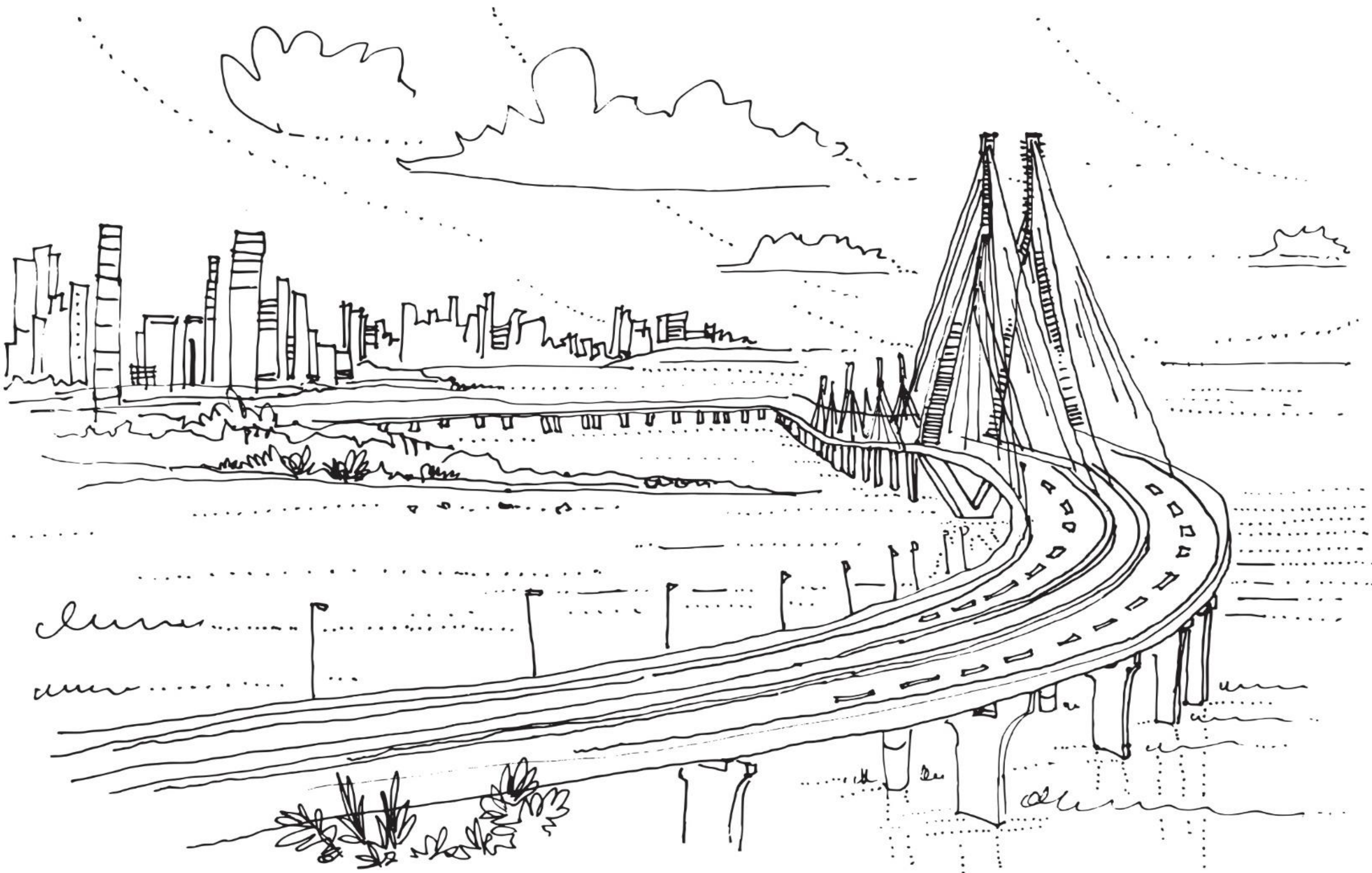

Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

May 2021

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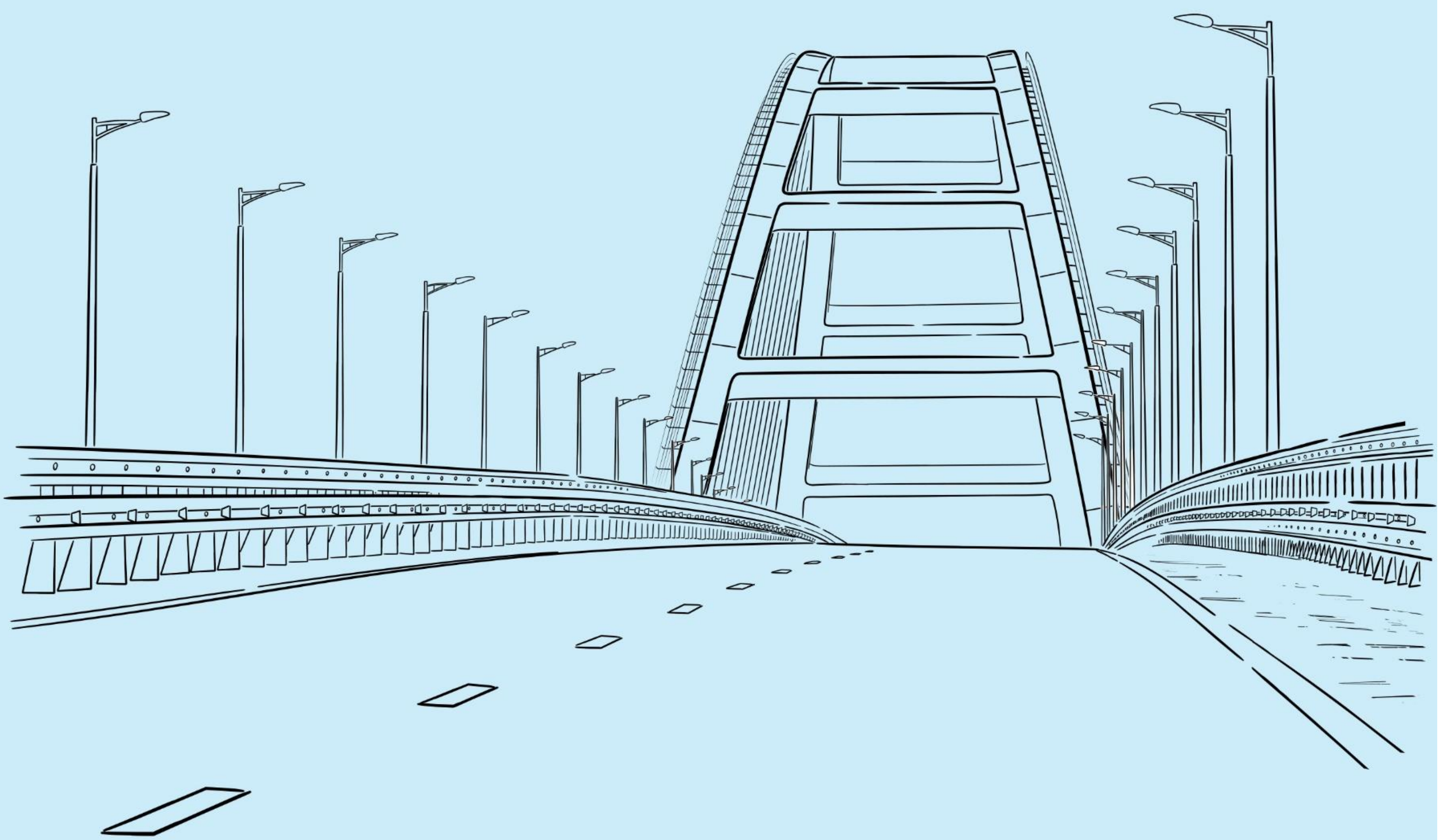
INFRASTRUCTURE



National Bank for Financing Infrastructure and Development receives assent of the President of India

Brief Background

- Pursuant to the Finance Minister's proposal in her 2021 budget speech, the National Bank for Financing Infrastructure and Development Act, 2021 (**NBFID Act**) received the assent of the President of India on March 28, 2021. Certain sections of the NBFID Act have been brought into effect vide a notification dated April 19, 2021.
- With this enactment, the Government of India (**GoI**) aims at creating not only a government backed Development Finance Institution (**DFI**) but also encourages the setting up of other development finance institutions to be licensed by the Reserve Bank of India (**RBI**).
- The NBFID Act provides a thrust to the National Infrastructure Pipeline project of the GoI which aims at financing 7,400 projects amounting INR 111 lakh crore/trillion.

Aims and Objectives of the NBFID Act

- The NBFID Act aims to:
  - support the development of long-term non-recourse infrastructure financing in India including the development of the bonds and derivatives markets via co-ordination with all relevant stakeholders
  - support development of infrastructure assets in areas listed under the updated 'Harmonized Master List of Infrastructure Sub-sectors' released by the Ministry of Finance.
- The financial objective of the National Bank for Financing Infrastructure and Development (**Institution**/**Bank**) would be **to lend or invest**, directly or indirectly, and seek to attract investment from private sector investors and institutional investors, in infrastructure projects located in India, or partly in India and partly outside India, with a view to foster sustainable economic development in India.

Funding and share-holding pattern of the Bank

