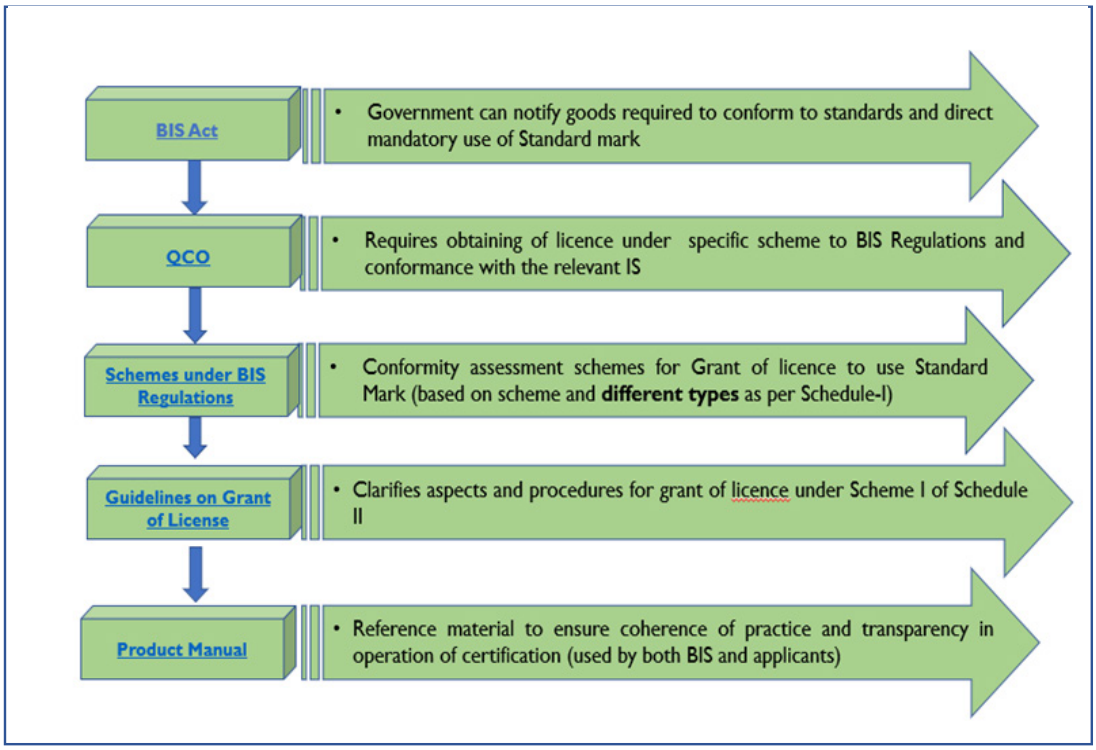
[46] The provisions of the Code pertaining to execution can be excessively confusing on account of the varying procedure which the Code prescribes when it comes to executing the decree against different kinds of assets such as movable properties, immovable properties, debts, shares, negotiable instruments, salaries etc.

[47] For instance, getting warrants of attachment issued and served upon a judgement debtor can by itself be a herculean task. However, the troubles of the decree-holder do not end there because once the attachment is completed, he again has to get warrants for sale of the attached property issued and served upon the judgement debtor.

Present Legal Framework Governing Standards, QCOs and Issuance of License

Authors: Nishant Shah, Partner – nishantshah@elp-in.com
Stella Joseph, Partner – stellajoseph@elp-in.com
Prakhil Mishra, Senior Associate - prakhilmishra@elp-in.com
Pulkit Devpura, Advocate - pulkitdevpura@elp-in.com

At present, there are over 21,000 standards which have been formulated by BIS, majority of which are voluntary in nature whereas, some are made mandatory through the issuance of a Quality Control Order (**QCO**). A bird's eye view of the overall legal framework governing Indian Standards, QCOs and issuance of licenses to use BIS mark on the goods is diagrammatically represented below - each of which are further elaborated in the subsequent paragraphs:



FORMULATION OF INDIAN STANDARDS - THE CONSULTATIVE MECHANISM

- As the National Standards Body, the BIS is responsible for harmonious development of the quality standards for goods, articles, processes, systems and services, including for matters connected therewith or incidental thereto. BIS develops Indian Standards through a consultative mechanism in technical committees, comprising of various stakeholders that have interest in the relevant subject – this is to ensure that views of all are given due consideration and a consensus is evolved while formulating a standard.
- The stakeholders can broadly be categorized as industry, consumers/users, technologists (R&D and scientific institutions, academia, etc.) and government departments/regulators.
- There are around 1000 technical committees in BIS carrying out standardization work in 15 broad technology areas/sectors[48].
- Separate Division Council/Sectional Committees oversee and supervise the work relating to formulation of Indian Standard.
- Further, all Central Government Ministries and State Governments, as well as Industry Associations across all sectors have been requested for creation of Standardization Cells with the objective to enhance stakeholder involvement. About 64 Standardization Cells have been created in Ministries, Industry Associations, PSUs[49]. Apart from consultation within the technical/sectional committees, draft standards are also open for public views/ comments.
- The Standards are regularly reviewed and formulated in line with technological developments to maintain harmony with International Standards. The review of Indian Standards occurs as and when considered necessary. It is however necessarily done at least once in five years to establish whether these standards are still relevant, accurate and up-to-date with state of-the-art technology.
- There is at present, an exercise initiated to review and update all Indian standards dated prior to the year 2000, which is targeted to be completed over a period of two-three years.

