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Competition and Regulatory Issues in Coal Sector in India

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Abstract

A sound regulatory design achieves the right balance of ostensibly contradictory principles such as independence and accountability, transparency and commercial sensitivity, predictability and adaptability, cost-effectiveness and promptness, and it is for this reason that achieving it becomes critical, and yet challenging. In recent past, coal sector has been under wrath of the apex court of the country along with the competition watchdog for the disregard of fair and competitive practices in allocation and management of coal blocks. Previous government, in its attempt to render a better state of the sector, passed an ordinance to establish an independent coal regulator.

It is in this background that the paper attempts to highlight the competition and regulatory issues in coal sector in India and how the current legislative provisions are serving as breeding grounds for future litigations.

I. INTRODUCTION

India, as a growing economy, faces growing challenges in form of energy security. Coal has always been the primary and crucial resource to assimilate the need of the growing economy, however, inconsistent supply, inferior quality and lately sectoral reforms are paving way for new and greener sources of energy. Still, for Indian Industry, coal is indispensable.[1] Coal supplied about 53% of the primary commercial energy in India in 2011[2] and is projected to supply about 47% of primary commercial energy in 2031-32 even in the least coal usage scenario of the Integrated Energy Policy.[3] The coal production all over India has been 384.19 Million tonnes (MT) in 2012[4], a growth of 5.5% from the production in 2011 with Geographical Survey of India (GSI) estimating its reserves up to the depth of 1200 meters at 293.497 billion tonnes as on 01.04.2012.[5] India has the fifth largest coal reserves in the world. Of the total reserves, nearly 88% are non-coking coal reserves. While tertiary coals reserves account for a meagre 0.5 % and the balance is coking coal.[6]

Table 1: Coal Reserves in India

(In Million Tonnes)

Company	2012-2013 Target	Actual Upto Dec 2012	Achievements (%)	Actual upto Dec 2011	Growth (%)
CIL	464.10	308.89	66.60	291.24	6.06
SCCL	54.00	37.18	68.90	35.26	5.45
Others	57.20	38.12	66.60	37.62	1.33
TOTAL	575.30	384.19	66.80	364.12	5.51

*Excluding Meghalaya

Source: MoC. 2013. Annual Report 2012-2013. Ministry of Coal. Government of India. 2013.

In particular, currently and still for many years to come, the sector will play important role for the power sector, given that about 76% of

[1] NSO. 2012. Energy Statistic of India. National Statistical Organisation. New Delhi. 2012.

[2] BP. 2012. Satistical Review of World Energy. British Petroleum. 2012

[3].Planning Commission. 2006. Integrated Energy Policy. Planning Commission, Government of India. 2006. Available on: http://planningcommission.nic.in/reports/genrep/rep_intengy.pdf. Last accessed on 11.03.2014.

[4] MoC. 2013. Annual Report 2012-2013. Ministry of Coal. Government of India. Page 1. 2013. Available on

http://www.coal.nic.in/annrep1213.pdf. Last accessed on 28.10.2014

[5] *Ibid.*

[6] PWC. 2012. The Indian Coal Sector: Challenges and Future Outlook. Indian Chamber of Commerce. 2012. Available on

https://www.pwc.in/assets/pdfs/industries/power-mining/icc-coal-report.pdf. Last accessed on 28.10.2014.

coal consumed in the country is used by the power sector and that 67% of the electricity generated comes from coal.[7] Further limited domestic production capacity for oil, falling production of natural gas with no new major discoveries being reported, demand for coal has spurred. This is reinforced by the increasing resistance to large hydro-electric and nuclear projects, and falling domestic production of natural gas. It is obvious that effective management and efficient utilization of the country's coal resources are clearly important for the progressive growth of our country.

Harnessing and use of the coal reserves, efficiently in the country is also critical if India has to meet its development objectives while minimizing local and global environmental impacts. Based on the reserves and current production levels, the Reserves/Production (R/P) ratio of coal is more than 100 years compared to around 18-20 years for oil and 25-27 years for natural gas.[8]

Production of coal has been a natural government monopoly with over 90% of the production coming through Coal India Limited (CIL) along with its subsidiaries. Captive mining as a policy instrument was introduced in the year 1993. This policy was instrumental in encouraging private players in the sector. However, private players have not yet provided for any promising progress in this regard. Out of the 200 allocated blocks (22 have been de-allocated); only 30 mines have commenced production and for the rest are stalled.

