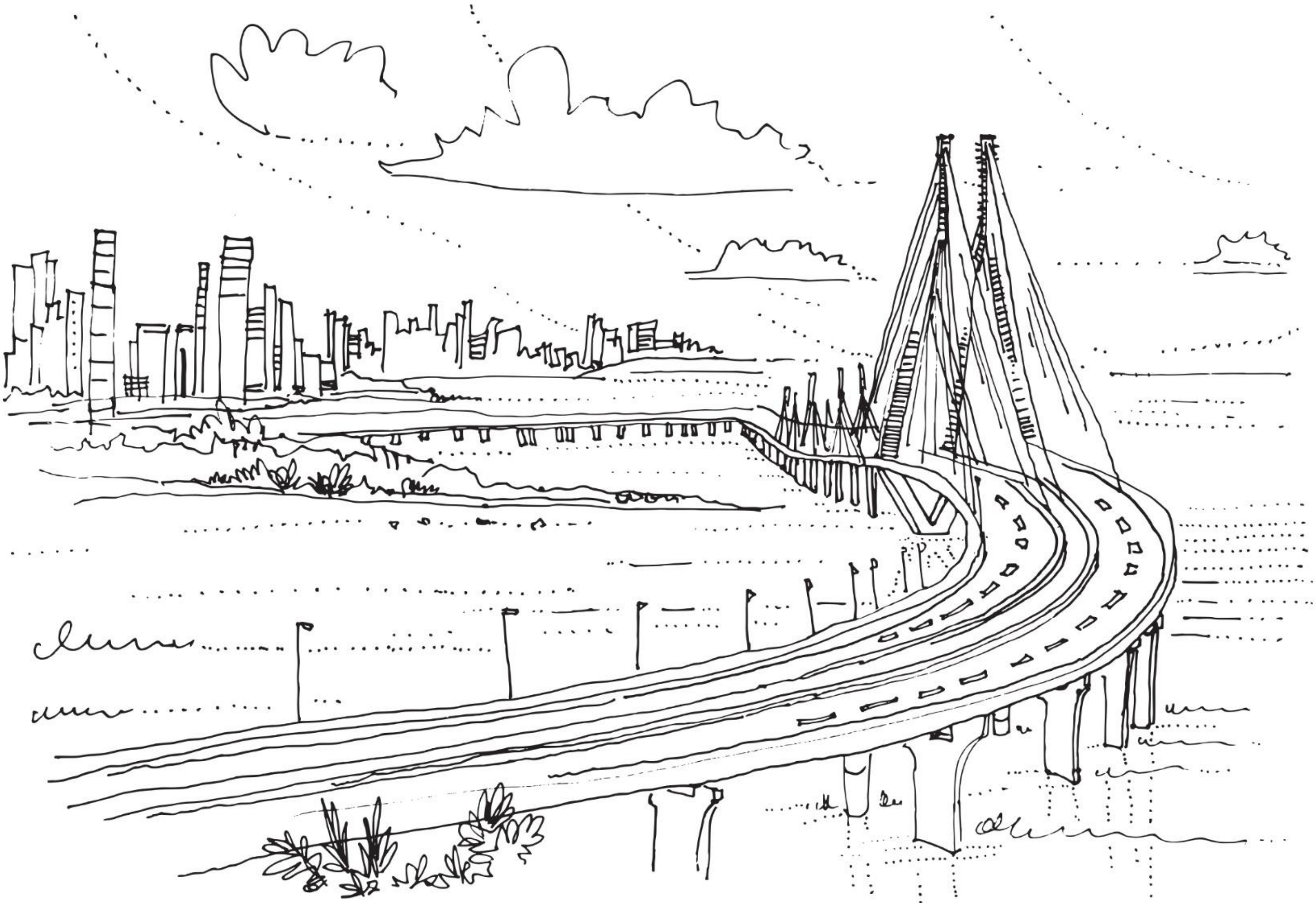
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS



# Infrastructure and Energy Digest

## Overview of Legal and Regulatory Developments

**SEPTEMBER 2018**

# TRANSPORTATION

## Relaxation in cabotage rules for coastal movement of fertilizers

As per the existing regulatory framework, a foreign ship can load cargo from one place or port in India and discharge cargo at other place or port in India, only under a license issued by the Director General of Shipping under Section 407 of the Merchant Shipping Act, 1958.

