

## Investment in Renewable Energy

Energy security, rising prices, Government policies, changing tariff structure and wide availability of energy sources are some of the rapidly changing factors affecting the energy scenario in India, making it one of the most attractive countries for investment in renewable energy. Government of India provides a host of incentives to investors in the renewable energy sector including setting of renewable energy generating standards for utilities, creating a structure for trading renewable energy certificates etc.

As per the extant Foreign Direct Investment (“**FDI**”) norms, 100 percent investment in the renewable energy sector as equity is allowed under the Automatic Route.

Generation, distribution and transmission of electricity in India is primarily governed by Electricity Act 2003, National Electricity Policy and the National Tariff Policy. Central Electricity Regulatory Commission (“**CERC**”), the nodal regulatory body to promote competition and efficiency in the energy market, has passed new regulations, tailored to provide higher returns on investments made by the companies.

India, in the recent times, has streamlined the funding of renewable energy projects. Government agencies under the aegis of Indian Renewable Energy Development Agency (“**IREDA**”) promote, develop and extend financial assistance for renewable energy and energy efficiency/conservation projects. Of late, the growing awareness and favorable Government policies & regulatory mechanisms (both at central & state level) have led to the gradual confidence boost of domestic commercial banks providing loans to the renewable energy projects. A number of microfinance institutions (“**MFIs**”) facilitate the purchase of renewable energy systems like solar cookers, solar lanterns, or small biogas plants in off-grid areas of India. There are also provisions for soft loan facilities for industries ancillary to renewable energy projects.

The Government started the Jawaharlal Nehru National Solar Mission (“**JNNSM**”) which is a major initiative of the Government of India and State Governments to promote ecologically sustainable growth while addressing India’s energy security challenges. The JNNSM seeks for solar energy to obtain grid parity with coal by 2030 and seeks to deploy 20,000 MW of solar power by 2022. Apart from generation of solar power, a plethora of opportunities for foreign companies exist in the ancillary industries like EPCs, developers, component or equipment manufacturing, solar farm analytics ,training and support industries.

The Government also provides for a Special Incentive Package Scheme (“**SIPS**”), providing 20 percent of the capital expenditure during the first 10 years for semiconductor industries, including manufacturing activities related to solar PV technology located in Special Economic Zones (“**SEZ**”), and 25 percent for industries not located in an SEZ.

Wind energy sector has evolved as one of the most lucrative option, having an average growth rate of 30% and being the fastest growing source of renewable energy in the world. India has an installed capacity of 14158 MW and occupies the fifth place in the world in wind energy generation. The sector offers opportunities in the industries of Project Developers, Turbine Component Manufacturing, and Wind Energy Analytics. There are provisions for concession on import duty on specified wind turbine components and 100% exemption from excise duty on certain wind turbine components provided by the Government. The policies of Government also provide for a guaranteed market through a specified Renewable Portfolio Standard policy in some states, as decided by the state electricity regulators. The policy obligates each retail seller of electricity to include in its resource portfolio a certain proportion of power from renewable energy resources, such as wind, solar, small hydro and various forms of biomass energy.

Hydro energy is yet another sector which received tremendous interest from investors. India has an assessed hydropower potential to the tune of 84,000 MW out of which only about 20% has been developed so far. Recognizing the fact that sanctioning of projects is itself a process that requires streamlining, the Ministry of Power, Ministry of Finance, Ministry of Environment and Forests and the Planning Commission are working to minimize the time cycle for sanctions by reengineering processes. Special emphasis is being given to expediting environmental clearances. In addition to that hydro projects are entitled to all the benefits available to the other sectors.

Under the Electricity Act, 2003, the State Electricity Commissions define certain entities as *obligated entities* (which include the distribution licensees, users owning captive power plants, open access consumers etc). These entities are mandated to comply with Renewable Purchase Obligation (“**RPO**”) (minimum percentage of power purchased from renewable energy sources). This entails drafting and negotiating of various contractual agreements, of which, Power Purchase Agreement (“**PPA**”) is often regarded as the central document in the development of independent electricity generating assets (power plants), and is a key to obtaining financing for the project. A PPA is a legal contract between an electricity generator (provider) and a power purchaser (host). The power purchaser purchases energy, and sometimes also capacity and/or ancillary services, from the electricity generator. The relevant guidelines for the formation of the same have been put forth in the Electricity Act, 2003 and have to be carefully considered while

drafting the PPAs.

