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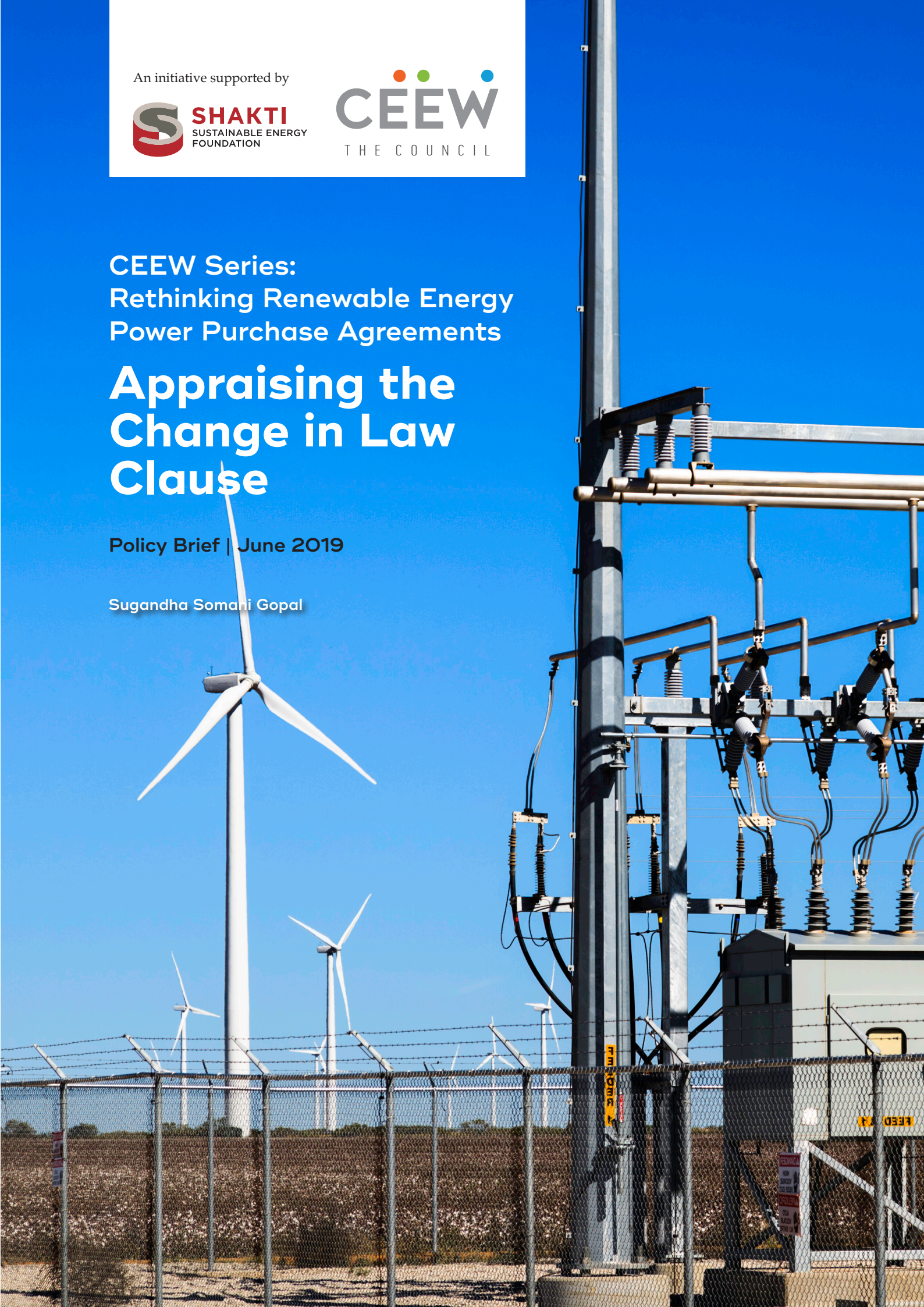


CEEW Series:
Rethinking Renewable Energy
Power Purchase Agreements

Appraising the Change in Law Clause

Policy Brief | June 2019

Sugandha Somani Gopal





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SUGANDHA SOMANI GOPAL

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The Council on Energy, Environment and Water (CEEW) is one of South Asia's leading not-for-profit policy research institutions. The Council uses data, integrated analysis, and strategic outreach to explain – and change – the use, reuse, and misuse of resources. The Council addresses pressing global challenges through an integrated and internationally focused approach. It prides itself on the independence of its high-quality research, develops partnerships with public and private institutions, and engages with the wider public.

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Sugandha was with the renewable energy team at the Council on Energy, Environment and Water (CEEW). Her interest lies in devising solutions for the establishment of a robust legal and regulatory paradigm for the advancement of renewable energy. At The Council, she is involved in assessing legal and regulatory risks in the renewable energy sector in India.

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“Unexpected changes in the legal and regulatory regime contribute significantly to regulatory uncertainty in the renewables sector in India. In order to increase investor confidence and escalate growth of the sector, it is imperative that the risk of ‘change in law’ is adequately addressed.”

