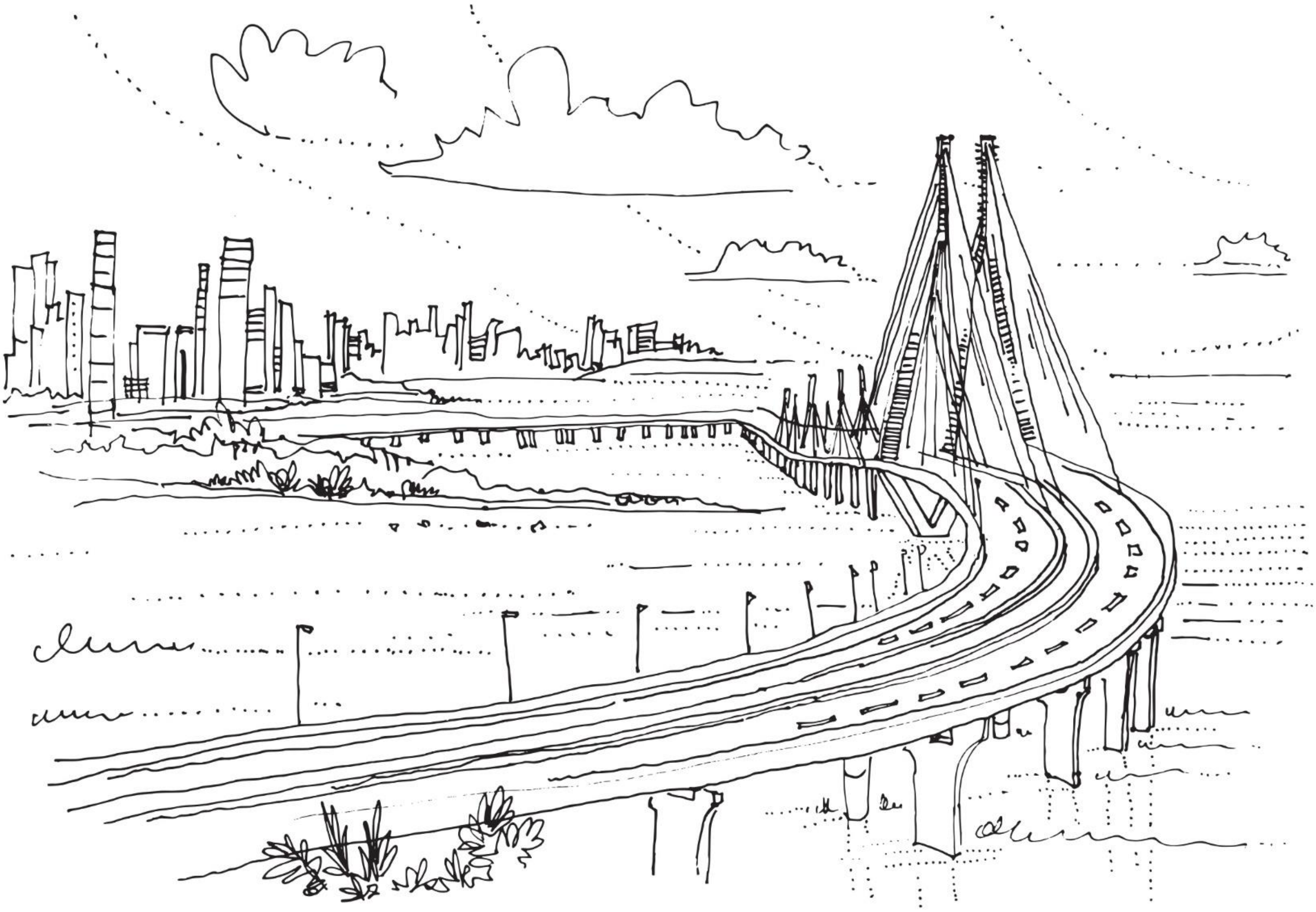
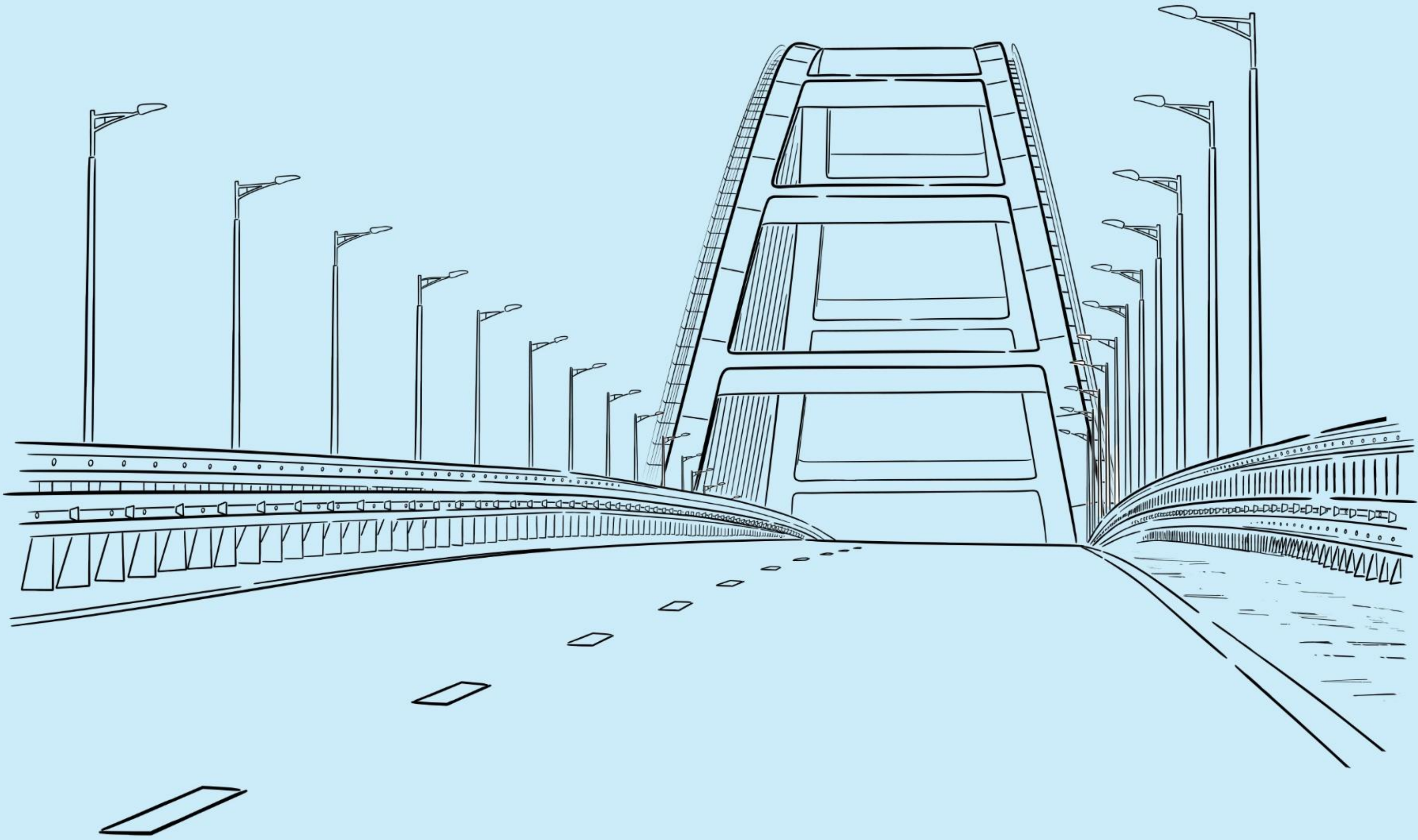


Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

July 2019

INFRASTRUCTURE



Overview of budget pronouncements

This year's budget speech was in essence a continuation of the previous budget's keen focus on the infrastructure sector, with a special emphasis on the transportation sector. Key budget proposals for the infrastructure sector include:

General

- The Government announced its intention to invest INR 100,00,000 crore in infrastructure over next 5 years. To this end, the Government has proposed to set up an expert committee to (i) study and evaluate the current situation relating to long term finance and experience with development finance institutions, and (ii) to recommend the structure and required flow of funds through development finance institutions.
- One of the biggest challenges crippling the infrastructure sector has been inadequate financing by banks due to the NPA crisis. The budget proposed to provide public sector banks with a funding of INR 70,000 crore to boost credit. This will hopefully strengthen the banks' balance sheets and consequently will allow them to increase their credit outreach.

Power

- The Government has highlighted the 'One Nation One Grid' initiative to ensure availability of power to states at affordable rates. Blueprints for developing gas grids and water grids will be made available by the government soon.
- The Government will work with State Governments to bring in reforms such as removal of cross subsidy surcharges, undesirable duties on open access sales or captive generation for industrial and bulk consumers.
- The Government will soon announce a package for power tariff and structural reforms. However, no specific details of the proposed reforms were given.
- The performance of the Ujjwal DISCOM Assurance Yojana (UDAY), which was launched to achieve financial turnaround and revival of the state distribution companies, will be reviewed with a view to further improving the scheme.