Pointers for companies: The relevant industry players should keep themselves informed as regards to such consultations and submit their suggestions to the draft Standards. In case of any identified gaps between what the Standard prescribes and the practical feasibility of the testing requirements/ technological challenges, necessary representations may be made to the relevant BIS Sectional Committee to consider revision of the Standards. It is advisable for the companies that have a dominant place in the market to pitch for becoming part of such committees to make sure that their key inputs are taken into consideration while developing the standards.

ISSUANCE OF BIS LICENSE - KEY LEGAL PROVISIONS OF THE BIS ACT

- In terms of Section 13 of the BIS Act, BIS has the power to grant: (i) a license to use or apply a Standard Mark, where any goods conform to an Indian standard or (ii) a certificate of conformance wherein demonstration of conformity is desired without the use of a Standard Mark.
- In terms of Section 16 of the BIS Act, the Central Government may direct compulsory use of standard mark on notified products by way of issuing QCOs. In respect of such notified products, in terms of Section 17 of the BIS Act, no person is permitted to manufacture, import, distribute, sell, hire, lease, store or exhibit for sale such goods without a Standard Mark.

[48] Source: BIS Annual Report 2020-21, available at: https://www.bis.gov.in/wp content/uploads/2022/02/Annual_report_for_final_approval_on_12-1-2022.pdf

[49] ibid

- It is especially crucial to note Section 17 of the BIS Act. This provision has a wide impact and casts an obligation on various entities in the transaction chain i.e. a person who "manufactures" or "imports" or "distributes" or "sells" or "stores or exhibit for the purpose of sale". This intent is to make everyone in the chain, and not just the initial manufacturer or the last seller, responsible. This fact is also corroborated by the definition of the term "person"[50] as well as the requirements of Section 18 of the BIS Act.

QUALITY CONTROL ORDERS (QCOS)

- Some Standards are made mandatory by the issuance of QCOs. The decision to make a particular Indian Standard mandatory is essentially taken by the parent ministry dealing with the product covered under the Indian Standard (who then issues the relevant QCO making the Indian Standard mandatory). For instance, the QCO on steel products was issued by Ministry of Steel, on toys by Ministry of Commerce and Industry and on different chemicals by Ministry of Chemicals and Fertilizers.

- QCO is a gazette order issued under Section 16 of the BIS Act. It also typically prescribes BIS as the authority responsible for enforcing the QCO, including the penal consequences for any contravention of the QCO.

- The QCO specifies the scope and variants of the products which are specifically covered. Several questions/ambiguities arise here with respect to coverage under the QCO- whether a particular variant of a product is covered, whether parts/ components of the product are covered and even whether only pure products or even a combination/mixture of the product is also being covered.

Pointers for companies: The coverage of certain products/raw-materials/parts etc. within the scope of the QCO need to be specifically addressed by an applicant after examining the exact language of the QCO itself as well as the underlying Indian Standard which is made mandatory by the QCO.

APPLICABILITY OF QCOS TO IMPORTED AND EXPORTED GOODS

- QCOs are made equally applicable to both domestically manufactured goods as well as to imported goods. For compliance of this requirement, all manufactures/exporters of these products to India shall be required to obtain BIS license for using Standards mark on their product.

- Appendix III of Schedule I - Import Policy of ITC (HS), 2012 gives a list of products under mandatory certification.

- QCOs also typically provide for an exception to the goods which are meant for exports, consistent with the underlying thrust of consumer laws in India i.e. to safeguards interest of consumers in India.

Pointers for companies: It is important to analyze the text of the QCO no sooner than its draft is made public to identify its coverage and its bifurcation of products. This should be done immediately to represent the concerns of the stakeholders as regards the applicability of the QCO to the relevant ministry.

[50] Defined as follows: **"a manufacturer, an importer, a distributor, retailer, seller or lessor of goods or article or provider of service or any other person who uses or applies his name or trade mark** or any other distinctive mark on to goods or article or while providing a service, for any consideration or gives goods or article or provides service as prize or gift for commercial purposes **including their representative** and any person who is engaged in such activities, where the manufacturer, importer, distributor, retailer, seller, lessor or provider of service cannot be identified"

CONSULTATION WITH INDUSTRY

- As also highlighted earlier, prior to issuance of a QCO, it is expected for the relevant department/ authority under the BIS to commence interactions with the relevant industry participants to form a committee for preparation of the relevant standards - including testing requirements and post issuances of the QCO for development of the 'product manual'.

Pointers for companies: During the consultation phase with the Government, prior to issuance of a QCO, industry should make adequate representation on various aspects of the QCO in relation to which relief is required. This includes the date of implementation, specific exemptions for stock in hand or products meant for exports, relevant Scheme of certification to be adopted, coverage of the products etc.

BUREAU OF INDIAN STANDARDS (CONFORMITY ASSESSMENT) REGULATIONS, 2018 (BIS REGULATIONS)

- The BIS Regulations prescribe eight different types of schemes wherein different types of procedures are prescribed for obtaining a license or certificate of conformity for different products/services/ processes.
- While eight different schemes having been prescribed, Scheme I is normally prescribed for procedure of obtaining the license, especially for most consumer goods, as it is the most stringent out of all the eight schemes, with the procedure requiring a mandatory factory audit and licensing of premises.
- Critical to note is that the license granted under Scheme I is in relation to "manufacturing premises"[51]. Therefore, once a BIS license is issued for a "manufacturing premises", such premises can then be used for marking the goods with the ISI mark.

Pointers for companies: The BIS license is required to be taken in relation to the "manufacturing premises". In certain cases, an issue arises as to whether the license would be required for all the premises where any form of processing of the product is carried out. On this issue, there however continues to be some legislative ambiguity.