- The authorized share capital of the Bank would be INR 1 Lakh Crore.
- Central Government would initially hold 100% of the share capital of the Bank. This can be reduced to a minimum of 26%.
- The shares of the Institution may be held by the Central Government, multilateral institutions, sovereign wealth funds, pension funds, insurers, financial institutions, banks, etc.
- The Central Government may support the Institution through grants or contribution, as and when necessary, in the form of cash or marketable Government securities.
- An initial grant of INR 5,000 Crore to be provided by the Central Government.

Salient features of the NBFID Act

- The Central Government is to prescribe a concessional rate of fees, not exceeding 0.1%, at which at which the Government guarantee may be extended to the Institution for borrowings from multilateral institutions, sovereign wealth funds, etc.
- The Government can provide re-imbursement of hedging risk taken by the Institution to insulate it from any exchange rate fluctuations.
- The Bank is to be available for consultation to the Central Government, RBI and other institutions engaged in infrastructure finance by maintaining expert staff to study problems relating to this field.

- The Bank is to also perform a dispute resolution function by taking an active role in negotiations and discussions with government authorities and stakeholders.
- The Central Government can provide a sovereign guarantee for the loans, debentures and bonds issued by the Institution.
- The Bank can take over or refinance existing loans extended by a lender for infrastructure projects located in India, or partly in India and partly outside India.
- The Bank can convert the debt it has extended to equity.
- The Bank is to provide technical, legal, marketing and administrative assistance to any person engaged in infrastructure development activities.
- The Bank is to provide consultancy services in the field of infrastructure development, project structuring, capital structuring, etc.