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Abbreviations

APERC	Andhra Pradesh Electricity Regulatory Commission
APTEL	Appellate Tribunal for Electricity
AVVNL	Ajmer Vidyut Vitran Nigam Limited
CERC	Central Electricity Regulatory Commission
COD	Commercial Operation Date
DGTR	Director General of Trade Remedies
ERC	Electricity Regulatory Commission
GERC	Gujarat Electricity Regulatory Commission
GST	Goods and Services Tax
GUVNL	Gujarat Urja Vikas Nigam Limited
JdVVNL	Jodhpur Vidyut Vitran Nigam Limited
JNNSM	Jawaharlal Nehru National Solar Mission
JVVNL	Jaipur Vidyut Vitran Nigam Limited
MERC	Maharashtra Electricity Regulatory Commission
MNRE	Ministry of New & Renewable Energy
MPPMCL	Madhya Pradesh Power Management Company Limited
MSEDCL	Maharashtra State Electricity Distribution Company Limited
NSM	National Solar Mission
NTPC	National Thermal Power Corporation
NVVN	NTPC Vidyut Vyapar Nigam Limited
PPA	power purchase agreement
PV	photovoltaic
RE	renewable energy
RERC	Rajasthan Electricity Regulatory Commission
SECI	Solar Energy Corporation of India Limited
SGD	safeguard duty
TANGEDCO	Tamil Nadu Generation and Distribution Corporation Limited
TNERC	Tamil Nadu Electricity Regulatory Commission
TSSPDCL	Telangana State Southern Power Distribution Company Limited
UHBVNL	Uttar Haryana Bijli Vitran Nigam

Executive Summary

This study is a part of the *CEEW Series: Rethinking Renewable Energy Power Purchase Agreements*.

The series strives to address some of the key issues underpinning the solar and wind energy sectors in India by

- assessing the current regime of power purchase agreements (PPAs) in the solar and wind sectors; and
- making recommendations on how the provisions corresponding to identified thematic areas in the PPAs could be re-worked to enhance bankability and address some of the PPA clause related regulatory challenges in these markets.

Unexpected change in the legal and regulatory framework creates uncertainty. It can significantly impact a project's financial structure and cause anxiety among project developers, investors, and lenders. In India, the renewable energy (RE) industry has been experiencing uncertainty with the implementation of new taxes and duties, such as the goods and services tax (GST) and safeguard duty (SGD), and the related carrying costs. Power purchase agreements (PPAs), being long-term contracts (20–25 years), are particularly vulnerable to changes in the applicable legal and regulatory framework. Such changes may impact a project's revenue projections. It is not possible to freeze the legal and regulatory framework applicable for a project; therefore, the PPA must address the risk of change in law so that it can operate smoothly throughout its term.

If a project demonstrates a high probability of success, a financial model with adequate future cash flows, and a risk mitigation plan where mitigation measures are implemented and risks are allocated to appropriate parties, and if the results of a project's financial model meet the expectations of investors and lenders, they will finance it. Such a project is considered bankable. A robust change in law clause makes a PPA more bankable by addressing lenders' concerns regarding which party will be responsible for the costs arising from changes in law and for funding such costs. The obligation to service debts under financing agreements continues even if the law changes. Therefore, allocating this risk clearly will placate the concerns of lenders and investors over accountability and repayment in case of changes in the law.

This study seeks to examine the risk of change in law and alleviate uncertainty on this account by analysing the provisions relating to change in law in PPAs¹ issued by government authorities in competitively bid as well as feed-in-tariff based projects. It discusses some common issues and sets out the features of a robust change in law provision.

Our assessment of 20 solar and wind PPAs issued by different state and central government agencies highlights several issues. Feed-in tariff-based PPAs issued by state governments are silent on the risk of change in law; among competitively bid PPAs, RE PPAs issued by Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) even in 2017 do not acknowledge the risk. Some earlier solar PPAs included change in law as a force majeure event. The only relief available was an extension in the scheduled commercial operation date; and no monetary compensation was provisioned for. In many PPAs, the definition of 'change in law' is not comprehensive; there is ambiguity over the scope of the applicable legal framework or what constitutes 'change' in that framework. There have been considerable delays in disposing of change in law petitions by quasi-judicial and judicial authorities. The compensatory mechanism in many change in law clauses do not expressly include restitution as a principle for adherence, leading to uncertainty regarding carrying costs.

To address these issues and make PPAs more bankable, this study recommends that change in law provisions have certain features.

- The definition of 'change in law' must be clear and unambiguous. The scope of the law (often termed 'Applicable Law') should be comprehensive. It should state explicitly what a change in law would comprise, the date from which the change in law clause will be effective, and the relevant authorities within the span of the change in law.
- In order to expedite change in law proceedings, a procedure should be established for parties to arrive at a preliminary understanding on compensation before they approach the appropriate electricity regulatory commission (ERC).

1 In this report, 'power purchase agreements' and 'PPAs' refer to the solar and wind energy sectors in India (unless explicitly stated otherwise). This report examines 20 solar and wind energy PPAs issued by different government authorities.

- Pending litigation, partial compensation for change in law events should be paid into an escrow account. If the plea for a change in law event is denied, the amount paid should be refunded with interest.
- If a change in law event occurs during the construction period, the scheduled commercial operation date of the project may be suitably extended.
- The principle of restitution should be included in the compensation mechanism. It will provision for carrying costs and ensure that the parties are restored to the same economic position as if such change in law had not occurred.
- Bid documents for RE tenders should be standardised. This will ensure that project-specific deviations, if any, are justified.

1. Introduction

Ideally, contracts should factor the costs of complying with current legal obligations. However, power purchase agreements (PPAs), being long-term contracts, are susceptible to multiple risks during their term which cannot be reasonably considered at the time of their execution.

One such risk is an unexpected change in the legal or regulatory framework which formed the basis of the PPA. The law (often termed 'Applicable Law') may change after a bid corresponding to a PPA has been submitted. But such a change could not have been foreseeable at the time of bidding and, therefore, their impact could not have been factored into the tariff.

A change in law may significantly increase or decrease the obligations of the parties to a PPA and, therefore, impact their costs, expenses, or expected income. Some change in law events may also alter the very foundation of a PPA and may, in the absence of a clear and balanced change in law dispensation, render a project commercially unviable.

By nature, PPAs are vulnerable to changes. Project developers and financiers consider change in law as among the most important risks when performing due diligence of a power project. It is crucial that this risk is properly addressed for the smooth operation of PPAs.