Table 2: Geological Resources of Coal in India

States	Geological Resource of Coal (In Mt)			
	Proved	**Indicated**	**Inferred**	**Total**
Andhra Pradesh	9566.61	9553.91	3034.34	22154.86
Arunachal Pradesh	31.23	40.11	18.89	90.23
Assam	464.78	45.51	3.02	513.31
Bihar	0.00	0.00	160.00	160.00
Chhattisgarh	13987.85	33448.25	3410.05	50846.15
Jharkhand	40163.22	33609.29	6583.69	80356.20
Madhya Pradesh	9308.70	12290.65	2776.91	24376.26
Maharashtra	5667.48	3104.40	2110.21	10882.09
Meghalaya	89.04	16.51	470.93	576.48
Nagaland	8.76	0.00	306.65	315.41
Orissa	25547.66	36465.97	9433.78	71447.41
Sikkim	0.00	58.25	42.98	101.23
Uttar Pradesh	884.04	177.76	0.00	1061.80
West Bengal	12425.44	13358.24	4832.04	30615.72
Total	**118144.82**	**142168.85**	**33183.48**	**293497.15**
Source: MoC. 2013. Annual Report 2012-2013. Ministry of Coal. Government of India. 2013.				

These mines had a combine production of 36.30 MT (FY 2010-11) as against the desired target of 104 MT, 1/4th the desired performance. The reasons for having dismal production have been issues like unavailability of data, cumbersome LARR provisions, and multiple clearances under various legislations, among others.[9] By introducing an independent regulator, through Coal Regulator Authority Bill 2013, the government postulates a transparent and efficient process for auctions. Further articulations are under process for selling certain stakes in Coal India Ltd. (CIL), a government owned entity, to bring in private equity. Although India has the fifth largest reserves of coal in the world, and being the third largest producer of coal after China and USA (5.6% of the global coal production), it is not able to meet its domestic

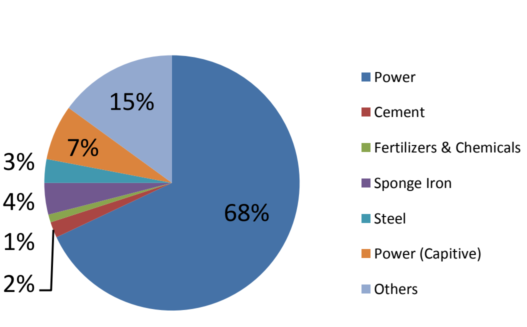
[7] CEA. 2012. Monthly Generation Report, March 2012. Central Electricity Authority, Government of India. New Delhi. 2012.

[8] Planning Commission. 2006. Integrated Energy Policy. Planning Commission, Government of India. 2006. Available on: http://planningcommission.nic.in/reports/genrep/rep_intengy.pdf. Last accessed on 11.03.2014.

[9] ASSOCHAM. 2014. Coal Sector-Challenges and Opportunities. ASSOCHAM India and CRISIL Infrastructure Advisory. New Delhi. 2014.

demand. It has been projected that the likely overall demand for coal for the 12th Five Year Plan ending 2016-2017 is going to be 980.5 MT, of which the demand from power utilities would be 75% (inclusive of captive generation) with steel forming 7% of the total demand and cement and sponge iron forming 4.7% and 5.1% respectively. The gap between the projected demand of 980.50 MT with the estimated domestic availability of 715.0 MT works out to 265.5 MT for the Five Year plan period ending 2016-17. This comprises of 35.5 MT of Coking Coal and 230 MT of thermal coal. The projected gap between demand and supply is likely to escalate to 423 MT in the 13th plan period (2017-22)[10]. The reason for consistent widening of the gap has been augmented to include procedural delays in project clearances, delays in adopting new excavation technologies and inadequate facilities for evacuation of coal etc.

Fig 1: Sectoral Usage of Coal in India (2011-2012)



Source: CCO. 2012. Provisional Coal Statistics 2011-12., Ministry of Coal, Government of India. 2012.

This gap is considerably bridged every year through coal imports by various industries and sometimes by the State Governments too. Since 2004-2005, India's coal import has grown at a CAGR of 15% (till 2010-11).

[10] *Ibid.* Page(s) 10-11.

It is during the same period the import of thermal coal grew at a CAGR of 25%.[11] According to projections, India's coal import requirement will be more than 200 MT by the end of the 12th Five Year Plan.[12]

Fig 2: Estimated Sector-wise Coal Consumption in India (2016-2017)

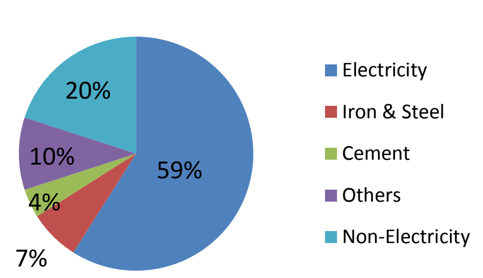
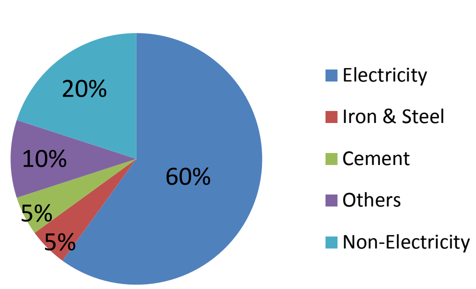


Fig 3: Estimated Sector-wise Consumption in India (2031-2032)



Source: WEC. 2012. Indian Energy Book 2012. World Energy Council, Indian Member Committee. 2012.