Roads

- The Government will carry out a comprehensive restructuring of the National Highway Programme to ensure that a National Highway Grid of desirable length and capacity is created using financeable/ innovative models. However, no details for such restructuring were discussed.
- Upgradation of roads connecting villages to rural markets was proposed.

The budget discussed the need to develop inland waterways to shift a significant portion of inland cargo movement from the traditionally used modes of road and railways - the intent is that this will ultimately help in decongesting traffic along roads and railways.

Railways and metros

- Considering the required investments for enhancing railway infrastructure, the budget envisions public-private partnership for expeditious development and completion of tracks, rolling stock manufacturing and delivery of passenger freight services. The Finance Minister mentioned that an investment to the tune of INR 5,00,00,000 crore in railway infrastructure is needed between 2018-2030.
- Railways to be encouraged to invest more in suburban railways through special purpose vehicle (**SPV**) structures like Rapid Regional Transport System (**RRTS**) proposed on the Delhi-Meerut route.
- Program for railway station modernization will be launched.

Aviation

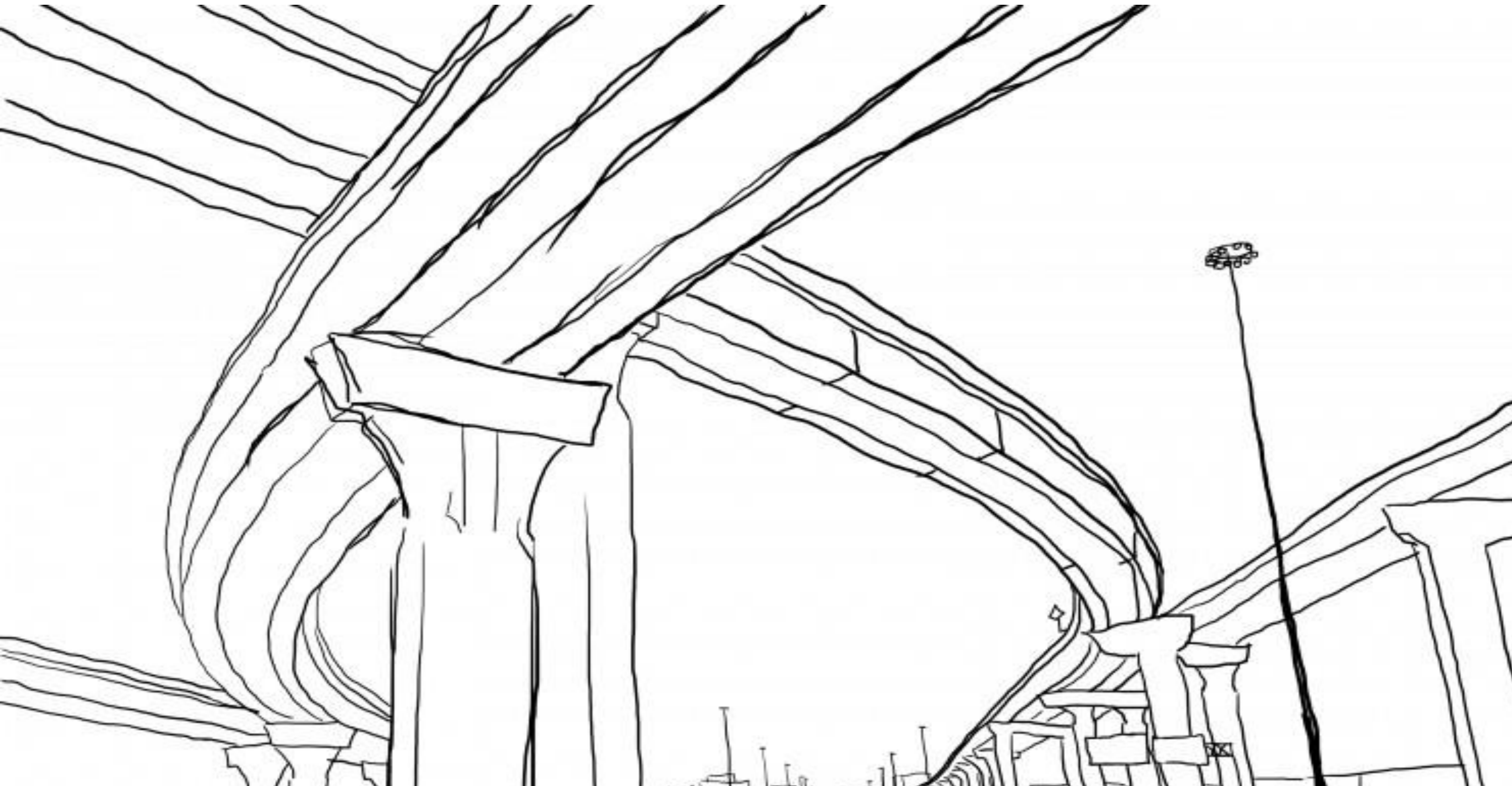
The Government has proposed to examine suggestions for increasing FDI limits in aviation, along with specific measures to make the country a hub for aircraft leasing and aviation finance. This would not only help in job creation but also help businesses leverage opportunities available in India's financial Special Economic Zones (**SEZ**s), such as, International Financial Services Centre (**IFSC**).