This report starts with setting out the key aspects of change in law discussing the risks involved and the need

Power purchase agreements (PPAs), being long-term contracts, are susceptible to multiple risks during their term which cannot be reasonably considered at the time of their execution.

to address these, particularly in the context of PPAs (Sections 2 and 3). The next section sets out the salient features of a robust change in law clause. It also offers suggestions regarding how to revise the provisions in present and future PPAs to address the risk of change in law and improve the bankability of PPAs. Section 5 collates our observations with respect to existing change in law provisions in PPAs issued from 2010 to early 2019. This is followed by a detailed discussion on the infirmities and issues with respect to change in law provisions in PPAs. The penultimate section studies the impact of safeguard duty as a case study of a recent change in law event. The last section is the conclusion.

2. What is a change in law?

When a contractor bids to provide a service, they build the cost of complying with the current legal and regulatory framework into the price. After the contractor has submitted a bid, the legislation may change. Such change is not foreseeable or within either party's control. However, if the law changes, the parties to a contract are obliged to align their contract with the changed law² and these changes may impact the capital expenditure and/or operating costs pertaining to the project. The contractor could not have factored into the contract the costs of complying with the new or modified law. In such situations, it is not clear which party is responsible for funding these costs.

The risk of change in law emanates from unexpected changes in the Applicable Law after a bid has been submitted or a contract has been executed. After investment has been made, such unexpected changes are to an investor's detriment.³ Changes in the law may take the form of the implementation of new laws, amendment of statutes, introduction of new mandatory

² Judgment dated March 15, 2010 issued by Supreme Court in Civil Appeal No. 3902 of 2006 titled as PTC India Ltd. CERC & Ors.

³ Comeaux, Paul E., and N. Stephen Kinsella (1994) "Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & (and) OPIC Investment Insurance", New York Law School Journal of International and Comparative Law (15) 1.

codes or standards, imposition of a new tax, or a new interpretation of the law by the courts.

3. Why safeguard against change in law?

In traditional commercial contracts, contractors are generally able to pass on the risk of change in law to their customers through an increase in price, or contracts with flexible payment mechanisms may be able to factor the impact of change in law during the term of the contract. However, PPAs are long-term contracts (typically between 20–25 years) where prices are agreed on a long-term basis without much scope for adjustment. Typically, a bid underlying a PPA is prepared based on a detailed due diligence of circumstances (including the applicable legal and regulatory framework) existing at the time of bidding. However, it may not be possible to account for unforeseen eventualities that a PPA may be exposed to during its tenure. The long-term nature makes the PPAs more vulnerable to prospective changes. Writing complete contracts has been long accepted by economists as being an impossible endeavour. Economic contracts are inherently incomplete and will remain so since information asymmetries will always exist, and economic activities will continue to be exposed to uncertainties, the nature of which may be unknown at the time of contract writing.⁴

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An unexpected change in law event may significantly alter the assumptions underlying a PPA. To comply with changes in law, the power producer may incur additional costs and/or take more time to perform its obligations. This may make it wholly or partially impossible for the project developer to perform its contractual obligations, or delay it, or make it more

expensive.⁵ The imposition of a new tax or duty, or complying with a new safety or environmental regulation, may increase the project cost and/or impact the timeline. At the time of bidding, the power producer cannot factor into the tariff the cost of these unforeseeable changes to the legal regime.

Since PPAs are especially vulnerable to changes in law in the long term, a PPA must address this risk and clearly identify the party liable for contingencies on account of changes in the law. By means of specific provisions in the contract, a change in law clause may help parties reduce the legal uncertainty involved with change in law events.⁶ Protection against the impact of changes in law allows parties to assess the legal framework applicable on the date of submitting the bid, based on which due diligence was conducted, and adjust the PPA based on the changes in circumstances. A robust change in law clause allows the project developer to reduce the amount of contingency priced in the bid.⁷

If a project demonstrates a high probability of success, a financial model with adequate future cash flows, and a risk mitigation plan where mitigation measures are implemented and risks are allocated to appropriate parties,⁸ and if the results of a project's financial model meet the expectations of investors and lenders,⁹ they will finance it. Such a project is considered bankable. A robust change in law clause makes a PPA more bankable by addressing lenders' concerns over which party will be responsible for the costs arising from changes in law and for funding such costs.¹⁰ A change in law risk entails considerable uncertainty and may impact a project's revenue projections. The obligation to service debts under financing agreements continue even if the law changes. Therefore, allocating this risk clearly will placate the concerns of lenders and investors over accountability and repayment in case of change in law.

5 World Bank Group (2017) *Guidance on PPP Contractual Provisions 2017 Edition*, Washington: World Bank

6 Association of Corporate Counsel (2015) "Applicable law to a contract: What happens when the law changes?" available at <https://www.acc.com/legalresources/quickcounsel/applicable-law-to-a-contract.cfm?makepdf=1>, accessed on 24 January 2019.

7 World Bank Group (2015) *Report on Recommended PPP Contractual Provisions 2015 Edition*, Washington: World Bank

8 IRENA (2018) "Develop Bankable Renewable Energy Projects" available at <https://www.irena.org/-/media/Files/IRENA/Project-Navigator/IRENA-Project-Navigator-2018.pdf> accessed on 11 March 2019

9 IRENA (2017) "Developing Bankable Woody Biomass Projects" available at <https://www.irena.org/newsroom/articles/2017/Mar/Developing-Bankable-Woody-Biomass-Projects> accessed on 11 March 2019.

10 World Bank Group, Public-Private-Partnership Legal Resource Center "Change of Law- Checklist and Sample Wording" available at <https://ppp.worldbank.org/public-private-partnership/overview/practical-tools/checklists/change-of-law>, accessed on 24 January 2019.

