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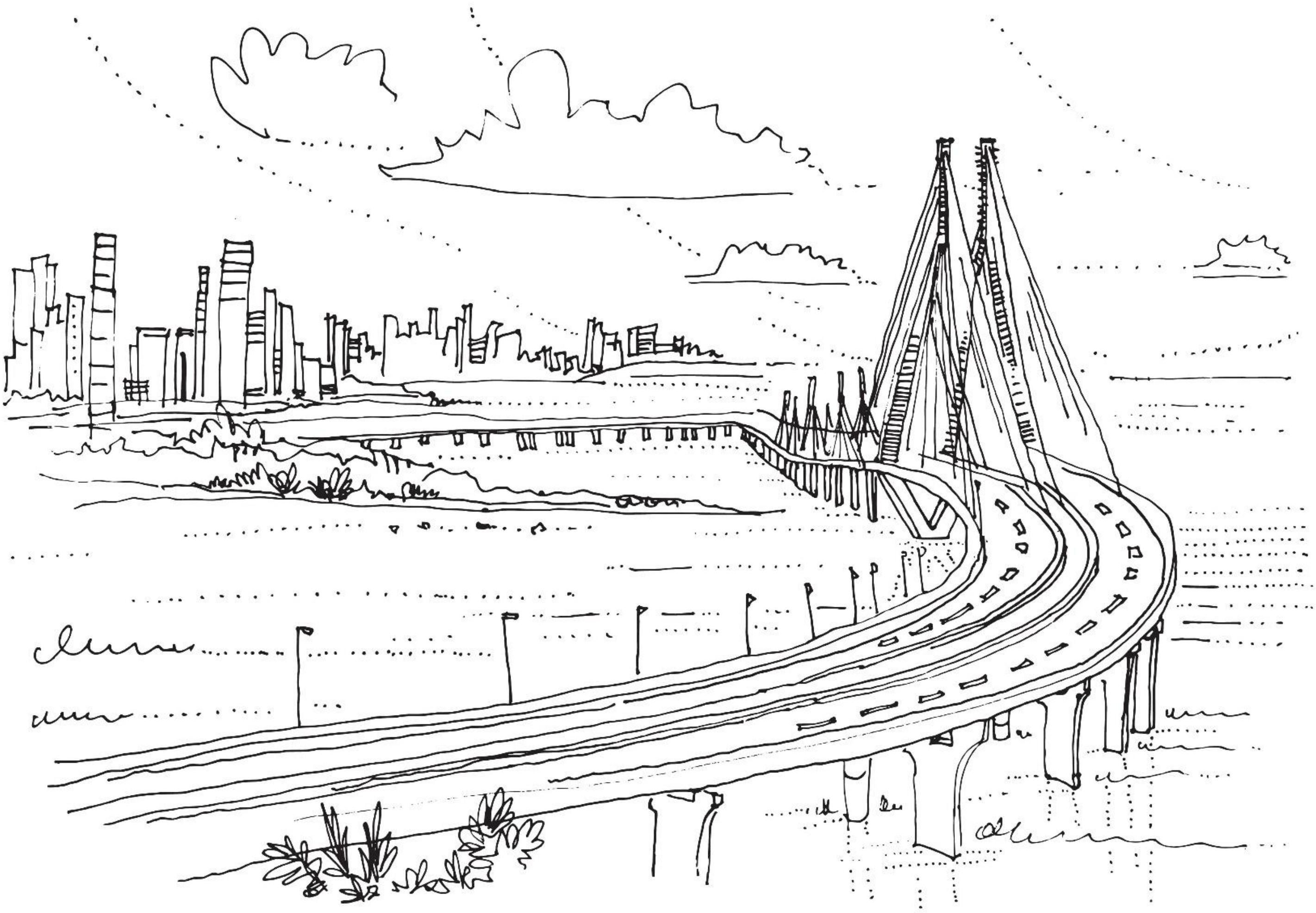

Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

Dear Reader,

The infrastructure sector has long established itself as a key growth driver for India's economy. The sector was allocated over INR 1 lakh crore in this year's Union Budget, underlining its relevance to the country's economic development and highlighting Government of India's continuing focus and commitment to infrastructure development.

