



COMMENTS TO THE DRAFT
ELECTRICITY (AMENDMENT)
BILL, 2020

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1. INTRODUCTION

The Ministry of Power, Government of India issued a draft proposal for the amendment of Electricity Act, 2003 (36 of 2003) (hereinafter referred to as “the 2003 Act”) in the form of draft Electricity Act (Amendment) Bill, 2020 (hereinafter referred to as “Amendment Bill”) on April 17, 2020. It has been felt that a few provisions of the 2003 Act are unable to cope with the rapid development of the electricity sector. The Amendment Bill aims to address some such critical issues that have weakened the commercial and investment activities in the sector.

2. KEY AMENDMENTS PROPOSED

The major amendments proposed in the Amendment Bill are set out below¹:

2.1 Establishment of Electricity Contract Enforcement Authority and strengthening of APTEL

The Amendment Act proposes to establish an Electricity Contract Enforcement Authority (“ECEA”) which shall be the sole authority and having original jurisdiction to adjudicate upon matters regarding the specific performance of contracts related to purchase or sale of power between a generating company and a licensee or between licensees; and contracts related to transmission of electricity between a generating company and a licensee or between licensees. The orders of the ECEA shall be executable as a decree of a civil court and the Appeal against orders of the Electricity Tribunal shall be heard by Appellate Tribunal for Electricity (“APTEL”). Further, the Amendment Act proposes to strengthen the APTEL in terms of strength of Members and powers of Tribunal.

2.2 Selection Committee for Chairperson and Members of Commission and Qualifications

The Amendment Act proposes to have a single selection committee for selection for the posts of Chairperson and Members of the APTEL and all Regulatory Commissions to bring uniformity in the selection process. Appointments shall continue to be done by respective State Governments or Central Government. Further, the qualification for appointments of Chairperson and Members of Central and State Commission is proposed to be made uniform.

2.3 Subsidy

The Amendment Act proposes state commissions to determine tariff for the retail sale of electricity without any subsidy under Section 65 of the 2003 Act.

2.4 Cost reflective Tariff, Simplification of Tariff Structure & Cross Subsidy

The Amendment Act proposes to expand the provisions related to tariff determination and strengthen the aforementioned provisions by imposing certain restriction on deferring revenue recovery. Further,

¹Statement of Objects and Reasons to “The Electricity (Amendment) Bill, 2020”

it is proposed that the tariff should reflect the cost of supply of electricity and cross-subsidies to be reduced.

2.5 Payment Security Mechanism

The Amendment Act proposes to empower load dispatch centre to oversee the payment security mechanism before scheduling dispatch of electricity and to be made mandatory considering the sanctity of the existing contracts unless it is waived by the parties to contract themselves.

2.6 Penalties

The Amendment Act proposes to strengthen Sections 142 and 146 with increased penalties.

2.7 RPO- HPO

The Amendment Act proposes to expand the scope of renewable power purchase obligations (“RPO”) to include Hydro sources. Further, the Amendment Act proposes to empower the State Commissions to specify the RPO as per RPO trajectory prescribed by the Central Government from time to time.

2.8 National Renewable Energy Policy

The Amendment Act proposes that the Central Government may after consultation with the State Governments, as may be considered necessary, prepare and notify a National Renewable Energy Policy for the promotion of generation of electricity from renewable sources of energy and prescribe a minimum percentage of purchase of electricity from renewable and hydro sources of energy.

2.9 Function to CERC related to Cross-Border Trade of Electricity

The Amendment Act proposes to empower the Central Commission to oversee the cross-border transactions in order to regulate the cross-border transactions of electricity with other countries.

2.10 Dealing situations in case of Non-Functional SERC due to vacancies

The Amendment Act proposes to empower other State Commissions including joint commissions to discharge functions of such State Commissions that are non-functioning due to vacuum in the State Commission.

2.11 Deemed adoption of Tariff discovered through competitive Bid

The Amendment Act proposes to address the time taken for adoption of tariff discovered under competitive bids as per Section 63 of the 2003 Act and identify time-line for the same.

2.12 Distribution sub-license and Franchise

The Amendment Act proposes that the Distribution licensee (“DISCOM”), if it so desires, may engage Sub-Distribution Licensees (“Franchisees”) to distribute electricity on its behalf in a particular area within its area of supply. However, it will be the DISCOM which shall be the licensee, and therefore, ultimately responsible for ensuring the quality distribution of electricity in its area of supply. Enabling provisions have been made to Sections 126, 135, and 164 of the 2003 Act.

3. CLAUSE-BY-CLAUSE CRITIQUE

No.	Section	Proposed Provision	SOLPO Research's Comments
1.	Section 2	(i) in clause (11), after the words "or Appropriate Commission" and before the words "or the Appellate Tribunal", the words "or Electricity Contract Enforcement Authority" shall be inserted;	
		(ii) after clause (15), the following new clause shall be inserted, namely:— “(15a) “Cross border trade of electricity” means transactions involving import or export of electricity between India and any other country and includes transactions related to passage of electricity through our country in transit between two other countries;”;	Instead of introducing new terms, the legislature should consider using words that are otherwise defined in the 2003 Act. For import and export – the terms used can be “supply” and “trading”. For “transactions related to passage, one can use “transmission of electricity”.
		(iii) after clause (17), the following clause shall be inserted, namely:- “(17a) “Distribution sub-licensee” means a person recognized as such and authorized by the distribution licensee to distribute electricity on its behalf in a particular area within its area of supply, with the permission of the appropriate State Commission. Any reference to a distribution licensee under the Act shall include a reference to a sub-distribution licensee;	This provision appears unnecessary. The statute provides a detailed procedure for grant of licensee and for revocation thereof. There are provisions that provide for sale / transfer of utility. Further, there are certain qualifications (Capital Adequacy etc.) prescribed by the Central Government under its rule making power, to be eligible for grant of Distribution License. All these provisions must be adequately amended (and effectively scrapped) to allow introduction of this concept of a private appointment of a sub licensee. This provision is inherently contradictory to the overall scheme / policy of the statute. Introduction of this provision may only benefit some domestic players, who can now sell power directly to a sub licensee and create vertical integrations. They will be able to step into the shoes of the

