Change in Law

Evolving dimensions of infrastructure contracts

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Certain unique features of infrastructure projects distinguish them from regular commercial arrangements. The most recent legislative recognition of the fact that infrastructure services are public goods involving facilities that cannot be denied to citizens and invariably lack substitutes came in the form of the 2018 amendment to the Specific Relief Act, 1963. Invariably, infrastructure facilities are premised on concessions granted by the state (licences, mining rights, use of airwaves, rights of way, etc.). They involve large upfront capital investments (the National Infrastructure Pipeline for 2019-24 targets an investment of $1.4 trillion of which 70-80 per cent will be debt) with long gestation periods (construction phase) and regulated returns. They comprise vital inputs to the economy (roads, telecom, airports, power supply), which have multiplier effects on GDP growth, and a negative impact when they are unreliable or in shortage. Infra assets have long lives (20-60 years) and are tied up in complex long-term contractual frameworks. This includes a mechanism in policy, legislative and contractual frameworks to tackle any unforeseen and uncontrollable change that threatens the survival of the facilities (called incomplete contracts by economists).

This aspect came to be recognised globally in the past five decades (under Ronald Reagan in the US and the Margaret Thatcher government in the UK) with the emergence of regulatory institutions and regulated contracts. Indian legal and policy frameworks have evolved over the past three decades with the implementation of the landmark decision of 1991 to liberalise the economy by changing industry structures to create a space for private investment and competition for state-owned incumbents. These changes are enshrined in laws and policies governing the infrastructure sectors – roads and highways, telecom and broadcasting, electricity, petroleum and natural gas, airports, et al. The key structural changes began with the rules of the game being altered to permit private sector participation and create a level playing field to attract such investments while recognising the need to recover prudent costs and a reasonable return on investment. The idea was pushed to move out of an economy of shortage and give competitive choice to consumers while ensuring quality, safety and reliability of the infrastructure service. Along with this came the need to regulate entry and exit, quality of service, safety, pricing including issues of subsidy (taxpayers funding part of the cost of those who cannot afford) and cross-subsidy (richer consumers sharing part of the cost for those not so affluent), and expert time-bound adjudication and appellate reviews. In essence, this came at a cost to the freedom of parties to contract.

The India's journey of liberalisation/economic reforms to create space for private sector participation, including foreign direct investment, started with the Industrial Policy Resolution, passed on July 24, 1991. Soon after, on September 15, 1991, the Electricity Laws (Amendment) Act, 1991 was passed to amend the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, providing for participation by private generating companies and their tariff, etc. The National Highways Authority of India Act was amended in 1995 to add Section 8A, enabling the award of concessions to the private sector to build and operate highways, as also collect tolls. The Telecom Regulatory Authority of India Act, 1997 was enacted to, inter alia, enable private operators to establish and operate mobile telephony and value-added services for a fee. The Electricity Act, 2003 was enacted to, inter alia, establish regulatory commissions at the centre and in states, distance governments from regulation, attract private sector participation

and facilitate consumer choice.

Over two decades (1991 to 2010), these industries had their share of bittersweet experiences in the public-private partnerships experiment. Some of the vexed issues doing the rounds before the legislature, statutory tribunals and courts concerned auctions, payments, contract enforcement and exclusivity claims. Other issues that caught the imagination included the award of concessions for airport development in Delhi and Mumbai, flaws in the 2G spectrum allocation and imputed loss to the exchequer, the ad hoc coal mine and coal linkage allocations, and the failure of Coal India Limited and its subsidiaries to supply adequate coal to thermal plants that had been promised enough supply to meet 85 per cent of the annual power generation.

In this piece, we are looking at thermal plants and the problems that arose for them after the Government of India induced private investments on the back of (i) assurance of coal linkages, (ii) an expert regulatory regime assuring cost-reflective tariffs with reasonable returns for bilateral power purchase agreements (PPAs), and (iii) a robust framework for bid-out PPAs, with restitution provided for unforeseen changes that impair the investment. Adding to the problem was the fact that, anticipating higher demand for power, the Government of India had rolled out the ultra-mega power policy to attract investments in 4,000 MW thermal power plants using the latest supercritical technology at coal mines (domestic coal) or ports (imported coal). These had been facing coal shortages domestically, and an exponential price rise for imported coal (from Indonesia, Australia, etc.) due to spiralling demand from India and China.

On March 3, 2023, a division bench of the Supreme Court of India pronounced a landmark judgment in the Maharashtra State Electricity Distribution Co. Limited vs Adani Power Maharashtra Limited (2023 SCC OnLine SC 233) case, reaffirming the progressive approach of

the Supreme Court in enforcing the rights of parties arising out of regulated contracts. The three noteworthy findings in this ruling are summarised below:

- Restitution for change in law must result in full compensation for adverse economic impact without any discounting or reductions – be it for coal quality (gross calorific value of coal and station heat rate) or quantity.
- Courts will not normally interfere with the concurrent findings of expert bodies such as the Central Electricity Regulatory Commission and the Appellate Tribunal for Electricity, except in rare cases where the decision of the expert body (i) fails to consider mandatory statutory provisions, or (ii) is made on extraneous considerations, or (iii) is ex-favour illegal and arbitrary.
- The Supreme Court deprecated the practice of state instrumentalities taking contradictory stances from policy decisions of the government, as well as divergent stands on the same issue at different points in time. It expressed concern that such conduct effaces the stated purpose of the Electricity Act.

This ruling cements a line of evolving regulatory jurisprudence, securing generators against the unintended "expropriatory" impact of unforeseen changes. This was built up over the past six years in judgments such as Energy Watchdog [(2017) 14 SCC 80]; Nabha Power & Talwandi Sabo v PSPCL [(2018) 11 SCC 508]; Uttar Haryana Bijli Vitran Nigam v Adani Mundra [(2019) 5 SCC 325]; Jaipur Vidyut Vitran Nigam vs Adani Rajasthan [2020 SCC Online SC 697]; UHBVNL vs Adani Power [(2023) 2 SCC 624]. It will go a long way in allaying the apprehensions of investors regarding the country risks and expropriation risks of investments made in Indian infrastructure projects, and strengthen the implementation of the ambitious Rs 111 trillion National Infrastructure Pipeline and the Rs 6 trillion National Monetisation Pipeline.

Another line of judgments was delivered by the Supreme Court reaffirming the principles settled since 2017 on April 20, 2023 in brief:

- Compensation for any event qualifying as change in law after the bid cut-off date must fully restore the suffering party to an economic situation as if such change had not occurred. The resultant change will be in consumer tariff.
- Once a regulatory commission and the Appellate Tribunal have returned concurrent findings on any claim, the Supreme Court shall not interfere with it lightly – unless it finds perversity, arbitrariness or contravention of a statutory provision.
- The court has expressed its concern about the persistent litigation in multiple rounds to avoid the implementation of judgments. It has cited, with approval, the Report of Standing Committee of Parliament regarding Change in Law and directed public utilities to not resort to dilatory tactics that will burden end consumers undeservedly with high carrying costs. It has directed the Ministry of Power to devise a mechanism to avoid unnecessary and unwarranted litigation.

It is gratifying to see these recent judgments, which are a milestone in the journey of investors seeking restitution against unforeseen fundamental changes in bid-out PPAs that we have had the privilege to anchor for Indian power generators over the past decade (Tata Power, Adani, Reliance, GMR and GVK), since 2011. We must not forget the magnitude of unpaid dues and subsidies, stressed assets and debts in the power sector, which were recognised as a critical risk for the Indian economy by the Reserve Bank of India in June 2022 and by the Report of the Power Finance Corporation in August 2022. ■