In order to keep our clients updated and help pre-empt any risk arising from the rapid pace of legal, regulatory and policy developments in this sector, we have started this monthly compendium to examine pertinent developments and analyse potential impact on infrastructure sector in the country. In this note, we address the latest issues impacting roads, ports, energy and oil & gas sectors, and provide supporting commentary to help the reader derive a holistic understanding of the issue at hand.

We hope you will find this information helpful. For any clarification or feedback, please connect with your point of contact at ELP or reach out to us at insights@elp-in.com.

Regards,

ELP Infrastructure Team

INFRASTRUCTURE SECTOR : IMPACT OF THE SPECIFIC RELIEF (AMENDMENT) ACT, 2018

In August 2018, Government of India notified the Specific Relief (Amendment) Act, 2018 (***Amendment Act***), with the intent of strengthening contractual enforcement framework in the country. was notified by the Government in August, 2018. In stark contrast to the earlier regime, the Amendment Act establishes specific performance under contracts as the primary remedy (subject to certain narrow exceptions).The Amendment Act also empowers courts to engage one or more experts and seek their assistance on any specific issue involved in a suit, if deemed necessary.

The expert committee constituted to recommend changes to the Specific Relief Act, 1963 (***SRA***) examined the potential impact on infrastructure sector specifically, given the central role of contracts in infrastructure developments, public private partnerships and other public projects, all of which often involve large investments.

As a major relief to this sector, the Amendment Act now provides that courts cannot grant an injunction in a suit involving a contract relating to an infrastructure project, if granting the injunction would cause impediment or delay in the progress or completion of such infrastructure project. It further states that injunctions cannot be granted if the injunction would interfere with the continued provision of relevant facility related to the infrastructure project or services being the subject matter of the infrastructure project. These provisions were necessitated by the frequent use of injunctions in disputes around infrastructure projects, which adversely impacted project timelines leading to delayed completion, significant public inconvenience and wastage of resources.

The Amendment Act has introduced a category of projects which are 'infrastructure projects' and are as listed in the Schedule to the Amendment Act. As opposed to the recommendations of the expert committee which suggested provisions regarding public works contracts, the Schedule to the Amendment Act lists out the category of projects and infrastructure sub-sectors that would be covered within the scope of 'infrastructure projects'. Therefore, only such projects as are included in the Schedule would benefit from the protections mentioned in the Amendment Act and other public works would not be covered. If the Central Government considers it necessary or expedient to do so, it is entitled to amend the Schedule depending upon the requirement for development of infrastructure projects.

Prolonged litigation and slow pace of dispute resolution has been a perennial pain-point impacting infrastructure projects. In order to rectify this, the Amendment Act has introduced the concept of special courts for trying suits in respect of contracts relating to infrastructure projects. The State Government, in consultation with the Chief Justice of the High Court, is now required to designate one or more civil courts as special courts, within the local limits to the area.

The Amendment Act also categorically provides that a suit filed under the provisions of the SRA is to be disposed of within a period of 12 months from the date of service of summons to the defendant. An extension of only 6 months in aggregate can be granted by the court vis-à-vis the aforesaid timeline.

Given that infrastructure projects are usually delayed on accounts of pending litigations, the amendments to the SRA may help in reducing unnecessary litigation and thereby aid development of infrastructure projects. Effective compliance with the provisions of the Amendment Act would ensure growth of the sector and ultimately benefit the public at large.

TRANSPORTATION: ROADS

ROADS

Amendment to EPC Agreements by the Ministry of Road Transport and Highways and its impact on bonus for early completion of projects

The Ministry of Road Transport and Highways (***MORTH***) vide circular dated August 8, 2018, amended the definition of 'Project Completion Date' under standard EPC Agreement for national highways and centrally sponsored road and bridge works. The revised definition now provides that the 'Project Completion Date' is the date on which the Completion Certificate (which is issued on the works under the EPC agreement being completed as evidenced by satisfactory completion of tests).