The overall long-term demand of coal is closely linked to the consumptions options of the end users such as electricity, iron and steel industries. Other industries using coal have only a marginal impact on the long-term

[11] Planning Commission. 2012. Report of the Working Group on Coal and Lignite for the Formulation of the 12th Five Year Plan (2012-2017). Planning Commission. Government of India. New Delhi. 2012. Available on http://www.planningcommission.nic.in/aboutus/committee/.../wg_Coal1406.pdf, Last accessed on 15.10.2014.

[12] GoI. 2011. Report of the Committee on Allocation of Natural Resources. Government of India. New Delhi. 2011.

demand for coal. The charts 2 & 3 show the projected sector-wise coal consumption in India by the end of the 12th Plan and 15th Plan.

The current shortage of coal stands at 84 MT and the same is expected to rise to 300 MT per annum in medium-term if all the letters of assurance issued by the state-owned coal companies materialise. It is projected that this shortfall will be met by surplus supplies of captive plants or through imports. Furthermore it has been observed that quality, timely availability and cost are the factors that determine demand of domestic or imported coal. Meanwhile shortage in domestic coal supply has also led to increased usage of imported coal in power generation, which in turn, has led to debates about whether the increased costs of such power generation should be passed on to consumers.

II. STATE OF COMPETITION AND REGULATION IN THE SECTOR

The economic growth target of India as 8.2% as set out in the 12th Five Year Plan cannot be achieved unless there is massive increase in infrastructure services in various sectors including energy. It is pertinent to note that most of the core sector utilities are state owned companies. The Coal Sector of India has been no different, CIL accounts for approximately 80-82% of the production while Singareni Collieries Company Limited, a joint venture between the Central Government (49%) and State of Andhra Pradesh (51%), which accounts for approximately 9.5-11.5% of India's coal production in the 2013 fiscal year. It was in 1774 that the Indian history of coal mining started. The then initiatives were taken up by the East India Company. However with passage of time and after independence, the mining became part of a public domain. Prior to 1970, several private players were engaged in the mining and production of coal in India. Unplanned growth, inability of the sector to cater to the needs of the economy (acute shortage) along with unscientific exploitation of coal reserves, despicable conditions at work, etc. lead to a series of enactments nationalising coal mining in the early 1970s[13]. The Government first took over the management of the Coking Coal and Coal Mines[14] and thereafter nationalised the mines[15]. All existing mines at the time were brought under the umbrella of one behemoth, namely, Coal India Ltd. (CIL). Since nationalization, public sector companies are statutorily conferred with the exclusive right to carry out reconnaissance, prospecting, mining and production of coal (to the exclusion of captive mining). And since then there has been change in the autonomous monopolistic nature of CIL, however, various legislative initiatives and regulatory orders have been set up to tame this monopolistic nature.

Recently, the Competition Commission of India (CCI) has recommended that the government must initiate a process through which more players can be introduced in the mining sector. In a case before the Commission, against CIL for abusing its dominant position in the market, has observed that, *"the effects of various anti-competitive factors identified in the coal sector on the rest of the economy are widespread and create systemic risk. Inefficiencies in any one segment are felt in the entire value chain with a cascading impact*

[13] P. Seshagiri Rao, Law of Mines and Minerals - Vol.2, 18th Edn.2012, Asia Law House, Hyderabad, P.863.

[14] The Coking Coal Mines (Emergency Provisions) Act, 1971 and the Coal Mines (Taking Over of Management) Act, 1973.

[15] The Coking Coal Mines (Nationalisation) Act, 1972 and The Coal Mines (Nationalisation) Act, 1973.

on the end-consumers of electricity… there is an imperative need to…restructure the sector by introducing more players to reduce the dominance of any one player and facilitate competition."[16] Further, CCI has also observed that due to CIL's monopoly consumers have been paying higher electricity rates. The Order also stated that with over 250 billion tonnes of coal reserves, and despite the domestic demand for coal growing by 8 per cent annually, CIL's production has stagnated around 350 million tonnes over the last three years. And therefore CCI ruled that CIL through its subsidiaries operated independently of market forces and enjoyed undisputed dominance and has imposed unfair/ discriminatory conditions in the matter of supply of non-coking coal to power producers and in lieu of its observations imposed a penalty of Rs. 1773 crores, a first of its kind over a public sector enterprise. CIL is not only the nation's largest coal producer, but is also the single largest producer of coal in the world[17]. Subsequently CIL approached Competition Appellate Tribunal (COMPAT) challenging the order passed by CCI. Though the appeal hasn't been heard on merits yet; meanwhile a stay on penalty has been given where CIL has been asked to deposit Rs. 50 crores as security. CIL saw a decline in both its production and sector wise dispatches in 2011 led by issues and problems pertaining to procedural delays, land acquisition, forest clearance, adverse geo-mining conditions, tender finalisation for equipment, and delays in getting railway siding leading to a loss of 115.95 million tonnes of production[18]. It was in this background the Planning Commission, CAG and further pursuant to order recommendations by CCI, voices emerged for restructuring of CIL. Four decades ago, the Government of India, in order to protect the interest of the workers and provide them with conducive working conditions, took over the control of mines and minerals development in India. Coal mines were nationalised, excluding some and legislations were passed to this effect. A utility was established in the name of Coal India Limited, entrusted with coal production and distribution. It is the nature of this entrust that CIL became a monopoly. Instead of producing at optimum level, productions became low; CIL has been producing at the growth rate of 5% per annum, wherein coal demand is rising by 10-12% per annum.[19] Since 2007, CIL has failed constantly to achieve production targets.[20] All this has resulted in expensive coal imports and stressed operation of industries dependant on coal and coal by products. Coal