Oversight mechanism

- The annual report of the Bank is to be submitted to the RBI and Central Government. The Central Government would lay the report before Parliament.
- Every 5 years, an independent external agency is to undertake a performance review of the Bank.
- The NBFID Act provides protection to employees and directors for all action taken in good faith including in respect of assets created or transferred to the Institution.
- No agency can commence investigation for an offence alleged to be committed by the Director or the Chairperson of the Institution without first taking the Central Government's approval.
- No agency can commence investigation for an offence alleged to be committed by an employee of the Bank without first taking the permission of the Managing Director.
- The Bank has been kept out of the ambit of the Central Vigilance Commission and Comptroller and Auditor General.
- The Institution is to be bound by written directions of the Central Government on questions of policy.

Our view: In light of the present state of affairs in the country and impending lockdowns by State Governments, the Circular should offer a significant relief for transmission projects and help alleviate the stress in the sector as well as reduce exposure of the lending sector. The Circular is in line with previous directions from the MOP to the State Governments and the Governments of Union Territories to relax performance security and earnest money deposit requirements for power project bids on account of the impact of COVID-19 on businesses.

Production Linked Incentive (PLI) Scheme

National Programme on Advanced Chemistry Cell Battery Storage

Background

- In another step to promote Government's flagship Make-in-India and 'Atmanirbhar' program, Union Cabinet has approved Production Linked Incentive (**PLI**) Scheme for Advanced Chemistry Cell (**ACC**) Battery Storage manufacture.
- PLI Scheme for ACC Battery Storage has been approved with a financial outlay of INR 18,100 crore.
- The scheme will be implemented by Ministry of Heavy Industries & Public Enterprises (**MOHE**).
- Objective of the scheme is to reduce import dependence.

Key Features

- The Scheme intends to provide financial incentive to manufacturers of ACC Battery Storage.
- While fine print of guidelines is still awaited, following are broad conditions of the Scheme:
  - Eligible applicant to commit to set-up manufacturing facility of minimum (5) GWh
  - Further, eligible applicant to achieve domestic value addition of atleast 25% and incur mandatory investment of INR 225 per GWh within (2) years
  - Domestic value addition needs to be increased to 60% within (5) years, either at Mother Unit (in-case of an Integrated Unit) or at Project Level (in case of 'hub and spoke' structure)
  - Manufacturing facility to be commissioned within a period of two years
  - Incentive will be disbursed over a period of (5) years thereafter.
- The selection of applicant would be done via a competitive & transparent bidding process.

Government's Vision

- Achieve cumulative 50 GWh of ACC manufacturing facility in India and direct investment of around INR 45,000 crore in the sector
- Import substitution of approximate INR 20,000 crore, annually
- Provide impetus to Research & Development to achieve higher specific energy density
- Promote niche cell technologies

Way Forward

- Detailed guidelines and notification, specifying quantum of fiscal incentives and other conditions is expected to be announced shortly by Ministry of Heavy Industries & Public Enterprises.

Our view: Introduction of PLI Scheme is a step towards promoting Make-In-India and reduce energy dependency on imported fossil fuel. Successful implementation of PLI Scheme for ACC Battery Storage will also facilitate robust growth in sectors such as consumer electronics, electric vehicles, advanced electricity grids, solar rooftop etc.

Madras High Court rules that unless there is supervening Public Interest, hills and hillocks cannot be given for Mining

Background

In an order pronounced on April 26, 2021, the Madras High Court (**High Court**) in the case of *K. Santhanam vs. The District Collector, Virudhunagar and Others.*[1], held that the Government could not arbitrarily issue licenses for mining of hillocks, without assessing the impact it may have on the public and on the environment in the longer run.

What are the facts of the case?

- The Petitioner was seeking stoppage of the quarrying operations conducted by the fifth respondent (**Leaseholder**) who was granted mining lease to quarry rough stone in Survey No.846/1(Part) in Mottamalai Village, Ayan, Kollankondan Village, Rajapalayam Taluk, Virudhunagar District (**Land**).
- The Petitioner contended that the Leaseholder had breached the allotment conditions of the Land. Powerful explosives were being used by the Leaseholder. The blasting operations endangered the lives of the farm hands who were working in the nearby agricultural fields.
- The Petitioner further contented that there was considerable generation of dust causing air pollution. The Leaseholder had encroached a water body and also blocked the customary pathway of the villagers. The local panchayat had also passed a resolution favouring the closure of the quarry.
- The respondents contended that all the statutory requirements envisaged in Tamil Nadu Minor Mineral Concession Rules, 1959 were complied with. There was an approved mining plan. The District Level Environment Impact Assessment Authority had also granted clearance. Consent orders had been obtained from the Tamil Nadu Pollution Control Board.

What were the findings of the High Court?

- The High Court observed that the Government as well as the citizens have a constitutional obligation to protect the environment and ecology under Article 48-A and Article 51-A(g) of the Indian Constitution. The doctrine of inter-generational equity adumbrates that environment is not only for the benefit of the present but also the future generations.
- The High Court further observed that it was not open for the Government to arbitrarily give away hills and hillocks for exploitation. Merely because the process of issuance of mining lease was conducted in consonance with the statutory procedure, that would not confer any immunity against judicial scrutiny. Unless there were supervening public interest considerations, hills and hillocks cannot be given away for mining.
- The High Court observed that the photographs enclosed in the typed set of papers clearly show that a substantial part of the hillock had already been blasted away. Permitting quarry operations to continue any further would lead to its total destruction. A hill can be allowed to be exploited under certain circumstances but post-exploitation, the hill must still remain.

What was the Court's judgement?

- The High Court held that the Government must demonstrate that all other avenues had been exhausted and that in the interest of the general public, it was necessary to carry out limited mining in the hillock in question.
- In the instant case, the respondents had failed to show that all other avenues were exhausted. Since in the present case, the exploitation had gone beyond the threshold level, the High Court

[1] *W.P.(MD)NOs.18575 of 2019 &13406 OF 2020*

issued a writ of mandamus directing stoppage of further quarry operations.