Other announcements

In addition to the above, various other measures to improve infrastructural development have been proposed. These include:

- Private participation (such as in railways)
- Enhancement of sources of capital for infrastructure financing such as (i) preparation of an action plan to deepen the market for long term bonds including markets for corporate bond repos, credit default swaps etc., with a specific focus on infrastructure sector, and (ii) permitting investments made by FIIs/FPIs in debt securities issued by Infrastructure Debt Fund – Non-Bank Finance Companies (IDF-NBFCs) to be transferred/sold to any domestic investor within the specified lock-in period.
- Deepening of corporate debt financing. For enabling this, amongst other things, the Government proposes to work with regulators such as RBI/SEBI to enable stock exchanges to allow AA rated bonds as collaterals.

Our view: In this budget, there is distinct attention on addressing the financial crunch that has been inhibiting growth in the sector. Apart from sector specific pronouncements, intention to devise sources and mechanisms for financing has been made clear. This would, of course, be a welcome move. Interestingly, a majority of the announcements dealt more with the transport sector than the energy sector (other than those that related to structural reforms). Perhaps this could be a cue on where the priority of this Government will lie.



Bombay High Court quashes CRZ clearance to coastal road project

A much-debated issue in Mumbai, the coastal road project, took another turn of events on July 16 vide an order (**Order**) by the Bombay High Court (**HC**). The HC restrained the Brihanmumbai Municipal Corporation (**BMC**) from constructing the proposed 29.2 kilometer road (which aims to connect the Marine Drive area in South Mumbai to suburban Borivali in North Mumbai) before taking the requisite approvals. It also quashed the Coastal Regulation Zone (**CRZ**) clearances granted to the project.

The BMC claimed that it needed no environmental clearance for the work as it was merely a road under the city's development plan. It was further contended that construction of a coastal road on reclaimed land was the most cost-effective option and would help in reducing air pollution and resultant medical problems. The BMC stated that this construction on reclaimed land from the sea was necessary as any other method would result in slower movement of traffic, thereby causing an increase in air pollution.

The original petitioners - the Worli Koliwada Nakhwa Matsya Vyavasay Sahkari Society and Worli Machimmar Sarvodaya, argued that the ongoing reclamation work under the project was both illegal and would also irreversibly alter coastal biodiversity and affect traditional ecological practice.

A division bench of the high court comprising Chief Justice Pradeep Nandrajog and Justice NM Jamdar ruled on the matter and held as follows:

- The HC was of the view that there was a lack of a proper scientific study and that there was a serious lacuna in the decision-making process. In light of the above, the HC quashed the approvals granted by the Maharashtra Coastal Zone Management Authority (**MCZMA**), the Ministry of Environment and Forests and the Expert Appraisal Committee. The HC also observed that based on the facts before it, the project had not substantially complied with the Environmental Impact Assessment Notification, 2006.
- The HC observed that the lacuna was that none of the authorities took note of the fact that except for the environmental impact assessment study conducted by the consultants, all the other reports were not based on a complete and exhaustive analysis of the data (and did not have the material required to opine on the adverse environmental impact). Further, as per the HC, the MCZMA did not even bother to record having considered the objections by the NGOs to the proposed project.
- Noting that the area was ecologically sensitive having geo-morphological features which play a role in maintaining integrity of the species, the HC held that MCGM should not have commenced the work without obtaining permission for the project under the Wildlife Protection Act, 1972.

Our view: The decision of the Bombay HC has been contested by the BMC before the Supreme Court, which has listed the matter for hearing in August 2019. While the final decision on the matter is awaited, the delay on account of the legal tussle may directly impact the construction, execution and revenue recognition of the project.

Previously, (as covered in the June Edition of the Infrastructure and Energy Digest), vide an order dated May 6, 2019, the Supreme Court had modified the HC order dated April 23, 2019 and permitted Larsen and Toubro, the Hindustan Construction Company-Hyundai Development Corporation joint venture and others involved in the execution of the coastal road project to continue to execute the project work which had already commenced. However, the Supreme Court order specified that no fresh work was to be undertaken.

We await the addressal of this issue by the Supreme Court.