- **Conservative position:** License to be obtained for the actual manufacturers' location.
- **Balanced position:** When there are multiple manufacturing locations, a centralized facility can be identified to undertake activities to the extent higher than mere packing. Such activity can be argued to be equivalent to bringing into existence of a new product. However, such location must equip itself with the necessary facilities required under BIS Regulations.
- **Aggressive position:** A centralized facility to undertake packaging of the product after procuring finished goods from factories. Based on definition set out in FTP, packing / labelling can be argued to be "manufacturing".

[51] Defined as follows: "the premises, either owned by the applicant or otherwise, where a part of the manufacturing activity takes place and includes the premises where the final manufacturing activity is carried out and where Standard Mark is to be used or applied".

CONSULTATION WITH INDUSTRY

- The BIS Act and the BIS regulations are supplemented by certain Guidelines which are issued by the BIS as regards grant, renewal, change in scope of license etc. Key out of these is the Guidelines for Grant of License. BIS grants a license based on successful assessment of the manufacturing infrastructure, production process, quality control and testing capabilities of a manufacturer through a visit to its manufacturing premises.

- The Guidelines read with Scheme I itself lays down two options for obtaining the license, one simpler than the other [it is noteworthy that a foreign manufacturer and a large-scale manufacturer cannot opt for the simpler option].

- The process of license is digitized to a large extent and all the applications for domestic manufacturers are required to be made through the online portal called "manakonline". For foreign manufacturers, though the application needs to be filed physically (this function is still under development on the portal), post grant of license, the status of the same can be checked on manakonline portal.

Pointers for companies: Even after obtaining the license, the account on the portal should also be regularly checked to note any new requirements notified by BIS from time to time.

This article has been published in Mondaq

[52] Source: BIS Annual Report 2020-21, available at: *https://www.bis.gov.in/wp-content/uploads/2022/02/Annual_report_for_final_approval_on_12-1-2022.pdf*

The Demise of Advance Rulings

Authors: : Kumar Visalaksh, Partner – kumarvisalaksh@elp-in.com
Saurabh Dugar, Senior Associate – saurabhdugar@elp-in.com

In 1991, when the Indian economy opened, it was applauded as a new dawn. A breakaway from the infamous license-raj, it promised a liberalized, transparent, and investor-friendly India. Amongst the slew of measures taken by the government to boost investor confidence, a remarkable one was notifying the Authority for Advance Ruling (**AAR**) under income-tax law in 1993: a quasi-judicial forum through which prospective investors could obtain a tax ruling on future transactions.

The AAR was conceived as a body which would provide binding decrees – preventing inadvertent defaults of tax and thereby years of litigation. Inherent to the AAR was its impartiality, signified best by the fact that it was presided by a retired Supreme Court judge. The AAR was, suffice to say, successful in serving its intended purpose. Non-resident investors actively approached the Authority with difficult questions of fact and law, reassured that their submissions would be heard and considered impartially. Encouraged by this success, advance rulings were thereafter introduced for customs and excise matters in 1999. This was further extended to service tax matters in 2003. Notably, the structure of the income-tax AAR was retained – with a retired judge of the Supreme Court as the Chairman. Both AARs are responsible for various landmark rulings through the years. Over the years, they helped bridge the gap between the conflicting interests of the taxpayer and the revenue in an amicable, non-litigative manner – a relief for the already overburdened courts and tribunals. In all of this, the AARs also emerged as bodies specially geared towards addressing the tax implications of increasingly complex transactions.

Naturally, one would expect that these tools, which had helped build investor trust, provided taxpayer certainty and eventually contributed to growth would come to be expanded and evolved. The last few years, however, have had a different story to tell.

The first change in policy was showcased by the new advance ruling authority as constituted under GST. This AAR altogether did away with the requirement of a presiding retired judge or even an independent judicial member. Instead, it came to be comprised only of high-ranking government officers. Soon enough, this regression was taken over to other regimes – starting with the replacement of the AAR for customs with a Commissioner/Principal Commissioner (as a ruling member) in 2018. The option of appeal from the same was also removed in 2021 as part of "rationalization of Tribunals". The AAR for income-tax was also made defunct and replaced with the "Board of Advance Rulings" (**BAR**), which consists only of revenue officers. The ostensible reason given for this change was the non-availability of eligible persons (retired judges of the Supreme Court, Chief Justices of High Courts and other judges of High Courts who have served for seven years or more).

Notwithstanding the intent behind these changes, it has struck a devastating blow to the primary goals of advance rulings, i.e., providing confidence in the fairness of the system and bringing certainty to taxpayers, especially to the ones outside India. The perception of AARs as a neutral forum is now compromised with advance rulings left entirely in the hands of revenue officials. Contrary to the very purpose of advance rulings, this only opens more avenues for litigation. Time and again, the Supreme Court, especially in the context of tribunals, has reiterated the importance of neutral judges who are independent from executive control and trained to judicial thinking. This also extends to AARs, which were endowed with judicial functions and more important, the taxpayers' trust.

In addition to structural changes, there has also been a move towards making the rulings non-binding. Rulings of the new BAR under income-tax for example, are not binding on either the taxpayer or the revenue. A similar move is

now proposed in the Finance Bill, 2022 for the Customs AAR, by which the validity of its rulings will be limited to three years only – too small a time frame to offset the costs and risks of obtaining the advance ruling. These reduce the function of the AAR to a merely advisory body and take away any hopes the taxpayer might have towards certainty.