- The High Court was also conscious that the landowner was being restrained from enjoying the fruits of the Land well before the expiry of the lease period. Therefore, it permitted the Landowner to make representation to the authorities for refund of the proportionate lease amount for the unexpired period.

Our view: The aforesaid decision emphasizes the need for protection of environment. Whilst exploitation of land for mining purposes is permitted in certain circumstances, the decision ensures that the Government cannot arbitrarily give away any land including hills and hillocks for exploitation, unless there are supervening public interest considerations.

Finance Ministry grants Infrastructure status to Exhibition-cum-Convention Centres

- The Ministry of Finance vide its notification dated April 26, 2021 (**Notification**) has amended the Harmonized Master List of Infrastructure Sub-sectors and has included Exhibition-cum-Convention Centre in the list.
- The Exhibition-cum-Convention Centre has been added under the category of 'Social and Commercial Infrastructure'.
- The Notification has defined Exhibition-cum-Convention Centre as Exhibition and Convention Centre Projects with minimum built-up floor area[2] of 100,000 square metres of exclusively exhibition space or convention space or both combined.

Our view: The grant of infrastructure status to the convention centres would help extend the benefits and exemptions available to the infrastructure to exhibition-cum-convention centres. This will help promote the construction and development of convention centres in the country thereby increasing revenue and attraction in the country. Successful convention centres tend to boost the local economy. Whilst some of the major convention centres in the country are presently supported by the Government, this move would encourage private players to set up convention centres as the infrastructure status would enable easier financing from lenders.

[2] Built up floor area includes primary facilities such as exhibition centres, convention halls, auditoriums, plenary halls, business centres, meeting halls etc.

A role for India's private sector in the SPR project

Background

In 2003 India initiated the idea of keeping Strategic Petroleum Reserves (**SPR**)[3]. Phase 1 of the SPR was launched in 2007 under the Indian Strategic Petroleum Reserves Limited (**ISPRL**), a Special Purpose Vehicle (**SPV**) wholly owned and controlled by the Oil Industry Development Board under the MoPNG. Phase 1 construction was completed on February 10, 2019.

Proceedings of the 100th meeting of Public Private Partnership Appraisal Committee (PPPAC) held on March 15, 2021[4]

- The meeting noted that the justification for the project put forth by the Ministry of Petroleum and Natural Gas is to enhance the SPR from the present 5.33 MMT to 11.83 MMT as a part of Phase 2 of the SPR which aims at leveraging private sector resources (in construction as well as operation) along with also obtaining financial support from the Government via a grant.
- The concession period for the two projects envisaged under Phase 2 of SPR at Chandikol (Odisha) and Padur (Karnataka) is 60 years and ISPRL would be the implementing authority under the PPP.
- The PPPAC noted that the Concession Agreement allows the concessionaire the freedom to commercialize and earn revenue out of the entire capacity of the Project.
- Finally, the PPAC noted that the justification for considering Phase-II of SPR in PPP mode in place of directly by public sector i.e. by ISPRL as in case of Phase-I should be clearly brought out when seeking the subsequent Cabinet approval for the project.

Opportunities for the private sector

- The 2019-20 Annual Report of ISPRL states that ISPRL is exploring the options to construct these SPRs under a **Public Private Partnership (PPP) model with prospective partners like Financial Investors/ Traders/ Domestic & Foreign Oil Refining and Marketing companies/ Large Construction Companies/ Sovereign wealth funds**[5]**.**
- Updates on the project status of Phase II of the SPR are available at the India Investment Grid website[6].

Our view: While final cabinet approval of the revised proposal of MoPNG is awaited; given the fact that most decks of the project have already been cleared be it – land acquisition or environmental clearance; participating in Phase II of the SPR represents a unique moment in India's PPP landscape. The important role given to the private sector in this project will go a long way in contributing to the stated priorities of the Government of India in ensuring 'Energy Access, Energy Efficiency, Energy Sustainability and Energy Security with Energy Justice at its core.'

[3] A mechanism mooted by the International Energy Agency in 1974 which mandates member states to keep oil reserves of up to **90 days.** India set up its SPRs in light of the Iraq War of 2003.

[4] PPPAC appraisal/approval is required for PPP Projects in the central sector whose cost exceeds INR 100 Crore. This approval is then sent to the Cabinet Committee on Economic Affairs ("**CCEA**") for approval, after which the projects can be bid out. https://www.pppinindia.gov.in/documents/20181/22330/100th/30111511-ccc6-4c85-93a8-3cd9fee81be4?version=1.1

[5] http://www.isprlindia.com/downloads/annual-reports/ISPRL-ANNAUL-REPORT-19-20.pdf

[6] https://indiainvestmentgrid.gov.in/opportunities/nip-project/701366

ENERGY

Ministry of Power's directions to electricity regulators for ensuring timely issue of tariff orders

The Ministry of Power (**Ministry**) vide its notification dated May 3, 2021 (**MoP Notification**) has issued directions to State Commissions for timely issue of tariff orders under Electricity Act, 2003.

What is the issue?

- The Ministry while referring to provisions of the Electricity Act regarding tariff regulations, determination of tariff and procedure for tariff order, has observed that some of the State Electricity Regulatory Commissions (**SERC**) are not strictly adhering to the provisions of the Electricity Act for timely issuing of the tariff orders.
- The Ministry further referred to the order of the Appellate Tribunal for Electricity's order dated November 11, 2011 (**APTEL Order**) which had *inter alia* directed the SERCs to ensure regular and timely revision of tariffs including regular truing up of tariffs.