On the tax incentives front, the Government has allowed project developers to take 80 percent accelerated depreciation on assets deployed in renewable energy generation and given a ten year tax holiday to the sector and concessional duties for imports. Also, the setting up renewable energy industries does not require any industrial clearances. The Government has provided Customs Duty exemptions for renewable energy spares and equipment.

Another incentive to invest in renewable energy is the initiation of the Renewable Energy Certificate (“REC”) mechanism. They are certificates given to an entity on the basis of the renewable energy initiatives taken by them. According to the laws of different states, every entity is supposed to meet certain Renewable Purchase Obligations which are basically the minimum RECs an entity is statutorily required to have. RECs are now a tradable commodity and are traded in CERC approved Power Exchanges.

*Disclaimer:*

*This Note provides only an introduction and a general overview of investment in renewable energy sector in India. It should not be relied upon as a substitute for legal advice.*

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## COMPULSARY LICENSING

In a landmark decision, the Controller General of Patents granted a go ahead to Hyderabad-based Natco Pharma Ltd to make and sell an aped version of German drug maker Bayer AG’s patented cancer treatment drug Nexavar. It’s the first time that an Indian company has been granted a compulsory license to market a generic version of a patented drug.

A compulsory license is when a government allows someone else to produce the patented product or process without the consent of the patent owner.

India has subscribed to various international agreements for the protection of intellectual property which contains varied provisions regarding compulsory licenses, the earliest being the **Paris Convention for the Protection of Industrial Property**. This convention applies to industrial property in the widest sense and includes patents, marks, industrial designs, trade names, geographical indications and the repression of unfair competition. The purpose of the Paris Convention is to promote uniformity in patent law as well as lay down the rules to safeguard the inventions of inventors internationally. This convention is administered by the World Intellectual Property Organization (WIPO). Article 5 of the Convention empowers each country to take legislative measures for compulsory licensing so as to prevent

abuse of the patented invention resulting from exclusive rights conferred by the patent. It further lays down that the application of a compulsory license cannot be based on the grounds of failure to work or insufficient working before the expiration of a time period of four years commencing from the date of the patent application or three years from the date of the grant of the patent, subject to whichever period expires last. The application will be refused if the patentee furnishes legitimate reasons for his inaction. Such a license will be non – exclusive and non-transferable.

Perhaps the most important and comprehensive international agreement on intellectual property rights that India entered into is the **Trade-Related Aspects of Intellectual Property Rights (TRIPS)** which is administered by the World Trade Organization (WTO). Under the WTO's TRIPS Agreement, CLs are a legally recognized means to overcome barriers in accessing affordable medicines.

Article 31 of the agreement contains provisions for "*Other Use Without Authorization of the Right Holder*". It lays down that where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

- Authorization shall be subject to individual merits.
- Such use may be permitted if the proposed user has attempted to obtain authorization from the right holder at reasonable commercial terms and conditions but these efforts have failed to materialize within a reasonable time period. This requirement may be waived in case of national emergency, other circumstances of extreme urgency or in cases of public non-commercial use.
- The use is non –conclusive and non – assignable.
- Such use is authorized for supply to the domestic market predominantly
- The right holder is entitled to adequate remuneration considering the economic value of the authorization
- Authorization for such use shall be liable, subject to safeguarding the legitimate interests of the person so authorized, to be terminated if and when the circumstances which led to such authorization cease to exist and are not likely to recur.
- The legal validity of any decision relating to the authorization as well as the remuneration of the right holder shall be subject to judicial review or other independent review by a distinct higher authority in that Member.

It is important to note that TRIPS provides great flexibility for a member state to deploy "compulsory licensing" provisions.

In November 2001, the Doha Ministerial Declaration on TRIPS and Public Health was introduced with a view to address the public health problems faced by many

developing and least-developed countries especially those arising from HIV/AIDS, tuberculosis, malaria and other epidemics afflicting and making the TRIPS Agreement a part of the national and international action taken to address these problems. It also helped in clarifying the flexibilities provided by the TRIPS Agreement. With respect to compulsory licensing the Declaration stated the following provisions:

- Each member has the right to grant compulsory licenses as well as the freedom of determining the grounds upon which such license can be granted.
- Each member has the right to determine what constitutes national emergency or other circumstances of extreme urgency. It being understood that public health crises including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics can be representative of a national emergency or other circumstances of extreme urgency.

