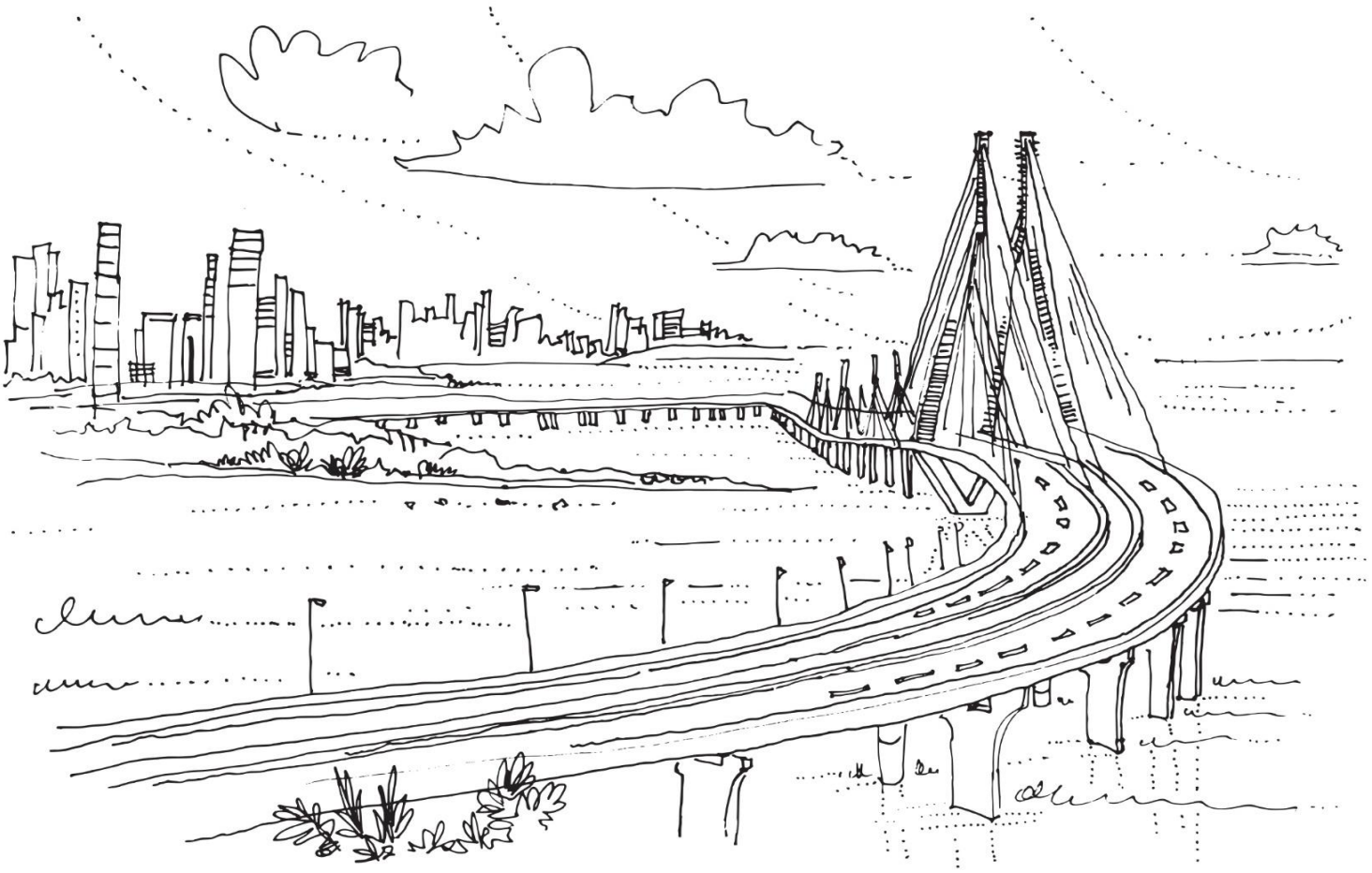
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS



Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

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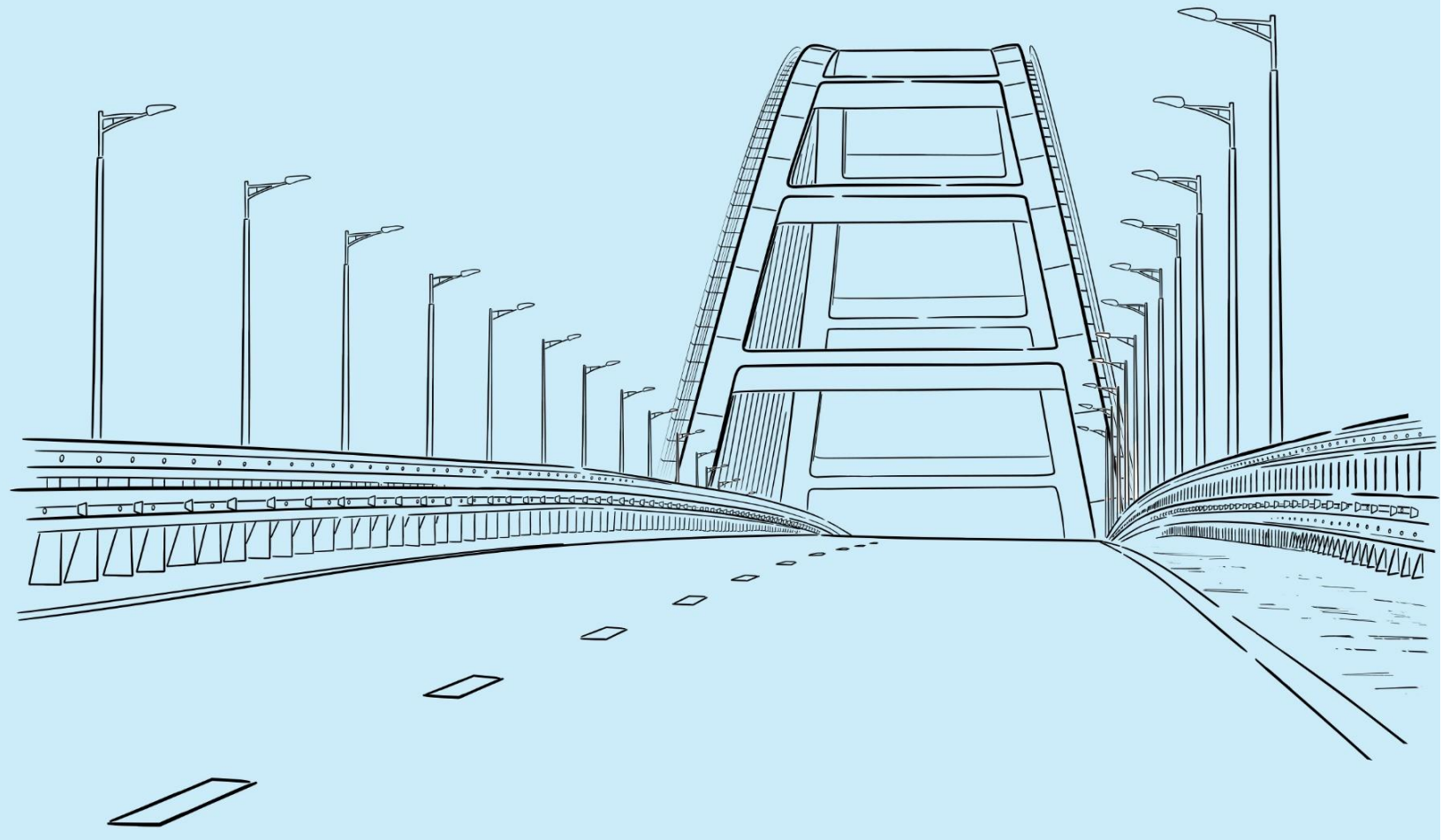
INFRASTRUCTURE