What does the Notification provide?

- The Ministry observed that the distribution sector is a crucial element of the entire society value chain. Sustainability of the entire power sector is critically dependant on the sustainability and growth of the distribution sector.
- The Ministry took note of the status of the tariff order for the financial year 2021-2022 issued till April 28, 2021 and observed that some of the SERCs had not issued tariff orders for the foregoing financial year and are thereby not adhering to the provisions of the Electricity Act and the APTEL Order.
- The Ministry directed the SERCs to issue the tariff orders for the financial year 2021-2022 at the earliest and submit status reports regarding issuance of tariff orders by the respective SERC to the Ministry at the earliest.

Our view: Timely determination of tariff and issuing of tariff orders are essential for the smooth functioning and financial stability of the DISCOMS. The financial stability of DISCOMs would in turn benefit the power sector as a whole.

Maharashtra Electricity Regulatory Commission dismisses ACME Heergarh Powertech's plea for safeguard duty compensation

Background

In an order pronounced on May 19, 2021 the Maharashtra Electricity Regulatory Commission (**MERC**) in the case of *ACME Heergarh Powertech Private Limited vs. Maharashtra State Electricity Distribution Company Limited*[7], dismissed the petition filed by ACME Heergarh Powertech Private Limited (**ACME**) seeking compensation to offset the alleged financial impact that imposing safeguard duty led to as premature against Maharashtra State Electricity Distribution Company Limited (**MSED**).

What are the facts of the case?

- MSED had floated a tender for procurement of 1000 MW power from solar power projects through competitive bidding (followed by reverse auction) vide its request for selection on December 5, 2018.
- ACME in the e-reverse auction was declared the successful bidder quoting a tariff of INR 2.74 per unit. Thereafter, MSED issued the letter of award on March 19, 2019 to ACME.
- MSED had approached MERC seeking approval for adoption of tariff for long term procurement of 1000 MW solar power under Section 63 of the Electricity Act, 2003 (**Electricity Act**) meeting the solar renewable purchase obligations (**RPO**). This included ACME's project of 300 MW for which the tariff to be adopted was INR. 2.74 per unit. MERC accorded its approval for procurement and adoption of tariff on May 27, 2019. Pursuant thereto, a power purchase agreement (**PPA**) was signed between MSED and ACME on August 21, 2019.
- ACME had placed purchase orders for supply of solar modules and inverters from suppliers located in China in the month of December 2019 as the project was supposed to be commissioned by June 25, 2021. However, due to outbreak of COVID-19 in China in December 2019 and thereafter across world, the suppliers informed ACME about the force majeure situation and indicated that the delivery date of equipment will be delayed.
- In light of the above, ACME issued a force majeure notice dated February 21, 2020 to MSED under Article 8.1 of the PPA intimating MSED about the occurrence of force majeure with effect from December 31, 2019.
- The outbreak of COVID-19 and the ensuing uncertainty in delivery of solar modules and inverters from China, made it impossible for ACME to perform its obligations within the prescribed timeline of 24 months and even with the maximum limit of time extension up to 30 months. As MSED refused to accept the force majeure notice sent by ACME, ACME was constrained to approach the MERC. The MERC by its order dated June 20, 2020 in Case No. 78 of 2020 granted an extension to the project for a period starting from the date of the notice of the force majeure i.e., February 21, 2020 till supply chain was restored and lockdown was lifted completely, plus 30 days.
- Subsequent to the aforesaid order of the MERC, the Department of Revenue, Ministry of Finance issued the Notification 2/2020-Customs (SG) dated July 29, 2020 imposing Safeguard Duty (**SGD**) on the import of "solar cells whether or not assembled in modules or panels". As a result, ACME filed a petition dated August 23, 2020 seeking issuance of direction / order for a mechanism for recovery of the compensation to offset financial/ commercial impact of Change in Law events on account of increase in capital cost due to imposition of SGD.

[7] *Case No. 175 of 2020*

- MSED contended that as per Article 9.3 of the PPA, ACME had to issue notice intimating the occurrence of a Change in Law event along with the precise details of the effect of such Change in Law on MSEDCL for seeking reliefs under Article 9.2 of the PPA. The notice sent by ACME was devoid of the requisite details. Further, MSED contended that ACME would be eligible to claim only the additional burden arising from the SGD for import of goods i.e., the difference between the obligation before imposing SGD and the present obligation, after issuance of the SGD Notification. However, in absence of any details about the additional liability, it was mere presumption on the part of ACME to seek compensation.

What was the MERC's judgement?

- ACME had not provided any status of actual import of solar panel/module. It had only stated that as per original plan it had placed a purchase order with a Chinese supplier in December 2019. However, due to the outbreak of the Covid-19 pandemic, such supply order was impacted by force majeure.
- The original scheduled commissioning date of the project as per PPA was June 25, 2021, which was just one month before expiry of applicability of SGD Notification.
- The MERC further stated that since the possibility of levying SGD as per the SGD Notification on the solar panel/module itself was doubtful, holding such notification as Change in Law event would be extremely premature. Although, the MERC noted the concerns and intentions behind the petition (raising funds from financial institutes for increased expenses and to reduce time lag in payment of compensation), without a reasonable possibility that ACME would be actually affected (and would be incurring the additional expenses), the MERC could not hold that the SGD Notification as a Change in Law event at that stage and thus the petition was dismissed.