The instances point towards a gradual (and steady) weakening of the structure of advance ruling authority and a dilution of its independence. As they stand today, the AARs do not appear to inspire any confidence of the taxpayer. Ironically enough, these changes which undermine the AARs have come after the WTO Agreement on Trade Facilitation signed at Bali (to which India is a signatory), which specifically mandates a system of advance ruling as part of a modern and efficient tax procedure. Our government seem to be thinking otherwise though.

This article has been published in Business Today

India's New Regime for Taxing Virtual Digital Assets

Authors: : Stella Joseph, Senior Associate – stellajoseph@elp-in.com
Yash K Desai, Senior Associate - yashdesai@elp-in.com

The Finance Minister of India, during her announcement of India's Union Budget 2022, introduced specific proposals to tax virtual digital assets (**VDAs**), including cryptocurrencies. A VDA is defined to have various elements, many of which are comparable to the definition of "virtual currency" as defined by the Financial Action Task Force in its 2014 report on "Virtual Currencies—Key Definitions and Potential AML/CFT Risks."

The definition of VDA under the Indian Income Tax Act, 1962 (**IT Act**) (proposed to be inserted by the Finance Bill, 2022), can be divided into the following parts:

Part	Analysis
"any information or code or number or token (not being Indian currency or foreign currency)"	The terms "information", "code", "number" and "token" are not separately defined under the IT Act and may be subject to a wide interpretation.
"generated through cryptographic means or otherwise"	This part of the definition is extremely wide as it also includes any "information," "code," etc., which is not generated through cryptographic means. This may allow the Government to tax any information or number or code or token which is derived through blockchain or through technology which does not involve cryptographic means.
"providing a digital representation of value"	The phrase "digital representation of value" may be construed as anything to which a value can be assigned and not specifically anything which may have an underlying asset. Therefore, it will be sufficient to have only a digital representation of value, without an underlying asset.
"exchanged with or without consideration"	This phrase makes the intention of the government very clear: Any transfer of a VDA, even without receipt of consideration, is liable to income tax in India.
"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, but not limited to investment scheme; and can be transferred, stored or traded electronically"	A VDA should possess any of these three characteristics, i.e., (i) inherent value; (ii) a store of value; or (iii) a unit of account. While these three terms have not been defined under the IT Act, they seem to replicate the terminology used in the definition of currency (i.e., "legal tender") used by other nations. Also, the definition is wide enough to include the use of a VDA in a financial transaction (which may be the case for blockchain users) or for investment purposes (not limited to any scheme).

Part	Analysis
"a non-fungible token or any other token of similar nature, by whatever name called"	A non-fungible token (NFT) is defined to mean a digital asset as the government specifically notifies. One will have to wait for the notification to comment on the exact type and nature of NFTs to be covered therein.
"any other digital asset, as the Central Government may, by notification in the Official Gazette specify"	This gives the government the leeway to notify further assets as VDAs in the future.

Given the wide sweep of the definition of a VDA as examined above, it is possible that the Indian government wanted to keep its scope flexible enough to include future technologies akin to cryptocurrencies. However, the wide definition, in the absence of clarification, leads to several ambiguities, with the possibility to extend its scope to several electronic/digital transactions/activities which are very different in nature to cryptocurrencies.

TAX ON INCOME FROM VDAS—SECTION 115BBH OF THE INCOME TAX ACT

The Union Budget 2022 proposes to introduce section 115BBH into the IT Act to introduce a specific tax regime for VDAs. The key features of section 115BBH (proposed to be inserted by the Finance Bill, 2022) and its implications are set out below:

Section 115BBH	Implications
▪ Any income arising from the "transfer of any virtual digital asset", whether in cash or kind, shall be taxed at the rate of 30%. ▪ No deduction (other than cost of acquisition) of any expenditure or allowance or set-off of any loss shall be allowed to the assessee under any provision of the IT Act.	▪ Imposing tax at 30%, which is the highest tax bracket applicable and comparable to the tax regime applicable to speculation incomes (such as winnings from lotteries, racehorses etc), has garnered a lot of criticism from the industry. In this regard, several representations have been filed by various Indian crypto-exchanges urging the government to reconsider the high tax rate. ▪ Since cryptocurrency, and probably the other VDAs, operate globally, it will be interesting to see whether the cost of acquiring multiple VDAs can be considered as a single block of assets or whether the cost of acquisition will have to be determined at the level of asset, asset class or category, etc.
▪ Losses from the transfer of VDAs cannot be set off against any other income.	▪ While it appears that losses from the transfer of VDAs may not be allowed for set-off or adjustment against any other income, whether multiple transactions of the same assessment year which yield both losses and gains would be eligible for set-off *inter se* is uncertain.

WITHHOLDING TAX ON VDAS—SECTION 194S OF THE INCOME TAX ACT

In order to capture the transaction details, pursuant to section 194S of the IT Act (proposed to be inserted by Finance Bill, 2022), any person responsible for paying a resident any sum by way of consideration for transfer of a VDA shall withhold an amount equal to 1% of such sum as income tax.

Where the consideration for transfer of a VDA is wholly in kind or in exchange for another VDA, or partly in cash and partly in kind, the person responsible for paying such consideration shall ensure that tax has been paid in respect of such consideration for the transfer of the VDA (before releasing the consideration).