Union Budget 2022: PM Gati Shakti National Master Plan

Background

In her Budget speech, the Finance Minister (**FM**) emphasized on the importance of Gati Shakti NMP as a mode of transformative approach for economic growth and sustainable development.

- On October 21, 2021, the Cabinet Committee on Economic Affairs approved the Gati Shakti NMP.
- The approach is driven by seven engines, namely, roads, railways, airports, ports, mass transport, waterways, and logistics infrastructure.
- These engines are supported by the complementary roles of energy transmission, IT communication, bulk water & sewerage, and social infrastructure.
- The focus of Gati Shakti NMP will be on planning, financing including through innovative ways, use of technology, and speedier implementation.
- The projects pertaining to the seven engines in the National Infrastructure Pipeline will be aligned with Gati Shakti NMP framework.
- The touchstone of the Gati Shakti NMP will be world-class modern infrastructure and logistics synergy among different modes of movement – both of people and goods – and location of projects.
- It envisions integration of modes of connectivity with logistics infrastructure and industrial corridors.
- It incorporates several existing schemes such as Sagarmala, Bharatmala, inland waterways and UDAN.
- It aims to facilitate the last mile connectivity of infrastructure and reduce travel time for people. This will help raise productivity and accelerate economic growth and development.

Road Transport

- Gati Shakti NMP will be formulated for expressways in FY 2022-23.
- The aim of Gati Shakti NMP for expressways will be to facilitate faster movement of goods and people.
- The national highways network will be expanded by 25,000 km in FY 2022-23 and allocated an amount of INR 20,000 crore which will be mobilized through innovative ways of financing to complement the public resources.

Seamless Multimodal Movement of Goods and People

- The data exchange among all mode operators would be brought under a unified logistics interface platform, designed for application programming interface.
- The aforesaid platform will efficiently move goods through different modes, reduce logistics cost and time, assist just-in-time inventory management, and will eliminate tedious documentation.
- The platform would also aim to provide real time information to all stakeholders as well as improve international competitiveness and facilitate open-source mobility stack, in order to organize seamless travel of passengers.

Multimodal Logistics Parks

- Contracts for implementation of multimodal logistics parks at 4 locations through PPP mode are proposed to be awarded in FY 2022-23.

Railways

- The railways would develop new products and efficient logistics services for small farmers and SMEs along with taking the lead in integration of postal and railways networks to provide seamless solutions for movement of parcels.
- The concept 'One Station-One Product' will be popularized to help local businesses and supply chains.
- A 2,000 km network will be brought under Kavach, in FY 2022-23 as part of Atmanirbhar Bharat.

- 400 new-generation Vande Bharat Trains with better energy efficiency and passenger riding experience will be developed and manufactured as well as 100 PM Gati Shakti Cargo Terminals for multimodal logistics facilities will be developed.

Mass Urban Transport including Connectivity to Railways

- Innovative ways of financing and faster implementation would be encouraged for building metro systems of appropriate type at scale.
- Multimodal connectivity between mass urban transport and railway stations would be prioritized.
- Design of metro systems will be re-oriented and standardized as per Indian conditions and needs.

Parvatmala: National Ropeways Development Programme

- The National Ropeways Development Programme will be taken up on PPP as alternative to conventional roads in difficult hilly areas.
- Contracts for 8 ropeway projects for a length of 60 km are proposed to be awarded in FY 2022-23.
- The aim of the aforesaid programme is to improve connectivity and convenience for commuters, besides promoting tourism and also cover congested urban areas, where conventional mass transit system is not feasible.

Capacity Building for Infrastructure Projects

- The capacity building commission would provide technical support to central ministries, state Governments, and their infra-agencies to enable their skills to be upgraded.
- The aforesaid commission would assist in ramping up capacity in planning, design, financing (including innovative ways), and implementation management of the Gati Shakti NMP for all the infrastructure projects.

SEZ

- The FM announced that the Special Economic Zones Act, 2005 will be replaced with a new legislation that will enable the states to become partners in 'Development of Enterprise and Service Hubs'.
- The aforesaid move is intended to enable all large existing and new industrial enclaves to optimally utilize available infrastructure and enhance competitiveness of exports.
- The announcement follows the recommendations of the SEZ Policy Review Committee. The committee submitted its report in December 2018 and recommended the setting up of Employment and Economic Growth Enclaves in place of SEZs.
- It remains to be seen how the new legislation will overcome the hurdles that plagued SEZs such as land acquisition, site selection, connectivity and lack of support from the state Government.

River-Linking Projects

- The FM announced an outlay of INR 4,46,050 million for the ambitious Ken-Betwa river linking project.
- The FM also stated that Central Government would provide support for 5 other river-linking projects, once a consensus is reached among the beneficiary states.

Miscellaneous

- In order to promote development of the North-East region, the FM announced that a new scheme i.e., Prime Minister's Development initiative for North-East will be implemented through the North-Eastern Council. The council which will fund infrastructure, in the spirit of Gati Shakti NMP, and social development projects based on the needs of the North-East.
- The FM also allocated a record sum of additional INR 1 lakh crore in form of interest free loan for a period of 50 years to assist the states in catalyzing overall investments in the economy. The said allocation shall be used for Gati Shakti NMP related and other productive capital investment of the states.

Win-Win for Stakeholders

- The Gati Shakti NMP signals a paradigm shift in the Government approach to development planning.
- If implemented effectively, the Gati Shakti NMP would be a game-changer in inter-ministerial and inter departmental cooperation in infrastructure planning and ensure maximum utilization of resources and capacities.
- Gati Shakti NMP can be a win-win for all the stakeholders and assist in the overall economic growth of India.
- However, currently there is no legislation providing a framework for inter-governmental cooperation under the PM Gati Shakti NMP.

Union Budget 2022: Financing of Investments - Infrastructure Sector

Green Bonds

- In her Budget speech the FM announced that sovereign Green Bonds will be issued for mobilizing resources for green infrastructure in FY 2022-23.
- The announcement re-enforces the Government's commitment towards achieving the country's climate targets.
- Sovereign Green Bonds are essentially debt securities issued by the Government.
- The proceeds of the bonds would be used to fund public sector projects that have a positive impact on the environment by helping reduce the carbon intensity of the economy.