4 Garg, Swapnil, and Sachin Garg (2017) "Re-thinking Public Private Partnerships: An Unbundling Approach", *Transportation Research Procedia*, 25C (2017) 3793–3811

A change in law clause allocates the risk of change in law among parties by providing relief with respect to obligations, additional time, and/or costs underlying the PPA;¹¹ it does not bind public authorities to not change the Applicable Law or freeze the legal framework applicable at the time of submitting the bid.

A robust change in law clause makes a PPA more bankable by addressing lenders' concerns over which party will be responsible for the costs arising from changes in law and for funding such costs.

4. What makes a change in law clause robust?

This section sets out the features of a robust change in law clause. Emphasis has been laid on having a clear and comprehensive definition of change in law, a streamlined procedure for expeditious resolution of change in law claims, and the need for fair compensation based on principles of restitution.

4.1 A clear and comprehensive definition

In defining the scope of 'change in law', the PPA must distinctly set out what the Applicable Law is; what constitutes a change in that law and what is expressly excluded; the date after which the change must have occurred;¹² and the authorities that can authorise the change in law.

4.1.1. Clear definition of 'Applicable Law'

The definition of 'Applicable Law' should be clearly worded. It should be limited to obligations with which the parties must legally comply, including the local, state, and federal regulatory framework in the form of statutes, rules, regulations, notifications, ordinances, decrees, and codes, as well as clearances, permits, taxes, duties, and cesses.

4.1.2. Comprehensive description of change in Applicable Law

To achieve its purpose, the change in law clause should unambiguously cover the various ways (enactment of a new law, amendment or repeal of an existing law) in which the scope of the Applicable Law could be expanded or modified. A narrow definition could defeat the objective of effectively addressing a genuine change in the legal framework. For instance, the model solar PPA approved by the APERC under competitive bidding route vide its Order dated 15 July 2014 and the PPA issued by the TSSPDCL for procuring 2,000 MW solar power in 2014 limited the definition of change in law to "any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of India, Government of Telangana including the erstwhile Government of Andhra Pradesh from time to time". This definition is incomplete since it does not consider any new law that may be enacted or a law that may be repealed; or the need to acquire new clearances or permits or the possibility of change in the terms of existing consents and permits; or the imposition of any new tax or duty or change in existing taxes or duties.

It is important to expressly set out the exceptions to change in law to avoid ambiguity over the rights and obligations of parties when a change in law event occurs. For instance, many PPAs specifically exclude the change in withholding tax on income or dividends from the scope of change in law. Certainty around what will (and will not) constitute change in law is paramount to make the generator aware of the risks involved in a PPA and enable them to factor these into their bid. Such certainty also eliminates apprehensions that project

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developers may have with respect to the applicability of taxes or duties. For instance, the PPA issued by M.P.

¹¹ Supra, Footnote 5

¹² Supra Footnote 6

Power Management Company Limited for development of Rewa Ultra Mega Solar project in 2016 specifically included any change with respect to GST as a change in law in the PPA, thus addressing concerns that bidders may have about the implications of the GST. This may also be applicable in the context of the SGD.

In December 2017, Indian solar photovoltaic (PV) manufacturers approached the Director General of Trade Remedies (DGTR) seeking imposition of safeguard duties on imported solar cells. Since then, solar power developers have been uncertain if such imposition would be considered a change in law and permitted as a pass-through in the tariffs under the PPAs.¹³ The authorities have been changing their position, and different PPAs¹⁴ take different stands on whether the imposition or modification of safeguard duties is a change in law event; therefore, apprehensions have only perpetuated.

4.1.3 Essential to state the qualifying date for change in law

Specifying the date when the change in law will become effective is essential for greater certainty and computing the compensation for change in law. The qualifying date for change in law should be aligned with the date when parties are expected to have computed their financial bids, that is the date of the submission of the bid or a few days earlier. In some PPAs, the change in law is effective from the date the PPA has been executed.¹⁵ That may not effectively allocate the risk, since PPAs are executed much after the bids have already been submitted (when the risks should have been considered). Specifying a date is pertinent also for determining the compensation for change in law, which is required to be paid from the date of implementation of the change in law event.¹⁶ Therefore, compensation should be available for a change in law event which

occurs after the qualifying date and effective from the date of the event.

In the absence of an express stipulation regarding the qualifying date for change in law, the Supreme Court, in 2017, granted the Central Electricity Regulatory Commission (CERC) the liberty to determine the relevant effective date towards entitlement of compensation for any increase/decrease in cost to the seller.¹⁷ The jurisprudence regarding the effective date for change in law was further settled by the Supreme Court in its judgment dated 25 February 2019 in Civil Appeal No. 5865 of 2018 titled *UHBVNL vs. Adani Power Limited & Ors.* The apex court laid down the law regarding such determination considering two distinct sets of circumstances. One, the adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law in case the change in law happens to be by way of adoption, promulgation, amendment, re-enactment, or repeal of the law. Two, if the change in law is on account of a change in interpretation of law by a judgment of a court or tribunal or governmental instrumentality, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/tribunal or the governmental instrumentality.

4.1.4 Authorities authorised for the purpose of change in law

The change in law clause should also expressly and comprehensively cover the authorities at whose behest a change in law will be considered as one under the PPA, such as the central government, state government(s), local authorities, courts, tribunals, quasi-judicial bodies, etc. Multiple litigations have followed from the absence of a clear mention of which entities will be covered within the scope of 'authorities' in a change in law. For instance, in *GMR Kamalanga vs. Bihar State Power (Holding) Company Limited*, both the CERC¹⁸ and subsequently APTEL¹⁹ rejected the petitioner's plea to hold as a change in law event a notification issued by Mahanadi Coalfields Limited (a subsidiary of Coal India Ltd) changing the mode of coal transportation from railways to road.