			distribution licensee without obtaining any license. To effectively reform the distribution sector, the need of the hour is surely for regulators to function independently and provide for cost reflective tariff, discharge of regulatory assets, reduction of loss levels and cross subsidies.
		<p>(iv) after clause (24), the following clause shall be inserted, namely :—</p> <p>“(24a) “Electricity Contract Enforcement Authority” means an Electricity Contract Enforcement Authority referred to in sub-section (1) of section 109A;”;</p>	<p>This is an interesting attempt as an introduction of Electricity Contract Enforcement Authority (“ECEA”) would certainly benefit lawyers!</p> <p>This aspect is discussed in greater detail in comments to proposed Section 109A. At this stage it suffices to say that introduction of any judicial tribunal should be preceded by a “Judicial Impact Assessment”. This has been said by the Supreme Court from the time of Salem Bar Association². Recently, the Supreme Court has reiterated this in the matter of Rojer Mathew v. South Indian Bank Limited & Ors. case, 2019³.</p> <p>The nomenclature suggests that this authority is designed more towards resolution of contractual disputes. More like a Dispute Settlement Board. Breach of contract will entail reliefs either in the form of – (a) specific performance or (b) damages. Surely, this authority cannot be expected ensure performance (enforcement) of contract and ignore relief in the form of damages. Detailed comments on the issue are captured in the later part of this Note.</p>
		<p>(v) for clause (27), the following clause shall be substituted, namely:-</p> <p>“(27) “franchisee means a person recognized as such and authorized by a distribution licensee to distribute electricity on its behalf in</p>	<p>This must be seen in the context of Section 13 of the 2003 Act. Again, this is not in line with the structure and policy of the statute. The question that will arise is that whether a simple “under information” appointment of an agency (without any oversight by the</p>

² Salem Advocate Bar Assn. (II) v. Union of India (Writ Petition (C) No.496 of 2002 with No. 570 of 2002), dated 02.08.2005; (2005) 6 SCC 344 : AIR 2005 SC 3353

³ Rojer Mathew v. South Indian Bank Ltd. & Ors. (Civil Appeal No. 8588 of 2019) dated 13-11- 2019; 2019 (369) ELT 3 (SC) : 2019 SCC OnLine SC 1456.

		<p>a particular area within his area of supply, under information to the appropriate State Commission. Subject to the provisions of the agreement entered into between the distribution licensee and the franchisee, any reference to a distribution licensee in the Act shall include a franchisee;”;</p>	<p>commission) that has a consumer interface is adequate or not.</p>
		<p>(vi) for clause (43), the following shall be substituted, namely:-</p> <p>“(43) "Member" means the Member of the Appropriate Commission or Authority or Joint Commission, or Electricity Contract Enforcement Authority or the Appellate Tribunal, as the case may be, and includes the Chairperson of such Commission or Electricity Contract Enforcement Authority or Authority or Appellate Tribunal;”.</p>	
2.	Section 3	<p>4. Amendment of Section 3</p> <p>After section 3 of the principal Act, the following section shall be inserted, namely:-</p> <p>“3A National Renewable Energy Policy - The Central Government may, from time to time, after such consultation with the State Governments, as may be considered necessary, prepare and notify a National Renewable Energy Policy for the promotion of generation of electricity from renewable sources of energy and prescribe a minimum percentage of purchase of electricity from renewable and hydro sources of energy.”.</p>	<p>There is no requirement for a separate Section. Instead, the Central Government may include pro-renewable chapters in the National Electricity Policy (“NEP”). What prevents them from having a more aggressive chapter on renewables in the National Electricity Policy and the Tariff Policy. It is better to see renewables alongside conventional energy sources to have a complete energy policy perspective in one document. This will reduce potential of overlap and areas of conflict, particularly on matters of integration of Renewable Energy (“RE”) power in the grid. All this has to be addressed at one place.</p>

<p>3.</p>	<p>Section 14</p>	<p>5. Amendment of Section 14</p> <p>In section to section 14 of the principal Act, -</p> <p>i) for the seventh proviso, the following proviso shall be substituted, namely:-</p> <p>“Provided also that a franchisee shall not be required to obtain any separate license from the appropriate State Commission and such distribution licensee shall continue to remain responsible for distribution of electricity in its area of supply.”;</p> <p>ii) After the seventh proviso, the following proviso shall be inserted, namely:-</p> <p>“Provided also that a distribution sub-licensee shall not be required to obtain any separate license from the appropriate State Commission.”.</p>	<p>Not required. Section 13 is clear on this.</p>
<p>4.</p>	<p>Section 26</p>	<p>6. Amendment of Section 26</p> <p>In section 26 of the principal Act, after sub-section (3), the following subsections shall be inserted, namely:-</p> <p>“(4) the National Load Despatch Centre shall</p> <p>(a) be responsible for optimum scheduling and despatch of electricity in the country across different regions in accordance with the contracts entered into with the</p>	<p>It may be necessary and expedient to provide for consequence for non-compliance of sub-section (6). Also, should there be any dispute relating to the instructions issued by National Load Despatch Centre (“NLDC”), the instructions must be complied with pending resolution of dispute by the Central Commission.</p> <p>Some of the concerns in this context include:</p> <p>(a) Is it possible or necessary to have a cadre for State Load Despatch Centre (“SLDC”) employees, who can be placed across the country?</p> <p>(b) Is it necessary to legislatively introduce some kind of digital</p>