Infrastructure status

- The FM indicated that data centres and energy storage systems (including dense charging infrastructure and grid-scale battery systems) would be granted infrastructure status by inclusion in the harmonized list of infrastructure.
- This announcement is to boost credit availability to data centres and energy storage systems in the country.
- Once a sector is granted the infrastructure status, it would be entitled to several concessions, including the ability to avail credit at competitive rates and with enhanced limits for a longer duration of time.

Financial Viability of Infrastructure Projects

- The FM announced that various steps will be undertaken by the Government to enhance financial viability of infrastructure projects.
- Such measures would include PPP, availing technical and knowledge assistance from multi-lateral agencies and adopting global best practices, innovative ways of financing, and balanced risk allocation.
- Financial viability of infrastructure projects has been a long-drawn concern and it would be important to ascertain the steps undertaken by the Government in this regard.

Union Budget 2022: Energy Conservation and Climate Change

Economic Survey

- The Economic Survey 2021-22 notes that India has witnessed the fastest rate of growth in renewable energy capacity addition among all large economies, during the last 7.5 years with renewable energy capacity growing by 2.9 times and solar energy expanding by over 18 times.
- The budget speech had significant announcements pertaining to energy conservation and climate change.

Environmental Clearances

- A single window portal, PARIVESH (Pro-Active and Responsive facilitation by Interactive, Virtuous and Environmental Single-window Hub), for all green clearances was launched in 2018.
- PARIVESH was instrumental in reducing the time required for environmental approvals.
- The FM announced that the scope of PARIVESH will now be expanded to provide information to the applicants.
- Based on location of units, information about specific approvals will be provided.
- This would enable application for all four approvals (Environment, Forest, Wildlife and Coastal Regulation Zone Clearances) through a single form, and tracking of the process through 'Centralized Processing Centre-Green.'
- It is expected that the modified PARIVESH portal will be able to provide environmental clearances in a more streamlined manner.

Electric Vehicles

- Given the constraint of space in urban areas for setting up of EV charging stations at scale, the FM announced that an EV battery swapping policy will be brought out and inter-operability standards will be formulated.
- However, there was no mention of an EV battery recycling policy. The absence of such a framework could lead to environmental degradation if EV batteries are disposed of without care.

Solar Manufacturing

- To facilitate domestic manufacturing for the ambitious goal of 280 GW of installed solar capacity by 2030, the FM announced an additional allocation of INR 1,95,000 million for PLI for manufacture of high efficiency modules, with priority given to fully integrated manufacturing units from polysilicon to solar PV modules.

Circular Economy

- The FM stated that the circular economy transition is expected to help in productivity enhancement as well as creating large opportunities for new businesses and jobs.
- The FM also stated that action plans for 10 sectors such as electronic waste, end-of-life vehicles, used oil waste, and toxic and hazardous industrial waste are ready.
- The aforesaid transition would be supported by active public policies covering regulations, extended producers' responsibilities framework and innovation facilitation.
- As of last year, the Government had already begun taking steps in this regard. A case for instance would be the notification of the Motor Vehicles (Registration and Functions of Vehicle Scrapping Facility) Rules, 2021 by the Ministry of Road Transport and Highways on September 23, 2021.

Thermal Power Plants

- The FM announced that 5%-7% biomass pellets will be co-fired in thermal power plants resulting in CO2 savings of 38 MMT annually.
- The aforesaid announcement is intended to provide extra income to farmers and job opportunities to locals and help avoid stubble burning in agriculture fields.
- This announcement follows the 'Revised Policy for Biomass Utilization for Power Generation through co-firing in coal based power plants' issued by the Ministry of Power on October 8, 2021.
  - Under the aforesaid policy, thermal power plants had until 1 year to mandatorily use 5% blend of biomass pellets.
  - The obligation would increase to 7% with effect from two years from the date of the issuance of the aforesaid policy and continue thereafter.
  - The policy also stated that the minimum contract period for procurement of biomass pellets is required to be 7 years.

Energy Saving

- The FM announced the setting up of ESCO to promote energy efficiency and savings measures in large commercial buildings.
- The ESCO would facilitate capacity building and awareness for energy audits, performance contracts, and common measurement and verification protocol.
- The exact role that the ESCO will perform in light of the Energy Conservation Act, 2001 remains to be seen. The Energy Conservation (Amendment) Bill, 2022 is expected to be tabled in the present session of the Parliament.
- The FM also stated that policies and required legislative changes to promote agro forestry and private forestry will be brought in. This may entail changes in the Compensatory Afforestation Fund Act, 2016.

Tariff Measures for Blending of Fuel

- The FM reiterated that the blending of fuel is a priority of the Government. To encourage the efforts for blending of fuel, the FM announced that unblended fuel shall attract an additional differential excise duty of INR 2 per litre from the 1st day of October 2022.

Union Budget 2022: Changes to Government Procurement Policies

Replacement of Bank Guarantees with Surety Bonds

- The FM announced that the use of surety bonds in lieu of bank guarantees would be made acceptable in relation to Government procurements. The FM indicated that this move is intended to reduce indirect costs for suppliers and work-contractors.
- In September 2020, the IRDAI had published a "Report of the Working Group on suitability of offering of Surety Bond by Indian Insurance Industry", which included representations from relevant stakeholders for replacement of bank guarantees with surety bonds.
  - In the aforesaid report, IRDAI noted that the large number of representations were received in this regard as bank guarantees were becoming very problematic.
  - Banks had increased two components i.e., margin money as well as the commission. Hence, the need for an alternative option arose.
  - The report also acknowledged that as the banking sector bears the load of issuing guarantees to provide surety services to contractors. As the sector has been undergoing challenges, the cost of bank guarantees has increased.
- Earlier this year, the IRDAI released the IRDAI Guidelines which are stated to come into effect from April 1, 2022. The IRDAI Guidelines permit insurers registered under the Insurance Act, 1938 to issue surety bonds.
- Replacement of bank guarantees with surety bonds should certainly offer comfort to developers, contractors and suppliers. With the Government making this an acceptable form of security for Government tenders, private players may follow suit.
- It may be noted that security bonds being insurance contracts will be governed by the rules relating to insurance and there may be increased disclosure and good faith obligations placed on contractors obtaining such security.

Modernization of Rules for Procurement

- The FM announced that Government rules for procurement have been modernized pursuant to inputs from various stakeholders. Such rules allow use of transparent quality criteria besides cost in evaluation of complex tenders.
- With a view to address the financial issues in a project, the Department of Expenditure vide its

office memorandum dated October 29, 2021, on "General Instructions on Procurement and Project Management" has made provisions for payment of 75% of running bills, mandatorily within 10 days.

- The modernized rules for procurement are intended to encourage settlement of disputes through conciliation.
  - While conciliation is already recognized as a dispute resolution mechanism under model concession agreements in different infrastructure sectors such as roads and ports, its efficacy has been a point of discussion.
  - The conciliation proceeding may just delay the dispute resolution process as very often the disputes ultimately go through the entire process of arbitration and litigation.