Department of Heavy Industry issues Expression of Interest for deployment of Electronic Vehicle infrastructure

- ELP's December 2018 Infrastructure & Energy digest had briefly discussed the guidelines and standards issued by the Ministry of Power (**MoP**) for India's charging infrastructure for electric vehicles (**EV**). On July 12, 2019, the Department of Heavy Industry (**DHI**) issued an Expression of Interest (**EOI**) inviting proposals for the deployment of EV charging infrastructure.
- The EOI has been issued under the Scheme for Faster Adoption and Manufacturing of (**Hybrid**) & Electric Vehicles in India (**FAME India Scheme**). Phase II of the FAME India Scheme was approved for a period of 3 years commencing from 1st April 2019 and has a total budget support of INR 10,000 crore. The DHI has also constituted a 'Project Implementation and Sanctioning Committee' headed by the Secretary (Heavy Industries) that will monitor the implementation of the Fame India Scheme.
- The DHI will be the nodal department in the Government of India. Each State Government will appoint a nodal agency for the setting up of the charging infrastructure. The State distribution company will generally be the nodal agency, but the State government will be free to select a Central/State public sector unit including urban local bodies, urban area development authorities as its nodal agency.

Highlights:

- The EOI details the following 3 categories of EV charging stations to be established:
  - **Category A** – At public places for the commercial use of any individual without restriction
  - **Category B** – At the premises of a state or central government office complex such as government hospitals/clinics/dispensaries/Government educational institutions/any other public office for non-commercial use
  - **Category C** – At semi-restricted premises for commercial or non-commercial use; available to any individual without restrictions, such as for taxi aggregators, co-operative housing societies etc.

- **Demand incentives**

The FAME India Scheme and the EOI contain provisions to incentivize demand for EVs by reducing cost of acquisition of such vehicles. The maximum incentive for the subsidization of the cost of the Electrical Vehicle Supply Equipment (**EVSE**) (the electrical equipment external to the electric vehicle that provides a connection for an electric vehicle to a power source) is detailed as follows:

- Category A – 70%
- Category B – 100%
- Category C – 50%

In an effort to reduce the purchase price of hybrid and electric vehicles, incentives for the same would be made available to consumers/end users. The Government of India would reimburse to Original Equipment Manufacturers (**OEM**s) the extent of the incentive offered. These incentives will be offered to vehicles used for public transport or those registered for commercial purposes in the 3 and 4-wheeler and bus segments. Additionally, privately owned 2-Wheelers will also be covered under this scheme as a mass segment. However, the Minister of State for Heavy Industries and Public Enterprises has clarified that privately owned 4-Wheelers will not be included for the purpose of the incentive.

State support to incentivize the adoption of EVs as private vehicles is to be extended in the form of tax rebates, as announced in the Union Budget for FY 19-20. Income tax rebates announced are up to INR 1.5 lakh to customers on interest paid on loans to buy electric vehicles with the total exemption benefit of INR 2.5 lakh over the entire loan period.

- It has also been advised that the EV charging stations are to be connected with 'Grid connected solar power plants' of required capacity as per guidelines issues by the Ministry of New and Renewable Energy to ensure grid stability and green energy for EVs.

Our view: The EOI by the DHI provides a concrete demonstration of the Government's emphasis on promoting eco-friendly technology. The demand incentives offered to the OEMs and the tax rebates on loans for the purchase of EVs make operating commercial EV fleets an attractive proposition. These measures seem to be generating a fair degree of optimism with regard to systemic efforts to reduce the pollution problems plaguing the country. However, the emphasis on connecting these EV charging stations to a 'grid connected solar power plant' could be a potential operational hurdle in terms of providing access to clean energy. Given the unrest surrounding the revised tariff rates offered to developers of solar and wind energy projects, it remains to be seen how this potential addition to the load on the renewable energy sector plays out.

Inter-State River Water Disputes (Amendment) Bill, 2019

Inter-water disputes and water management have been a bugbear for governments- old and new- in India. Indeed, some disputes have been persisting for over 33 years. An urgent course correction was needed on this front.

On July 31, 2019, the Look Sabha passed the Inter-State River Water Disputes (Amendment) Bill, 2019 (**Bill**) with a view to amend the Inter-State River Water Disputes Act, 1956 **(ISW Act).**

Objectives of the Bill

- To address the following drawbacks of the ISW Act:
  - Very few of the tribunals constituted under the ISW Act have made any successful award till date
  - No prescribed time limit for adjudication of disputes by the tribunals
  - No prescribed upper limit for the Chairman or a Member of the tribunals
  - No mechanism for continuation of work on occurrence of any vacancy in the office of the Chairman or a Member of the tribunals
  - No prescribed time limit for publishing the report of the tribunals
- To streamline and lay down a defined timeframe for the adjudication of inter-state river water disputes
- To make robust the extant legal and institutional mechanism for resolution of water disputes
- To provide for the maintenance of a databank and information system by an agency to be appointed or authorized by the Central Government.