Recognising the necessity of promotion of trade, ease of doing business in India and simplification of processes for shipping of cargo and operation of vessels, the Central Government has, vide certain orders, granted certain relaxations to foreign flag ships engaged in the coasting trade of India from the stringent requirement of obtaining a licence under Section 407 of the Merchant Shipping Act, 1958. Relaxations notified by the Ministry of Shipping, Government of India (vide its orders dated May 21, 2018 and May 22, 2018) exempt, subject to observance of prescribed conditions, foreign flag container lines/foreign ships from obtaining a licence for:

- Transhipment of EXIM laden containers and empty containers; and
- Carriage by sea of agricultural, fisheries, animal husbandry and horticultural commodities specified in the Indian Trade Classification (ITC), Harmonized System (HS) respectively.

A recent General Order No. 3 dated June 22, 2018 of the Ministry of Shipping, Government of India, now, also allows carriage by sea of fertilizers by foreign flag ships without obtaining a licence from the Director General of Shipping. In terms of the above order, the dispensation available with foreign flag ships from obtaining a licence is conditional inter alia upon the quantity of fertilizers contributing to at least 50% of the total cargo onboard the ship.

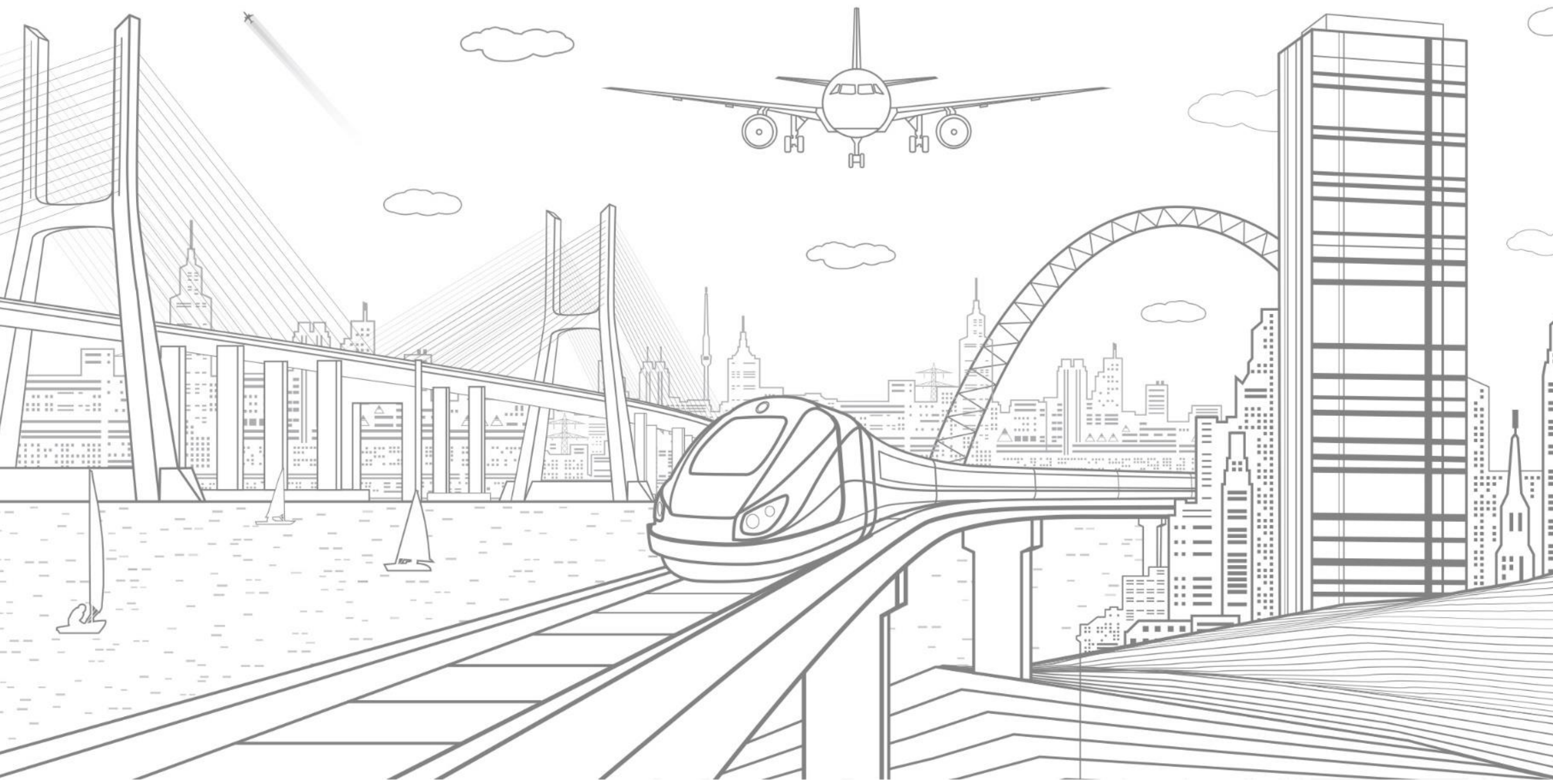
With a view to addressing doubts raised by some stakeholders relating to the aforesaid prescribed quantity of coasting trade of fertilizers which would make the foreign flag ships eligible for engaging in coasting trade of India without a licence, the Ministry of Shipping has issued a General Order No. 4 of 2018 on September 10, 2018. In this order it has clarified and exemplified that:

- The minimum movement of fertilizer to the extent of 50% of the total coastal cargo on board should be fertilizers and rest of the coastal cargo can be any other cargo; and
- The movement of fertilizers can be in either bulk, break bulk or containerized form.

### Conditions for availing relaxation of requirement for coasting trade of fertilizers under Section 407 of the Merchant Shipping Act, 1958

- Quantity of fertilizers loaded from the Indian port shall be at least 50% of the total coastal cargo.
- Submission of information to the Director General of Shipping in the prescribed format laid down in Annexure 1 to the General Order No. 03 of 2018, wherein Ship details (Name of owner/operator with address; Name of ship with IMO No., Flag of the ship) and Cargo details (Commodity No., Commodity (HS Code), Load port in India, Discharge port in India, Quantity in Tonnes and Date of pick-up and discharge) are required to be filled.
- Indian law enforcement agencies including inter alia Indian Navy, Coast Guard, State Maritime Police and Customs to be allowed to board such ships any time in the sea for ascertaining the bona fide credentials of the said ships/crew.

Cabotage has often been a debated issue with foreign shipping lines and port operators seeking relaxations in the restrictions permitting a more free movement of vessels within India's coasts. Although this is a relaxation, it is however, fairly limited in scope and subject to stringent conditions, which may not satisfy the relevant stakeholders considering that they seek a complete relaxation.



# ENERGY

# GENERAL

## CERC Order provides One Time Approval for Change in Law due to enactment of GST

The Central Electricity Regulatory Commission ("CERC") has issued an order, dated September 19, 2018, stating that the enactment of Goods and Services Tax ("GST") laws is covered as Change in Law in power purchase agreements ("PPAs") between the petitioners and respondents.