13 Dutt, Arjun, Manu Aggarwal, Kanika Chawla (2019) What is the safeguard duty safeguarding?

Analysis of the Impact of Safeguard Duty on Domestic Solar Manufacturing and Deployment, April, New Delhi: Council on Energy, Environment and Water

14 Re: Standard PPA for procuring solar power issued by SECI in 2018 where imposition of/change to safeguard duty was expressly excluded from the definition of change in law. This PPA was later amended in February 2019, where the express exclusion of safeguard duty was deleted and the latter can now be interpreted as a change in law event. In contrast, the PPA issued by GUVNL in 2018 for procuring 500 MW solar power categorically includes safeguard duty as a change in law event and provides a clear mechanism of compensation in case the same was imposed.

15 Re: Standard PPA for procuring solar power issued by SECI under JNNM Ph-II, Batch – I scheme in 2014.

16 Order dated April 23, 2012 issued by APTEL in Appeal No. 179 of 2010 titled as *M/s. Patikari Power Ltd. vs. Himachal Pradesh Electricity Regulatory Commission*.

17 Judgment dated April 11, 2017 issued by the Supreme Court in Civil Appeal No. 5399 of 2014 titled as *Energy Watchdog vs. CERC & Ors.*

18 Order dated 07.04.2017 in Petition 112/MP/2015

19 Judgment dated 21.12.2018 in Appeal No. 193 of 2017

4.2 Clear and swift procedure for claiming compensation

4.2.1 Inordinate delays in adjudication of change in law petitions

Claiming compensation on account of change in law is a lengthy and tedious process. Most PPAs do not set out any procedure to be followed by parties other than that the aggrieved party is required to approach the appropriate ERC to claim compensation in case a change in law event occurs. The Electricity Act, 2003²⁰ obliges ERCs to regulate the electricity purchased (including the prices) for distribution within the state. Therefore, ERCs are required to approve any tariff adjustment in a PPA. Accordingly, most PPAs provide that parties are required to approach the appropriate ERC for any revision in tariff on account of change in law. However, there have been protracted delays in adjudication of change in law petitions by ERCs and appellate authorities.

As on August 2018, various petitions seeking compensation on account of change in law under coal-based PPAs have been pending before various judicial and quasi-judicial authorities for two to seven years. Even in cases where ERCs have passed orders allowing change in law compensation, these orders are challenged in appeal, and no compensation is paid during the time the matter is pending in appeal. The delay on account of pending litigation has been considered a reason for increasing stress and non-performing assets in the power sector.²¹ Acknowledging this issue, the Ministry of Power directed the CERC to expedite the processing of pass-through claims for PPAs vide its communique dated 27 August 2018.

Disposal of change in law cases is delayed for many reasons. One is that parties take adversarial positions and unnecessarily contest claims before quasi-judicial and judicial authorities. This has been the trend even with respect to

- cases where the change in law relates to an event that impacts the industry at large, is widely known, and is a change in law event from a plain reading of the PPA;
- cases where change in law events have been previously allowed as such by ERCs in petitions with respect to similar PPAs; and

- change in law events which have been allowed for a prior period.²²

The rigid stand of parties in judicial proceedings even in these instances are among the reasons for unwarranted, prolonged litigation resulting in delays in compensation. The CERC has acknowledged the futility of approaching ERCs every year for computing and allowance of change in law events already determined.²³

One way to expedite the processing of change in law claims is by providing parties an opportunity to discuss and engage with the issue in a time-bound manner before approaching the ERC. Under most extant PPAs, there is no obligation on the aggrieved party to notify to the other regarding the change in law event or initiate a discussion on the impacts to arrive at a preliminary understanding. The parties are not required to make efforts to mitigate the impacts. Even where the aggrieved party has communicated a change in law event to the other party, often the latter has not responded to the same²⁴ since the PPAs do not set out any procedure for parties to follow to claim compensation on account of change in law. If the parties are obligated to discuss the change in law events and its impact prior to approaching the ERC, particularly with respect to events that the ERC has already allowed, the parties will have an opportunity to arrive at a preliminary understanding of issues. That may result in expediting the proceedings before the ERC.

4.2.2 Recommended steps for expediting change in law compensation

We suggest the following procedure which may be adopted in the PPAs for claiming relief on account of change in law.

- Upon the occurrence of a change in law event, the aggrieved party should issue a notice in this regard to the other party with its opinion on the impact of the event.
- Within 15 days of the other party's receipt of the notice, the parties must meet to discuss how to mitigate the impact of the change in law. The aggrieved party must produce all supporting

20 Re. Sections 79(1)(b) and 86(1)(b)

21 Re. 37th Report of Parliamentary Standing Committee on Energy, March 2018

22 Re. Order dated March 21, 2018 issued by RERC in Petition no. 1283/2017 titled as M/s Rajwest Power Ltd. vs. Jaipur Vidyut Vitran Nigam Ltd & Ors.

23 Re. Order dated February 21, 2018 issued by CERC in Petition No. 121/MP/2017 titled as Coastal Gujarat Power Limited vs. GUVNL & Ors.

24 Re. For instance the Order dated October 09, 2018 issued by CERC in Petition No. 188/MP/2017 mentions two instances in Paras 16 and 23 where notices regarding change in law were issued and the other party did not respond to the same.

material to demonstrate the impact of change in law.

- Subsequent to the above discussions or the lapse of the 15-day period, the aggrieved party may approach the relevant ERC.

This procedure provides the parties an opportunity to discuss the issues, impact, and means of mitigation. The mandate to discuss the issues before approaching the ERC will not only help apprise the parties of change in law events but may also be a chance to sort out preliminary differences, which may expedite proceedings before the legal authorities.