[16] M/s Maharashtra State Power Generation Company Ltd. v. Coal India Ltd. & Ors., Case No. 03, 11, 59 of 2012, Competition Commission of India (CCI), New Delhi, Decided on: 09 December 2013. Available on: http://www.cci.gov.in/May2011/OrderOfCommission/27/592012.pdf

[17] CIL Annual Report & Accounts 2011-2012, Chairman's Statement, p.18, can be accessed at http://www.coalindia.in/Documents/Coal_India_AR_2011_-_2012_17082012.pdf, last accessed on 03.03.2014.

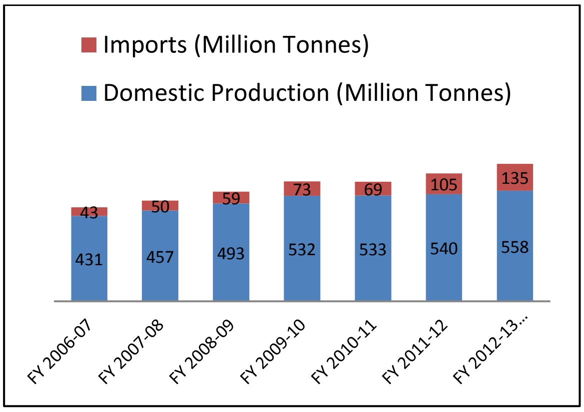
[18] Office of the Comptroller and Auditor General, Report No. - 7 of 2012-13 for the period ended March 2012 - Performance Audit of Allocation of Coal Blocks and Augmentation of Coal Production (Ministry of Coal), 2012,p. 20, can be accessed at http://saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_reports/union_performance/2012_2013/Commercial/Report_No_7/Report_No_7.html. Last accessed on 03.03.2014.

[19] CAG. 2012. Performance Audit of Allocation of Coal Blocks and Augmentation of Coal Production (Ministry of Coal). Comptroller Auditor of India. New Delhi. Available on: http://saiindia.gov.in/english/home/Our_Products/Audit_report/Government_Wise/union_audit/recent_reports/union_performance/2012_2013/commercial/Report_No_7/Report_No_7.html . Last accessed on 12.03.2014.

[20] *Ibid.*

mines and mining in India are no longer an issue of national importance to be protected by PSU ring fencing. In fact they are an inefficient and poor utiliser of these assets.

Fig 4: India's Rising Coal Imports



Source: CCO. 2012. Provisional Coal Statistics 2011-12., Ministry of Coal, Government of India. 2012.

Thus restructuring of CIL from a monopoly to smaller entities competing with each other is essential to bring in competition into the sector. This competition will also effectively address the issue of execution, transparency, accountability, monitoring, control and most importantly law and order issues. If implemented well, the restructuring will usher in efficiency into the sector and will enable the CIL to become a world class company. Having diminished control of Ministry of Coal and monopoly of CIL we may expect less scams and price distortions. Interestingly, with 2014 elections just a month away, the Ministry has shelved the idea for having restructured CIL as planned according to earlier issued policy document, a step that only re-emphasises how in India, economic policy decisions are also clubbed with election manifestos.

The following section identifies the policy, legislative and procedural barriers plaguing the sector and affecting competitiveness and suggests remedies to overcome the same.

2.1. Regulatory/Legislative Framework

Sitting at top of all legislations in India is public interest and at the bottom is the constitutional validity. Under the Constitutional scheme, the Centre is empowered by virtue of Article 246(1) of the Constitution and Entries 54 and 55 of List I (Union List) of the Seventh Schedule to legislate on 'regulation of mines and mineral development' and 'regulation of labour and safety in mines and oilfields'. However, the State is also empowered by virtue of Article 246(3) and Entries 23 and 50 of List II (State List) of the Seventh Schedule to legislate on 'Regulation of Mines and Minerals development' subject to the provisions of List I with respect to regulation and development under the control of the Union and 'taxes on mineral rights' subject to any limitations imposed by Parliament by law relating to 'mineral development'. Thereby making the authority of the States different from Union and also giving due deference to Union's overriding authority.