		<p>licensees or the generating companies;</p> <p>(b) monitor grid operations;</p> <p>(c) exercise supervision and control over the inter-regional and interstate transmission network; and</p> <p>(d) have overall authority for carrying out real time operations of the national grid.</p> <p>(5) The National Load Despatch Centre may give such directions and exercise such supervision and control as may be required for the safety and security of the national grid and for ensuring the stability of grid operation throughout the country.</p> <p>(6) Every Regional Load Despatch Centre, State Load Despatch Centre, licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the National Load Despatch Centre.”.</p>	<p>and publicly available record of SLDC log book / operating records? If not in real time, at least within a reasonable time span, so that there is some transparency in decision making.</p> <p>(c) Also, can we look at introducing a commercial liability on these agencies if it is established that their actions are in violation of the grid code, MOD, Must Run and was motivated to help distribution licenses / State.</p>
<p>5.</p>	<p>Section 28</p>	<p>7. Amendment of Section 28</p> <p>In section 28 of the principal Act, the following proviso shall be inserted in clause (a) of sub-section (3), namely:-</p> <p>"Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as agreed upon by the</p>	<p>There needs to be a carve out for exchange-based transaction.</p> <p>Further, though the proposed provision is beneficial for generators, it may be problematic during real time operations for thermal generators. If a generator is supplying power to multiple states and all beneficiaries do not provide payment security, the generator may remain unscheduled as remaining schedule is less than minimum technical limit. Generators will be at loss.</p>

		<p>parties to the contract, has been provided.".</p>	<p>The proposed amendment also stands the risk of converting the SLDC/ Regional Load Despatch Centre (“RLDC”) into an adjudicatory authority which would be entitled to take a view on whether a particular payment security mechanism is in accordance with the contract . This would give rise to numerous disputes hampering the dynamic nature of scheduling.</p>
6.	Section 32	<p>8. Amendment of Section 32</p> <p>In section 32 of the principal Act, the following proviso shall be inserted in clause (a) of sub-section (2), namely:-</p> <p>“Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as agreed upon by the parties to the contract, has been provided.”.</p>	<p>There needs to be a carve out for exchange-based transaction. Refer to comments for Section 28.</p>
7.	Section 42	<p>12. Amendment of Section 42</p> <p>In section 42 of the principal Act,</p> <p>i) for the first proviso to sub-section (2), the following shall be substituted, namely:-</p> <p>“Provided that such open access shall be allowed on payment of a surcharge, and charges for wheeling, as may be determined by the State Commission in addition to the charges for intra-state transmission, as determined under section 39, if applicable, and charges for inter-state transmission, as determined by</p>	

		<p>the Central Commission under section 38, if applicable.”;</p> <p>ii) for the third proviso to sub-section (2), the following shall be substituted, namely:-</p> <p>“Provided also that such surcharge and cross subsidies shall be progressively reduced by the State Commission in the manner as may be provided in the Tariff Policy.”;</p> <p>iii) after the fourth proviso to sub-section (2), the following proviso shall be inserted, namely:-</p> <p>“Provided also that the manner of payment and utilization of the surcharge shall also be specified by the State Commission.”.</p>	<p>The proposed amendment seeks to take away the State Commission’s power to determine Cross Subsidy Surcharge (“CSS”) as henceforth, CSS would be reduced in accordance with the Tariff Policy.</p>
<p>8.</p>	<p>Section 49</p>	<p>13. Amendment of Section 49</p> <p>For section 49 of the principal Act, the following shall be substituted, namely:-</p> <p>“49. Agreement with respect to supply or purchase or transmission of electricity).- (1) A generating company or a licensee may enter into an agreement with a licensee for supply, purchase or transmission of electricity on such terms and conditions, as may be agreed upon by them, including tariff and adequate security of payment consistent with the provisions of this Act.</p> <p>(2) Where the Appropriate Commission has allowed open</p>	<p>The proposed amendment is in complete violation of Section 61 to 64 of the 2003</p>

		<p>access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.”</p>	<p>Act. This also violates Section 86(1)(a) and (b) of the 2003 Act. Since tariff is regulated and the Commission is predominantly a tariff commission, these provisions are in complete departure / disregard to the legislative policy. Interest of consumers will be seriously compromised. There is potential for exploiting the situation by a process of collusion generally between generators and compliant-licensees/by vertically integrated utilities, who have investments in generation as well as distribution.</p>
9.	Section 49	<p>After section 49 of the principal Act, the following section shall be inserted, namely:-</p> <p>“49A: Cross Border Trade of Electricity - (1) The Central Government may prescribe rules and issue guidelines for allowing and facilitating cross border trade of electricity in accordance with the provisions of this Act.</p> <p>(2) The Central Government may require the Central Commission to make regulations for cross border trade of electricity.”</p>	<p>The ability to allocate certain domestic risks like Demand Side Management (“DSM”), Section 11, Section 23 etc., to the cross-border entities will arise and must be addressed either contractually or through rules. PTC India Ltd. (“PTC”), in a case before the CERC is seeking relaxation of CERC DSM Regulations. However, CERC is not willing to budge and provide any relief to PTC by waiving DSM charges for supply to a neighbouring country. This will need a separate and more comprehensive analysis to ensure that some guidelines are visible in the legislation, so rules can be accordingly framed. The legislation should at the least contain a positive statement to promote and facilitate cross border</p>

			transaction, thus enabling introduction of specific promotional measures.
10.	Section 61	<p>15. Amendment of Section 61</p> <p>In section 61 of the principal Act-</p> <p>i) in clause (g), the word “progressively” shall be omitted and for the words “specified by the Appropriate Commission” the words “as provided in the Tariff Policy” shall be substituted;</p> <p>ii) in clause (h), after the words “from renewable” and before the words “sources of energy”, the words “and hydro” shall be inserted.</p> <p>iii) In clause (i) , after the words “ tariff policy”, the words “and National Renewable Energy Policy” shall be inserted.</p>	<p>Perhaps, it would be beneficial to reintroduce the word “eliminated”, which was earlier deleted</p> <p>Comments given earlier.</p>
11.	Section 63	<p>17. Amendment of Section 63</p> <p>Section 63 of the principal Act shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:-</p> <p>“(2) The Appropriate Commission shall, after receipt of application complete in all respects, adopt the tariff so determined under sub-section (1), in a timely manner but not later than sixty days from the date of application:</p>	<p>There should not be any public notice / hearing at this adoption stage. Some commissions continue this practice. Appropriate legislation can be introduced to ensure that public notice / hearing is not held.</p>