Our view: The MERC has in the past held that the imposition of SGD qualifies as a Change in Law event. Even in the present case, the MERC re-iterated such position, but clarified that since ACME had failed to demonstrate how the project would be impacted on account of such event, the relief could not be granted. Thus, it would be important for developers seeking relief under Change in Law provisions to factually substantiate the impact of the relevant Change in Law.

Punjab & Haryana High Court stays power department privatization

The Punjab and Haryana High Court (**High Court**) *vide* its order dated May 28, 2021 in the case of *UT Powermen Union, Chandigarh (Regd.) vs. Union Of India And Others*[8], has stayed the privatization of the Electricity Wing, U.T., Chandigarh until the next date of hearing.

What are the facts of the case?

- The Ministry of Power *vide* its notice inviting tender dated November 10, 2020 proposed to privatize the Electricity Wing, U.T., Chandigarh.
- A writ petition was filed before the High Court against the proposed privatization and matter was first heard on December 1, 2020, whereby the High Court stayed the operation of notice inviting bids for privatization until further orders (**December Order**).
- The December Order was challenged before the Supreme Court. Pursuant to the challenge, the Supreme Court *vide* its order dated January 12, 2021 (**January Order**) observed that there shall be interim stay of the December Order. Further, on February 9, 2021, the Supreme Court while disposing of the said petition ordered that the January Order would continue till the disposal of the writ petition by the High Court, with a request to dispose of the same as expeditiously as possible preferably within a period of 3 months.
- The writ petition came up for hearing before the High Court on February 16, 2021 wherein the Court observed that any execution of the MoP in question would be subject to the final outcome of the present petition and the matter was posted for March, 2021. However due to administrative reasons and surge in Covid cases throughout the country, all matters, including the petition were adjourned in April 2021 to August 18, 2021.
- Meanwhile, on May 24, 2021, civil miscellaneous applications were filed before the High Court, wherein challenge has been laid to communication dated April 19, 2021. As per such communication, the Special Secretary Engineering, UT, Chandigarh issued instructions to the transaction advisor appointed by the Ministry of Power asserting that the process of privatization in Chandigarh is required to be kept on fast track (**Communication**).
- Pursuant to the Communication the petitioners made representations to advisor to the Administrator-cum-Chairman, Disaster Management Committee, UT Chandigarh whereby a request was made to stop the further proceedings in the matter of privatization at least till the matter was finally adjudicated on the judicial side.

What did the High Court observe?

- The High Court observed that the Engineering Wing of the UT Administration is akin to public sector undertakings which were created by the Government of India to make a self-sufficient nation.
- The High Court observed that privatization is not a panacea for all the ills and privatization with blind motive of so-called efficiency falls flat as the department is not only a profitable one but also time and again matched the high standards of customers' satisfaction.
- The High Court while taking into account the grim situation on account of Covid-19 in the country, kept the operation of the Communication in abeyance, considering that the matter would be heard before the High Court on August 18, 2021.

Our view: The order of the High Court is on the same line as its earlier order of December 2020. It would be interesting to see if the present order is also challenged before the Supreme Court. The final judgement on this matter would have important consequences for other DISCOMs in the country. As we had opined previously, while the move to privatize DISCOMs would help alleviate the financial stress faced by them, the impact of such move on the employees and other stakeholders also ought to be considered. The High Court too has noted that there was no reference in the petition or in the reply with regard to stakeholders, who happen to belong to lowest strata of the society like the Scheduled Castes, Backward Classes, OBC. A balanced approach would need to be resorted to ensure that the disadvantages of privatization do not outweigh the advantages.

[8] CM-6812-CWP-2021 and CM-6813-CWP-2021 in CWP-20439-2020

Central Electricity Regulatory Commission asks Solar Energy Corporation of India to compensate solar developer for impact of safeguard duty

Background

In an order pronounced on May 4, 2021, the Central Electricity Regulatory Commission (**CERC**) in the case of *SBG Cleantech Projectco Five Private Limited vs. Solar Energy Corporation of India Limited and Uttar Pradesh Power Corporation Limited*[9], directed the Solar Energy Corporation of India (**SECI**) to compensate SBG Cleantech Projectco Five Private Limited (**SBG**) for the increased cost incurred due to imposition of safeguard duty under the 'Change in Law' clause under the terms of the Power Purchase Agreement.

What are the facts of the case?

- SECI had issued a request for selection to select solar power developers for development of grid connected cumulative solar capacity of 200 MW on January 5, 2018 (**Project**).
- SBG was declared as a successful bidder on May 18, 2018 for developing the Project in the Pavagada Solar Park being developed by Solar Park Implementation Agency in the State of Karnataka with its intended sale to SECI.
- Subsequently, the Central Government imposed SGD on the import of "Solar Cells whether or not assembled in modules or panels" vide notification No. 1/2018 dated July 30, 2018 (**SG Notification**).
- SECI executed power supply agreements with the State distribution companies of Uttar Pradesh Power Corporation Limited (**UPPCL**) on November 15, 2018. On November 30, 2018, letters of Intent were issued in favour of SBG for developing the Project. SBG executed four independent PPAs with SECI for supply of cumulative 200 MW capacity.
- SBG stated that since SG Notification was notified by the Department of Revenue, Ministry of Finance, it was within the ambit of the definition of 'Law' as provided in the PPA and therefore is an event of Change in Law as specified in the PPAs. Furthermore, SG Notification was promulgated after the last date of bid submission i.e., May 10, 2018. Therefore, SBG contended that the imposition of Safeguard Duty qualifies as 'Change in Law' under the PPAs and entitles to relief under Article 12 of the PPAs.
- SBG contended that SECI was liable in terms of the PPAs, to compensate SBG by way of an upfront payment/ on annual basis (along with interest) for the additional non-recurring and recurring expenditure incurred by SGB as a result of enactment of SG Notification.
- SBG stated that SECI had accepted and acknowledged the amount of INR 103,67,46,075 as an implication of safeguard duty imposition. SECI had informed SGB that it would release the payments spread over 13 years at the annuity rate of 10.41% per annum. SBG submitted that owing to the non-payment of the aforesaid amounts, it was losing INR 1,11,00,000 per month being the interest cost.