E-Bill System

- As a further step to enhance transparency and to reduce delays in payments, a completely paperless, end-to-end online e-Bill System will be launched for use by all central ministries for their procurements.
  - The system will enable the suppliers and contractors to submit their digitally signed bills and claims online and track their status from anywhere.
  - The online e-Bill System may help simplify the billing and payment procedure.

Our view:
This Union Budget has reiterated the importance of the infrastructure sector in the overall growth of India. The Government has adopted a holistic approach for different infrastructure sectors through the Gati Shakti NMP. The issuance of sovereign green bonds and grant of infrastructure status to data centres and energy storage systems should grant a fillip to India's climate change targets. The measures announced in relation to PLI incentives for solar modules and EVs should also aid India's low carbon development strategy. The introduction of surety bonds as a substitute for bank guarantee will help improve the financial viability of suppliers and contractors by decreasing indirect costs. The key themes for the infrastructure announcements appear to be synergy and increased private participation to fuel ambitious growth plans and targets.

Recent Amendments to Minerals Concession Rules, 2016

Background

On November 2, 2021, the Ministry of Mines notified the Fourth Amendment to the Mineral (Other than Atomic and Hydrocarbons Energy Mineral) Concession Rules, 2016 (**Mineral Concession Rules**). The Fourth Amendment was notified to operationalize the Mines and Minerals (Development and Regulation) Amendment Act, 2021 (**MMDR Amendment 2021**) which amended the Mines and Minerals (Development and Regulation) Act, 1957 (**MMDR Act**).

The Mineral Concession Rules apply to all minerals other than minor minerals (such as gravel, clay, ordinary sand); energy minerals (coal and lignite) and atomic minerals (such as lithium, titanium, zirconium). The Mineral Concession Rules prescribe the formats in which prospective applicants are required to submit their application to the respective State Governments for the grant of *inter alia* a prospecting license and a mining lease.

Changes operationalized by the Fourth Amendment

- **Transfer of leases of non-auctioned captive mines:** In 2016, the first proviso to Section 12A(5) of the MMDR Act was added which permitted the transfer of captive mining leases which are not granted via an auction subject to certain conditions. The Fourth Amendment adds a condition that such transfer should not result in the change of the status of a

mine from a captive mine to a merchant mine or *vice versa.*

- **Sale of mineral from captive leases:** The MMDR Amendment 2021 permitted the lessee of a captive mining lease to sell up to 50% of total mineral produced in a year subject to certain conditions. The Fourth Amendment adds certain conditions. One of the conditions is that the lessee is required to maintain a separate record of such a sale in the monthly and annual returns maintained under the Mineral Conservation and Development Rules, 2017.
- **Power of State Government to condone delay:** The Mineral Concession Rules required a lessee who has been unable to commence mining operations within 2 years of the execution of a mining lease to file an application with the State Government 3 months prior to the 2-year expiry date i.e., the date from which mining lease would lapse. The Fourth Amendment gives the power to the State Government to condone this delay and grant a further period of 1 year, if a lessee makes an application after the 3-month cut-off date, provided that the application is made before the lapse of the lease.
- **Reduction in punishment:** The Mineral Concession Rules provided for a penalty of 24% simple interest to be charged by the State Government if there was a delay of more than 60 days in the payment of any rent, royalty, or any other applicable fee. The Fourth Amendment rationalizes this to 12% simple interest. Further, Rule 54 of the Mineral Concession Rules provided for punishment of 2 years or a fine which may extend to INR 5 Lakh or with both for the contravention of any provision of the Rules. The Fourth Amendment, applies the punishment to only certain specified rules, thus decriminalizing the contravention of other Rules. Further, under Rule 17(2) of the Mineral Concession Rules, a lessee is required to submit a mining plan 180 days before the expiry of a mining plan to the concerned officer. Contravention of this rule has now been decriminalized and carries a penalty by way of fine. The fine amount as stated in Schedule XII of the Rules is INR 2,000 per day subject to a maximum of INR 5,00,000.
- **Surrender of part area of mining lease:** The Mineral Concession Rules permitted the part surrender of a mining lease only in cases where the lessee has been unable to obtain forest clearance. In such cases the lessee was required to give a written notice of at least 12 months to the State Government. The Fourth Amendment permits the part surrender of a mining lease in all cases and reduces the notice period to 6 months.
- **Reduction in minimum area for grant of mining lease:** The Mineral Concession Rules stated that a minimum area for the grant of a mining lease should be not less than 5 hectares. The Fourth Amendment reduces the minimum area to 4 hectares. The Fourth Amendment further reduces the minimum area to 2 hectares for beach sands or placers which are mono or multi mineral concentrations and small deposits of limestone, bauxite, manganese, kyanite, etc. which have a depth of mineralization of up to 20 meters a strike length not exceeding 200 meters.
- **Disposal of waste mineral:** The Fourth Amendment enables the lessee to dispose of the waste rock and over-burden which is generated in the course of mining on making such payment as may be decided by the State Government.

Our view:

The Fourth Amendment brings in important procedural and substantive changes to the mining law regime in India. It however remains to be seen whether these changes are substantial enough to encourage global mining players to finally invest in India's mining sector.

ENERGY

Central Electricity Regulatory Commission (CERC) order[1] on Claims for Service Tax and GST Compensation

What were the facts of the case?

- Azure Power (Rajasthan) Private Limited (**Azure**) established a solar power generation system (**Project**) in Rajasthan pursuant to a power purchase (**PPA**) agreement executed with NTPC Vidyut Vyapar Nigam Limited (**NVVN**).
- NVVN executed power sale agreements with the DISCOMS to sell bundle power on January 14, 20211 as per the provisions of the National Solar Mission.
- Azure had outsourced operation and maintenance (**O&M**) services under the PPA to a third party. After the execution of the PPA, the law on goods and services tax (**Tax Laws**) were introduced by the Central Government. As a result of such Tax Laws, Azure incurred additional recurring and non-recurring expenditure in relation to the operation and maintenance of the Project.
- Azure claimed that the enactment of the Tax Laws would constitute a 'Change in Law' event under the PPA and consequently sought additional compensation along with carrying costs.

What did the CERC observe?

- The CERC while taking note of its earlier orders, observed that the enactment of the Tax Laws qualified as a 'Change in Law' within the terms of the PPA.
- In relation to additional compensation with respect to the O&M costs, CERC observed that the Tax Laws would apply if there was an outsourcing of the O&M services to a third party. The outsourcing of the O&M services was not the requirement of the PPAs/bidding documents. The concept of the outsourcing was neither included expressly in the PPAs nor was it included implicitly in the 'Change in Law' clause under the PPA.
- The CERC took note of its earlier orders and observed that outsourcing of O&M services is a pure commercial decision of a power developer taken for its own advantage and any increase in cost (including on account of taxes) in such case, cannot increase the liability of NVVN or other respondents.
- The CERC held that claim of Azure on account of additional tax burden on O&M expenses (if any), was not maintainable.
- In respect of claims of carrying costs, the CERC while referring to earlier orders observed that if there is a provision in the PPA for restoration of Azure to the same economic position as if no 'Change in Law' event has occurred, Azure would be eligible for carrying cost for such allowed 'Change in Law' event(s) from the effective date of 'Change in Law' event.
- The CERC held that that claim for carrying cost is not admissible since the PPA did not have a provision dealing with restitution principles of restoration to same economic position.