		<p>Provided that on expiry of sixty days from the date of application, if it is not decided by the Appropriate Commission, the tariff shall be deemed to have been adopted by the Appropriate Commission.”.</p>	
12.	Section 65	<p>18. Amendment of Section 65</p> <p>In section 65 of the principal Act-</p> <p>i) for the words “and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:”, the words “the amount of subsidy directly to the consumer and the licensee shall charge the consumers as per the tariff determined by the Commission.” shall be substituted;</p> <p>ii) proviso to section 65 shall be omitted.</p>	<p>While payment of subsidy directly to consumer is a welcome initiative, certain implementation issues may require addressing. For example, the ability of a tenant to claim subsidy when the connection is in the name of the landlord. Therefore, it would be beneficial if electricity bills reflect the amount of subsidy due which can be claimed by tenant from landlord or deducted from rent payable subsequently.</p>
13.	Section 77	<p>19. Amendment of Section 77</p> <p>In section 77 of the principal Act –</p> <p>i) In sub-section (1), after the words “commerce, finance” and before the words “or, management and”, the words “, public policy” shall be inserted;</p> <p>ii) In clause (b) of sub-section (1), for the word “finance”, the word “law” shall be substituted;</p>	<p>It appears that proposed appointments are being tilted toward the bureaucracy. The introduction of “public policy” as a qualification is a matter of concern. Is it headed towards a further <i>capture</i> by retired bureaucrats?</p>

		<p>iii) In clause (c) of sub-section (1), after the words “field of”, the word “finance,” shall be inserted and for the word “law”, the words “, public policy” shall be substituted;</p> <p>iv) sub-section (2) shall be omitted.</p>	
14.	Section 78	<p>20. Amendment of Section 78</p> <p>Section 78 of the principal Act shall be substituted by the following, namely: –</p> <p>“78. Constitution of Selection Committee to recommend Members: -</p> <p>(1) The Central Government shall, for the purposes of selecting the Members of the Appellate Tribunal and the Chairperson and Members of the Central Commission, Electricity Contract Enforcement Authority, State Commissions and Joint Commissions constitute a Selection Committee consisting of –</p> <p>(a) A person who is, or has been, a Judge of the Supreme Court to be nominated by the Chief Justice of IndiaChairperson;</p> <p>(b) Secretary-in-charge of the Ministry of the Central Government to be nominated by the Central GovernmentMember;</p> <p>(c) Chief Secretaries of two State Governments in accordance with sub-section (2)..... Member;</p>	

	<p>(d) Secretary-in-charge of the Ministry of the Central Government dealing with power.....Member.</p> <p>(2) For the purposes of clause (c) of sub-section (1), the Chief Secretary of the State Governments in alphabetical order of the states starting with Andhra Pradesh, Arunachal Pradesh shall be the members of the Selection Committee for a period of one year.</p> <p>(3) Secretary-in-charge of the Ministry of the Central Government dealing with Power shall be the Convener of the Selection Committee.</p>	<p>The need to amend Section 78 is to bring it in line with the principles enumerated in Supreme Court Advocates-on-Records Association, 2016⁴ (4th Judges case) and the recent judgment in the Rojer Mathews case. This amendment may still fall short of what the Supreme Court expects. The Supreme Court expects “judicial dominance” in the selection process, and will now settle for nothing less. To save it from further challenge and uncertainty, it may be prudent to introduce a larger judicial content, say by including another judge who is the Chief Justice of a High Court or Chairperson of Appellate Tribunal. The relevant paragraphs of Rojer Mathew’s case are as follows:</p> <p><i>“163. We are in agreement with the contentions of the Learned Counsel for the petitioner(s), that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain.</i></p> <p>.....</p>
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⁴ Supreme Court Advocates-on-Record Association v. Union of India, W.P. (Civil) 13 of 2015 (Supreme Court of India) : (2016) 5 SCC 1 : 2015 SCC OnLine SC 964