The General Council of the WTO vide its judgment dated 6th December, 2005 decided to amend the TRIPS Agreement by inserting Article 31bis after Article 31. Article 31 (f) states that production under compulsory license must be predominantly for domestic market. This would limit the ability of countries that are unable to make pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are patented. However, this amendment would enable any member country to export pharmaceutical products made under a compulsory license for this purpose.

In India, the provisions regarding compulsory licensing is contained in Chapter XVI of the **Patents Act, 1970**. Section 84 of the Act lays down that three years after the grant of a patent, any entity may, notwithstanding that he is already the holder of a license under the patent, apply to the patents office for a license to sell a generic version of the drug. The patent regime further provides that compulsory licenses can be issued, if:

1. The patented invention is not able to meet the “*reasonable requirements*” of the public.
2. The patented invention is not reasonably priced

The circumstances constituting failure to meet the “*reasonable requirements*” of the public are further elaborated in Section 90 of the Act.

While considering the application for Compulsory License the Controller should take note of matters such as:

- The nature of the invention, the time period which has elapsed since the sealing of the patent as well as the measures adopted by the patentee to fully work the invention.
- The ability of the applicant to work the invention to the utmost advantage of the

public.

- The capacity of the applicant in undertaking the risk for providing capital and working the invention, subject to the application being granted.

After considering the application and the abovementioned matters if the Controller is satisfied that the patented invention is unable to meet the “*reasonable requirements*” of the public or that the patented invention is not available to the public at a reasonable price he may then order the patentee to grant the license to the applicant upon such terms as he may deem fit.

Indian legal environment is very conducive to the concept of Compulsory Licensing. The proof of the fact rests in India’s participation in a number of international agreements safeguarding intellectual property of which compulsory licensing is an important provision as well as in enacting legislative material like the Patents Act, 1970 which promote compulsory licensing vide its many provisions. The most recent and important being the Natco v. Bayer landmark judgment which showcases India’s policy of encouraging the concept of Compulsory Licensing.

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### **Analysis on the Judgement of of Financial Software & Systems Pvt. Ltd. - Implied exclusion of Part I of the Arbitration Act, 1996**

The Madras High Court in the matter of *Financial Software & Systems Pvt. Ltd. vs. ACI Worldwide Corp. & Ors.*<sup>1</sup> (“**Respondents**”) have continued to hold that Indian Courts have no jurisdiction to entertain an Application under Section 9 of the Arbitration and Conciliation Act, 1996 (ACT) if the governing law (substantive law) and the curial law (procedural law) of the contract is a foreign law, thereby impliedly excluding Part I of the Act.

The Dispute Resolution Clause before the Madras High Court was, “*This Agreement shall be construed and enforced in accordance with and governed by the laws of Singapore. The Parties hereby agree that any act to enforce the terms of this Agreement, or for any other remedy arising out of said Agreement, will be settled exclusively by compulsory arbitration in accordance with Arbitration Rules of the Singapore International Arbitration Centre (“SIAC”); except that either Party may pursue legal/equitable remedies in any court of competent jurisdiction.*”

The Application filed under Section 9 of the Act was dismissed by the Single Judge on the ground that Part I of the Act was excluded.

The Issue before the Appeal Court was whether the Court had the jurisdiction to entertain an Application under Section 9 of the Act.

The Madras High Court while interpreting the Dispute Resolution Clause relied on

the judgement of the Supreme Court (“SC”) in the matter of *Sumitomo Heavy Industries Limited vs. ONGC*<sup>2</sup> that for any given arbitration, several laws are applicable including:-

- The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.
- The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.
- The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.

The Madras High Court further held that the proper law governed the agreement itself and in the absence of any stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is the law governing the agreement, which would also be the proper law applicable to the arbitration proceedings. The Madras High Court clarified that in the absence of any express agreement, it is presumed that the curial law is the law of the seat of arbitration and operates during the continuance of the proceedings providing the powers to the Court within its jurisdiction to entertain applications in conformity with the requirements of the curial law and the powers seize when the arbitration proceedings are concluded.