The implications of the proposed tax deducted at source (**TDS**) and applicability of Section 115BBH in scenarios involving a purchaser/seller in India or outside India are summarized below:

Particulars	Purchaser in India	Purchaser outside India
Seller in India	▪ Tax at 30% in the hands of resident seller ▪ TDS at 1% to be deducted by resident purchaser	▪ Tax at 30% in the hands of resident seller ▪ TDS at 1% to be deducted by non-resident purchaser
Seller outside India	Not applicable	Not applicable

Section 194S will take effect from July 1, 2022.

POSSIBLE TAXABLE EVENTS IN RELATION TO CRYPTOCURRENCIES

Considering the underlying technology involved in cryptocurrencies, their creation and distribution may involve several taxable events. Different countries have chosen to tax different taxable events. From India's perspective, the following implications may arise with regard to the various stages involved in the life cycle of cryptocurrencies:

Stages	Implications under Indian budget
Creation: Once a new cryptocurrency is created, one of the first steps is to ensure that it is available in the hands of potential users. The distribution of cryptocurrencies can be undertaken in several ways, including through: ▪ Airdrops—free distribution among influencers to increase awareness of a particular cryptocurrency; ▪ Initial token/coin offering—issued in exchange for a cryptocurrency, or, in some cases, fiat currency;	▪ As regards airdrops, it is possible to take the view that these amount to a gift of a VDA (without consideration), to be taxed in the hands of the recipient. However, as regards their valuation, they may have little market value, if any, since they involve distribution of insignificant numbers. Thus, valuation of such airdrops, required to be aligned with "aggregate fair market value" would pose significant challenges. ▪ In relation to initial token/coin offering, it is likely to be considered as a transfer of a VDA, to be taxed at 30% in the hands of the transferor. Where it involves an exchange with another cryptocurrency, in the absence of any exclusion for such transaction from the ambit of taxation, one view could be that the 30% tax may be levied on both sides.

Stages	Implications under Indian budget
▪ Mining (proof of work)—refers to the process of validation of transactions through solving complex mathematical algorithms. As a reward for such solving, a digital coin is awarded to the miner by the blockchain network and, as result, a cryptocurrency is derived from blockchain technology. ▪ Forging (proof of stake)—refers to the process through which transactions are verified when a distributed ledger technology uses a "proof of stake" mechanism where shares of validation rights are assigned to users according to the stake that they have in the blockchain.	▪ As regards the mining/forging where the miner or forger earns the cryptocurrency as a reward for their efforts/acts, it is unclear how the 30% tax will be levied. This is primarily because it is unclear who is the transferor of a VDA in this case. Further, whether the ambit of "transfer" can be understood as broad enough to include even the creation of cryptocurrency, is something that needs to be specifically clarified. While there is a definition of "transfer" in the IT Act, that is only "in relation to a capital asset" and may not automatically extend to the transfer of a VDA.
Storage: To store the cryptocurrency, the user requires a wallet, which consists of one or more digital wallet addresses.	▪ The present proposals with respect to taxation of VDAs may be seen as not specifically taxing the act of storing the cryptocurrencies (without involving the element of transfer).
Exchange of cryptocurrencies: The next step in the life cycle of cryptocurrencies would be to find potential purchasers or sellers. Typically, virtual currency exchanges (**VCEs**) are the most well-known mode of exchange where an online service facilitates customers to trade virtual currencies. A less popular mode of exchange is the over the counter (**OTC**) broker. This involves a process of brokering an "off-market" exchange of tokens in exchange for either fiat currency or for other crypto-assets.	▪ Valuation issues may arise as regards cryptocurrencies traded on VCEs, since their prices vary significantly, depending on the exchange on which they are traded—due to factors such as size of the crypto market, exchange volume, entry price etc., and primarily since cryptocurrencies and VCEs are not regulated under any law. Further, the value of a cryptocurrency for each assessee may be different, depending on which VCE the assessee has traded it. Similar valuation issues arise even in cases of cryptocurrencies traded through an OTC broker. Therefore, guidelines on valuation issues are now eagerly being awaited. ▪ Further, in relation to TDS obligations on the buyer, a critical challenge is the modality of withholding income tax at 1% where such a transaction is facilitated by VCEs or OTCs. In such cases, identification of the counterparty is a challenge and therefore the TDS could become a permanent cost of the transaction.

Stages	Implications under Indian budget
Disposal of cryptocurrencies: Disposal of cryptocurrencies may occur in any of the following ways: ▪ in exchange for fiat consideration; ▪ in exchange for another cryptocurrency or digital asset (e.g., an NFT); ▪ to procure goods or services; or ▪ without any consideration (e.g., as a gift).	**Transfer of cryptocurrencies for fiat currency: in exchange for fiat consideration;** ▪ On a plain reading of the definition of a VDA, a transfer of cryptocurrency for fiat currency would clearly fall within the tax net and be subject to 30%. **Transfer of cryptocurrencies for another cryptocurrency (or any other VDAs—e.g., NFTs):** ▪ The manner of taxation of such a transfer is unclear at present. In the absence of a clear exclusion of an exchange of one cryptocurrency for another, or for another VDA, like NFT, one may view this transaction as also falling within the ambit of taxation. Whether there would be taxation at both ends, since both parties would qualify as earning income from transfers of VDAs, will have to be seen. **Transfer of cryptocurrencies as payment for goods or services:** ▪ This may lead to a situation where the seller/supplier of goods or services would treat the income from the transaction as business income, while the recipient of the goods/services, i.e., the transferor of the cryptocurrency, would need to tax the income from such a transfer at 30%. This issue requires clarification. **Gifting of cryptocurrencies:** ▪ Gifts of VDAs are specifically proposed to be taxed in the hands of the recipient. However, it will be difficult to determine the "aggregate fair market value" of a VDA on which the tax is to be borne by the recipient, considering the above valuation difficulties, especially from the perspective of the recipient. Clear guidelines on this aspect will be necessary.