			<p><i>The exclusion of the Judiciary from the control and influence of the Executive is not limited to traditional Courts alone, but also includes Tribunals since they are formed as an alternative to Courts and perform judicial functions.</i></p> <p><i>164. Clearly, the composition of the Search-cum-Selection Committees under the Rules amounts to excessive interference of the Executive in appointment of members and presiding officers of statutory Tribunals and would undoubtedly be detrimental to the independence of judiciary besides being an affront to the doctrine of separation of powers.</i></p> <p><i>167. We are of the view that the Search-cum-Selection Committee as formulated under the Rules is an attempt to keep the judiciary away from the process of selection and appointment of Members, Vice-Chairman and Chairman of Tribunals.</i></p> <p>.....</p> <p><i>Cognisant of the doctrine of Separation of Powers, it is important that judicial appointments take place without any influence or control of any other limb of the sovereign. Independence of judiciary is the only means to maintain a system of checks and balances on the working of Legislature and the Executive. The Executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments.</i></p> <p><i>168. We are in complete agreement with the analogy elucidated by the Constitution Bench in the Fourth Judges Case (supra) for compulsory need for exclusion of control of the Executive over quasi-</i></p>
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		<p>(4) The Central Government shall, within a period of one month from the date of occurrence of any vacancy by reason of death, resignation or removal of a Member of the Appellate Tribunal, or the Chairperson or a Member of the Central Commission or the Electricity Contract Enforcement Authority and within a period of twelve months before the superannuation or end of tenure of the Member of the Appellate Tribunal or Chairperson or Member of the Central Commission or Electricity Contract Enforcement Authority, make a reference to the</p>	<p><i>judicial bodies of Tribunals discharging responsibilities akin to Courts. The Search-cum-Selection Committees as envisaged in the Rules are against the constitutional scheme inasmuch as they dilute the involvement of judiciary in the process of appointment of members of tribunals which is in effect an encroachment by the executive on the judiciary.</i></p> <p><i>The contentions of the Learned Counsel for petitioner(s) are, therefore, duly accepted by this Court insofar as it is contended that the Rules have an effect of dilution of the judicial character in adjudicatory positions. It has been repeatedly ruled by this Court in a catena of decisions that judicial functions cannot be performed by technical members devoid of any adjudicatory experience.”]</i></p>
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	<p>Selection Committee for filling up of the vacancy.</p> <p>(5) The State Government shall, within a period of one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson or a Member and within a period of twelve months before the superannuation or end of tenure of the Chairperson or Member, make a reference to the Selection Committee for filling up of the vacancy.</p> <p>(6) The proceedings of the Selection Committee shall be held in Delhi or such other places as the Central Government may notify.</p> <p>(7) The Selection Committee shall finalise the selection of the Chairperson and Members referred to it under sub-sections (4) and (5) and make a recommendation for every vacancy referred to it within three months of the receipt of the reference.</p> <p>(8) Before recommending any person for appointment as Member of the Appellate Tribunal, or the Chairperson or other Member of the Appropriate Commission or Electricity Contract Enforcement Authority, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as the Chairperson or Member.</p>	<p>There should be a clear statement of law to disqualify a person who has been an <i>officer of a state power utility</i> from being appointed to <i>that State Commission</i> for a period of at least 3 years from his resignation or retirement. The same will apply to the Central Commission appointments, for those who are employed in the central power utilities. The conflict of interest is palpable and is now becoming an embarrassment. Unless the Central Govt. / legislature takes notice and sorts this out, the courts will intervene. A similar restriction to prevent conflict of interest needs to be introduced for selection of the non-</p>
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		<p>(9) No appointment of the Chairperson or other Member shall be invalid merely by reason of any vacancy other than that of the Chairperson in the Selection Committee.”.</p>	<p>technical members /chairpersons i.e. the persons coming from the bureaucracy, with “public policy” background – who have been heading energy departments / ministries. They should not have held such posts for a period of three years preceding their appointment in the commission or tribunal.</p>
15.	Section 79	<p>21. Amendment of Section 79</p> <p>In section 79 of the principal Act –</p> <p>i) in clause (f) of sub-section (1) of section 79 of the principal Act, after the words “to adjudicate upon disputes”, the words “except matters referred to in section 109A” shall be inserted;</p> <p>ii) after clause (j) in sub-section (1), the following clause shall be inserted, namely:-</p> <p>“(ja)To regulate cross border trade of electricity in accordance with the provisions of this Act and rules made there under;”.</p> <p>iii) In sub section (4) after words “tariff policy published under section 3”, the words “and National Renewable Energy Policy under section 3A” shall be inserted.</p>	<p>Is it limited to only trade (as distinguished from supply)? Will the amendment also cover sale by generating companies? There needs to be greater clarity in the language.</p>
16.	Section 86	<p>25. Amendment of Section 86</p> <p>In section 86 of the principal Act –</p>	

		<p>i) in clause (f) of sub-section (1) after the words “to adjudicate upon disputes”, the words “except matters referred to in section 109A” shall be inserted;</p> <p>ii) in clause (e) of sub-section (1), after the words “from renewable”, the words “and hydro” shall be inserted and after the words “a distribution licensee”, the words “as may be prescribed by the Central Government from time to time” shall be inserted.</p> <p>iii) In sub section (4) after words “tariff policy published under section 3”, the words “and National Renewable Energy Policy under section 3A” shall be inserted.</p>	<p>This is dealt with in the later part, when commenting on Section 109 A etc.</p>
<p>17.</p>	<p>New Chapter</p>	<p>28. Insertion of New Chapter</p> <p>After PART X of the principal Act, the following part shall be inserted, namely:-</p> <p style="text-align: center;">“PART XA</p> <p style="text-align: center;">ELECTRICITY CONTRACT ENFORCEMENT AUTHORITY</p> <p>109A. Establishment of Electricity Contract Enforcement Authority.-</p> <p>(1)The Central Government shall, by notification, establish an Electricity Contract Enforcement Authority to exercise the powers conferred on, and discharge the functions assigned to, it under the Act.</p>	<p>A clumsy legislative reaction to a genuine problem. In Federalist 78, Hamilton while describing the judiciary as the weakest branch said – judiciary “<i>have neither FORCE nor WILL only judgement; and must ultimately depend</i></p>