This is in contrast to the earlier definition which linked the Project Completion Date to the date of issuance of the provisional certificate. A Provisional Certificate is issued if all works, except works for which an extension is granted under the EPC Agreement for certain specific reasons, are completed. These include extensions for reasons attributable to the Authority, change of scope, *force majeure* event and delays in providing right of way.

Where the Project Completion Date occurs before the Scheduled Completion Date (being the date by which all the works have to be complete), contractors are usually entitled to a bonus. The amendment is aimed towards ensuring that the contractor completes all the works required for the project before being entitled to this bonus, in order to guard against the prevalent scenario of contractors completing the entire works only after the Scheduled Completion Date, despite receiving a bonus at t the time of issuance of the Provisional Certificate.

PORTS

Fresh guidelines for investments by major ports

The Major Port Trusts Act, 1963 (***MPTA***) *vide* Section 88 mandates that investments pertaining to pension, provident and surplus funds shall adhere to guidelines issued from time to time by the Central Government, i.e. the Ministry of Shipping or Ministry of Finance.

Considering the unimpressive returns yielded from surplus funds parked by ports solely in fixed deposits with the public sector banks, the Ministry of Shipping, with a view to facilitate major ports[1] in earning higher returns on provident and surplus funds, has, in supersession of earlier instructions issued including under the erstwhile Ministry of Shipping, Road, Transport and Highways *vide* letter no. PR-15018/1/2007-PG dated February 20, 2009, issued fresh guidelines in gazette notification No. PD-12018/3/2018-PD-VI (Coord) on July 27, 2018 (***New Guidelines***) to all the major ports on:

- The investment of provident funds, based on EPFO (Employees Provident Fund Organization) guidelines from the Ministry of Labour and Employment in gazette notification D.L. 33004/99 on May 29, 2015; and
- The investment of surplus funds, based on guidelines from the Department of Public Enterprises (Ministry of Heavy Industries and Public Enterprises) in O.M. No. DPE/18(1)/2012-Fin on May 8, 2017, with certain amendments as specified in the gazette notification No.PD-12018/3/2018-PD-VI(Coord), dated July 27, 2018.

[1] Kandla, Mumbai Port Trust, JNPT, Goa, New Mangalore, Cochin, Tuticorin, Chennai, Ennore, Vishakapatnam, Paradip and Kolkata/Haldia

In terms of the New Guidelines, investment in pension, provident and gratuity funds is permitted in government securities, debt and related instruments (either listed, Basel III Tier I Bonds, debt mutual funds, fixed deposits with scheduled commercial banks (**SCBs**), rupee bonds issued by the International Bank for Reconstruction and Development (**IBRDA**), International Finance Corporation (**IFC**), Asia Development Bank (**ADB**) or infrastructure and housing bonds), listed equity instruments and mutual funds, mortgage or asset backed securities, Infrastructure Investments Trusts and Real Estate Investment Trusts up to the specified limits for each.

Investment in surplus funds may be made in T-Bills, Government of India securities, term deposits with banks, instruments issued by SCBs, debt instruments issued by public sector undertakings, mutual funds. collateralised borrowings and lending obligations and inter-PSU loans and or deposits.

Certain additional changes introduced by the New Guidelines in the regulation of investment by ports in surplus funds are:

Investment of surplus funds is now allowed in term deposits with national banks (in lieu of SCBs) and in instruments issued by national banks (in lieu of SCBs) as referred to in the explanation under Section 88(2) of the MPTA;

Mutual funds and other debt instruments (including commercial paper) have been declared as eligible securities as referred to in Section 88(2)(b) of the MPTA; and

The applicability of highest credit rating in respect of loans and or deposits with Central Public Sector Enterprises has been done away with. The provision for inter port loans shall be regulated by Section 88(2)(c) of the MPTA.