In addition, delays in the disposal of change in law proceedings may be addressed by requiring the liable party to pay partial compensation of the amount claimed into an escrow account for the time matters are pending litigation. Such a dispensation is particularly relevant for change in law events which have been previously allowed by the relevant ERC for a prior period, and the change relates to the change in quantum for the year in question (for example, once imposition of GST has been allowed as a change in law event, and there is an increase/decrease in GST in subsequent years). It is also relevant when change in law events have been allowed by the relevant ERC with respect to another PPA with a similar change in law clause.

A provision may be added whereby in case a particular claim for which compensation has been paid is denied in judicial proceedings, the amount be refunded with interest. This will ensure that frivolous claims are not raised and the party paying the compensation will have an incentive to make the payment.

4.3 Fair compensation

4.3.1 Restitution and carrying costs

When parties enter into a PPA, there is a presumption that the underlying transaction serves their respective interests and will result in certain benefits for both parties. A change in law – an unexpected, exogenous factor and beyond the parties' control – may render a PPA far more or less beneficial than the parties expected and erode this presumption. Hence, the intent of a change in law clause in a PPA is to ensure that a party is not deprived of what it legitimately expected and, therefore, to restore the affected party to the same economic position as if no such injury had been caused.

Restoring the parties to the same economic position as if the change in law had not occurred requires ensuring that the compensation for change in law is not limited only to the adjustments on account of additional costs or expenses incurred but also include 'carrying cost', or the compensation for monies denied at the appropriate time and paid after a lapse of time.²⁵ Since there may be a substantial time lag between when a change in law occurs and when it is approved by an ERC, the aggrieved party is entitled to carrying cost for this period aligned with the principle of compensating for time value of money and restitution.²⁶ Restitution is fundamental to the principle of placing parties in the same position in which they would have been but for the intervening event. In law, restitution is understood in the sense of

- return or restoration of some specific thing to its rightful owner or status;
- compensation for benefits derived from a wrong done to another; and
- compensation or reparation for the loss caused to another.²⁷

The right for claiming carrying costs has been allowed in many judgments of APTEL²⁸ and is now settled law after Supreme Court²⁹ has upheld the principle of restitution as built-into the compensation mechanism when the affected party is required to be restored to the same economic position as if the change in law had not occurred.

Standard coal-based PPAs expressly state that the purpose of determining the consequence of change in law is to restore the affected party to the same economic position as if such change in law had not occurred. However, barring a few,³⁰ most solar and wind PPAs³¹ do not expressly mention this principle when computing the compensation for change in law. Many litigations have followed from the absence of an express provision

25 Re. Order dated August 14, 2018 issued by APTEL in Appeal No. 119 of 2016 titled as Adani Power Rajasthan Ltd vs RERC & Ors, Order dated December 21, 2018 issued by APTEL in Appeal No. 193 of 2017 titled as GMR Kamalanga Energy Limited vs CERC & Ors.

26 Re. Order dated April 13, 2018 issued by APTEL in Appeal No. 210 of 2017 titled as Adani Power Ltd vs. CERC & Ors.

27 Judgment dated October 13, 2003 by Supreme Court of India in South Eastern Coalfields Ltd. vs. State of M.P. And Ors.

28 Supra, Footnote 26, 27

29 Re. Judgment dated 25 February 2019 issued by Supreme Court in Civil Appeal No. 5865 of 2018 titled Uttar Haryana Bijli Vitran Nigam Ltd vs. Adani Power Ltd & Ors.

30 Re. Standard PPA for procuring solar power issued by SECI in 2018, Draft PPA issued by MSEDCL for procuring 500 MW wind power.

31 Re. Standard PPA for procuring solar power under JNNISM issued from 2011 – 2014, PPA issued by GUVNL for procuring 500 MW solar power in 2018, PPA issued by NTPC for procuring wind power in 2017

The intent of a change in law clause in a PPA is to ensure that a party is not deprived of what it legitimately expected

for carrying costs or the principle of restitution.³² In its Order dated 13 April 2018 in Appeal No. 210 of 2017 titled *Adani Power Ltd vs. CERC & Ors.*, APTEL allowed carrying costs for change in law compensation with respect to a PPA which provided that the parties were to be restored to the same economic position as if such change in law had not occurred, but it denied relief in respect of the PPA where this principle was not expressly stated.

In many cases, even in the absence of express stipulation regarding restitution and carrying cost, courts have granted appropriate equitable relief where circumstances have so demanded. Courts have adhered to the rule of exception to contractual interpretation by implying terms into contractual provisions applying the ‘business efficacy’ test, i.e. to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen.³³

Therefore, while courts have granted relief with respect to restitution in the absence of a specific stipulation, an express provision with regard to restitution as a part of the compensation mechanism may avoid unwarranted litigation and induce greater regulatory certainty.

4.3.2 Minimum threshold for compensation

One of the ways how insignificant claims with respect to change in law may be avoided is by stipulating a minimum threshold of impact and by making available compensation for change in law only in case of a breach of the minimum threshold. A minimum threshold for compensation has been specified in solar PPAs issued by GUVNL since 2017, where relief for change in law is available in case costs are impacted by 1 per cent of the estimated revenue.³⁴ Similarly, in the PPA between MPPMCL and Rewa Ultra Mega Solar Limited, the parties

have agreed that the aggregate financial impact due to a change in law of INR 20,000,000 in the remaining term of the PPA will be incurred by the solar power developer; for additional costs, the parties may seek approval from the ERC.³⁵ It is suggested that like in these PPAs, a minimum threshold of impact for change in law may be adopted in other RE PPAs. Parties will then be prepared to undertake the risks up to the minimum threshold. It will also ensure that only substantial change in law claims are raised.

4.3.3 Extension in scheduled commercial operation date

Change in law events may have both monetary and time implications. A change in law event during the construction period – for example, the need to comply with a new standard, or obtain a new permit or consent, or unreasonable delay in procuring a consent – may impact project milestones. Accordingly, the relief should include compensation for the monetary impact and suitable extension in the scheduled commercial operation date of the project.

