ECONOMIC LAWS PRACTICE
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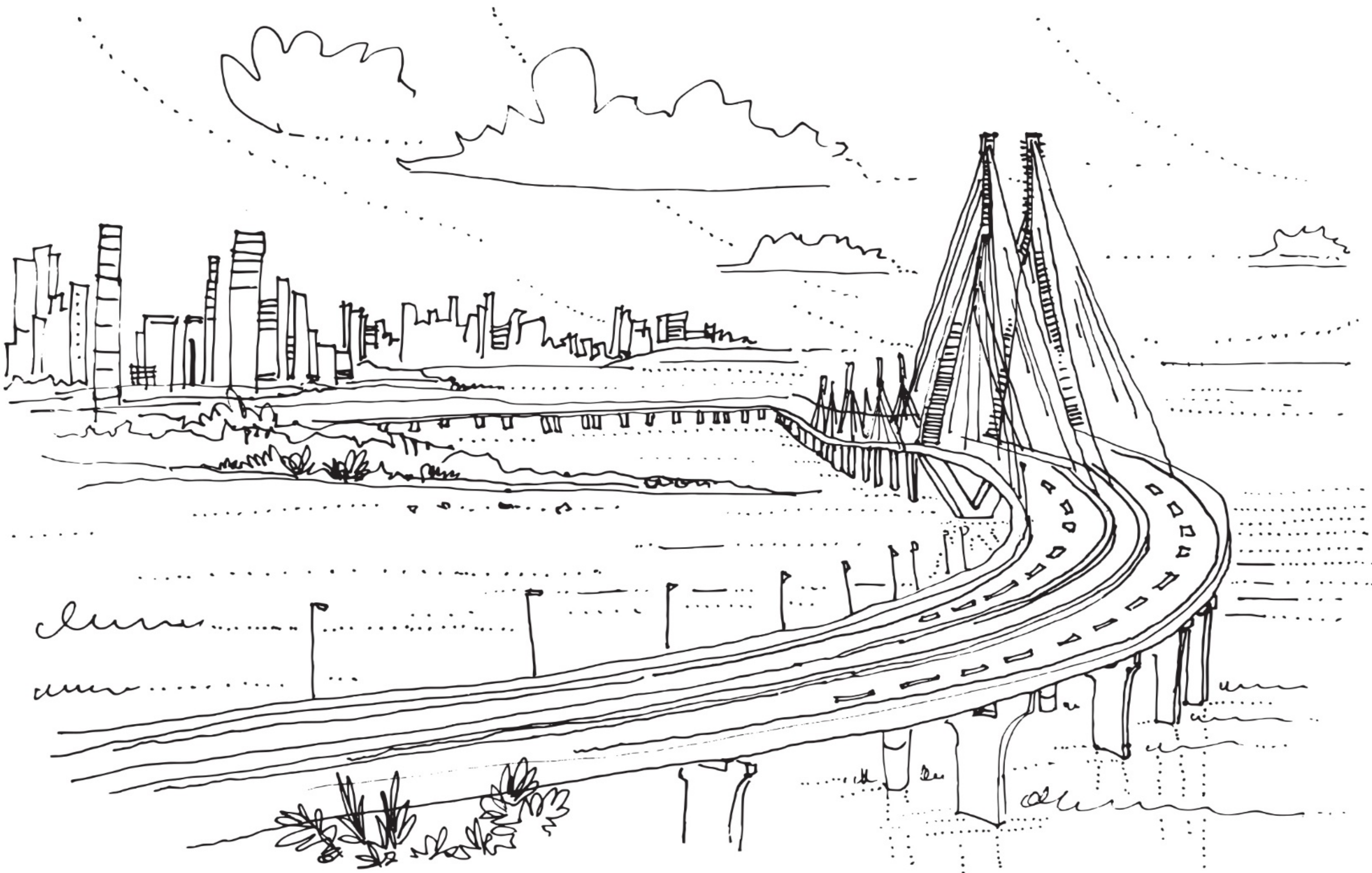
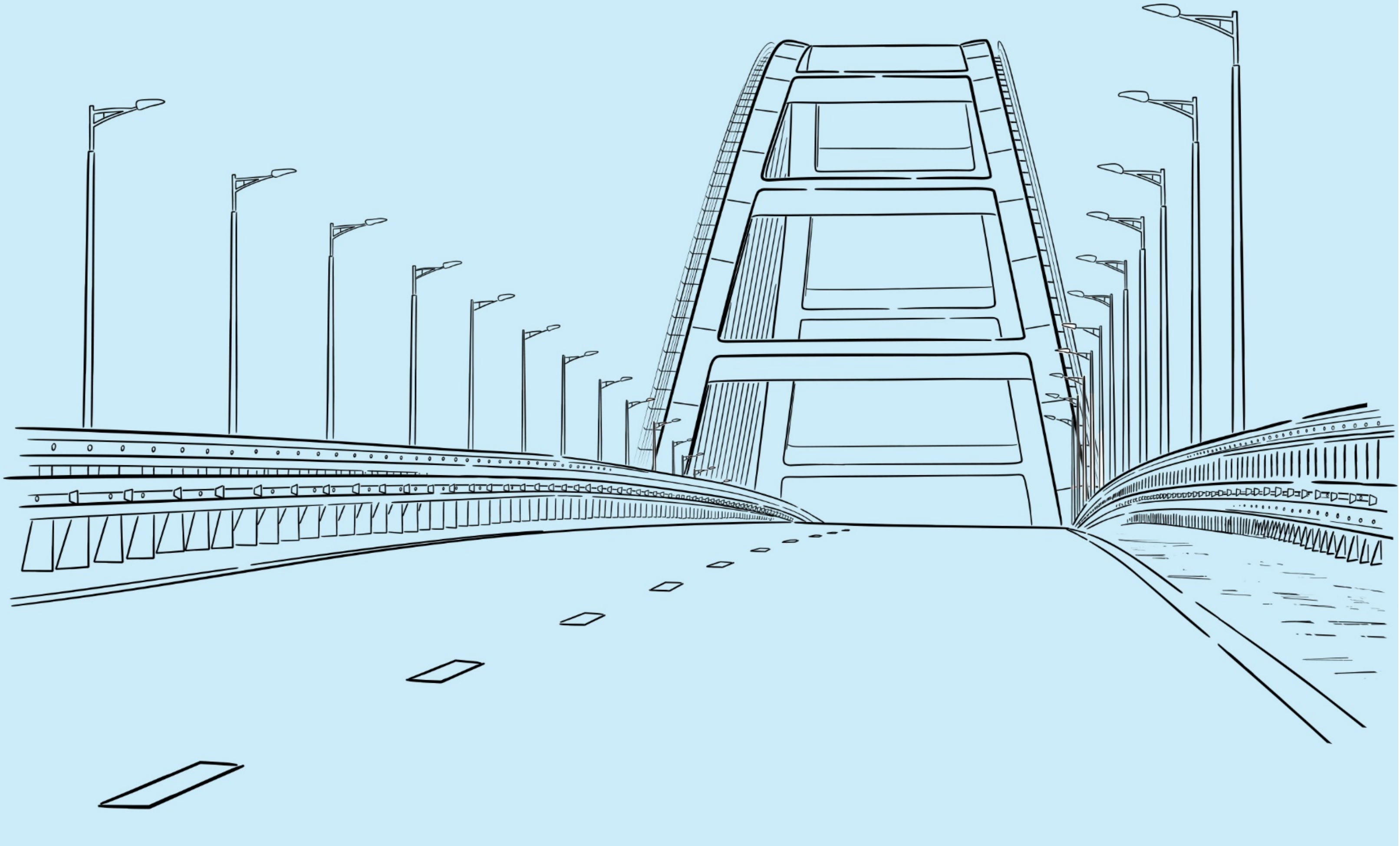