Substantive Issues of Interest:

There are around 12 legislations governing the coal sector, however not all call for referendum for change. The analyses of the legislative and regulatory rules and policies which affect competitiveness in the sector have been covered as follows:

2.1.1. *Mines and Minerals (Development and Regulation) Act, 1957*[21] *(MMDRA)*

The MMDRA is considered as the parasol for legislations pertaining to mining major minerals[22] in India. The concerned section of

[21] Including amendments as provided for in the year 2010.

[22] According to the MMDRA 1957, 'All minerals are major minerals excluding building stones, gravel, ordinary clay, ordinary sand, limestone used for lime burning, boulders, kankar, murum, brick

this Act is pertaining to competitive bidding of coal blocks. Though the government has introduced allocation of coal blocks through competitive bidding however, the participation has been restricted only to steel industries, power industries and washeries, provided that it's for their captive consumption. Thereby it excludes all other industries from commercial exploitation of coal. CIL is having a natural monopoly over the production and exploitation of coal. Furthermore, the provision of reserving coal blocks by the State/Union government, a practice that has been criticised by many, end up securing prime blocks for the State Utilities (PSUs), while the private companies participate through competitive bidding. Then also it should be noted that PSUs are not restricted to participate through competitive bidding and thereby have a generous advantage. The idea of pre-allocating (reserving) blocks for PSUs vitiates the idea of level playing field as propagated by the Ministry in its invitation brochure and thereby affecting competitiveness negatively.

2.1.2. *Coal Mines (Nationalisation) Amendment Bill 2000*

The amendment bill was introduced in the year 2000; however, no consolidated decision has been reached so far. In light of the recent events of irregular coal supply, shortage in market and increase in coal imports, there is imminent need to introduce private players in coal mining initiatives ranging beyond captive consumption. With the Coal Mines (Nationalisation) Amendment bill 2000 domestic private companies were to be allowed to mine and produce coal "either for own consumption, sale of for any other purpose in accordance with the prospecting licence or mining lease or sub-lease". This can successfully supplement capabilities of CIL; besides the coal imports estimated at 30 MT for current fiscal can also be offset by private sector access to domestic coal resources. With increase in efficiency through regulated private participation, competitiveness will thrive. However, a concerned view still surrounds the preamble of the principle Act, i.e. Coal Mines (Nationalisation) Act, 1973, as the word *Nationalisation* as represented in the title of the Act would be contrary to the insertion of the amended provisions pertaining to inclusion of private players and thereby re-nationalising the coal mining sector. Therefore keeping in mind the harmonious construction rule of interpretation of law, there is a need to amend the title and scope of the Act of 1973.

2.1.3. *PPP in State Joint Ventures*

While the above amendment bill has been pending, various State Governments undertook steps to involve private sector in commercial mining. The Central Government having power in allocating coal blocks would allocate to State Governments, which in turn would hand these allocated blocks to the state utilities, who then partner with private companies for commercial mining. This practice mechanism has not only helped in securing more production of coal, but has also increased the efficiency within the sector and thereby fostering positive competitiveness.

2.1.4. *Allocation of Blocks and Policy Ambiguity*

A comparative study of the laws in the sector highlights the inadequacy of laws creating level playing field and promoting competition. All the more, it has been noted that the current practices are arbitrary while being prejudicial to private participation and at the most being tailor made for the suitability of Coal India Ltd (CIL). For instance, there exists a natural monopoly in the sector as the extant

earth, bentonite, road metal, slate, marble, stones used for making household utensils etc.

laws render unbridled preference over CIL. The provisions for acquisition of a coal bearing land, under the Coal Bearing Areas (Acquisition and Development) Act 1957, for example, allows possession of a virgin coal bearing land by the Central Government for a centrally controlled public sector company only. This implies that the PSEs do not have to obtain coal- mining leases for land acquired under the Act. As there is no scope for private players to acquire land under this Act, thus there is a clear lack of level playing field. Further, there is a contradiction with reference to acquisition of land under the Land Acquisition Act, 1894 (*replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 w.e.f. 01.01.2014)*.[23]

A land to be acquired should be for 'public purpose', though the definition has been made clear over time by various judgements of Supreme Court and other High Courts, still the procedural formalities for a PSE and a private player are different. Currently, a number of projects are facing delays due to opposition from local population. In most cases, this opposition stems from inadequate compensation to the project affected people also due to issues related to illegal squatting. Most of the coal mining in India is done by the open-cast method, producing around 90% of the coal, which requires acquisition of surface rights and causes displacement of local people. However, compensations are often are inadequate and mostly delayed. Such weakness hasn't been cured through the new LARR Act, providing breeding ground for social distress, alienation of local population and eventual resistance.

[23] The LARR Act hasn't cured the contradiction in provisions and in addition various other clearances and reports have been introduced by the new Act, making the process prone to bureaucratic delays.