CONCLUDING REMARKS

The general position in law remains that it is possible to tax an income even if such income is generated out of a business which is illegal. Thus, the taxation of VDAs per se does not lend legitimacy to its trading and it will be necessary to wait for the final version of India's Cryptocurrency Bill to understand the legality of the underlying trade.

This article has been published in Bloomberg Tax

'Crossing' into a Renewed Procedural Regime before SEBI

Authors: Jitendra Motwani, Partner – jitendramotwani@elp-in.com
Abhiraj Arora, Associate Partner – abhirajarora@elp-in.com
Harshvardhan Nankani, Associate – harshvardhannankani@elp-in.com

The recent judgement of the Hon'ble Supreme Court of India in *T. Takano v SEBI* was a pronouncement on the *audi alterem* partem principle of natural justice in procedural matters before the country's financial market regulator, the Securities and Exchange Board of India (**SEBI**). It was held in *T. Takano* that a fair procedure was as important, if not more, than a fair result. It was noted that reliability of the record in assisting the adjudicator to arrive at a decision was essential to achieve this objective. One way in which reliability of the record can be ensured is by giving the Show Cause Noticee the opportunity to confront the evidence cited against them through cross-examination of witnesses providing the evidence. Cross-examination is an effective tool to elicit the truth. In one of the first and most recent invocations of the judgement of the Hon'ble Supreme Court in *T. Takano v. SEBI,* the Hon'ble Securities Appellate Tribunal (**SAT**) has set aside a decision passed by the Adjudicating Officer, SEBI (**AO**) denying cross-examination to a Show Cause Noticee.

Rana Kapoor's grounds for challenging SEBI's decision were that he was being denied his right to an opportunity to defend himself appropriately and adequately. In the absence of an opportunity to cross-examine a fact-witness whose statements allegedly formed the sole basis of the charge, the inevitable reliance placed on such a statement would taint the record. Cross-examination would serve the essential purpose of verifying the veracity of the statement and credibility of the witness and was essential to his defence, it was argued. Reliance was placed on *T. Takano v. SEBI* where SEBI was directed to disclose an Investigation Report against the Appellant during adjudicatory proceedings. The Supreme Court has clarified that the principle of *audi alterem* partem (no person shall be condemned before being heard) would encompass the right to fair disclosure for the sake of procedural fairness, reliability of the record and transparency. The right to an opportunity to cross examine a witness is an indispensable right of a Show Cause Noticee to confront the evidence being cited against him. The fairness of the 'process' has, in this way, been prioritized over the fairness of the 'outcome' in judging whether principles of natural justice had been transgressed, meriting the interference of an appellate forum. The argument in Rana Kapoor's case is that cross-examination would achieve the very same purpose by satisfying these principles and thus, should be mandatorily allowed in proceedings before the AO.

In *T.Takano,* the Supreme Court preferred the standard of 'relevant' over 'relied upon' as the test for disclosure to satisfy principles of natural justice at the adjudicatory stage and held that a mere ipse dixit of SEBI that the material is not 'relied upon' is insufficient. To see if something is 'relevant' its nexus to the order and reasonable likelihood to influence the order must be gauged. The statement of this witness is undeniably relevant. The requested cross-examination is concededly to determine a question of fact. The argument of SEBI that the statement of the witness in question was not 'relied upon' by the Ld. AO has been rejected.

The SAT, after hearing the parties held in favour of Rana Kapoor on this procedural point without venturing into the merits of the case. The matter was remanded to the Ld. AO to be decided afresh after taking into consideration the decision in T.Takano.

This is of significance as the order to come will have to be a reasoned one and will have to deal with the principles laid down in *T.Takano* by the Supreme Court. It will be one of the first demonstrable cases where a decision of SEBI

will be tested against the touchstone of this seminal judgement. It will also go a long way in allaying the anxieties of Show Cause Noticees before SEBI by providing clarity as to their procedural rights. It is about time the mist around the right to cross-examination in proceedings before SEBI clears. A 2022 judgement of the Supreme Court in S*EBI v. Mega Corporation Ltd.* has left this question open. It will be interesting to see how the AO decides and for what reasons in its *de-novo* decision.

We are witnessing a watershed moment in capital markets jurisprudence. *T.Takano* is very clear on the application of principles of natural justice to applications for disclosure. The question really is, "Can *T.Takano* come to the rescue of a Show Cause Noticee seeking cross-examination?" The decision of SEBI is awaited with eager anticipation.

India – UAE Comprehensive Economic Partnership Agreements

Authors : Sanjay Notani, Partner – sanjaynotani@elp-in.com
Akshay Jain, Principal Associate – akshayjain@elp-in.com

INTRODUCTION AND OVERVIEW

On February 18, 2022 India and the United Arab Emirates (**UAE**) signed **the Arab Emirates Comprehensive Economic Partnership Agreement (CEPA),** which came into force on May 1, 2022[53]. The commitments made under the CEPA were ratified vide Customs Notification No. 22/2022-customs dated 30 April 2022[54] (**Notification**).

While most tariff lines were subject to the reduced/eliminated tariffs, tariff reductions for certain tariff line items are subjected to Tariff Rate Quota (**TRQ**). Table III of the Notification provides the list, which includes goods of plastic (Chapter 39), gold (Chapter 71), and copper (Chapter 74). The provisions on tariff reduction subject to TRQs included as part of the CEPA are the first in various trade agreements signed by India. The tariff reductions subject to TRQ appear to have been included in the CEPA at India's insistence to check on a sudden and sharp rise in imports from the UAE.