The CERC issued the order while responding to separate petitions. (i)The first petition was filed by Prayatna Developers Private Limited ("PDPL") against National Thermal Power Corporation, Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited, and the Ministry of New and Renewable Energy. (ii)Another petition was filed by Azure Power Venus Private Limited ("APZPL") against Solar Energy Corporation of India and Uttar Pradesh Power Corporation Limited. The petitions were filed under Section 79 of the Electricity Act, 2003 read with Article 12 of the PPAs executed between the petitioners and respondents, for seeking approval of Change in Law events due to enactment of the GST laws.

The key requests made by the Petitioners were as follows:

- PDPL had petitioned the CERC to declare that the imposition of the Integrated Goods and Services Tax, 2017, Central Goods and Services Tax, 2017 and Rajasthan Goods and Services Tax, 2017 come under Change in Law under Article 12 of the relevant PPA.

- PDPL had also requested the CERC to restore the petitioners to the same economic condition before the occurrence of the Changes in Law by way of adjustment in tariff in terms of Article 12 of the aforementioned PPA- by increasing the tariff as prayed for in the present petition and to pass such other and further orders under the facts and circumstances of the present case.

- APZPL had requested CERC to declare that the promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017 with effect from July 1, 2017, are all Change in Law events under Article 12 of the PPA dated October 21, 2016, executed between the petitioners and the respondent.

- APZPL had also requested CERC to direct a lump sum compensation of INR 6,50,40,687 (Indian Rupees Six Crore Fifty Lakh Forty Thousand Six Hundred and Eighty Seven) to be paid to the petitioners by the respondent in lieu of the additional tax burden on the engineering, procurement and construction cost, as elaborated in the instant Petition, and a monthly levelled tariff payment of INR 0.02/kWh towards the additional tax burden on operation and maintenance expenses incurred by the petitioners due to promulgation of the Integrated Goods and Services Tax, 2017, the Central Goods and Services Tax, 2017 and the Uttar Pradesh Goods and Services Tax, 2017.

- APZPL had further requested the CERC to direct the respondent to pay the petitioner an additional tariff of INR 0.28/ kWh with effect from the commercial operation date of the petitioner's solar power generating systems as compensation for the additional tax burden incurred by the petitioners on establishing and running the project.

### CERC's Final Order

- The enactment of GST laws is covered as Change in Law under Article 12 of the PPA.
- With regard to claims made during the construction period, the petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate.
- The claim of the petitioners because of additional tax burden on operation and maintenance ("O&M") expenses (if any), is not maintainable.
- The relief for Change in Law is allowed as a separate element on one-time basis, and in a time bound manner

The order clarifies the terms of relief for solar PV projects that were affected due to the sudden change in taxation due to the advent of GST regime in India. This would be a welcome relief to solar power producers with subsisting power purchase agreements that have been impacted by the wide-sweeping changes wrought by the change in the indirect tax regime.

## Supreme Court pronounces status quo order in case of RBI's February 12 Circular

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 of 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), the 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.

### The Circular was challenged by the following companies in various High Courts including

- Sugar companies namely Dharani Sugars & Chemicals Limited and the South Indian Sugar Mills Association – Tamil Nadu before the Madras High Court;
- Shipyards Association of India before the Gujrat High Court;
- Power companies viz. Independent Power Producers Association of India, Association of Power Producers and Prayagraj Power Generation Company Limited before the Allahabad High Court;
- Vayam Technologies Limited and All India Bank Officers Confederation before the Delhi High Court

On August 6, 2018, the RBI had filed a transfer petition in the Supreme Court in order to transfer all petitions challenging the Circular which were pending before various high courts. The hearing in this matter took place on September 11, 2018 whereby the Supreme Court allowed the cases pending before various High Courts to be transferred to itself. An interim relief was granted to the stressed companies by pronouncing a status quo order and the next date of hearing is fixed as November 14, 2018.