# Infrastructure and Energy Digest

## Overview of Legal and Regulatory Developments

**February 2020**

# INFRASTRUCTURE



# *Cabinet approves Major Port Authorities Bill, 2019 (Bill)*

## Brief Background

The Bill[1] repealing the Major Port Trusts Act, 1963 has reportedly been approved by the Union Cabinet on February 12, 2020 with the intent of enhancing the overall efficiencies of the ports.

## What are the objectives of the Bill?

- To provide for regulation, operation and planning of Major Ports
- To vest the administration, control and management of Major Ports to the Boards of Major Port Authorities (**Board**(**s**)). Earlier the administration of the Major Ports was vested with the respective Board of Trustees.

## Which ports are covered under the Bill?

- The Bill applies to the following ports, namely Chennai, Cochin, Deendayal (Kandla), Jawaharlal Nehru (Nhava Sheva), Kolkata, Mormugao, Mumbai, New Mangalore, Paradip, V.O. Chidambaranar (Tuticorin) and Visakhapatnam (**Major Ports**).

## What is the framework under the Bill for management and administration of the Major Ports?

- The Bill envisages that a Board be constituted by the Central Government for each Major Port. This Board would comprise a Chairperson, a deputy Chairperson and will include 1 member each from (i) the respective state governments, (ii) the Railways Ministry, (iii) the Defence Ministry, and (iv) the Customs Department. The Board will also include 2 to 4 independent members, 1 Member (either in the rank of Director or higher) nominated by the Central Government, ex officio and 2 members representing the interests of the employees of the Major Port Authority.
- Further, an Adjudicatory Board comprising of a Presiding Officer and a maximum of 2 members, as appointed by the Central Government is also proposed to be formed.

## What are the powers and authorities of the Board?

The Board would be a permanent body having perpetual succession and is authorized to:

- To acquire, hold or dispose of movable or immovable property[2];
- To contract with parties;
- To sue and be sued;
- To use its assets and funds for the benefit of Major Ports;
- To use its funds for corporate social responsibility activities;
- To make rules on declaring availability of port assets for port related activities and services; developing and providing infrastructure facilities such as setting up new ports, jetties; providing exemption or remission from payment of any charges on any goods or vessels; undertaking activities and studies to promote maritime education etc.; and constructing and erecting infrastructure viz. structures, buildings, drains, roads, fences, etc. as deemed proper;
- To determine (either suo motu or through committee(s)) rates[3] for services that will be performed at ports; access to and usage of the port assets, and different classes of goods and vessels;
- To raise loans from any (i) scheduled bank or financial institution in India, or (ii) any financial institution outside India that is compliant with all the laws[4].

[1] The bill was originally introduced as the "Major Port Authorities Bill, 2016" in the Lok Sabha on December 16, 2016.
[2] If the Board proposes to sell, alienate or divest its assets, properties, rights, powers and authorization, prior sanction of the Central Government would be necessary.
[3] Such rates are required to be prospective and in consonance with rules or directives of the Central Government, provisions of the Competition Act, 2002 and other applicable laws.
[4] The previous sanction of the Central Government is required for loans proposed to be taken by the Board in excess of 50% of the Board's capital reserves.

## What are the powers and authorities of the Adjudicatory Board?

The Adjudicatory Board would be required to:

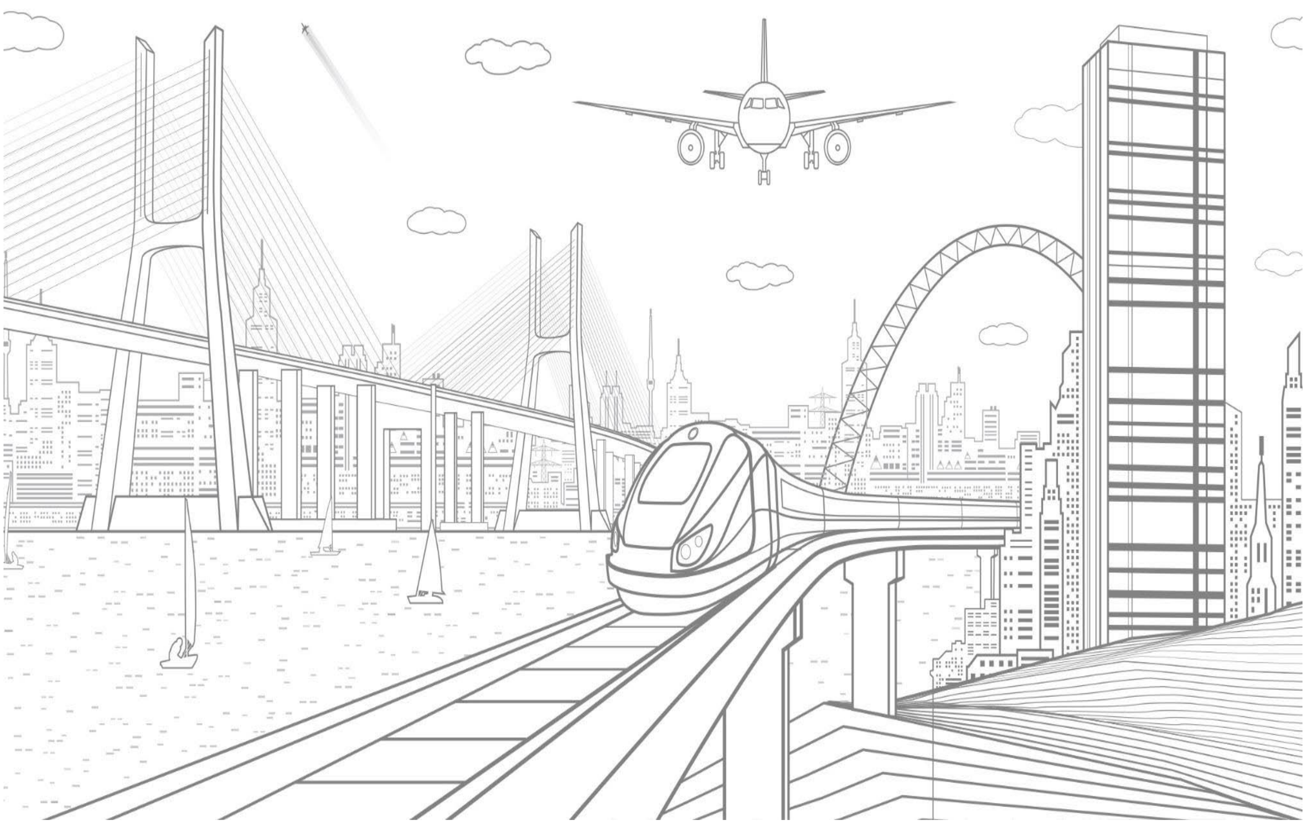
- Carry on certain functions previously carried out by the Tariff Authority for Major Ports;
- Adjudicate on disputes or claims related to rights and obligations of Major Ports and Public Private Partnership (**PPP**) concessionaires;
- Review stressed PPP projects;
- Review complaints received from port users regarding port services and passing necessary orders.

As the Bill does not provide for a forum which would hear appeals from the Adjudicatory Board, a party aggrieved by an order of the Adjudicatory Board could possibly file a writ petition.

## What are the other notable features of the Bill?

- **Proposed mechanism for fixing tariff for PPP projects:** For PPP projects, the Bill proposes that the concessionaire would be free to fix the tariff based on market conditions. The revenue share and other conditions would be as per the provisions of the specific concession agreement between the Board and the PPP concessionaire appointed under the PPP project.
- **Continuing benefits to Mumbai and Kolkata Ports:** The Bill proposes that the existing benefit enjoyed by Mumbai and Kolkata Port in respect of municipal assessment of property under the Bombay Port Trust Act, 1879 and the Calcutta Port Trust Act, 1890 would continue.

**Our view: The Bill envisages a structural overhaul in the management and administration of Major Ports in India. Besides striving towards autonomy and flexibility for Major Ports, the Bill provides for an effective dispute resolution mechanism and, in contradistinction with the Major Port Trusts Act, 1963, streamlines, to a large extent, the imposition of penalties for non-compliance. The freedom to fix tariffs would be quite a welcome move. However, the conditionalities for such tariffs would need to be examined before private port operators can rejoice.**



# *Clarification to cover Coronavirus under Force Majeure clause*

## What is the rationale for the clarification?

The novel coronavirus which originated in China has now been declared as a pandemic by the World Health Organization. As a result of the coronavirus outbreak, doubts had arisen if the disruption of the supply chains due to spread of coronavirus in China or any other country would be covered in the Force Majeure clause. It is in this context that the Department of Expenditure Procurement Policy provided a clarification.