The TRQ is a mechanism that allows a set quantity of specific products to be imported annually. These specific products can be imported at lower import duty rates (in-quota duty) than the import duty rate normally applicable to such products. Unlike a simple quota system, a TRQ regime does not restrict the quantity of imported products. For example, India has set a TRQ limit on imports of Low-density Polyethylene (**LDPE**) 50,000 MT per annum at a concessional tariff rate of 0% (from the most favoured nation's tariff rate of 7.5%) under a customs notification. The importers in India may import the LDPE into India at a concessional rate of 0% only up to 50,000 MT annually subject to applicable procedures. However, any imports of LDPE above the quantity of 50,000 MT would be subject to a tariff rate of 7.5%.

BACKGROUND

A corresponding Public Notice No. 06/2015-2020 dated 1 May 2022 (**Public Notice**) has been issued to make suitable changes to the Handbook of Procedure (**HBP**) and Appendix 2A. Changes in Appendix 2A have been enclosed as Annex-1.

The products notified under the Public Notice (i.e., products of plastics, gold, and copper) constitute a significant proportion of India's imports from the UAE. In the Financial Year 2021-22, these tariff lines constituted about 18% of the total value of imports from the UAE. Details can be viewed in Annex 2.

It is interesting to note that the imports of articles covered under the provisions for TRQ have increased substantially in FY 2020-21 compared to the previous experience of India on FTA, especially under the existing FTA's such as ASEAN FTA, Japan FTA, and Korea FTA. Under these FTAs, the imports into India have increased substantially compared to exports from India[55]. Therefore, the Indian government has brought in TRQ measures under the CEPA to ensure that imports do not increase substantially, injuring the domestic industry.

[53] List of documents launched/signed during the India-UAE Virtual Summit, 18 February 2022, available at: *https://www.mea.gov.in-/bilateral-documents.htm?dtl/34880/List_of_documents_launchedsigned_during_the_IndiaUAE_Virtual_Summit*

[54] Notification No. 22/2022-Customs dated 30.04.2022, available at: *https://egazette.nic.in/WriteReadData/2022/235481.pdf*

[55] A Note on Free Trade Agreements and Their Costs, NITI Aayog, available at: *https://www.niti.gov.in/writereaddata/files/document_publication/FTA-NITI-FINAL.pdf*

This update provides a high-level summary of the provisions introduced vide the Public Notice and its implication for the relevant industries.

INDUSTRY-SPECIFIC TRQ PROVISIONS

The public notice specifies different Quotas and tariff eliminations for the different products. This update encapsulates the industry-specific changes pursuant to the Public Notice.

A. Plastic Products

Plastic products and articles such as LLDPE, LDPE, Polyethylene, Polypropylene, PVC, etc., are subject to TRQs. The Public Notice provides a 50% tariff reduction for plastic products classifiable under Certain Tariff Items that will be phased over 5 years. Further, these tariff reductions will be subjected to the TRQ limits, and there are two types of TRQ for these items-

- The quantity of these quotas will be increased each year over 7 years and thereafter will remain stagnant, or
- Standard Annual TRQ of 60,000 MT.

The Public Notice specifies the quantities for various line items that can be imported at the reduced tariffs. These quantities are provided (either separately for an individual tariff line item or cumulatively for multiple tariff line items). Once the import quantities specified under the Public Notice are achieved, any subsequent imports during the year would be subject to the effective tariff rate mentioned in the Public Notice.

To Apply for a TRQ license for items of Chapter 39, the applicant will have to prove that he has been an importer of the specified item for the last two years. These importers must be the users/processor of the articles imported into the country. The applicant will have to furnish a self-certified copy of the document issued by Central/State/District Authorities indicating processing capacity to prove the same. The Directorate General of Foreign Trade will govern the issuance of the licenses. The Public Notice does not specify the manner in which the licenses will be issued to the applicants. It remains to be seen whether the DGFT issues licenses to the applicants on the basis of on first come basis or devise any procedure/methodology to allocate the permissible quantities to various applicants. Any methodology to process the licensing by DGFT will have its challenges for any importer to avail of the benefit under this scheme

B. Gold Industry

There are two types of tariff reduction for the articles of gold –

- Certain articles which are classifiable under Heading 7108[57] will be eligible for the relief of 1% in absolute percentage terms subject to a TRQ limit of 200 tons (cumulatively for the specified tariff line items under **Annex 1**) phased in 5 years.
- Certain articles which are classifiable under Heading 7113[58] will be eligible for a 5% tariff reduction subject to the TRQ limit of 2.5 tons, and both of them are phased in 5 years.

The applicants applying for a TRQ license for the articles of gold of Heading 7108 will have to comply with the additional conditions, which can be viewed here.

C. Copper Industry

For copper items, the Public Notice provides for complete tariff elimination, which is phased over five years, and the same will be subjected to increasing TRQ limits for the initial five years thereafter, TRQ will be calculated based on moving average volume. However, it is unclear whether the moving average will be determined on the basis of actual imports or specified quantities of TRQ in the preceding years.

For more details on exact tariff items click here.

[56] Tariff item No. 71081100, 71081200, and 71081300.

[57] Tariff Item No. 71131910, 71131920, 71131930, and 71131940.

APPLICATION PROCEDURE

The applicants will have to file the TRQ application online through the DGFT website (https://dgft.gov.in) under the import management system.