What was the CERC's judgement?

- The CERC stated that SBG had submitted the bid on May 10, 2018, and the same was accepted and agreed upon after the e-reverse auction held on May 18, 2018. Since, the SG Notification was issued on July 30, 2018, the imposition qualified as 'Change in Law' under the PPAs under which the developer was entitled to the compensation.
- SECI had admitted that there was no dispute over the claimed amount. Further, the provisional settlement of the claims toward safeguard duty had also been confirmed by UPPCL.
- It was noted that SBG had accepted the annuity rate of 10.41% per annum as suggested by SECI.

[9] *Case No. 81/MP/2021*

- Accordingly, the CERC directed SECI to pay to SBG as per mutually agreed mechanism for payment of compensation on annuity basis. The CERC clarified that that the compensation payable to SBG was not conditional upon the payment to be made by UPPCL to SECI. However, SECI was eligible to claim the same from UPPCL on 'back-to-back' basis and the CERC directed UPPCL to expeditiously settle such claim.

Our view: The CERC's order is in line with the settled position that imposition of safeguard duty on import of cells amounted to a change in law under the PPAs. The CERC's clarification that the compensation payable by SECI was not conditional upon the payment to be made by UPPCL to SECI is important. This would help avoid any delays on account on non-payment by UPPCL.

MNRE allows extension of scheduled commissioning dates of RE projects due to spread of COVID-19

Background:

- In our previous newsletters, we discussed the notification dated February 19, 2020 from the Department of Expenditure / Procurement Policy Division of the Ministry of Finance which stated that coronavirus be considered as a case of natural calamity and would thus be covered as 'Force Majeure' event. Pursuant to the above notification, the Ministry of New and Renewable Energy (**MNRE**), through its office memorandum dated March 20, 2020, had allowed for extension in the scheduled commissioning dates (**SCD**) of renewable energy projects.
- Thereafter, MNRE issued an Office Memorandum dated August 13, 2020 wherein it provided a blanket time-extension of 5 months for renewable energy projects on account of COVID-19 and the associated lockdown. Through clarifications dated February 9, 2021 and March 30, 2021 it was communicated that further time-extension beyond 5 months can be granted by implementing agencies in exceptional cases. However, for any time-extension that amounts to more than 6 months, a reference was required to be made to MNRE.
- On account of the second wave of the pandemic in India, the MNRE received several representations from renewable energy project developers and associations for seeking time-extension on the grounds that there has been resurgence of COVID-19, leading to several States/ Union Territories issuing instructions restricting mobility of people.

Extension:

- MNRE has partially modified MNRE's earlier Office Memorandum dated March 30, 2021 and indicated that the total time-extension on account of first wave of COVID-19 is to be restricted to 6 months, including the 5 months blanket time-extension already granted by MNRE. As such, no further time-extension is to be considered on this account.
- The MNRE has indicated that renewable energy projects being implemented through Implementing Agencies designated by the MNRE or under various schemes of the MNRE, having their SCD on or after April 1, 2021 would be eligible to claim time-extension for completion of their project activities, provided such time-

extensions are not used as a ground for claiming termination of Power Purchase Agreement (**PPA**) or for claiming any increase in the project cost.

- The actual quantum of time-extension will be decided in due course depending on the COVID-19 related developments that take place in the coming weeks.

What is the procedure to avail the extension of time?

- The renewable energy projects, being implemented through Implementing Agencies designated by the MNRE or under various schemes of the MNRE, having their SCD on or after April 1, 2021 after considering the time extension mentioned as above, can apply to the concerned Implementing Agency for claiming time-extension in project commissioning.
- While applying for such time-extension, renewable energy developers must undertake that the time-extension will not be used as a ground for claiming termination of PPA or for claiming any increase in the project cost, including Interest During Construction (IDC) or upward revision of tariff.
- If the conditions above are satisfied, then no other supporting documents will be required for granting time-extension.
- On receipt of an application for time-extension, the Implementing Agency has been directed to not initiate any coercive action on the project for recovery of penalty on delayed commissioning, till the time-extension request is decided upon.
- Within the extended time provided for commissioning, intermediate milestones of RE projects, scheduled for completion on or after April 1, 2021 after considering the time extension mentioned above, will also be commensurately extended.
- Developers are required to pass on the benefit of time-extension to other stakeholders down the value chain including EPC contractors, material/ equipment suppliers, OEMs, etc.

Our view: As the country is grappling with the impact of the second wave of the pandemic, several States/ Union Territories have taken various measures such as night curfew, imposition of Section 144, weekend lockdown. The aforesaid direction issued by the MNRE would come as a major relief for renewable energy developers and help them navigate through the challenges arising out of the restrictions imposed on account of the second COVID-19 surge. Further, the requirement for developers to pass on such benefit to other stakeholders such as EPC contractors and suppliers is a welcome move.

Article: BOCWW Cess is payable only in respect of cost of construction and not on supply or erection scope of works

Naresh Thacker, Partner and Alok Jain, Associate Partner, Economic Laws Practice share their views on the Supreme Court's recent judgement in Uttar Pradesh Power Transmission Corporation Ltd. & Anr. v. CG Power and Industrial Solutions Limited & Anr, SLP(C) No. 8630 of 2020.