Our view:
Introduction of GST has been well-recognized to be a change in law event under PPAs. However, this CERC order clarifies that additional compensation would not be payable if costs were incurred on account of outsourcing services that were not contemplated under the PPA. The CERC correctly held that any increase in costs on account of a commercial decision of Azure could not make NVVN liable for increased costs.

[1] Order dated November 30, 2021, in the case of Azure Power (Rajasthan) Private Limited vs. NTPC Vidyut Vyapar Nigam Limited and others (Petition No.: 211/MP/2018)

Karnataka Electricity Regulatory Commission directs Bagasse-based Cogeneration plants to pay Cross-Subsidy Surcharge

Background:

In an order pronounced on December 3, 2021, the Karnataka Electricity Regulatory Commission (**KERC**) in the case of *Athani Sugars Limited and Others vs. Hubli Electricity Supply Company Limited and Another*[2], held that the levy of cross-subsidy surcharge (**CSS**) on bagasse-based cogeneration plants was not discriminatory in nature.

Factual Matrix:

- The petitioners, being bagasse-based cogeneration plant owners, prayed for KERC to issue a declaration that the respondent state distribution companies (**DISCOMs**) were not authorized to collect CSS under the Electricity Act, 2003 (**Electricity Act**) and to issue an order or direction that from April 2013 onwards, the petitioners were entitled to the same level of concessions as extended to the solar power projects in exempting CSS.
- The petitioners contended that in the tariff orders passed by the KERC, it was stated that CSS would not be applicable to captive generating plants for carrying electricity to destination of own use and for those renewable energy generators who had been exempted from CSS by specific orders. Except this category, there was no provision in the Electricity Act to exempt payment of CSS from any other category. However, KERC exempted payment of CSS from the consumers availing power under solar power projects from 2014, and this was discriminatory as renewable and cogeneration plants were to receive the same promotional measures under Section 86(1)(e) of the Electricity Act.
- The petitioners submitted that their projects generated power to utilize on a captive basis during the bagasse season of October to March. For the remaining months of the year, they had to depend on either the power from DISCOMs or open access power, for their consumption requirements. The quantum of imports for O&M were miniscule and were only for the purpose of their own consumption and not for third party sales to the consumers of electricity supply companies. In contrast, solar projects wheel power all through the year and so the economic impact of CSS on the DISCOMs was higher for solar projects than for the cogeneration plants.
- The petitioners further contended that they imported energy by availing inter-state open access and such procedure was regulated by the CERC regulations under which CSS could not be levied. The petitioners stated that KERC had no jurisdiction or authority to increase CSS because the open access regulations framed by it under Section 42 of the Electricity Act applied to intra-state open access transactions.
- The respondents contended that the primary objective of cross subsidy was to compensate for the supply of subsidized energy by the DISCOM. Such cross-subsidies are levied on the high-tension (**HT**) consumers of the Distribution Licensee. When HT consumers, such as the petitioners, opted for open access, DISCOMs missed out on cross-subsidy that such consumers would have paid under HT tariff. Regardless of the transmission network of the DISCOMs being utilized, the petitioners were bound to pay CSS.
- The respondents stated that due to the higher tariff for solar producers and low quantities of solar energy being produced in the state of Karnataka, KERC was justified in exempting solar producers from CSS. The respondents argued that the petitioners had no basis to import the provisions of solar energy to bagasse-based power plants, and that disallowing CSS would weaken the DISCOMs.

[2] OP No. 64 to 69 of 2020

KERC's Decision:

- The KERC stated that the decision to extend concessions such as exemption of CSS and wheeling and banking charges to the solar projects was fully justified, considering the cost of solar generation. The classification which distinguished solar power projects from other renewable energy power projects in terms of availability and costs of generation was not discriminatory. In order to substantiate this point, KERC noted that the Government of India had waived inter-state transmission charges for wheeling of power from solar and wind power projects as a promotional measure.
- The KERC held that any person who sources electricity from a source other than the DISCOM of the area would be liable to pay CSS irrespective of whether such a person is a consumer of the area DISCOM or connected to the distribution system/network of the DISCOM.
- The CERC had previously held that even though it had not specified the surcharge payable by a consumer for the use of the Central Transmission Utility's system, this did not absolve the consumer (who had been permitted open access by the state commission) of the liability to pay CSS as specified under Section 42(2) of the Electricity Act. Therefore, the petitioners' contention that KERC regulations levying CSS were not applicable to them, as the power procured by them came under CERC purview, was rejected.
- KERC clarified that the petitioners were cogeneration power plants that generated power as a part of the sugar industry to optimize energy requirements and they also procured power from the DISCOMs or through open access to meet additional power requirements. The electricity was mainly utilized for the sugar plants, which is an industry, and so they were to be classified under the HT-2(a) category. Therefore, with regard to the procurement of power under open access, the CSS applicable under such HT-2(a) category was to be levied.
- The respondents were directed to revise the demand raised on the petitioners and petitioners were ordered to pay CSS as determined in KERC's tariff orders.

Our view:
In the past, bagasse-based cogeneration plants have been exempted from the levy of CSS by certain state commissions. Thus, this order would increase the uncertainty as to whether such plants would be bound to pay CSS. Until this issue is finally settled, the levy may depend on the facts and circumstances of each case.

Tamil Nadu Electricity Regulatory Commission issues revised Guidelines for the Verification of Captive Generating Plants

Background:

In an order pronounced on December 7, 2021, the Tamil Nadu Electricity Regulatory Commission (**TNERC**) in the case of *Indian Wind Power Association vs. Tamil Nadu Generation and Distribution Corporation Limited*[3] issued revised guidelines for the verification of captive generating plants (**CGP**).

Facts of the Case:

- The Tamil Nadu Generation and Distribution Corporation Limited (**TANGEDCO**) had issued a memorandum requiring captive generators and

[3] M.P. No. 24 of 2020

captive users to submit documents and data in order to verify the status of CGP in accordance with Rule 3 of the Electricity Rules, 2005 (**Electricity Rules**). Writ petitions were filed against this memorandum. Thus, the High Court of Madras ordered TNERC to look into the matter.