Salient Features of the Bill

- **Disputes Resolution Committee (DRC)**
  - Resolution of all inter-state water disputes shall be through a DRC to be set up by the Central Government
  - The timeframe for resolution of water disputes by the DRC by negotiations is 1 year which may be extended up to 6 months. Within the said timeframe, the DRC shall submit its report to the Central Government
  - Members of the DRC will be from the relevant fields, as deemed fit by the Central Government
- **Inter-State River Water Disputes Tribunal (ISR Tribunal)**
  - **Constitution**
    - An ISR Tribunal with multiple benches will be set up for the adjudication of water disputes, if the disputes are not resolved through the DRC
    - Impact of constitution of ISR Tribunal on existing tribunals:

    All existing tribunals would be dissolved and water disputes pending adjudication before the existing tribunals would be transferred to the ISR Tribunal
- **Expedited timeframe for adjudication of water disputes**
  - The ISR Tribunal needs to decide on a dispute within a period of 2 years this period may be extended by the Central Government by a maximum of 1 year. In cases where a matter is again referred to the ISR Tribunal by a State for further consideration, the ISR Tribunal has to submit its report to the Central Government within a period of 1 year. This period may further be extended by the Central Government up to a maximum of 6 months.
- **Decision of the ISW Tribunal**
  - The decision of the ISW Tribunal would be final and binding on the parties to the dispute and would have the same force as an order or decree of the Supreme Court
  - The requirement of publication of the decisions of the tribunal in the official gazette has been removed
- **Maintenance of data bank and information**

  The Central Government shall appoint or authorize an agency to maintain a data bank and information system at the national level for each river basin
- **Rule-making powers**

  Powers have been conferred on the Central Government to make rules providing for:
  - The manner of distribution of water during stress situations resulting from shortage in the availability of water
  - The matters for which data has to be maintained, the content of such data and the manner of maintaining such data
  - The manner of dissolution of staff of dissolved benches of existing tribunals

Our view: The proposed amendments to the ISW Act are a welcome step in expediting the settlement of river disputes between the States in a more organized manner. In contradistinction with the ISW Act, the Bill provides for the constitution of a single standing overarching tribunal for the settlement of disputes and envisions that the tribunal would pronounce its decision within 2 years in lieu of 3 years. Given the rising number of inter-State river disputes, the Bill serves to considerably simplify the dispute resolution mechanism under the ISW Act.

ENERGY

SC rules in favor of Adani Power Mundra with regard to terminating PPA with Gujarat Urja Vikas Nigam

The Supreme Court vide its order dated July 2, 2019 ruled in favor of Adani Power (Mundra) Limited (**APMPL**) with regard to termination of the power purchase agreement (**PPA**) it had signed with Gujarat Urja Vikas Nigam Limited (**GUVNL**). It was contended by APMPL that the PPA was to be terminated on account of that lack of timely delivery of coal supply from the Naini block of the Gujarat Mineral Development Corporation (**GMDC**).

The Naini coal block had been allocated to GMDC by the Ministry of Coal (**MoC**) but was de-allocated in 2014. GMDC was to construct a power plant in the vicinity of the mine but decided instead to transport coal to Gujarat for 2 units belonging to Torrent Power Limited and Adani Power Limited respectively. Consequently, a PPA was signed between APMPL and GUVNL for supply of 1,000 MW at INR 2.35/unit from its power project at Korba, Chhattisgarh, based on coal supplied from Naini. It was contended that bid submitted by APMPL was on the basis of the assurance given by the GMDC to supply 4 million tonnes of coal per to APMPL.

As GMDC was unable to keep up with the coal production, APMPL informed GUVNL regarding its inability to supply power in the absence of a fuel supply arrangement between the parties. In light of the above, APMDL informed GUVNL that it had no other option except to terminate the PPA.

Whilst Adani contended that the agreement for supply of power was signed on the basis of the assurance provided by GMDC to supply the stipulated amount of coal, GUVNL contended that Adani was obliged to supply power, irrespective of whether it received the coal or not. However, the Supreme Court ruled in favour of Adani. The Supreme Court held that the bid made by APMPL was on the basis of the commitment by the GMDC to supply indigenous coal.