Considering that power companies have been severely impacted by various commercial and legal challenges, including increases in fuel price and deallocation of coal blocks, there are several stressed power companies that would be caught within the ambit of the Circular. The order of the Supreme Court would have wide-ranging repercussions on the power sector. An order that permits the Circular as is, would put a dampener on existing resolution processes and potentially wrest control away from existing promoters. It may also result in new investments channelled into the sector and make available for acquisition existing operating assets, provided the investors are willing to deal with the volatility in this sector.

## Proposed Amendments to the Electricity Act, 2003

The Ministry of Power released proposed amendments (Amendment) to the Electricity Act, 2003 (Act) on September 7, 2018, seeking public comments on the same. The Amendment is stated to have incorporated the comments received from various stakeholders on the Electricity (Amendment) Bill, 2014 ("2014 Bill") and the Standing Committee on Energy which submitted its report in May, 2015. We have dealt with certain significant aspects of the Amendment below:

- **Separation of Distribution and Supply:** The 2014 Bill had mooted the idea of segregation of the distribution and supply business in order to promote competition and efficiency in the sector. In line with the 2014 Bill, the Amendment has proposed significant changes to divide the distribution and supply business or the carriage and content as it is widely called. It is proposed that the State Governments would be empowered to determine a scheme for segregation of the carriage and content. The key idea behind the proposal is to ensure that the customer has the option of purchasing electricity from more than one supply licensee. Licensees would be required to supply 24x7 power to the consumers and tie-up their obligations in a manner so as to meet the average demand.

**ELP Comment:** The segregation of the carriage and content may prove to be extremely beneficial for the sector as it would promote competition amongst the stakeholders. However, it is important that the Amendment lay down the principles on the basis of which the State Governments are to determine the scheme for the segregation.

- **Amendments regarding Renewable Energy:** The current Government has been extremely focussed on promotion of renewable energy as a means of generation. The Amendment proposed that a national renewable energy policy would be drafted. Furthermore, certain entities which are generating and supplying electricity from renewable energy sources would be exempt from obtaining a license under the Act.

  The Amendment has introduced the concept of both a renewable purchase obligation (RPO) and a renewable generation obligation (RGO). The RPO is similar to the obligation as is presently prescribed by the States under their respective regulations. A key insertion is the provision of a specific penalty in respect of a failure to comply with the RPOs. The penalty has been tied to the per unit shortfall in meeting the RPO. As regards the RGO, coal or lignite based thermal generating stations are required to generate or procure and sell a specified amount of power which is generated from renewable energy. The quantum of the RGO would be notified by the Government.

**ELP Comment**: Whilst the amendments with regard to renewable energy are a welcome move, it would be important for the Government to ensure that adequate checks and balances are in place so as to ensure that both the RPO and the RGO are enforced. As has been seen in the present scenario, despite having framed regulations in respect of RPOs, states have found it extremely difficult to enforce such obligations. Accordingly, adequate deterrents or incentives would be required to be in place in order to provide an impetus to generation of power from renewable energy sources.

- **Reduction of Cross Subsidy Surcharge:** One of the principal reasons for establishment of a captive generating plant would be to avail the exemption from payment of cross-subsidy charges. It is important to note that in order to qualify as a captive generating plant, users would have to meet the conditions as laid down in the Act and the rules framed thereunder. However, the Amendment proposed to do away with the cross subsidisation of tariff gradually. The proposal is to progressively reduce the tariff and ensure that it is eliminated within 3 years. The Appropriate Commission would be obligated to safeguard that the cross subsidisation of tariff to the consumers within the distribution area does not exceed 20%. The trajectory for reduction of the cross subsidisation of tariff and the category of consumers would be as determined by the Appropriate Commission. The Amendment proposes that there should be a minimum reduction of 6% in one year in cross subsidy.

**ELP Comment:** We understand that the intention behind reduction and elimination of cross subsidy surcharges is to promote competition. However, given that this would be a major incentive for captive generating plants, the manner in which the elimination of the surcharge is implemented would be crucial. The interests of all stakeholders would have to be borne in mind in this regard.