		<p>(2) Notwithstanding anything contained in this Act or any other law in force, the Electricity Contract Enforcement Authority shall have the sole authority and jurisdiction to adjudicate upon matters regarding performance of obligations under a contract related to sale, purchase or transmission of electricity, provided that it shall not have any jurisdiction over any matter related to regulation or determination of tariff or any dispute involving tariff.</p> <p>(3) Every contract between a generation company and a licensee shall be filed with the Appropriate Commission within 30 days of the said contract having been concluded.</p>	<p><i>upon the aid of the executive arm even for the efficacy for its judgment”⁵</i></p> <p>Courts adjudicate disputes and do not engage on “<i>matters regarding performance of obligations</i>”. Performance of obligations is on the parties to the contract. If there is a breach in performance of obligation, the legal remedies will be available. The ECEA will then like any other ordinary court decide the matter in terms of the laws of contract. It cannot do anything more.</p> <p>As indicated earlier, the remedy / relief against the party in breach will be either in the form of damages or a decree in the nature of specific performance. The law is quite clear on this. When damages as a measure of relief is a quantifiable, specific performance is not a remedy that is available. There are few exceptions provided in the Specific Relief Act.</p> <p>The proviso seeking to carve out “<i>dispute involving tariff</i>” make the entire provision completely unworkable. All disputes in the power sector will have a tariff implication. Disputes will eventually, directly or indirectly, <i>involve</i> tariff. Non-payment of monthly tariff under PPAs, determination of change in law compensation and non-payment thereof are matters involving tariff. Who will have jurisdiction – Commission or ECEA? Similar issues will arise in the transmission contracts in matters of payment of relinquishment charges, etc.</p> <p>Further, the current Covid-19 pandemic scenario is bound to raise dozens of Force Majeure and Change-in-Law claims and counter claims, which will have tariff implications. Who will have jurisdiction over such multiple claims with tariff implications?</p> <p>If the legislature is seriously looking at cleaning it up, one can consider the following suggestion. It is slightly radical but, has adequate legal support.</p>
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⁵ Alexander Hamilton, The Federalist No. 78, in The Federalists Papers (Jacob E. Cook ed., 1961; New York: MacLean, p. 523

			<p>(a) Cut through the commission in the middle. Keep regulation making, tariff determination, licensing, regulating and advisory powers in one body. Take all “disputes” to another forum, like the ECEA.</p> <p>(b) Give ECEA a heavy judicial content, with high quality judicial and technical members;</p> <p>(c) This need not be at the State level, it can be at the regional level;</p> <p>(d) The orders / judgment of ECEA should be enforceable by ECEA;</p> <p>(e) Surely, there will be two levels of appeal</p> <p>The separation of legislative power to frame regulation and power to adjudicate dispute has become an absolute necessity. There are several Commissions who by amending regulations are seeking to modify contracts (and even vested rights under old regulations). It is akin to moving the goal post in the middle of the game. In this context, the Supreme Court had in <i>Clariant International Ltd. v. Securities & Exchange Board of India</i>⁶, observed that:</p> <p><i>“72. <u>The conflict of jurisdiction between an expert Tribunal vis-à-vis the courts in the context of the doctrine of separation of powers poses a problem even in other countries.</u></i></p> <p>,,,,,,,,,,,,,,,,,,,,,</p> <p><i>75. <u>The SEBI Act confers a wide jurisdiction upon the Board. Its duties and functions thereunder, run counter to the doctrine of separation of powers. <u>Integration of power by vesting legislative, executive and judicial powers in the same body, in future, may raise</u></u></i></p>
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⁶ Clariant International Ltd. v. Securities & Exchange Board of India, (2004) 8 SCC 524

	<p>109B. Application to Electricity Contract Enforcement Authority and order thereon - (1) Any person aggrieved in any matter referred to in section 109A may prefer an application to the Electricity Contract Enforcement Authority.</p> <p>(2) Every application under sub-section (1) shall be filed within a period of six months from the non-performance of the obligation under the contract:</p> <p>Provided that the Electricity Contract Enforcement Authority may entertain an application after the expiry of the said period of six months if it is satisfied that there is sufficient cause for not filing it within that period.</p> <p>(3) Every application received under sub section (1) shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed.</p> <p>(4) On receipt of an application or matter under sub-section (6) of section 92, the Electricity Contract Enforcement Authority may, after giving the parties to the application an opportunity of being heard, determine whether a valid contract subsists between the parties and whether any party is in violation of any of its obligations under the contract.</p>	<p><u>several public law concerns as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers.”</u></p> <p>In our view, the limitation should be kept at 3 years as is normally permitted. The reduced period of limitation will encourage more disputes to be filed. Sometimes with passage of time (like retirement / transfer of MD of the utility) disputes tend to get resolved.</p> <p>The proposed amendment is unhelpful. It is advisable to follow settled legal procedure with some level of rationality – like the workings of commercial courts, with a more aggressive time line.</p>
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	<p>(5) Upon a finding that there has a violation/breach of obligation under a contract by a party or parties, the Electricity Contract Enforcement Authority shall direct that the said parties immediately perform their obligation under the contract and may direct the payment of costs on account of the breach of contract or non-fulfilment of obligations of the contract and any further amount it may deem fit as compensation.</p> <p>(6) The Electricity Contract Enforcement Authority shall send a copy of every order made by it to the parties to the application as the case may be.</p> <p>(7) The Electricity Contract Enforcement Authority shall deal with the application filed before it under sub-section (1) and any matter referred to it under sub-section (6) of section 92 as expeditiously as possible and endeavour to dispose it finally within one hundred and twenty days from the date of its receipt:</p> <p>Provided that where any application could not be disposed of within the said period of one hundred and twenty days, the Electricity Contract Enforcement Authority shall record its reasons in writing for not disposing of the matter within the said period.</p> <p>109C. Composition of Electricity Contract Enforcement Authority-</p> <p>(1) The Electricity Contract</p>	<p>Once a petition is filed and the court fees is paid, the ECEA should hear the main matter on merits and dispose it off within 6 months. Adjudication should not be broken up into different phases as it will encourage filing appeals and writs on preliminary jurisdictional issues.</p>
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Enforcement Authority shall consist of the following –

- a) a Chairperson;
- b) two or more Judicial Members as may be prescribed by the Central Government from time to time; and
- c) three or more Technical Members, as may be prescribed by the Central Government from time to time.