## What is Force Majeure?

Para 9.7.7 of the Manual for Procurement of Goods, 2017 (**2017 Manual**) provides the following definition of 'Force Majeure':

*"A Force Majeure (**FM**) means extraordinary events or circumstance beyond human control such as an event described as an act of God (like **a natural calamity)** or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/ seasonal rain and any other events specifically excluded in the clause). An FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract. An FM clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the FM. The firm has to give notice of FM as soon as it occurs, and it cannot be claimed ex-post facto. There may be a FM situation affecting the purchase organisation only. In such a situation, the purchase organisation is to communicate with the supplier along similar lines as above for further necessary action. If the performance in whole or in part or any obligation under this contract is prevented or delayed by any reason of FM for a period exceeding 90 (Ninety) days, either party may at its option terminate the contract without any financial repercussion on either side."*

## What does the clarification provide?

The Department of Expenditure Procurement Policy Division *vide* notification dated February 19, 2020 clarified that coronavirus be considered as a case of natural calamity and would thus be covered as 'Force Majeure' under the above clause.

## What are the limitations?

The clause can be invoked wherever appropriate. However, it does not excuse a party's non-performance entirely but only suspends it for the duration of the period of the 'Force Majeure'. Additionally, parties claiming relief under the aforesaid clause are to give notice of the 'Force Majeure' event as soon as it occurs, and it cannot be claimed ex-post facto (retrospectively).

## Who can avail benefit of the clarification?

Given that the notification has been issued under the 2017 Manual, goods and entities procured by or supplied to any Ministry or Department of the Central Government in accordance with the 2017 Manual would be covered under the aforesaid clarification.

**Our view: The clarification provides a major and much needed relief to entities whose supply chains have been disrupted due to the global spread of the coronavirus.**

# *Cochin International Airport Limited held to not be a 'State' under Article 12 of the Constitution of India (Constitution)*

## What were the facts of the case?

- Cochin International Airport Limited (**CIAL**) was incorporated under the Companies Act, 1956. 32.24% of CIAL's paid up capital was held by the State Government.
- Article 95 of the Articles of Association was amended to state that as long as the Government of Kerala and/or its Public Sector Undertakings (**PSUs**) either jointly or severally held more than 26% of the paid up equity capital of CIAL, they would have the right to nominate 1/3rd of the total number of the directors of CIAL. They would also be entitled to remove any director that was so appointed and appoint any other person in his/her place. Further, the Government of Kerala had the right to appoint the Managing Director of the Company for a term which was to not exceed 5 years and to fix the remuneration as well. The Government also had the right to cancel/ withdraw the appointment made and to re-appoint any other director as Managing Director. However, the Government of Kerala was to exercise these rights in consultation with the board of CIAL.
- The Petitioners, employees of CIAL, challenged termination of their services by CIAL by way of writ petitions.
- CIAL objected to the maintainability of the writ petitions on *inter alia* the ground that they do not come within the purview of 'State' under Article 12 of the Constitution. CIAL contended that as they do not perform any public duties, the writ petitions could not lie against termination of services of its employees under Article 226 of the Constitution.
- The Petitioners alleged that CIAL would be an authority under Article 12, considering that though the Government held less than 51% of the paid up equity share capital of CIAL, since the Chief Minister had been appointed as the Chairman, 3 other members and the Managing Director had been nominated by the Government, the decision making power was in the hands of the Government.

## What were the issues?

- Whether CIAL is an instrumentality of State as defined under Article 12 of the Constitution?
- Whether the writ petitions would lie against termination of services of its employees as under Article 226 of the Constitution?

## What were the findings of the Kerala High Court?

- The Kerala High Court (**Court**) referred to the following tests laid down by the Supreme Court in earlier cases to determine whether an institution is a State as under Article 12 of the Constitution:

  (i) One thing is clear that if the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
  (ii) Where the financial assistance of the State almost meets the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
  (iii) It may also be a relevant factor to note whether the corporation enjoys a monopoly status which is either State conferred or State protected.
  (iv) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
  (v) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government. Specifically, if a department of the Government is transferred to a corporation, it would be a strong factor supporting the inference that the corporation is an instrumentality or agency of the Government.

- The Court also took note of precedents, stating that the aforesaid tests are not a rigid set of principles - so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. If the body is financially, functionally and administratively dominated by or under the control of the Government, it would be deemed to be a State as under Article 12 of the Constitution. However, when the control is merely regulatory whether under a statute or otherwise, the body would not be deemed to be a State.

- The Court was of the view that CIAL was not an authority or instrumentality of State within the meaning of Article 12 of the Constitution, due to the following:

  - As per the Memorandum of Association and Articles of Association, CIAL was not financially, functionally and administratively dominated by or under the control of the Government.