- **Power Purchase Agreements:** The Amendment mandates that all sale and purchase of power should be through power purchase agreements, whether long-term, medium-term or short-term. The Central Electricity Authority would prescribe the format for such power purchase agreements which is to be approved by the Central Government. A failure to comply with the obligations under the power purchase agreement would attract a penalty as high as INR 1 crore. Further, the Amendment also moots that licenses may be suspended or cancelled if they fail to meet their obligations under power purchase agreements. Consumers having a connected load of 1 MW or more are entitled to sell or purchase electricity from any such person on such terms as they deem fit.

  Such consumers are also entitled to procure electricity from open access under contractual agreements.

**ELP Comment:** The requirement of seeking consent form the electricity regulatory commission for cancellation of power purchase agreements may lead to further delays and disputes, in a sector that is already languishing.

- **Smart Grids:** The Amendment specifies that Central Commission and State Commissions are to take steps for promotion and development of smart grids. A smart grid would be an electricity network that uses information and communication technology to gather information and act intelligently in an automated manner to improve the efficiency, reliability, economics, and sustainability of generation, transmission and distribution of electricity as may be specified by the Central Electricity Authority. The idea behind a smart grid is to ensure efficiency in terms of generation, transmission and distribution of electricity.

**ELP Comment:** The development of a smart grid would help cut down losses in the sector to a large extent. The Government would have to ensure that adequate security measures are in place to avoid any breaches with regard to the data collected by smart grids.

*All things considered, the intent of the Amendment seems to be in the positive direction. The Governments actions will be a welcome reprieve for the power sector which has been beset with challenges.*

## Proposed Amendments to Tariff Policy, 2016

The Ministry of Power ("MoP") vide its letter dated September 10, 2018, proposed amendments in the Tariff Policy, 2016 ("Tariff Policy"). These proposals are pursuant to the draft amendments that were earlier released by the MoP for public comments on May 30, 2018. However, unlike the proposal on May 30, 2018, the amendments proposed vide the September 10, 2018 letter are limited to simplification of tariff categories and rationalisation of retail tariff. The MoP has proposed the amendments with a view to harmonise the tariff structure across all states which have become quite complex over the years.

### The key amendments proposed to the Tariff Policy are as follows:

- The concept of having different tariff for usage by different categories of customers is proposed to be done away with in order to ensure a simplified tariff structure across all distribution companies. The tariff will be calculated on the load used and energy consumed as opposed to a differential tariff for usage in the domestic, commercial or industrial sectors. The MoP proposed to adopt the principle of paying a price for use of electricity as a commodity.

- The new tariff structure is proposed to be based on different slabs in the sanctioned load and units consumed. Maximum 5 (five) load categories would be created. Further, for each load bracket, the consumption slab would be considered with progressive rates. The State Commissions would be entitled to decide the slab range for load and energy consumption depending upon the consumption pattern of their respective states.

- It is further mooted that considering the vast socio-economic divide in India, the issue of subsidy and cross subsidy may be handled through different slabs in load and units consumed. The consumers having sanctioned load and unit consumption in lower brackets would be subsidised by consumers in the higher load bracket and consumption bracket.

- A systematic method will be adopted to revise the load automatically if average load of the preceding year exceeds the load sanctioned. This is with a view to prevent consumers from declaring lesser load. As a deterrent, a penalty will be imposed for exceeding the sanctioned load in a particular month.

- It has also been suggested that appropriate rebates may be provided to bulk customers so as to incentivise them to take supply at a higher voltage category.

- The State Commissions may also be empowered to create a separate category for electric vehicle charging stations, if required.

- The states would also have the option of adopting kW or kWh or kVA and kVAh based tariff. However, the MoP letter states that it may be preferable to have load and units consumption in kVA and kVAh respectively for levels above 10kW to take care of the impact of the power factor.