ENERGY

GENERAL

Allahabad High Court denies interim relief to stressed power companies' plea against IBC proceedings

The Reserve Bank of India (***RBI***) laid down a comprehensive procedure for restructuring of stressed assets vide its Circular dated February 12, 2018 (***Circular***). The said Circular stipulates that in respect of accounts with aggregate exposure of the lenders at INR 2,000 crores and above, on or after March 1, 2018 (***Reference Date***), including accounts where resolution may have been initiated under any of the existing schemes as well as accounts classified as restructured standard assets which are currently in respective specified periods (as per the previous guidelines), resolution plan will be implemented as per the following timelines – (a) if in default as on the Reference Date, then 180 days from the Reference Date, i.e. August 28, 2018; (b) if in default after the reference date, then 180 days from the date of first such default and if the resolution plan is not approved by all the lenders within the 180-day period, then the lenders shall refer the stressed accounts to the NCLT under the Insolvency and Bankruptcy Code, 2016 (***IBC)*** within 15 days to initiate the process against the stressed power companies for recovery of bad loans.

Independent Power Producers Association of India (IPPA), Association of Power Producers (APP) and Prayagraj Power Generation Company Limited (collectively, ***Petitioners***) sought judicial intervention by filing writ petitions in the Allahabad High Court challenging the said Circular. The Petitioners argued that power companies should be treated differently with respect to resolution of the stressed assets because of large number of stressed power projects and low investor interest.

The Allahabad High Court in its judgement on August 27, 2018 denied interim relief to the Petitioners. However, the High Court ruled that any company can independently approach the court in case urgent interim relief is required by placing material facts on record.

By the said judgement, the Hon'ble High Court directed the Central Government to consider initiation of the consultative process under Section 7 of the RBI Act and conclude the same within 15 days from the date of the judgment. Section 7 of the RBI Act gives power to the Central Government to give directions to the Central Bank, after consultation with the Governor of the Bank, in public interest. The High Level Empowered Committee is required to submit its report within 2 months from its constitution and the Ministry of Power is ordered to invite a senior representative of the RBI, after consultation with the Governor of RBI, as a member of the High Level Empowered Committee.

The order further reiterates that this order shall not curtail the rights/powers of a financial creditor under Section 7 of the IBC or even of the RBI in issuing directions in specific case(s) under Section 35AA of the Banking Regulation Act, 1949 to initiate corporate insolvency resolution process under Chapter II of Part II of IBC, in any given case, including the petitioners or members of the petitioners' Association.

Draft Amendments to Inter-State Open Access Regulations

The Central Electricity Regulatory Commission (***CERC***) has issued the draft of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) (Fifth Amendment) Regulations, 2018 (***Amendment Regulations***) to amend the provisions of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2004 vide notification no. PM/NOAR/2016/CERC on August 8, 2018.

The key amendments proposed are as follows:

- National Open Access Registry (***NOAR***), which will be a centralized electronic platform owned and operated by the National Load Dispatch Centre (***NLDC***) and owned and operated by the Power System Operation Corporation (***POSOCO***). NOAR's functions will include, but not be limited to the following:
  - Provide single point electronic interface for all the stakeholders, including open access participants, trading licensees, Power Exchanges, NLDC/Regional Load Dispatch Centres (***RLDCs***)/State Load Dispatch Centre (***SLDCs***) and Regional Power Committees.
  - Automate the administration of the short-term open access in inter-state transmission system.
  - Provide audit trail of the applications and dash board facility summarizing at any point of time the details of the short-term open applications made, approvals/rejections accorded by RLDCs/SLDCs, applications pending etc.
  - Act as a repository of information related to short term open access in interstate transmission system.
  - Interface with the scheduling software applications of the RLDCs/SLDCs for processing short-term open access bilateral transactions.
- Short-term open access applications will be processed through NOAR, and information related to approvals, rejections, revisions, curtailment and payment schedules will be made available through the NOAR to the respective market participants through email or SMS.
- After stakeholder consultation, POSOCO will issue the detailed procedure with prior approval of CERC to operationalize open access through NOAR.
- Seekers of short-term open access must declare that there is no other contract for sale or purchase of the same power for which standing clearance has been applied for.
- Application for advance scheduling for a bilateral transaction must now be submitted to the nodal agency through NOAR up to the fourth month.
- The power exchange will make an application to the nodal agency through NOAR for scheduling of the collective transactions discovered on its platform. The nodal agency will approve or advise the power exchange to revise the application for scheduling of collective transactions based on the transmission corridor availability in accordance with the detailed procedures.
- If the default in payment exceeds 90 days from the due date of payment of the charges, the NLDC or RLDC may deny short-term open access to the defaulting entity without approaching the CERC for specific directions.