  - Further, it cannot be said that CIAL had any government conferred monopoly in providing air traffic services as under the Airport Authority of India Act, 1994 as it was the function of the Airports Authority of India (**AAI**).

  - The AAI is bound to render assistance in the establishment of Airports, whereas CIAL was only facilitating the AAI to perform its statutory obligations.

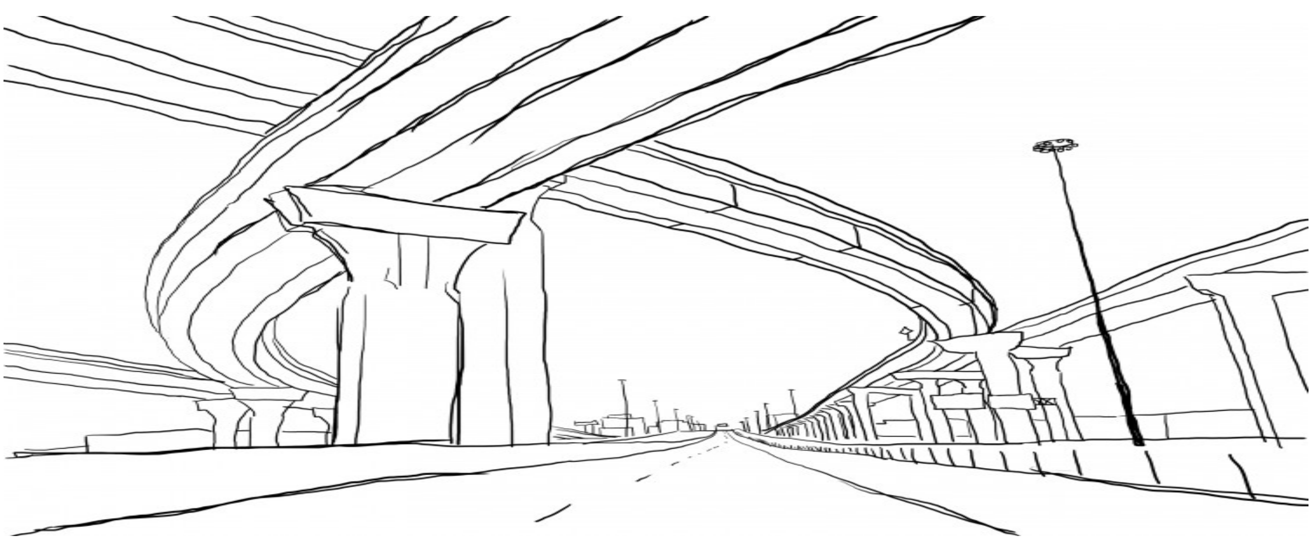
  - Since airways, aircraft, provision for aircrafting etc., come under the Seventh Schedule of the Constitution, the contention that CIAL is a State or that it public functions or sovereign functions was deemed irrelevant.

  - CIAL did not get any financial aid from the Government and it did not have to submit any reports or accounts before the Government. Further, there were no provisions enabling the Government to issue directions to CIAL.

- The Court was of the view that employment of the Petitioners by CIAL or the termination as such would not involve any public element, as CIAL did not have any statutory duty to be performed and in such a case no direction can be issued to enforce any personal contracts.

- Accordingly, the writ petitions were dismissed.

**Our view: This order will offer some relief to, and upholds the independence of, companies like CIAL who could potentially be considered as 'State' and be susceptible to writ jurisdiction.**



# ENERGY

## RENEWABLE ENERGY

# *Clarification regarding registration of solar manufacturers under the Approved List of Models and Manufacturers*

### What is the Approved List of Models and Manufacturers?

The Approved List of Models and Manufacturers (**ALMM**) is a list of models and manufacturers of solar modules which are registered with the Ministry of New and Renewable Energy (**MNRE**). The objective of the ALMM is to ensure quality control and indigenous production of solar modules.

### What does the notification provide?

MNRE *vide* notification dated February 6, 2020 has issued clarifications as regards "definition of model", "quantum of fees" and provisions related to manufacturers who are exempted from Bureau of Indian Standards (**BIS**) registration for ALMM application purposes.

### What are the clarifications?

The MNRE has issued the following clarifications:

(a) Definition of 'model'

The clarification *inter alia,* provides that 'model' under the ALMM guidelines refers to modules/cells of same nominal power output rating. All BIS approved modules/cells with same nominal power output rating would be treated as one model.