(2) Subject to the provisions of this Act,

a) the jurisdiction of the Electricity Contract Enforcement Authority may be exercised by Benches thereof;

b) a Bench may be constituted by the Chairperson of the Electricity Contract Enforcement Authority with two or more Members of the Electricity Contract Enforcement Authority as the Chairperson of the Electricity Contract Enforcement Authority may deem fit:

Provided that every Bench shall include at least one Judicial Member and one Technical Member;

c) the Benches of the Electricity Contract Enforcement Authority shall ordinarily sit in Delhi and such other places as the Central Government may, in consultation with the Chairperson of the Electricity Contract Enforcement Authority, notify;

(d) the Central Government shall, in consultation with the Chairperson of

the Electricity Contract Enforcement Authority, notify the areas in relation to which each Bench of the Electricity Contract Enforcement Authority may have exercise jurisdiction.

(3) Notwithstanding anything contained in sub-section (2), the Chairperson of the Electricity Contract Enforcement Authority may transfer a Member of the Electricity Contract Enforcement Authority from one Bench to another Bench.

Explanation.- For the purposes of this section, a Judicial Member shall include the Chairperson of the Electricity Contract Enforcement Authority.

109D. Qualification for appointment of Chairperson and Members of Electricity Contract Enforcement Authority.- (1) A person shall not be qualified for appointment as the Chairperson of the Electricity Contract Enforcement Authority or a Member of the Electricity Contract Enforcement Authority unless he-

- (a) in the case of the Chairperson of the Electricity Contract Enforcement Authority, is, or has been a Judge of a High Court; and
- (b) in the case of a Judicial Member of the Electricity Contract Enforcement Authority, is, or has been a District Judge or Additional District Judge for a minimum period of seven years; and

	<p>(c) in the case of a Technical Member of the Electricity Contract Enforcement Authority,-</p> <p>i. is, or has been, an officer of the rank of Additional Secretary or above for at least one year in the Ministry or Department of the Central Government dealing with power or any other sector of infrastructure; or</p> <p>ii. is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission, distribution and regulation, or economics, finance, public policy, commerce, or management with experience in infrastructure related matters.</p> <p>(2) The Chairperson and Members of the Electricity Contract Enforcement Authority shall be appointed by the Central Government on the recommendation of the Selection Committee referred to in section 78.</p> <p>(3) Before appointing any person for appointment as Chairperson or other Member of the Electricity Contract Enforcement Authority, the Central Government shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member.</p> <p>109E. Term of Office and Terms and Conditions of service.- The</p>	<p>In our view, there should be enough flexibility to enable younger practicing lawyers to join the ECEA. It should not be a position reserved only for present or retired judges. This comment to competent consultants who are qualified, can be considered for appointment in Commissions and the ECEA.</p> <p>The Central Government should follow the principles enunciated by the Supreme Court in the Rojer Mathews case.</p>
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Chairperson of the Electricity Contract Enforcement Authority or a Member of the Electricity Contract Enforcement Authority shall hold office as such for a term of five years from the date on which he enters upon his office:

Provided that such Chairperson or other Member shall not be eligible for reappointment in the same capacity as the Chairperson or a Member in the Electricity Contract Enforcement Authority;

Provided further that no Chairperson of the Electricity Contract Enforcement Authority or Member of the Electricity Contract Enforcement Authority shall hold office after attaining the age of sixty-seven years.

109F. Vacancies.-If, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson of the Electricity Contract Enforcement Authority or a Member of the Electricity Contract Enforcement Authority, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Electricity Contract Enforcement Authority from the stage at which the vacancy is filled.

109G. Resignation and Removal.
(1) The Chairperson of the Electricity Contract Enforcement Authority or a Member of the

	<p>Electricity Contract Enforcement Authority may, by notice in writing under his hand addressed to the Central Government, resign his office:</p> <p>Provided that the Chairperson of the Electricity Contract Enforcement Authority or a Member of the Electricity Contract Enforcement Authority shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of term of office, whichever is the earliest.</p> <p>(2) The Chairperson of the Electricity Contract Enforcement Authority or a Member of the Electricity Contract Enforcement Authority shall not be removed from his office except by an order of the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by Chairperson of the Appellate Tribunal in which the Chairperson or a Member of the Electricity Contract Enforcement Authority concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges.</p> <p>109 H. Member to act as Chairperson in certain circumstances.- (1) In the event of the occurrence of any vacancy in the</p>	<p>This may require realignment to the principle enunciated in Rojer Mathew’s case as below:</p> <p><i>“181. It is essential that the same be observed in letter and spirit and we therefore reiterate that Members and Presiding Officers of Tribunals cannot be removed without either the concurrence of the Judiciary or in the manner specified in the Constitution for Constitutional Court judges.”</i></p>
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office of the Chairperson of the Electricity Contract Enforcement Authority by reason of his death, resignation or otherwise, the senior-most Member of the Electricity Contract Enforcement Authority shall act as the Chairperson of the Electricity Contract Enforcement Authority until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(2) When the Chairperson of the Electricity Contract Enforcement Authority is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member of the Electricity Contract Enforcement Authority shall discharge the functions of the Chairperson of the Electricity Contract Enforcement Authority until the date on which the Chairperson of the Electricity Contract Enforcement Authority resumes his duties.

109I. Officers and other employees of Electricity Contract Enforcement Authority.- (1) The Central Government shall provide the Electricity Contract Enforcement Authority with such officers and other employees as it may deem fit.