Another interesting contradiction has been with reference to the ineffective separation of potentially competitive segments from monopoly structure creates another source of inequality to the potential private players. For instance, there are certain segments in the mining industry like provisions of health, education and housing for mine workers that can be outsourced. But the Contract Labour (Regulation and Abolition) Act, 1970 does not allow outsourcing of perennial jobs and since all jobs in the mining sector are perennial in nature, no outsourcing is legally allowed in this sector.[24]

There are 179 forestry proposals awaiting clearances and if all approvals are secured on time, it can more than double its output to 1,132 MT, given that mines start production from 2016-17.[25] Such approvals have been lying out to dry for too long now and if closely studied the delays have been caused due to policy ambiguity between the Centre and the State with an added advertence of Rehabilitation and Resettlement (R&R) provisions. Furthermore, it has been observed that a lot of mining leases have been provided to individuals, however the areas are small. Also as the mine owners are not able to use scientific methods for mining, the process has become more cumbersome and inefficient. With added burden of environmental clearances, such small miners are seeking a getaway through joint ventures. However as no provisions at both Central and State level exists to bail out such miners, the mines are

[24] R.N. Sahay, 'Competition Concerns in Captiva Mining in Coal Sector', *Competition Commission of India*, Internship Reports, 2011, New Delhi.

[25] PWC. 2012. The Indian Coal Sector: Challenges and Future Outlook. Indian Chamber of Commerce. 2012. Available on

https://www.pwc.in/assets/pdfs/industries/power-mining/icc-coal-report.pdf. Last accessed on 28.10.2014.

dormant and the national asset is getting wasted.

2.1.5. *Issue of Coal Pricing and Imports*

The Indian Coal Sector is plagued with structural and administrative irregularities too. According to the MMDR Act and other ancillary provisions, the Central Government possess the right to determine the price for coal in accordance with its grade and quality. However, such power to notify prices has been entirely dependent upon the price notified by CIL. And thereby the issue of price distortion arises.

Though it has been observed that price of coal should be determined in a competitive market (price de-regularisation)[26], however still, due to the nature of dependency on coal by major industries along with obscurity of policies in force, pricing distortion are evident. Thus there is a call for an independent sector regulator, which will not only diminish the monopolistic power of CIL but also foster holistic level playing field for private participation. Coal imports for the period April-December 2012 had crossed 100 Million Tonne, it is anticipated that the imports would rise to 185 Million Tonnes by 2016-17. In the 2012-13 fiscal, Steam Coal was exempt from customs duty but attracted a concessional Countervailing Duty (CVD) of one per cent, whereas Bituminous coal attracted a duty of 5 per cent and CVD of 6 per cent. In course of the Budget Speech for the year 2013-14 the Finance Minister was of the opinion that since both kinds of coal are used in thermal power generation the same amounted to a miscalculation. Given the same the duties on both kinds of coal were equalised and 2 per cent customs duty and 2 per cent CVD were imposed uniformly. Thermal generators who import low grade coal would feel the pinch of this duty equalisation. This becomes important in the context of the fact that around 60-70% of coal imported by power plants is low grade and was exempt from customs duty in the previous fiscal of 2012-13. This move to equalise the duties is again beneficial to coastal power plants which import high calorific value coal but may increase the average cost of power generation.

Further distortions in the price of coal to the power sector (domestic and imported) are leading to differential cost of power generation. Since the power sector is the primary consumer of coal and is heavily regulated, the government objective has been to keep power prices as low as possible, to keep the factor cost to the economy low. Thus, any increase in the power prices due to coal prices increase is difficult, and thus, the coal prices for CIL have remained below the international parity price. Recently when coal was imported by Adani Group as a fuel to be fended in their power plants, as expected the imported coal was priced higher than the domestic. CIL had to compensate the difference of prices, even though when it was clearly evident that domestic coal was, and still is under-priced.

2.1.6. *Sustainable production of Coal*

Greenpeace, an environment non-governmental organisation (NGO) has recently released a study[27], suggesting that the 'extractable' coal reserves would not last more than 17 years at the projected increase in domestic demand for coal. Erratic production/supply for coal will affect competitiveness in the sector. *Firstly*, the sustainability of any business venture (mining

[26] Draft Approach Paper to the 12th Five Year Plan (2012 – 2017) prepared by the Planning Commission of India.

[27] Greenpeace, 'Coal India: Running on Empty?' *Institute of Energy Economics and Financial Analysis, Greenpeace*, September 2013.

in this case) emancipates private investment. Therefore, if the concerned sector is likely to worn out in 17 years, the projected private investment will fall manifold. *Secondly,* if the resource is scarce, the government in that case will not adopt competitive price discovery mechanism rather will monopolise its production even more. *Lastly,* as CIL be given preference, abuse of dominance as already observed by CIL will become rampant.