(b) Quantum of fees for enlistment in ALMM

The fees for one model of module is either INR 2500 per MW or INR 5000 per MW depending upon the installed manufacturing capacity of the modules. Further in case of multiple models, the application fee for every additional model would be 1% of the applicable fees.

As regards PV cells, the fees have been fixed as INR 5000 per MW for the first model and 1% of the applicable fees for the subsequent models.

(c) Enlistment of PV manufacturers exempted from BIS registration/certification

The solar PV manufacturers who are exempted from BIS registration/certification as per MNRE's notifications, would be eligible for enlisting their solar modules under the ALMM. However, the validity of their enlistment would be co-terminus with the validity of the exemption from BIS registration/certification.

Manufacturers who have enlisted their products under the ALMM without BIS registration/certification are required to submit the requisite registration/certification at least one month prior to the expiry of their ALMM enlistment. Upon successful submission of the registration, their enlistment under ALMM would be valid for a period of 2 years from date of enlistment of the manufacturer's products under the ALMM.

**Our view: The notification provides clarity to the manufacturers of solar PV modules regarding the application for enlistment under ALMM. This is important considering that from March 1, 2020 only those models and manufacturers which are included in the ALMM would be eligible for use in Government/Government assisted projects or projects under Governments schemes and programmes. Given the number of Government projects in the solar space, this clarification has a great deal of significance and should be heeded by all manufacturers of such models.**

# *CERC direction to reimburse costs towards safeguard duty incurred by Solar Developer*

The Central Electricity Regulatory Commission (**CERC**) vide its order dated February 5, 2020 (**Order**), directed NTPC Limited (**Respondent**) to reimburse to Solairepro Urja Private Limited (**Petitioner**) the cost incurred on account of imposition of safeguard duty.

## Brief Background

- The petition comes in the backdrop of levy of safeguard duty on a solar power developer engaged in the development of a 250 MW Solar Power Generating System in Andhra Pradesh (**Petitioner**) pursuant to a notification dated July 30, 2018[5] of the Ministry of Finance (**Customs Notification**).

## What were the prayers of the Petitioner?

- The Petitioner sought the following reliefs from the CERC:
-
- Declaration that the issuance of the Customs Notification is a change in law under Article 12 of the Power Purchase Agreement dated February 7, 2018 between the Petitioner and NTPC Limited (**PPA**).
- Direction to the Respondent to
  - pay compensation of INR 154,67,13,701 as relief for change in law resulting from the Customs Notification;
  - pay additional compensation of INR 7,73,35,685 as Goods & Services Tax; and
  - reimburse legal and administrative costs incurred by the Petitioner.
- Passing of other orders as deemed fit by the CERC.

## What was the decision of the CERC?

- Whilst upholding that Integrated Goods and Services Tax on imported goods would include safeguard duty, the CERC held that imposition of safeguard duty is a "change in law" event.
- <u>Settlement of dues:</u>
  - CERC ruled that the Respondent was liable to pay the claimed amounts to the Petitioner.
  - CERC further ruled that the Respondent could claim the compensation from the distribution companies, viz. NTPC Vidyut Vyapar Nigam Limited, Southern Power Distribution Company of A.P. Limited and Eastern Power Distribution Company of A.P. Limited (**Other Respondents**) on a 'back to back' basis.
  - CERC directed NTPC and the Other Respondents to pay the amounts within 60 days from the date of the Order, failing which late payment surcharge would be leviable.
  - As an alternative mechanism, CERC suggested a mutual agreement between the parties to a mechanism for settlement of dues during the term of the PPA.
- Notably, the CERC denied the Petitioner's claim for carrying cost (additional expenditure incurred by the Petitioner as a result of the change in law event). Such relief was denied as there was no provision providing for economic restitution of the Petitioner under the PPA.

**Our view: The Order of the CERC is of significance as it reaffirms the imposition of safeguard duty as a "change in law" event for the purpose of power purchase agreements. Additionally, in furtherance of its previous orders, the CERC has reiterated that the eligibility of project developers for carrying cost depends on the inclusion of a specific provision in the power purchase agreement providing for restoration of the project developer to its economic position prior to the occurrence of the change in law event.**

[5] Bearing No. 01/2018 Customs (SG)

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