**ELP Comment:** The MoP's intent to simplify and rationalise the tariff structure is a welcome move. However, given that the State Commissions still have discretionary powers under the proposed amendments, in terms of determination of tariffs, it would be important to ensure that the Government's intent of harmonising the tariff across all states is achieved. Further, given that the draft amendments propose to do away with different consumer categories (domestic, commercial, agricultural, industrial and institutional) in terms of tariff determination, it would be crucial to determine the manner in which different consumers would be provided incentives and subsidies. Moreover, with the amendments also being separately proposed to the Electricity Act, 2003, it would be necessary to ensure that the amendments are synchronised in order to obviate any ambiguity.

# RENEWABLE ENERGY

## Supreme Court allows Government to levy 25% Safeguard Duty on Solar Imports

The imposition of safeguard duty has been a subject matter of challenge before various Courts in the country. The High Court of Orissa had earlier passed an order staying such imposition; however, the duty took effect from July 30, 2018 despite the 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.

Pursuant to this, in a significant order, the Supreme Court of India has made it clear that safeguard duty will be levied effective July 30, 2018. Through this interim order, the Supreme Court has nullified the Orissa High Court's stay order on levy of safeguard duty on imported solar cells and modules. The resulting implication is that solar imports from July 30, 2018 may attract a safeguard duty of 25% and all the developers who had their solar module shipments released by providing bonds may now have to pay the safeguard duty.

The Ministry of New and Renewable Solar Energy and solar developers opposed safeguard duties, claiming it could potentially stall India's programme of setting up 100,000 MW of solar capacity by 2022 due to higher costs and increased tariffs.

India currently has a solar capacity of 23,000 MW. The Ministry of Finance has now issued an instruction requesting the custom authorities to finalise all the provisional assessment and collect safeguard duty as per its earlier notification dated July 30, 2018. The Ministry has issued the order in exercise of the powers conferred by sub-section (1) of section 8B of the Customs Tariff Act, read with rules 12, 14 and 17 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, after considering the final findings of The Directorate General of Trade Remedies ("DGTR").

The duty will be levied as follows:

- 25 % ad valorem (according to value in proportion) minus anti-dumping duty payable, if any, when imported during the period from July 30, 2018 to July 29, 2019 (both days inclusive).
- 20 % ad valorem minus anti-dumping duty payable, if any, when imported during the period from July 30, 2019 to January 30, 2020 (both days inclusive).
- 15 % ad valorem minus anti-dumping duty payable, if any, when imported during the period from January 30, 2020 to July 29, 2020 (both days inclusive).

## Cap on Solar Tariffs

It has been reported that the Ministry of New and Renewable Energy ("MNRE") has written a letter to the Solar Energy Corporation of India ("SECI") directing the SECI to set the maximum permissible tariff on solar power. A copy of the aforesaid letter is not yet publicly available.

The cap is reportedly proposed to be INR 2.50/kWh (Indian Rupees Two and Fifty Paise per kilowatt hour) for solar power generated using domestic cells and modules without safeguard duty. If the safeguard duty is levied, the cap proposed is INR 2.68/kWh (Indian Rupees Two and Sixty-Eight Paise per kilowatt hour).

In addition to the aforesaid, it has been reported that the SECI has also been directed to bring future solar bids in lot size of 1200 MW (twelve hundred megawatt) with no upper cap while the minimum bid size is to be set at 50 MW (fifty megawatt).

**ELP Comment:** Given that tariffs are determined on a variety of factors, placing a cap on tariffs prove detrimental to the developers of solar projects. Further, given that different states have varied potential in terms of solar power as also varied costs in respect of setting up of a project, a uniform cap on solar tariffs across all states may also not be desirable and disincentivize investments in solar energy generation. If the intention is to promote competition in the sector, the MNRE should ensure that the grievances of the solar project developers are paid heed to.