2.1.7. *Surplus production to be transferred*

Writing law is easy, governing isn't. As already discussed there are 12 principle legislations governing the coal sector, while many are contains cumbersome procedures, few are redundant as well. The law provides that a private company can indulge in mining activity for captive consumption. Although the guidelines and procedure are clearly laid down for captive mining, however, in case of surplus production, the companies transfer the surplus outside the end-use sector. Recently after an inter-ministerial deliberation, Planning Commission has suggested that such transfer should be restricted and that any transfer of surplus production should be done at the notified price to the nearest CIL subsidiary or other firms in the same sector facing shortage in linkage coal from CIL. Though many appreciated the suggestion of Planning Commission, it bears uncanny resemblance to similar relief being sought by CIL. It seems like another attempt of the Ministry and the Central Government to protect CIL from its inefficient and ineffective method of mining and piling cases of breach of fuel supply agreements. The private sector works for profit. If these participants are not given right over their production, the interest in the sector is likely to decline and so would the investment.

2.2. Does there is any need for establishing an Independent Regulator in the Coal Sector?

The T.L. Shankar Committee[28], the Integrated Energy Policy Report of Experts[29], The Approach Paper to the 12th 5 year Plan and the CAG Report[30] route for the establishment of an Independent Regulator for the Coal Sector. The Shankar Committee opined that there was a need for a new and comprehensive governance structure for the Coal Sector including a regulatory mechanism *"to attend to all issues relevant for development of coal resources, regulation of coal price, whenever necessary, and nurturing level playing field between the influential large public sector coal companies and the emerging small coal companies in the State public sector and the captive mining sector."* Similarly the Integrated Energy Policy Report whilst recommending the establishment of a regulator in the Coal Sector suggests the probable functions of such regulatory body[31]:

- *As an interim measure approve coal price revisions,*
- *Ensure supply of coal to power sector under commercially driven long term FSA*
- *Facilitate the development of formulae/indices for resetting coal prices under long term fuel supply agreements,*
- *Monitor the functioning of e-auctions, ensure that the price discovery through e-auctions is free of distortions,*

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[28] An expert committee was formed at the behest of the Ministry of Coal, Government of India to ascertain the road map for coal sector reforms. The committee has six members with T.L. Shankar as the Chairperson of presiding it. The report was published in the year 2007.

[29] A report published by the Planning Commission, Government of India in the year 2006.

[30] Released on August 23, 2012.

[31] Supra n.35, p.121.

- *Regulate trading margins,*
- *Develop a mechanism for adequate quantities of coal imports under long term contracts to bridge the gap between supply and demand,*
- *Create an environment for competitive coal market to operate, and*
- *Regulator to ensure that mines are planned, designed and developed in a scientific manner, giving due importance to conservation of coal*

At present there is a significant need for reforming India's coal sector in line with other parts of the energy sectors.[32] Currently, Ministry of Coal is not involved in the price setting of coal. However, prices are being fixed by CIL. Evidently enough coal consumers do not directly participate in price negotiations. Nonetheless, there are no comprehensive frameworks that govern the licensing and operational setups of coal mining/ trading companies. It is therefore voices emerge for setting up of a regulator in this sector, but the question is, whether setting up of regulator is the necessary solution?

With this background the Cabinet of Minister for the Government of India initiated for the Coal Regulatory Authority Bill, which was tabled in the lower house earlier in 2013. The proposed bill procrastinated sessions over session in the parliament. Now given that the Cabinet has already started the process for establishing an independent coal regulator for the sector by passing an executive order, the proposed regulator, is weak and in all possibilities an extraneous position created with the ideology of accountability and transparency but disguised by retiring plans of the incumbent bureaucrats. It should be noted that the creation for the regulator is through an executive order and not through parliament process. An urged decision taken up to bandage the wound inflicted by inefficient decisions on coal pricing and block allocations made earlier. As the legislative mandate is missing, so would be the powers of the regulators.

The Regulator as conceived by the Cabinet has only advisory/recommendatory powers, powers to frame principles and methodology. If there is any violation of the same, powers to impose penalty or take up any other corrective measures to remedy such violations. The regulator will have no decisive role in the cancellation or suspension of mining licences. It is also unclear how a non-statutory body can effectively adjudicate disputes between PSUs and buyers. The conceptualisation of regulator has happened due to various recommendations as mentioned above and in particular the CAG Report which emphasised how coal block auctions did not followed a competitive bidding process. Many thrashed the wise suggestion of CAG as overstepping its mandate in projecting 'notional losses' from coal allocation; however the observations so made cannot be rendered to nullity. It is true that with ad hoc screening committees, inter-ministerial groups and empowered groups of ministers, looking into allocation, there has been little transparency, let alone oversight, in the allocation and de-allocation of blocks. The scant regards given to the best practices model in government procurement by the Union Government certainly raises doubts about the efficacy of interventions from a mere advisory body such as the conceived regulator. If the government has serious thoughts about the coal regulator then it must

[32] Oil and Gas sector is regulated by Director General of Hydrocarbons and Petroleum and Natural Gas Regulatory Board, whereas Power has central regulator as Central Electricity Regulatory Commission and State Electricity Regulatory Commission.

first break the monopoly nature of CIL by bringing in private players and accentuating the level playing field. Unless a legislative mandate is there the regulator being merely a non-statutory body would only raise red flags without any tangible effect on arbitrary or corrupt practices.