- TNERC subsequently passed an order (**TNERC order**) on January 28, 2020, specifying the procedure to be followed for the verification of the status of CGP. After TANGEDCO commenced implementation as per the TNERC order, the Indian Wind Power Association and others (**Petitioners**) sought clarification from TNERC on whether TANGEDCO was both the authority to collect and collate the information, as well as the adjudicating authority.
- The Petitioners contended that since TANGEDCO was the sole distribution licensee in Tamil Nadu, there were concerns that it might hamper competition by unilaterally rejecting the CGP status. Therefore, petitioners asked for clarity on the scope, extent, and manner by which TANGEDCO would exercise the powers delegated to it. The petitioners contended that since the High Court of Madras had left he matter of jurisdiction open, TNERC was obligated to go with the binding judgements of the Appellate Tribunal for Electricity (**APTEL**). APTEL had held that the power to verify CGP status vested with the state electricity regulatory commissions.
- The APTEL, in its judgement of June 7, 2021, had set aside certain findings of the TNERC order and stated that TANGEDCO could be the verifying authority. However, if any coercive action was to be initiated, then the state commission would have to make the decision. TNERC issued the present order, with revised guidelines for verification of CGP.

Guidelines for verification:

- To facilitate the verification of CGP status as on March 31, all CGP holders are directed to submit the data as per the specified format to TANGEDCO on or before May 31 of every year. TANGEDCO will submit a report containing details of the verification to TNERC on or before July 31 of every year and furnish the details of verification viz. name of the company, date of submission of documents by CGP, compliance of twin criteria of ownership and consumption for all CGPs and other details relevant to this issue. If there is non-compliance, TANGEDCO will file a miscellaneous petition before TNERC for adjudication, and such petition must be disposed of within six months.
- The data verification procedure will be applicable from the financial year (FY) 2020-21. There cannot be any retrospective application of the procedure formulated under the TNERC order, but TANGEDCO can, for the years prior to 2020-21, verify the status of CGP based on data the CGP/captive users have already furnished while availing open access.
- The captive generators are required to identify the unit/units intended for captive consumption at the time of furnishing documents for proof of ownership. If there are one or more captive users, the user should hold not less than 26% of the equity share capital with voting rights and consume not less than 51% of the electricity generated annually for captive use. If this criteria is not met, then the generating plant will cease to be a captive generating plant, and the users, on ceasing to be captive users, will be liable to pay cross-subsidy surcharge. The verification of captive status will be done annually on the basis of the shareholding existing at the end of such FY.
- For captive users, the consumption to be considered for verification will be equal to the adjusted units grossed up with applicable transmission and distribution losses.
- All intended captive users who require approval for open access, that is, the wheeling of energy generated from their CGP to their respective high tension service connections should furnish the required documents. If there is a change in ownership in the middle of the FY, the new owner alone is required to submit documents in order to receive approval for open access or wheeling of energy.

- Failure to comply with the minimum percentage of captive use in a year would result in the CGP losing its captive status. The entire electricity generated from the project will be treated as supply of electricity by a generating company.
- The verification criteria of consumption will be based on the aggregate energy generated from generating units in a generating station identified for captive use before the commencement of captive wheeling to be determined on annual basis, i.e., gross energy generated less auxiliary consumption.
- In the case of wind energy, if CGP have multiple generating units with separate energy wheeling agreements and the ownership structure is the same in each agreement, then the aggregate energy of all generating units will be considered irrespective of separate wheeling agreements.
- TANGEDCO may also create a web portal for CGP for login of data by generators. This would help in monitoring changes in shareholding patterns and verification of data.
- TNERC in recent orders had taken the view that there was no merit in strict adherence to all conditions in Rule 3 of the Electricity Rules for CGP when restriction and control measures on supply of electricity were in place. Therefore, levy of cross-subsidy surcharge for non-compliance during such period will be decided on the merits of each case.

Our view: The aforesaid order by TNERC addresses the concerns raised by the petitioners and seeks to make the verification easier, more transparent and quicker. It would be important that the order is implemented effectively by TANGEDCO, bearing in mind APTEL's decision.

Information Technology Interventions in Electricity Distribution

Information Technology (**IT**) enablement of the distribution sector has remained one of the major thrust areas under various centrally sponsored schemes. IT enablement was taken up in 1260 towns under Restructured Accelerated Power Development and Reforms Programme (**R-APDRP**) launched by Ministry of Power (**MOP**) in 2018. Further, to expand the coverage of IT enablement of distribution business to non-RAPDRP areas, MOP approved IT enablement of an additional 1651 towns under IPDS (**IT Phase II**). The implementation of IT Phase II works in these towns is undertaken with an objective to enable the Distribution Company to improve consumer satisfaction, monitoring, carryout effective energy accounting and auditing based on use of IT enabled System.

Further, the Government of India recently launched a Revamped Distribution Sector Scheme (**Scheme**) which provides financial assistance to distribution utilities linked to reforms and improvement of performance. The scheme envisages following IT interventions to facilitate aggregate technical & commercial losses reduction:

- **Smart Metering**: Smart metering of consumers and system metering (i.e., metering of feeders and distribution transformers) is one of the major components under the Scheme to facilitate automatic measurement of energy flows and energy accounting as well as auditing without any human intervention. The Scheme envisages that along with installation of prepaid smart metering and the associated advanced metering infrastructure, the installation of communicable system meters at feeder and distribution transformer levels would enable proper energy accounting for identification of theft prone pockets and high loss areas.
- **Advanced Information and Communication Technology:** The Scheme envisages leveraging

artificial intelligence to analyse data generated through IT/OT devices including system meters, prepaid smart meters to prepare actionable Management information system from system generated energy accounting reports so as to enable the DISCOMs take informed decisions on loss reduction, demand forecasting, asset management, consumer analytics and for other predictive analysis.

- **Supervisory Control and Data Acquisition (SCADA) and Distribution Management System (DMS) in urban areas:** The Scheme envisages a system that enables an electric utility to remotely monitor, coordinate and operate distribution components in a real time from remote location.

Our view:
IT and its applications assist in the quality and reliability of supply, making billing more accurate, better complaint redressal, energy audits and achieving automation in distribution. Increased intervention of IT is the need of the hour.

SC rules Captive Power Consumers not liable to pay Additional Surcharge

Background:

In an order pronounced on December 10, 2021, the Supreme Court upheld the decision of the APTEL in *Maharashtra State Electricity Distribution Company Limited v. M/s JSW Steel Limited and Others*[4] by which it had set aside the order of the Maharashtra Electricity Regulatory Commission (**MERC**) ruling that captive consumers were liable to pay an additional surcharge.

Facts of the Case:

- Maharashtra State Electricity Distribution Company Limited (**MSEDCL**), a distribution licensee, had filed a petition before MERC for multi-year tariff approval for the FY 2014-15, provisional truing up of the aggregate revenue requirement for the FY 2015-16 and multi-year tariff approval for the third control period from FY 2016-17 to FY 2019-20.
- MERC held that additional surcharge under Section 42(4) of the Electricity Act did not apply to captive users to the extent of their self-consumption from such projects. MERC further held that it would apply to all consumers who used open access to receive supply from sources other than the distribution licensee connected to them.
- MSEDCL in its revised review petition included a prayer to approve the additional surcharge for all open access consumers including those who sourced power from captive power plants. MERC subsequently passed an order that additional surcharge was leviable on captive consumers/users.
- The respondents, being captive users and captive consumers, approached the APTEL. The APTEL in its impugned order of March 27, 2019, set aside the MERC order and held that the group of captive consumers were not liable to pay the additional surcharge to MSEDCL.