For filing the applicant, the applicant will need to first ensure that the following requirements have been fulfilled[58]-

- The user profile of the applicant must be linked with an Import-Export Code (**IEC**).
- A valid Digital Signature Certificate (**DSC**) must be registered in the system.
- GSTN details correspond to the branches of the IEC.
- Valid Registration-cum-Membership Certificate (**RCMC**) details are issued to the IEC.

GENERAL CONDITIONS

The Notification and the Public Notice provide for certain general conditions[59] that need to be complied with for taking benefit of these concessional rates. These conditions are-

- The importer needs to submit a Certificate of Origin issued by concerned authorities in UAE at the time of clearance of the import consignment.
- TRQ limit for the concerned items will be proportioned periodically, except for the article of gold classifiable under Heading 7108, for which allocation will be proportioned on a quarterly basis.
- Applications for the Financial Year 2022-23 will be open from May 5, 2022 to 18 May, 2022. It will also include applications for the first two-quarters of articles of Heading 7108 i.e., till 30 September 2022. Subsequently, the third Quarter applications will be invited from August 1, 2022 to August 31, 2022, and the fourth Quarter applications will be invited from November 1, 2022 to November 30, 2022.
- TRQ will be allotted by the DGFT in accordance with the relevant procedure as specified in the HBP.
- These TRQ licenses will be valid for the specific allocation period or specific quarter, as applicable, and the same cannot be carried forward from one period to another.
- To be eligible for a TRQs license the applicants must be processors or manufacturers who will consume the concerned items, except for items.

IMPACT ON INDUSTRIES

With respect to the gold industry, the TRQ for items of Heading 7108 seems to be of limited effect in light of the fact that the total quantum of gold imported from UAE in the year 2021 was about 120.16 tonnes; thus, the preferential benefit is likely to be available for all imports. While India imports the majority of its gold requirements, the government has brought in TRQs measures for items of Heading 7108 to ensure that the imports[60] of gold, including under the heading 7108, are not increased significantly.

In addition, the tariff concession provided by India on gold items is likely to reduce the cost of raw materials for making jewelry. This will promote the export of plain gold and gold-studded jewelry, which is expected to increase to USD 10 billion in 2023[61].

Given that plastics were one of the major imports of India from UAE in the year 2020[62]

[58] Tariff Rate Quota (TRQ) Module, DGFT FAQs, available at: *DGFT FAQs*

[59] See. Page 11 and 12 of the Public Notice

[60] What India-UAE trade pact provisions say on gold, Deccan Herald, available at: *https://www.deccanherald.com/opinion/panorama/what-india-uae-trade-pact-provisions-say-on-gold-1103578.html*

[61] Trade pact with UAE may benefit $26 bn worth of Indian goods: Official, The Business Standard, available at: *https://www.business-standard.com/article/economy-policy/trade-pact-with-uae-may-benefit-26-bn-worth-of-indian-goods-official-122022000349_1.html*

[62] United Arab Emirates Exports to India, Trading Economics, available at: *https://tradingeconomics.com/united-arab-emirates/exports/india*

and that there has been substantial growth in the import of items of Headings 3901 and 3902, the Indian government seems to have imposed TRQs as a prudent measure to prevent an uncontrolled surge in the imports of these items. Further, even though there has not been a significant increase in the import of copper items, these TRQs will act as protective measures to prevent future contingencies.

Previous FTAs signed by India, especially the existing FTAs such as ASEAN FTA, Japan FTA, and Korea FTA, have not been favorable in terms of imports into India have vis-à-vis exports from India. The imports from FTA nations increased significantly compared to exports from India to FTA partner nations. Further, under the FTAs signed by India with partner nations, there is no mechanism to safeguard the domestic industry from any sudden rise in imports from such FTA partners other than bilateral safeguards (as per provisions of relevant FTAs) or imposition of trade remedial duties (such as anti-dumping and countervailing duties). The threshold for the domestic industry for seeking protection under bilateral safeguards or trade remedies duties is very high, thereby, it may not result in achieving the desired results. Therefore, the Indian Government seems to have insisted UAE incorporate the mechanism under the CEPA to check and contain any sudden rise in imports due to tariff concessions. This move has served dual purposes for the Indian industry i.e. protecting the interests of domestic producers of such articles while at the same time ensuring the availability of materials to the consuming industry at competitive prices.

Overall, these TRQs provide the optimal solution for ensuring sufficient availability of inputs at a lesser price without causing any potential risk to the domestic industry.

ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

MUMBAI
9th Floor
Mafatlal Centre
Vidhan Bhavan Marg
Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

NEW DELHI
801 A, 8th Floor
Konnectus Tower
Bhavbhuti Marg
New Delhi 110 001
T: +91 11 4152 8400

AHMEDABAD
C-507/508, 5th Floor
Titanium Square, Thaltej
Crossroads, SG Highway
Ahmedabad 380 054
T: +91 79 6605 4480/8

PUNE
202, 2nd Floor Vascon
Eco Tower Baner
Pashan Road Pune 411
045
T: +91 20 4912 7400

BENGALURU
6th Floor, Rockline Centre
54, Richmond Road
Bangalore 560 025
T: +91 80 4168 5530/1

CHENNAI
No 18, BBC Homes, Flat-7
Block A, 1st Floor, South
Boag Road. T. Nagar
Chennai -600 017
T: +91 44 4210 4863

FOLLOW US:

@ELPIndia

Economic Laws Practice

Economic Laws Practice (ELP)

elp_think_act_excel

elplaw@elp-in.com