5. Change in law provisions under power purchase agreements in India (2010–18)

This section analyses the change in law regime in RE PPAs in India. For this purpose, we have examined change in law provisions across 20 PPAs³⁶ for solar and wind technologies, issued/executed from 2010 – 2018, by different states and central government agencies. Our detailed observations on the change in law clauses in each of such PPAs, is tabulated herewith as Annexure I and a gist of the analysis is summarised hereunder.

5.1 Renewable energy power purchase agreements are not standardised

In India, RE PPAs are not standardised. Model contracts have been prepared for thermal power PPAs, but there

32 Re. (a) Order dated September 19, 2018 issued by CERC in Petition No. 50/MP/2018 titled *M/s Prayatna Developers Private Ltd vs. NTPC & Ors.* (b) Order dated February 15, 2018 issued by MERC in Case No. 276 of 2018 titled as *Tata Power Renewable Energy Ltd v. MSECL & Ors.* (c) Record of Proceedings dated January 17, 2019 by CERC in Petition No. 164/MP/2018 titled as *Parampuja Solar Energy Private Limited v. NTPC & Ors.*

33 Judgment dated December 03, 2012 issued by the Supreme Court in *Satya Jain vs. Anis Ahmed Rushdie*

34 Clause 9.2.1 of the PPA issued by GUVNL in 2017, for procuring 500 MW solar power in Gujarat

35 Clause 17.1 (c) of the PPA between MPPMCL and Rewa Ultra Mega Solar Limited

36 The PPAs examined for this exercise have been selected randomly, primarily with the intention to assess PPAs issued by different agencies across geographies and time.

is no standard format for RE PPAs.³⁷ Standardising PPAs would improve efficiency and productivity, ensure uniformity in quality, and provide scope for emulating best practices.

In 2017, the Ministry of Power issued the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects (Wind Competitive Bidding Guidelines, 2017)³⁸ and the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects (Solar Competitive Bidding Guidelines, 2017).³⁹ However, these guidelines permit relevant entities to deviate from its terms with the relevant ERC's approval. In the absence of a standard PPA, and because deviating from the competitive bidding guidelines is per se allowed, multiple versions of PPAs have been issued by different state and central nodal agencies.

The guidelines make it binding upon procurers to include a change in law provision in PPAs but there have been instances where RE PPAs have specifically excluded change in law provisions and which have been approved by ERCs⁴⁰ (pursuant to the provision for deviating from the competitive bidding guidelines). Such actions ultimately defeat the purpose of these guidelines. In the absence of a change in law provision, judicial and quasi-judicial authorities have been hesitant to grant any form of relief, such as a change in tariff or extension of time, to mitigate the effect of a change in law.

In its judgment dated 22 August 2014, issued in Appeal No. 279 of 2013 titled Gujarat Urja Vikas Nigam Limited

Standardising PPAs would improve efficiency and productivity, ensure uniformity in quality, and provide scope for emulating best practices.

v. Gujarat Electricity Regulatory Commission, APTEL rejected the pass-through of impact of increased customs and excise duties since neither the PPA nor the underlying Tariff Order allowed for revision in tariff due to change in law. In its Order dated 13 March 2018 issued in M.P. No. 12 of 2017 titled Regen Powertech Pvt Ltd v. TANGEDCO, TNERC refused to revise the feed-in-tariff under a PPA since the underlying regulations (based on which tariff was determined) did not provide compensation for change in law.

In addition, the lack of standardisation has led to ambiguity and difference in the scope of change in law within PPAs. The PPAs for competitively bid RE projects issued by SECI⁴¹ and NTPC⁴² include within the scope of change in law the imposition of a new tax on both setting up a project and on the supply of power from the project. But the PPAs issued by GUVNL⁴³ account within the scope of change in law only the impact on final output of energy or sale of electricity, thus excluding any impact on capital or operating expenditure with respect to a project.

5.2 Inappropriate treatment of change in law

Some earlier solar PPAs⁴⁴ issued by states include change in law as a force majeure event and the only relief available in these cases is extension of the scheduled commercial operation date. Such clauses account for a change in law only during the construction period but not once the project is commissioned. While a change in law may have implications on a project's

In the absence of a change in law provision, judicial and quasi-judicial authorities have been hesitant to grant any form of relief, such as a change in tariff or extension of time, to mitigate the effect of a change in law.

37 Viswamohan, Anjali and Manu Aggarwal (2018) Rethinking Renewable Energy Power Purchase Agreements: Curtailing Renewable Energy Curtailment, June, New Delhi: Council on Energy, Environment and Water, p. 2

38 Re. Clause 3.2 of the Wind Competitive Bidding Guidelines, 2017

39 Re. Clause 5.2 of the Solar Competitive Bidding Guidelines, 2017

40 Re. Orders dated 16.11.2018 issued by TNERC in M.P. No. 18 of 2018 and M.P. No. 17 of 2018, filed by TANGEDCO where TNERC specifically excused TANGEDCO from including a change in law provision in PPAs issued for procurement of 500 MW wind power and 500 MW solar power respectively, on the ground that the previous PPAs issued by TANGEDCO did not have a change in law clause.

41 Re. Standard PPAs for procuring solar power and wind power on long-term basis issued by SECI in 2018.

42 Re. Standard PPA for procuring wind power on long-term basis issued by NTPC in 2017.

43 Re. RfS No. GUVNL / 500 MW / Solar (Phase IV) dated 29.12.2018 issued by GUVNL for purchase of 500 MW grid connected solar power; RfS No. GUVNL / 500 MW / Wind (Phase II) dated 23.02.2018 issued by GUVNL for purchase of 500 MW grid connected wind power.