Supreme Court Decision:

- MSEDCL's argument that captive generation was subject to regulations as per Section 9(1) of the Electricity Act and contention that captive users had to pay the additional surcharge because open access to carry electricity from captive power projects to the destination of use was regulated by Section 42(4) of the Electricity Act was rejected.
- The Supreme Court observed that under Section 9 of the Electricity Act, anyone who has a captive generating project has the right to open access, to transmit electricity from the captive power project to the destination of use, subject to the availability

[4] Civil Appeal Nos. 5074-5075 of 2019

of transmission facility that will be determined by Central or State Transmission utility. This right to open access to transmit electricity to the captive user is granted by the Electricity Act and does not require permission from the state commission.

- The Supreme Court stated that as per the scheme of the Electricity Act, there can be two classes of consumers:
  - The ordinary consumer or class of consumers supplied with electricity for their own use by a distribution licensee and;
  - Captive consumers, who are permitted to generate for their own use as per Section 9 of the Electricity Act.
- The Supreme Court further observed that ordinarily, consumers or class of consumers receive electricity supply from the distribution licensee in their area of supply. If the state commission permits them to receive a supply of electricity from a person other than their distribution licensee, then payment of additional surcharge under Section 42(4) of the Electricity Act must be made on wheeling charges in order to meet the fixed costs which arise out of the distribution licensee's obligation to supply. In such a case, additional surcharge levied under Section 42(4) is justified as compensatory in nature.
- It was observed that captive users/consumers form a separate class by themselves and cannot be compared to consumers as defined under Section 2(15) of the Electricity Act. This is because they incur considerable expenditure for constructing, maintaining, and operating captive generation plants and dedicated transmission lines. Consumers do not incur any expenditure and/or invest any amount at all, and so the levy of additional surcharge on captive users/consumers will lead to unequal's being treated equally.
- The Supreme Court held that captive consumers/users were not liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act. Since it would be a significant liability to refund what had been recovered at a stretch, the Supreme Court directed MSEDCL to adjust the additional surcharge already collected in future bills for wheeling charges.

Our view:
The additional surcharge of INR 1.25 per unit for captive power consumers/users was discriminatory and not in line with the open access concept envisioned under the Electricity Act and the National Electricity Policy. The decision of Supreme Court would help provide the requisite clarity for the captive power industry.

MNRE Increases Performance Bank Guarantee for Upcoming Renewable Tenders

- The Ministry of New and Renewable Energy (**MNRE**) *vide* its letter dated December 16, 2021, to Solar Energy Corporation of India (**SECI**), NTPC Limited (**NTPC**) and NHPC Limited (**NHPC**) reinstated the requirement of an earnest money deposit (**EMD**) in renewable energy tenders (**RE Tenders**).
- The value of the EMD would be 2% of the estimated project cost.
- MNRE has also increased the value of the performance bank guarantee and directed the implementing agencies (SECI/NTPC/NHPC) to include performance bank guarantee (**PBG**) of 4% of estimated project cost (in case of site specified by the procurer) and 5% of estimated project cost (in case of site selected by the generator) in all RE Tenders.
- In December 2020, MNRE had decreased the performance security to 3%, whereas the requirement of the EMD was replaced with the provision for bid security declaration.

Our view:
The reintroduction of the EMD may affect the financial viability (and working capital) of many bidders, while they overcome the adverse financial implications of COVID-19. Further, given the Finance Minister's announcement in the recent budget, it remains to be seen whether MNRE would accept surety bonds in lieu of PBG.

Central Electricity Regulatory Commission directs Solar Developer to approach SECI for change in Law Claims

Background:

In an order pronounced on December 16, 2021, the CERC in the case of *Azure Power Forty One Private Limited and Azure Power India Private Limited vs. Solar Energy Corporation of India Limited, Grid Corporation of Odisha and BSES Rajdhani Power Limited*[5] and *Azure Power Maple Private Limited and Azure Power India Private Limited vs. Solar Energy Corporation of India Limited and Madhya Pradesh Power Management Company Limited,*[6] directed Azure Power Forty One Private Limited (**Petitioner 1**), Azure Power India Private Limited (**Petitioner 2**) Azure Power Maple Private Limited (**Petitioner 3**) and Petitioner 2 (hereinafter collectively referred to as the **Petitioners**) to approach Solar Energy Corporation of India Limited (**SECI**) for change in Law claims due to the increase in customs duty on solar inverters.

What are the facts of the case?

- The Petitioners had filed petitions under Section 79 of the Electricity Act read with Article 12 of the PPAs dated September 17, 2021, in Petition No. 226/MP/2021 and dated November 27, 2019, in Petition No. 227/MP/2021. The Petitioners sought an appropriate mechanism for grant of adjustment/ compensation to offset financial/ commercial impact of change in law event on account of rescission of Notification No. 1/2011 – (Customs dated January 6, 2011, vide Notification No. 7/2021 - Customs dated February 1, 2021). The aforesaid notifications resulted in increase in rate of basic customs duty on solar inverters imported into India from 5% to 20% to encourage domestic manufacturing.
- SECI observed that the MOP had notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (**Change in Law Rules**) and therefore the Petitioners were required to follow the process specified thereunder. In response to the aforesaid observations, the Petitioners contended that they were in fact already in the process of filing the present petitions prior to the notification of the Change in Law Rules. The Petition also contended that the Change in Law Rules had a prospective application and that the Change in Law event relating to the rescission of Notification No. 1/2011- Customs dated January 6, 2011, vide Notification No.7/2021-Customs dated February 1, 2021, had occurred prior to the notification of the Change in Law Rules.

What was CERC's judgement?

- CERC observed that on occurrence of a change in law, the affected party i.e., the Petitioners, and the respondents, were required to settle the change in law claims amongst themselves and approach CERC only in terms of Rule 3(8) of the Change in Law Rules.
- CERC observed that from a plain reading of the definition of change in law as stated in Rule 2(1)(c) of the Change in Law Rules, it was clear that the definition of change in law would come into effect unless otherwise defined in the agreement. It cannot, in any manner, be construed to mean that the Change in Law Rules would apply only to those agreements which do not have the change in law provisions. The phrase "*unless otherwise defined in the agreement"* was used in the context of the definition of change in law and not in the context of applicability of the Change in Law Rules.
- CERC observed that the Petitioners did not point out any specific provision in the Change in Law Rules which prevented them from recovering custom duty under change in law. Change in Law Rules were framed to facilitate timely recovery of costs due to change in law events and provides a process and methodology to be followed. Accordingly, the Petitioners were required to first approach SECI/procurers in terms of the Change in

[5] Petition No. 226/MP/2021

[6] Petition No. 227/MP/2021

Law Rules for adjustment of tariff on account of such change in law.