RENEWABLE ENERGY

Safeguard duty on solar cells and photovoltaic cells

In order to safeguard domestic producers of solar power generating systems, the Government of India has imposed safeguard duty at 25% (subject to periodical reduction) on solar cells (whether or not assembled in modules or panels) imported into India from China and Malaysia.

The imposition of safeguard duty has been a subject matter of challenge before various High Courts. The High Court of Orissa had earlier passed an order staying such imposition; however, the duty took effect from July 30, 2018 despite such order. In a subsequent petition filed before it, the High Court of Orissa directed the Ministry of Finance to withdraw the notification imposing the safeguard duty. Pursuant to the aforesaid direction, the Ministry of Finance clarified that it would not, for the time being, insist on payment of safeguard duty on solar cells. The ministry further stated that until further directions, solar cells would, in respect of safeguard duty, be assessed provisionally on furnishing of simple letter of undertaking or bond by the concerned person. The matter before the High Court of Orissa is scheduled to be next heard in September, 2018.

Vide an order dated August 13, 2018, the High Court of Madras directed release of goods imported by Shapoorji Pallonji without insisting on payment of safeguard duty. Shapoorji Pallonji was, however, asked to execute a bond. The High Court further held that if the notification regarding safeguard duty is upheld, Shapoorji Pallonji would be liable to pay the safeguard duty.

Andhra Pradesh High Court's decision on generation-based incentive for wind power

In accordance with the regulations passed by the Andhra Pradesh Electricity Regulatory Commission (***APERC***), the APERC notifies the generic preferential tariff for wind power from time to time. In respect of tariff orders passed by the APERC for wind power projects commissioned during August 1, 2015 to March 31, 2017 (***Relevant Period***), the generation-based incentive (***GBI***) provided by the Government of India to the developers of wind power projects was not factored in. Accordingly, two distribution licensees of the state of Andhra Pradesh, namely Southern Power Distribution Company of Andhra Pradesh Limited (***SPDCAPL***) and Easter Power Distribution Company of Andhra Pradesh Limited, filed a petition before the APERC requesting it to amend the tariff to pass on the incentive to distribution licensees.

Vide its order dated July 28, 2018 (***APERC Order***), the APERC directed that the GBI claimed and availed by the wind power generators is to be given credit to in the tariff determined for the wind power projects for the Relevant Period. The APERC held that the distribution licensees are permitted to deduct the amounts so claimed and availed towards the GBI by any wind power generator and only pay the balance of tariff payable to such wind power generator for the electricity supplied by such generator to the licensees. A writ petition was filed by Orange Anantapur Wind Power Private Limited seeking the suspension of the APERC Order and seeking directions to SPDCPAL to remit the amounts that were wrongly withheld from it and to not withhold any payments on the GBI related accounts.

On August 23, 2018, the High Court of Judicature at Hyderabad for the state of Telangana and the state of Andhra Pradesh (***Hyderabad HC***) suspended the operation of the APERC Order. The Hyderabad HC held that considering that power of review could only be exercised by the

APERC in accordance with the applicable regulations (i.e. within 90 days of the original order), the APERC could not invoke its inherent power to exercise its power of review. Holding that the APERC had no jurisdiction to review the tariff order, interim suspension was granted in respect of the operation of the APERC Order.