There has been lingering controversy on whether the Building and Other Construction Workers' Welfare Cess (**BOCWW Cess**) under the Building and Other Construction Workers' Welfare Cess Act, 1996 (**BOCWW Cess Act**) and the rules promulgated in 1998, applies only to the cost of construction portion or the whole value of the contract. When computing BOCWW Cess, there existed a constant confusion surrounding the amplitude of the phrase *'cost of construction'*. Does it include the ancillary costs incurred in order to give effect to construction viz. engineering, design, supply, erection, installation, commissioning, testing etc.? Or is 'cost of construction' to be understood as per its plain meaning i.e. civil works only?

Construction contracts involve a series of activities including civil works. While merely 1-2% on 'cost of construction' does not appear to be a large sum, if this levy is to be charged on the entire contract value, the total cess liability would undoubtedly snowball into a hefty sum.

The recent judgement of the Supreme Court (**SC**) in *Uttar Pradesh Power Transmission Corporation Ltd. & Anr. v. CG Power and Industrial Solutions Limited & Anr* (**UPPTCL**) appears to have clarified this issue considerably.

In *UPPTCL*, the Owner entered into a framework agreement with the Contractor for construction of a power substation. The scope of works although towards one purpose was split into four different and distinct contracts (**Contract** / **Contracts**). These covered the **(i)** supply and delivery scope **(ii)** handling, election, testing and commissioning scope **(iii)** civil works scope and **(iv)** operation and maintenance scope.

As per the Contracts, the duty to pay the BOCWW Cess was on the Contractor and the Owner had no right of deduction from the contractors' running bills. The Owner did not originally deduct BOCWW cess at all. Upon being prompted by the report of the Comptroller and Auditor General, the Owner sought to deduct BOCWW Cess on the value of all four contracts by invoking the bank guarantee. This was despite there being no order of levy or assessment by the appropriate authorities.

Aggrieved by the Owner's attempt to deduct BOCWW Cess, the Contractor moved a writ petition under Article 226 of the Constitution of India before the Allahabad High Court. The Allahabad High Court sided with the Contractor and ultimately ordered that there could be no deduction of monies without there being an order for levy and assessment of BOCWW Cess.

In the Owner's subsequent appeal to the SC, the apex court upheld the decision of the Allahabad High Court and clarified the following key aspects:

1. BOCWW Cess was payable only on the third Contract, which covered the civil works. The first, second and fourth Contracts did not contemplate any civil works or construction works and thus did not attract levy of BOCWW Cess.
2. The BOCWW Cess could only be imposed upon the construction, repair, demolition, or maintenance or any other work of construction. Mere supply, installation and/or erection activities which did not involve construction work were not amenable to BOCWW Cess.
3. There could be no realisation of BOCWW Cess prior to an assessment by the concerned authorities. In the absence of any adjudication by the concerned department and in the absence of contractual right, it was not permissible for the Owner to deduct the BOCWW Cess.

In addition to the above, the SC also clarified that having an arbitration clause in an agreement did not preclude a concerned party from pursuing its writ remedy under Article 226 of the Constitution of India.

For now, the decision in *UPPTCL* seems to have settled the debate by ruling that 'cost of construction' would exclude design engineering supply and maintenance et cetera scope of works. However, it cannot be overlooked that in the present case, there were four different and distinct contracts for a single project with only one contract referring to construction work specifically

In the construction and infrastructure space, contracts are not always structured as was the case in *UPPTCL*. Often the scope of construction work may be integrated into the composite lumpsum contract. Often it is shown as an independent milestone in a composite contract for convenience of pricing, invoicing and payment. Due to its peculiar factual matrix, it appears that the judgement in *UPPTCL* would cover the latter category of contracts squarely. It though remains to be seen whether the reasons furnished by the SC would also apply to the former category of contracts where the supply or erection portion may not be as clearly divisible from the construction scope of works.

Presently, the controversy which arose from the varying decision of the High Courts is still pending before the three judge bench of the SC in SLP (C) No. 008256/2013. We expect further clarity to emerge on this issue as and when the said decision is pronounced.

But what does the judgement in *UPPTCL* mean for a Contractor who is presently undertaking construction and building work? *UPPTCL* provides some much needed relief to contractors where the scope of work clearly segregates the civil works from other aspects. Further, in the absence of a stipulation in their respective contracts, the Owner of premises may no longer be able deduct BOCWW Cess **(i)** at source and **(ii)** without formal assessment by the authorities. In appropriate cases, contractors may also avail a writ remedy despite the existence of an arbitration clause. Perhaps most importantly, in these testing times, contractors facing cash crunch can seek legal counsel to analyse their contracts and negotiate a reduced BOCWW Cess instead of paying it on the entire contract value.

Thank you for reading our infrastructure & energy digest. Contributing authors are:

Aakanksha Joshi, Partner

Megha Agarwal, Principal Associate

Vinit Shah, Senior Associate

Pranaav Gupta, Advocate

Farhan Ali, Associate

Shanaya Ardeshir, Associate

PLI article inputs: Adarsh Somani; Sahil Kothari

We welcome your queries and suggestions at: insights@elp-in.com

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MUMBAI

9th Floor, Mafatlal Centre
Vidhan Bhavan Marg
Nariman Point, Mumbai 400 021
T: +91 22 6636 7000

NEW DELHI

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400

AHMEDABAD

801, 8th Floor, Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8

PUNE

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

elplaw.in

insights@elp-in.com

/elplaw.in

/ELPIndia

/company/economic-law-practice