(2) The officers and other employees of the Electricity Contract Enforcement Authority shall discharge their functions under the general superintendence of the

	<p>Chairperson of the Electricity Contract Enforcement Authority.</p> <p>(3) The salaries and allowances and other terms and conditions of service of the officers and other employees of the Electricity Contract Enforcement Authority shall be such as may be prescribed by the Central Government.</p> <p>(4) The Chairperson of Electricity Contract Enforcement Authority shall exercise such financial and administrative powers as may be prescribed by the Central Government.</p>	<p>Ensuring financial independence will be important and so now a legislative requirement. No specific comment, specific to set out the principle settled by the Supreme Court in Rojer Mathews case as below:</p> <p><i>“194. What appears to be of paramount importance is that every Tribunal must enjoy adequate financial independence for the purpose of its day to day functioning including the expenditure to be incurred on (a) recruitment of staff; (b) creation of infrastructure; (c) modernisation of infrastructure; (d) computerisation; (e) perquisites and other facilities admissible to the Presiding Authority or the Members of such Tribunal. It may not be very crucial as to which Ministry or Department performs the duties of Nodal Agency for a Tribunal, but what is of utmost importance is that the Tribunal should not be expected to look towards such Nodal Agency for its day to day requirements. There must be a direction to allocate adequate and sufficient funds for each Tribunal to make it self-sufficient and self-sustainable authority for all intents and purposes. The expenditure to be incurred on the</i></p>
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		<p>109 J. Procedure and powers of Electricity Contract Enforcement Authority.- (1) The Electricity Contract Enforcement Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Electricity Contract Enforcement Authority shall have powers to regulate its own procedure.</p> <p>(2) The Electricity Contract Enforcement Authority shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:-</p>	<p><i>functioning of each Tribunal has to be necessarily a charge on the Consolidated Fund of India. Therefore, hitherto, the Ministry of Finance shall, in consultation with the Nodal Ministry/Department, shall earmark separate and dedicated funds for the Tribunals. It will not only ensure that the Tribunals are not under the financial control of the Department, who is a litigant before them, but it may also enhance the public faith and trust in the mechanism of Tribunals.”</i></p>
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	<p>a) summoning and enforcing the attendance of any person and examining him on oath;</p> <p>b) requiring the discovery and production of documents;</p> <p>c) receiving evidence on affidavits;</p> <p>d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;</p> <p>e) issuing commissions for the examination of witnesses or documents;</p> <p>f) reviewing its decisions;</p> <p>g) dismissing an application on default or deciding it ex parte;</p> <p>h) setting aside any order of dismissal of an application on default or any order passed by it ex parte;</p> <p>i) pass an interim order (including granting an injunction or stay) after providing the parties concerned an opportunity to be heard; and</p> <p>j) any other matter which may be prescribed by the Central Government.</p> <p>(3) An order made by the Electricity Contract Enforcement Authority under this Act shall be executable by it as a decree of civil court and, for this purpose, the Electricity Contract Enforcement Authority shall have all the powers of a civil court including but limited to powers of attachment and sale of property, arrest and detention in prison and appointment of a receiver.</p>	<p>In several cases, the defaulting party is a public utility. What is the merit in attaching a transformer or a sub-station or for that matter the Managing Director’s car belonging to the public utility? For the private sector, all assets have been mortgaged to the bank. In our view, the legislature should be able to empower the ECEA with powers over allocation of receivables, diversion of central funds or grants etc. If the Government is the owner of the utility, there has to be some recourse to get the owner / shareholder to pay current utility liabilities under a statutory scheme.</p>
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(4) Notwithstanding anything contained in sub-section (3), the Electricity Contract Enforcement Authority may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

(5) All proceedings before the Electricity Contract Enforcement Authority shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code and the Electricity Contract Enforcement Authority shall be deemed to be a civil court for the purposes of section 345 and 346 of the Code of Criminal Procedure, 1973.

109 K. Distribution of business amongst Benches and transfer of cases from one Bench to another Bench.-

(1) Where Benches are constituted, the Chairperson of the Electricity Contract Enforcement Authority may, from time to time, by notification, make provisions as to the distribution of the business of the Electricity Contract Enforcement Authority amongst the Benches and also provide for the matters which may be dealt with by each Bench.

(2) On the application of any of the parties and after notice to the parties, and after hearing such of them as he may desire to be heard, or on his own motion without such notice, the Chairperson of the Electricity Contract Enforcement Authority

may transfer any case pending before one Bench, for disposal, to any other Bench.

109 L. Decision to be by majority.-

If the Members of the Electricity Contract Enforcement Authority of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Electricity Contract Enforcement Authority who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Electricity Contract Enforcement Authority and such point or points shall be decided according to the opinion of the majority of the Members of the Electricity Contract Enforcement Authority who have heard the case, including those who first heard it.

109 M. Right of parties to take assistance of legal practitioner.-

A person preferring an application to the Electricity Contract Enforcement Authority under this Act and any other party to the case may either appear in person or take the assistance of a legal practitioner of his choice to present his case before the Electricity Contract Enforcement Authority, as the case may be.

109 N. Appeal to Appellate Tribunal.-Any person aggrieved by any decision or order of the Electricity Contract Enforcement

		<p>Authority, may, file an appeal to the Appellate Tribunal within sixty days from the date of communication of the decision or order of the Electricity Contract Enforcement Authority to him:</p> <p>Provided that the Appellate Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.”</p>	
<p>18.</p>	<p>Section 121</p>	<p>34. Amendment of Section 121</p> <p>(1) Section 121 of the principal Act shall be numbered as sub-section (1) thereof.</p> <p>(2) In the sub-section (1) as so numbered, after the words “the Appropriate Commission or” and before the words “or other interested party, the words “Electricity Contract Enforcement Authority or” shall be inserted and after the words “to any Appropriate Commission” and before the words “for the performance”, the words “or Electricity Contract Enforcement Authority” shall be inserted;</p> <p>(3) After sub-section (1) as so numbered, the following sub-section shall be inserted, namely:-</p> <p>“(2)The Appellate Tribunal shall have the same jurisdiction, powers and authority to take action on wilful disobedience to any of its judgment, decree, direction, order or other</p>	<p>The Appellate Tribunal should be conferred with powers of contempt to reign in recalcitrant State Utilities.</p>

	<p>process or wilful breach of an undertaking given to a it, as a High Court under the provisions of the Contempt of Courts Act, 1971 (70 of 1971) on its own motion or on a motion made by the Advocate General or such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer or the Advocate General, and a reference in the Contempt of Courts Act, 1971 to a High Court shall be construed as including a reference to the Appellate Tribunal.”.</p>	
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