Apart from the relief provided to wind power generators, the decision establishes that a State Electricity Regulatory Commission does not have an inherent power of review and can only exercise such power in strict accordance with applicable regulatory provisions. Therefore, any person, including generators seeking a review of a tariff order would have to adhere to the express provisions and not apply for exercise of inherent powers of APTEL.

Enforcement of RPO obligations by the Maharashtra Electricity Regulatory Commission

On July 31, 2018, the Maharashtra Electricity Regulatory Commission (***MERC***) passed an order in respect of verification of compliance of renewable purchase obligation (***RPO***) targets by the Maharashtra State Electricity Distribution Company Limited (***MSEDCL***).

The requirements for RPO for Maharashtra are set out in notified the MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 (***MERC RPO Regulations***) specifying the RPO targets for obligated entities. As per the MERC RPO Regulations, distribution licensees, captive power plant owners and open access customers in the State of Maharashtra as specified therein. Obligated entities are required to either generate renewable energy, procure a certain percentage of its requirements from eligible renewable energy sources or purchase renewable energy certificates (***RECs***).

While reviewing compliance of the MERC RPO Regulations by MSEDCL, the MERC noted that MSEDCL's standalone and cumulative shortfall towards solar RPO targets as at the end of financial year 2016-17 had increased. Accordingly, the MERC directed MSEDCL to fulfil their RPO targets in any case and mandated MSEDCL to purchase solar power or RECs so as to fully meet its shortfall by the end of March 2019.

MSEDCL had requested for time until March 2020 to meet the shortfall on account of the backlog due to stay of the Supreme Court on trading of solar RECs. While the MERC noted the justification and mitigating circumstances submitted by MSEDCL, it held that since the RPO shortfall of MSEDCL had increased, MSEDCL ought to comply by the end of March 2019. However, vide orders passed on the same date as in the case of MSEDCL, the MERC accorded another chance to Brihanmumbai Electric Supply & Transport Undertaking and Reliance Infrastructure Limited (Distribution) to meet their respective RPO targets. The MERC noted that the efforts taken by the aforesaid parties warrant providing another opportunity to them to fulfil their RPO shortfall.

Enforcement of RPO obligations has always proven to be a challenge. The Ministry of New and Renewable Energy (***MNRE***) created an RPO Compliance Cell in May 2018 to coordinate with states, the Central Electricity Regulatory Commission and state electricity regulatory commissions on the matters relating to RPO compliance, including for monthly reports on compliance. The RPO Compliance Cell is required to also coordinate with the Government of India and take-up non-compliance related issues with appropriate authorities. In light of this and the tough stance taken by the MERC, compliance of RPO obligations may become more effective. Affected companies would therefore need to ensure that they comply with the RPO obligations. However, this may be difficult as the availability of RECs in the market is dependent on the actual generation by generators.

Amendment to the definition of 'Storage' in the National Wind Solar Hybrid Policy

The National Wind Solar Hybrid Policy (***Hybrid Policy***) was issued by the MNRE on May 14, 2018. The primary objective of the Hybrid Policy is to provide a framework for promotion of large grid connected wind-solar PV hybrid systems for optimal and efficient utilization of transmission infrastructure and land, reducing the variability in renewable power generation and achieving better grid stability.

The MNRE *vide* Office Memorandum dated August 13, 2018 (***Memorandum***), issued an amendment to the Hybrid Policy wherein the definition of the term 'storage' was amended to include technologies other than batteries, such as pumped hydro, compressed air, flywheel, etc., to facilitate growth of this segment. The provisions of the Hybrid Policy now refer to the term 'storage' instead of 'battery'.