Accordingly, the Supreme Court held the termination to be legal and valid. Noting that despite validly terminating the PPA, APMPL continued to take the project to its logical end, the Supreme Court held that in order to do economic justice, on the principle of business efficacy, APMPL would be entitled for adjustment of cost of the project and would also be entitled to the interest on the expenditure incurred by it for completion of the project. The Supreme Court further observed that expenditure towards running of the project after obtaining the coal from the open market would also be required to be taken into consideration. It was held that APMPL would also be entitled to the interest on the delay of payment after it receives payment upon determination of the rate which would be determined by the Central Electricity Regulatory Commission.

Our view: The Supreme Court's judgment comes as a major relief to APMPL. Given that the Supreme Court has considered the fact that bids were placed relying on the assurance by the Government to supply coal, the judgement could possibly impact other projects which have failed to prosper owing to insufficient supply of coal.

RENEWABLE ENERGY

Review of existing PPAs by the Andhra Pradesh Government

In a contentious move, the newly elected Andhra Pradesh government announced that it would review all power purchase agreements (**PPA**s) signed over the last five years, when the Telugu Desam Party (**TDP**) was in power. This was done despite the central government requesting the Andhra Pradesh government to continue with existing power purchase agreements. Whilst the Andhra Pradesh government claims that this would benefit industry, the other viewpoint is that this will shake the confidence of the investors. This update specifically refers to the AP government's decision on PPA's of wind power developers.

Background

On June 14, 2017, the Ministry of New and Renewable Energy sanctioned the 'Scheme for Setting Up of 1000 MW CTU-connected Wind Power Projects'. The Scheme was set up with the view of transmitting wind power from the states in India with higher wind energy to those that do not. This was to be achieved through the India's first wind energy reverse-auction process conducted by the Solar Energy Corporation of India (**SECI**). The introduction of competitive tariff-based bidding saw the price discovered at INR 3.46 per unit in the February 2017 auction, which was much lower than the prevailing feed-in tariffs varying from INR 4-6 per unit. Wind power tariffs have been falling steadily through subsequent auctions, ranging anywhere between INR 2.43 and INR 2.83 per unit.

Government's Decision and Challenge

On July 1, 2019, the new government under Chief Minister Y.S Jagan Mohan Reddy announced that it will review all the PPAs signed with wind power developers. It stated that these PPAs have been signed at prices much higher than those discovered by the wind auctions conducted by other states.

Pursuant to the aforesaid announcement, the Government of Andhra Pradesh, vide G.O.R.T No. 63 dated July 1, 2019 (**Order**) ordered the formation of a 'High Level Negotiation Committee' for the review and renegotiation of the PPAs. Subsequently, on July 12, 2019 the Andhra Pradesh Southern Power Distribution Company wrote to the SECI and the National Thermal Power Corporation asking them to revise the existing tariff to INR 2.44 per unit. However, on July 24, 2019, the High Court of Andhra Pradesh stayed the operation of the Order and the letter dated July 12, 2019. The petition is scheduled to be heard on August 22, 2019.

Despite the stay order, it has been reported that the state seeks to withdraw 21 existing PPAs that have been signed but not yet approved by Andhra Pradesh Electricity Commission (**APERC**).

Arguments in favor of the Review

Sourced from various petitions[1] filed before the APERC, Appellate Tribunal for Electricity, and press releases, the key points of the arguments made by State Government/ distribution companies (**DISCOMs**) are as follows:

- The high tariff rates were fixed on the basis of technical parameters that have since changed, causing wind power generators to be far more efficient. Coupled with the fact that the cost of installing and procuring this technology has come down significantly, the project developers are unjustly enriching themselves to the cost of the public exchequer.
- These PPAs were signed in excess of the renewable purchase obligation (**RPO**) placed on states. The mandated RPO was to be 5%, whereas the PPAs have been signed for up to 23%. As a result, the government has incurred a loss between INR 10 billion – 15 billion.It is alleged that these projects were sanctioned indiscriminately without a fair process by the previous government, without assessing the financial implications.

Arguments against the Review

The key points of the arguments made in response by the independent wind power producers and related associations are as follows:

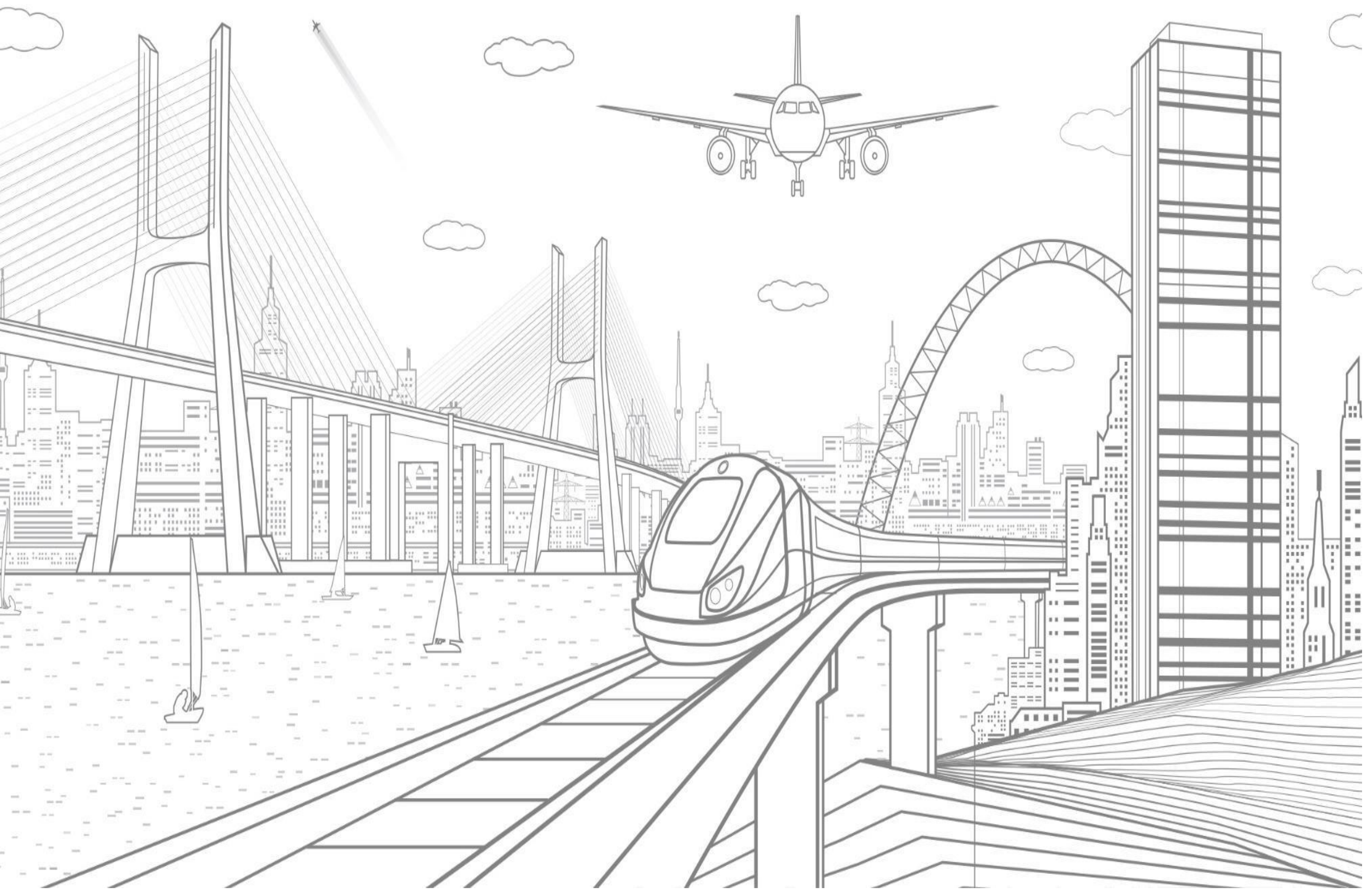
- Referring to a slew of judgments on the issue, the terms of the PPAs do not enable the state DISCOMs to opt out of the contract. The doctrines of promissory estoppel, legitimate expectation, and vested rights operate against the DISCOMs and are in favor of the power producers.
- The provisions of the Indian Contract Act, 1872, disallow the state DISCOMs from novating the contract (through the revision of tariffs) without the express consent of the power producers.
- Referring to the letter sent by the Minister for Power, RK Singh, to the Andhra Pradesh Government, reopening the PPAs to revise tariff rates unilaterally

[1] *O.P No. 1 of 2017 dated July 13, 2018, APERC; O.P. No. 5 of 2017 dated July 28, 2018; Order dated December 13, 2019 In the matter of 41 Nos. Power Purchase Agreements entered by the Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) with various wind power developers upto end of FY 2016-17, APERC.*

brings a lot of uncertainty that will disincentivize potential investors.

- The RPO of 5% is only the minimal threshold and there is no cap on the quantum of renewable energy that can be procured. The procurement of renewable energy, in spite of the cost, is toward the promotion of renewable energy and the fulfilment of the objects of the country pertaining to the creation of clean energy sources.

Our view: While the issue has not been conclusively decided, the Courts have in the past tended to uphold petitions challenging unilateral modifications to contracts. It would therefore be interesting to see the final view of the courts in this regard, bearing in mind the contentions of all concerned.



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