- CERC also noted that the compensation for change in law had to be computed in terms of Rule 3(5) of the Change in Law Rules, which provided that where the agreement lays down any formula, the same shall be in accordance with such formula; or where the agreement does not lay down any formula, it would be in accordance with the formula given in the schedule to the Change in Law Rules.
- Thus, CERC directed the Petitioners to approach SECI/procurers for settlement of change in law claims in terms of the Change in Law Rules and approach SECI only in terms of Rule 3(8) of the Change in Law Rules and accordingly disposed of both the petitions.

Our view:
CERC in the past has directed SECI to compensate solar developers for the additional cost incurred due to the imposition of the Goods and Services Tax (GST). However, in the present case, CERC directed the Petitioners to approach the respondent i.e., SECI for settlement of change in law claims as per the Change in Law Rules. As the aforesaid rules have been framed to facilitate timely recovery of costs due to change in law events and detail the methodology to be followed, they should ease out any issues for change in law claims.

APTEL rules in favor of a delayed solar project in Karnataka

Background:

In an order pronounced on January 6, 2022, the Appellate Tribunal for Electricity (**APTEL**) in the case of *Vatsala Bellary Solar Projects Private Limited vs. Karnataka Electricity Regulatory Commission and Another*[7], condoned the delay in commissioning of the solar project of Vatsala Bellary Solar Projects Private Limited (**VBSPPL**).

Facts of the case:

- The 2 MW solar project was established by VBSPPL, a solar power project developer, in response to a State Government program that encouraged land-owning farmers to set up such projects and facilitate the development of solar energy in the state of Karnataka.
- The scheduled commercial operation date (**SCOD**) of the project was January 2, 2017, but the project achieved the commercial operation date (**COD**) on July 2, 2017. VBSPPL contended that the approval for land conversion took 10 months at the government level, which derailed the project commissioning timeline.
- VBSPPL stated that the delay came under the 'Force Majeure' clause of the power purchase agreement (**PPA**) executed by the parties, and extension of the commissioning date was subject to an amicable resolution. The PPA would govern the dispute resolution process, and its provisions clearly stated that the Karnataka Electricity Regulatory Commission (**KERC**) could only adjudicate in the absence of an agreement.
- A government committee was set up to look into the issues of delays in projects under the scheme and they agreed with the contentions of various power project developers that the delays in approval had occurred at the end of the government departments, including on the issue of land conversion. The committee recommended granting an extension of SCOD up to 6 months.

[7] Appeal No. 66 of 2020 and IA No. 2058 of 2019

- VBSPPL approached the procurer, Bangalore Electricity Supply Company Limited (**BESCOM**), who agreed to grant an extension of 6 months as per the PPA and communicated the same by a letter dated March 2, 2017. However, KERC issued a general order on March 16, 2017, directing that no extension of time could be granted without its prior approval. Subsequent to the order, BESCOM's board of directors approved the extension of 6 months as the letter had communicated to VBSPPL but added a precondition that this extension would be subject to the approval of KERC. BESCOM declined to pay the agreed tariff and insisted that the contracted rate could not be enforced without KERC agreeing to the extension.
- To seek approval, VBSPPL filed a petition with KERC. The KERC order dated July 10, 2018 (**impugned order**) rejected the petition and observed that there had been a delay of 7 months from the effective date of the PPA on VBSPPL's part in applying for land conversion. KERC then proceeded to reduce the tariff to INR 4.36 per unit from the agreed rate of INR 8.40 per unit and imposed damages, including liquidated damages for the delay in commencement of supply of power to BESCOM. VBSPPL approached APTEL to appeal the impugned order.

APTEL's judgement:

- APTEL observed that the relevant clauses of the PPA allowed for the parties to amicably resolve issues such as a delay in achieving the COD of the project. BESCOM had the discretion to agree to or deny the request, but it chose to agree to an extension of 6 months.
- APTEL stated that the general order passed by KERC could not take away the effect and import of the agreement achieved when BESCOM communicated its consent via letter to VBSPPL. The condition added by BESCOM's board of directors regarding prior approval of KERC being necessary was also incorrect.
- APTEL noted that KERC erred by inquiring into the reasons for the delay so as to deny the benefit of the extension agreed upon by the parties in accordance with the contractual provisions and as per the PPA.
- APTEL set aside the impugned order and approved the delay of 6 months initially granted by the BESCOM letter without any pre-conditions.
- While condoning the delay in the commissioning of the project, APTEL directed BESCOM to honour its obligations at the original tariff of INR 8.40 per unit under the agreed terms of the PPA and to make up for the deficiency in payments for the period up to the date of this judgement.

Our view:
In a similar matter, APTEL had previously ruled in favor of the developer in the case of Chennamangathihalli Solar Power Project LLP vs. Bangalore Electricity Supply Company Limited and Another[8]. The appeal[9] against the aforesaid order of the APTEL was dismissed by the Supreme Court. Given the above, SERCs may follow such rulings and pay heed to the contractual provisions whilst arriving at the decision.

[8] Appeal No. 351 of 2018 and IA No. 505 of 2020 and IA No. 1703 of 2018 and IA No. 249 of 2019

9 Civil Appeal No. 3958/2020

Notifications on amendment to Approved Models and Manufacturers of Solar Photovoltaic Modules (Requirement of Compulsory Registration) Order, 2019

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 the solar modules.

Why are the notifications issued by MNRE?

- Earlier, the MNRE issued notification dated February 2, 2021, amending certain provisions of the ALMM Order No. 283/54/2018-Grid Solar dated January 2, 2019 ("**ALMM Order**") and notification dated March 10, 2021, regarding the implementation of the ALMM Order.

- Thereafter, the MNRE issued another notification dated January 13, 2022, amending provisions of the ALMM Order (**Amendment Notification**).

What is the amendment?

- The MNRE amended paragraph 3 of the ALMM Order vide the Amendment Notification.
- Previously, only the models and manufacturers included in the ALMM would be eligible for use in Government/ Government assisted projects/projects under the Government Schemes and Programmes.
- As per the amendment, models and manufacturers included in the ALMM will now be eligible for use in Government Projects/ Government assisted projects / projects under the Government Schemes and programmes / open access as well as the net-metering projects.
- It has been clarified that "Projects under Government Schemes and Programmes" referred above, includes projects set up under Component 'A' of PM-KUSUM Scheme. Further, the above amendment will be applicable on renewable energy projects which apply for open access or net-metering facility from April 1, 2022

Our view:

The ALMM amendment by MNRE is a significant announcement in the interest of all stakeholders. The amendment will enable consumers to get better quality and reliable supplies. The lenders and investors would have confidence on their investment as modules are a major component of solar power projects.

The announcement has come at a time when the basic custom duty would be implemented. The combined effect of both these moves would be massive and would help India grow and become a solar manufacturing hub in the coming years. The move will help provide necessary ammunition to the 'Make in India' movement and will also help smaller manufacturers expand capacities and improve business as the industry will see an uptake in demand.

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