III. CONCLUSIONS & RECOMMENDATIONS

Recently, the government has taken initiatives to bring reforms in the legal system governing the mineral sector. The latest MMDR Bill, 2011 (as introduced in the parliament) has attempted to address the key industry concerns of transparent concession systems, scientific mining, sustainable development and curbing illegal mining by repealing MMDR, 1957.[33] The Draft Act in line with National Mineral Policy 2008 aims to achieve speedy application processing by delegating power to the state government for award of mineral concessions with prior consent of central government required only in case of coal and atomic minerals.

In the case of the coal industry in India, the legislation restricts entry and confers exclusive rights, by statutorily limiting the production of coal to government companies. In terms of the effects on competition in the coal sector therefore the Coal Mines Nationalization Act 1973 creates and maintains a monopoly in favour of the government companies. Although the Nationalization Act does not confer a monopoly on a particular company, in reality there is no competition between public sector/government companies. Unlike the petroleum sector in which some level of competition appears to exist between public sector companies[34].Moreover, the Ministry of Coal governs the overall policy decisions of CIL & SCCL. Similarly the law discriminates against the private companies to the extent that they are required to participate in the auction as opposed to the allotment option given to the government companies. CPMPDIL which is a subsidiary of CIL is the repository of all geological data as far as exploitable coal reserves are concerned, thus leading to an information asymmetry.

The Coal Mines Nationalisation Amendment Bill 2000 was aimed at opening up the sector for private participation. However, it could not be passed given the opposition from the unions and political compulsions. Pending the passing of the Coal Mines (Nationalisation) Amendment Bill, 2000, other avenues permitted under existing legislation need to be resorted to so as to increase the number of players in the sector. The same includes:

a) Encouraging mining by State Government public sector companies;

b) Captive users must be allowed to sell incidental coal surpluses, during the development and operation of a block to CIL or other third parties;

c) Group captive mines must be allowed for small end users;

d) Those allotted captive blocks must work the block within a stipulated period of time failing which the allotment either stands cancelled or a penalty is imposed.

The Government could consider promoting state level public sector companies on the lines of SCCL and give them greater managerial freedom so that these companies

[33] PWC. 2012. The Indian Coal Sector: Challenges and Future Outlook. Indian Chamber of Commerce. 2012. Available on

https://www.pwc.in/assets/pdfs/industries/power-mining/icc-coal-report.pdf. Last accessed on 28.10.2014.

[34] *'IOC sees PSU rivals eat into market share'*, Business Standard, May 11th 2011, can be accessed at http://www.business-standard.com/india/news/ioc-sees-psu-rivals-eat-into-market-share/134787, last accessed on 04.12.2014.

become true competitors to CIL. One another idea to increase CIL's production capacity has been to introduce contract mining, whereby the private player would be paid at a per tonne basis by CIL which would be eventually selling the mined coal on per tonne basis[35].

Likewise the achievement of production targets depends on early and timely clearance of project proposals by the environment and forest agencies and mine approval agencies. Streamlining of procedures for giving a decision on the application of mining of coal in a block within a specified time by the State and Central Ministries of Environment and Forests at the State level and Central level is a must. Similarly there is a need for Inter – Ministerial coordination for development of infrastructure facilities in the nature of roads, railway lines and ports for speedy evacuation, distribution and import of coal.

The bottlenecks and the legislative hurdles in ushering greater sectoral productivity have been a source of debate and many a committees and expert groups have identified and suggested plausible solutions to overcome the same. However, a majority of the recommendations (including those discussed above) have not been implemented. There is a lack of political will, given the legislative measures that may have to be taken given the dynamics of coalition politics. This again is without prejudice to the fact that legislative and policy reform is imperative so as to increase domestic coal production. Having said that, piecemeal legislative interventions, in the absence of a sectoral regulator to coordinate the activities of the statutory players across the various activities involved in coal mining, import and distribution; it may not yield the desired results.

It is clear that the effects of various anti-competitive factors identified in the coal sector on the rest of the economy are widespread. Some initiatives have already been taken to reform the sector and there is a need to further carry forward the same. It is required to clearly define the reform objectives in coal sector and make sure that all policy changes are coherent in nature and can simultaneously help in achieving the stated objectives.

a) The first step is to restructure the sector by introducing more number of players so that it can reduce the dominance of any one player and can facilitate competition.

b) Keep a close track on the licenses issued for captive mining periodically.

c) Other major steps include bringing the coal sector under the independent regulatory oversight. It is also required to streamline process, procedure and remove various discriminatory provisions in the existing legal framework against the private players in order to incentives and expedite coal production.

d) Addressing sustainability issues and securing private investment through coal block banking mechanism.

[35] *'Price pooling issues being deliberated by govt: S Narsing Rao, Coal India'*, The Economic Times, 7th May 2013, can be accessed at http://economictimes.indiatimes.com/opinion/interviews/price-pooling-issues-being-deliberated-by-govt-s-narsing-rao-coal-india/articleshow/19927643.cms, last accessed on 10.05.2014.

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