The Madras High Court relied on other decisions of the SC, namely, *Dozco India Private Limited v. Doosan Infracore Company Limited*,<sup>3</sup> *Videocon Industries*<sup>4</sup> and *Yograj Infrastructure*<sup>5</sup> and held that in the present case the parties had impliedly excluded application of Part I of the Act by choosing a foreign law as the substantive law and procedural law. Applying the analogy of the *Dozco Case (supra)*, the Madras High Court stated that even if the seat of the Arbitration is not provided by the parties, the choice of SIAC Rules to govern arbitration proceedings excluded application of Part I of the Act.

This Judgement is another step in the right directions for the minimal interference of the Indian Courts concerning International Commercial Arbitrations.

1 O.S. No. 280 to 283 of 2011

2 (1998) 1 SCC 305

3 (2011) 6 SCC 179

4 (2011) 6 SCC 161

## International Contribution

### Document: An Unexpected Move

Early March saw the Reserve Bank of India (RBI) make an unexpected move.

Patrick Crowley, Country Executive of ABN AMRO Jersey, looks at what happened and whether it is likely to be the first in a chain of moves by the bank.

» [download document \[pdf, 275 KB\]](#)

### News 10 @ a glance

#### Government raises interest rates in small saving scheme

The government has announced an increase in interest rates on fixed deposits under the small savings scheme, including the Public Provident Fund, with effect from April 1, 2012. Interest on PPF to be raised from 8.6% to 8.8%.

#### Royalty linked benefit in coal mining companies

The mines ministry has recommended that coal miners mandatory share 100 per cent royalty with project-affected families. The proposal was made in response to the coal ministry's plea that coal miners be asked to share 26% royalty and not 26% of profits.

#### TRAI against separate exit policy for teleos

The Telecom Regulatory Authority of India (TRAI) said that there was no need for a separate exit policy for players in the sector and the entry fees they had paid would



remain non-refundable. Based on comment received from stakeholders and keeping in view the Supreme Court judgment of February 2, TRAI proposes to recommend the government there was no need for separate exit policy and the entry fee paid by the licensees will continue to be non-refundable.

### **RBI tells NBFCs to notify clients before auctioning jewellery**

Non-banking Finance Companies (NBFC) will now have to send “adequate prior notice” to their gold loan borrowers, if they plan to auction the jewellery kept as collateral, due to non repayment of loans, according to the Reserve Bank of India’s (RBI) guidelines on the fair practices code for the sector.

### **SEBI exempts govt from making open offer to IDBI Bank minority shareholders**

The Securities Exchange Board of India (SEBI) exempted the government of India from making an open offer to minority shareholders of IDBI Bank, a mandatory requirement unless given legal exemption, since a proposed capital infusion would breach the creeping acquisition limit of five per cent.

### **Iran agrees to part payment in rupees**

Iran has agreed to receive part

payment for crude oil exports in rupees through Indian banks. Confidential arrangements had been worked out for payment in the Indian currency.

### **Trustees, co-owners of foreign assets come under scrutiny**

Section 147 of the Income Tax Act, which says “income shall be deemed to have escaped assessment where a person is found to have any asset (including financial interest in any entity) located outside India”, till now, have been applicable to expatriate Indians only. Now it is being extended to residents as well. Hence, NRIs who visit India for more than six months (and become resident thereby) will also come under the ambit of this law.

### **59 Maharashtra industries fined for illegal hazardous waste disposal**

The Maharashtra Pollution Control Board (MPCB) has directed 59 industrial units to pay fine for unlawful storage and disposal of large quantities of hazardous waste in their premises. . They have been directed to send the hazardous waste to the common treatment facilities.

### **Telenor seeks payback from govt in 2G licence fight**

Norwegian mobile operator Telenor ASA has told the Indian government

it wanted to resolve its licence dispute, but said it would seek damages if the cancellation of its 22 licences was not settled. India's Supreme Court in early February ordered the revocation of all 122 mobile licences awarded in a scandal-tainted 2008 sale to be revoked in four months. The order covered 22 licences for Telenor's local joint venture.

### **Article 19 (1) c of the Constitution of India Amended**

The text of the 97th amendment to the Indian Constitution makes the right to form cooperative societies a fundamental right under Article 19 (1) c of the Constitution. The amendment also inserts a new directive principle into Part IV of the Constitution, Article 43B which lays down "The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of cooperative societies". The amendment came into force on January 12, 2012.