Pursuant to the amendment, it is stated that storage may be added to the hybrid project to:

- Reduce the variability of output power from wind solar hybrid plant.
- Provide higher energy output for a given capacity at delivery point, by installing additional capacity of wind and solar power in a wind solar hybrid plant.
- Ensure availability of firm power for a particular period.

The Memorandum furthers states that the bidding factors for wind-solar hybrid plants with storage may include minimum firm power output throughout the day or for defined hours during the day, extent of variability allowed in output power, unit price of electricity, etc.

The change appears to have been made to ensure that technologies (other than storage) that may be innovated and developed, also fall within the purview of the Hybrid Policy and are not inadvertently excluded by narrow usage of terms.

OIL & GAS

Policy framework for streamlining the working of Production Sharing Contracts

A policy framework (***Policy Framework)*** for streamlining the working of Production Sharing Contracts (***PSCs***), aimed towards expeditious development of hydrocarbon resources, was issued by the Ministry of Petroleum and Natural Gas, vide notification bearing no. O-22013/6/2016-ONGD-V dated August 14, 2018. Some significant provisions of the Policy Framework are:

- **Special dispensation for E&P activities in North Eastern Region (NER).** Based on recommendations in 'Hydrocarbon Vision 2030 for North East', the Government has extended timelines for exploration and appraisal period in operational blocks of NER considering geographical, environmental and logistical challenges. The exploration period has been increased by 2 years and appraisal period by 1 year. Further, in order to stimulate natural gas production in the NER, the Government has also allowed freedom in marketing including pricing freedom for natural gas to be produced from discoveries which were yet to commence production as on July 1, 2018 subject to certain conditions including that the price of the gas would have to be at an arms-length basis. Although pricing freedom is being permitted, where the market discovered price is less than the price notified by the Petroleum Planning Analysis Cell under the New Domestic Natural Gas Pricing Guidelines, 2014, the royalty to the Government will be paid on the latter.

- **Sharing of royalty and cess in pre- New Exploration Licensing Policy Exploration Blocks.** The Government has created an enabling framework for sharing of statutory levies, including royalty and cess, in proportion to the participating interest of the Contractor in pre - New Exploration Licensing Policy (***NELP***) Exploration Block. Payments towards such levies shall be eligible for cost recovery with prospective effect.

- **Extension of force majeure notice period.** The time limit for giving written notification to the Directorate General of Hydrocarbons/Management Committee about the occurrence of a *force majeure* event has been extended from 7 days to 15 days in Pre-NELP and NELP contracts in operational blocks. This dispensation will be applicable prospectively.

- **Tax benefits.** Tax benefits under section 42 of the Income tax Act, 1961, (***IT*** Act) are to be made available to all contractors of small and medium sized discovered fields, during the extended contract period. Section 42 of the IT Act allows the companies to claim 100% of expenditure incurred under a PSC as tax deductible for computing taxable income in the same year. PSCs which do not contain any provision regarding Section 42 of the IT Act, 1961 will be permitted to be amended so as to incorporate the applicability of such provisions. This will bring uniformity and consistency. This will bring uniformity and consistency in PSCs and provide incentive to the contractor to make additional investment during the extended period of PSC.

Amendment of the definition of 'petroleum' in the Petroleum and Natural Gas Rules of 1959

In a notification dated July 24, 2018 amending the Petroleum and Natural Gas Rules of 1959, the Ministry of Petroleum and Natural Gas has redefined 'petroleum' to mean 'naturally occurring hydrocarbon in the in the form of natural gas or in a liquid, viscous or solid form, or a mixture thereof', but has excluded 'coal, lignite and helium occurring in association with petroleum or coal or shale'. The amendment would open up exploration of all hydrocarbons in existing fields which is in line with the new Hydrogen Exploration and Licensing Policy (***HELP***). This should help in enhancing domestic exploration and production of hydrocarbons, thereby increasing India's energy security and reducing our dependency on imports. The move will open up more revenue opportunities for many of the 117 companies that were operating in India after the conclusion of the 9th round of the NELP.

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