44 Re. Model PPA approved by APERC vide Order dated 15.07.2014 for procuring solar power under competitive bidding route; PPA issued by TSSPDCL along with bid documents for procuring 2000 MW solar power in Telangana.

timeline, it is most likely to impact the aggrieved party's income and expenditure. However, these earlier PPAs do not provide for any monetary compensation on account of change in law. Most contracts allow for an extension of the completion date if a force majeure event occurs, but these do not permit a contractor to recover losses or damages as a result of the delay.⁴⁵ The risk of monetary implications arising on account of a change in the law is not addressed in these PPAs, and claiming relief in such a case will be a challenge for the aggrieved party.

Ironically, the PPAs issued by SECI, NTPC, and many states in the past two years provide a mechanism for monetary compensation for change in law but do not provide for an extension in the scheduled commercial operation date of a project. Thereby, any impact of a change in law event on a project's timelines during the construction period remains unaddressed.

5.3 Scope of change in law incomplete and ambiguous

The change in law clause in the PPAs reviewed has one or more of the following infirmities. The scope of 'change in law' is ambiguous, incomplete, and ill defined. It may include amendments to existing laws but exclude the enactment of new laws; the need to acquire new clearances, permits, or consents; the imposition of a new tax;⁴⁶ and many other relevant aspects.

The PPA does not set out the procedure that the parties should follow to claim the relief available in the event of a change in law. Some PPAs⁴⁷ require the parties to directly approach the relevant ERC without notifying the other party regarding the change in law event and its impact. These PPAs do not require that the parties discuss the issue at hand to try to resolve it expeditiously, or suggest that they should. And these PPAs do not levy any obligation on the parties to mitigate the losses.

The PPA does not expressly set out the principle to be applied when considering relief for a change in law. The objective of the change in law clause is to negate the adverse impact of unexpected changes in law such that

the aggrieved party is put in the same economic position as if such change in law had not occurred. Often PPAs⁴⁸ fail to mention that this fundamental aspect serves as the underlying principle when determining the relief for a change in the law.

Some wind PPAs explicitly disallow any revision in tariff if taxes⁴⁹ change even if parties are allowed to approach the ERC.⁵⁰ This renders the change in law clause inefficacious.

6. Change in law case study: Safeguard Duty

A recent and critical development in the solar power industry has been the imposition of SGD. On 30 July 2018, the Government of India issued a notification imposing a two-year SGD on import of solar cells (in modules or panels) at the rate of 25 per cent from 30 July 2018, and at the rate of 20 per cent and 15 per cent, respectively, in the subsequent six-month periods. India imports over 90 per cent of its solar equipment; therefore, the SGD was imposed as a measure to protect the domestic solar manufacturing industry.⁵¹

Solar modules or panels constitute 45–50 per cent of the capital expenditure of a solar project. Therefore, the imposition of the SGD has significantly increased the cost of solar projects. This unforeseeable and uncontrollable event is particularly perturbing for solar projects that won bids under bidding processes or executed PPAs before the SGD was imposed. A snapshot of projects for which PPAs were executed before SGD was notified is as under.

Table 1: Projects for which PPAs have been signed before 30 July 2018

Level of safeguard duty	25%	20% and 15%
Capacities of modules (MW)	5858	0

Source: Author's analysis

45 Powell, Kerry (2001) "What is force majeure" Heavy Construction News, 110.

46 Model PPA approved by APERC vide Order dated 15.07.2014 for procuring solar power under competitive bidding route; PPA issued by TSSPDCL along with bid documents for procuring 2000 MW solar power in Telangana.

47 Re. Standard PPA for Procurement of Solar Power on Long-term Basis, issued under JNNM in 2011, 2012, and 2014; PPA issued by NTPC in 2017 along with bid documents for procuring wind power on a long-term basis.

48 Ibid

49 PPA executed in 2014 with M.P. Power Management Company Limited

50 Re. Draft PPA issued by GUVNL pursuant to GERC's Tariff Order No. 2/2016, dated 30.08.2016 for purchase of wind power

51 Economic Times (2018) "India's import dependence for solar equipment over 90 per cent in last 3 fiscal: Government". 19 July. Available at: [//economictimes.indiatimes.com/articleshow/65055838.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](https://economictimes.indiatimes.com/articleshow/65055838.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

It is reasonable to assume that these projects had not factored the impact of SGD in their tariff. Therefore, the levy of this duty has led to widespread uncertainty in the solar sector. On 2 April 2018, the MNRE issued an office memorandum clarifying that under the Solar Competitive Bidding Guidelines, 2017, 'change in law' also includes change in rates of taxes, duties, and cesses. Such an assurance, however, may be helpful only for executed PPAs aligned with the Solar Competitive Bidding Guidelines, 2017, or in PPAs where the cess has been expressly included within the change in law. Despite this, anxiety continues to engulf the solar sector since

- regulatory approval will be required for pass-through of the impact of SGD, which may be a time-consuming process;
- it is apprehended that loss-making distribution companies (discoms) would delay paying the compensation even after regulatory approval; and
- delays in adjudication and payment of compensation will severely impact the cash flow of project developers.

As of April 2019, MERC is the only ERC that has acknowledged the imposition of the SGD as a change in law event and allowed compensation.⁵² Before the CERC alone, over seven petitions filed by different RE generating companies seeking pass-through of impact of the SGD are pending.

Conclusion

Since PPAs in the solar and wind energy sector have long-term horizons (20–25 years), these are susceptible to uncertainty, including those related to changes in law. It is difficult to predict or control the consequences of changes to the legal and regulatory framework after a PPA has been executed, and these can completely erode the understanding based on which a bid was submitted and have negative knock-on effects on investment. In addition, the outlay of change in law provisions in

PPAs in India differ in varying degrees – some PPAs do not acknowledge the risk at all, and some PPAs address it partially. Effective allocation, as in long-term infrastructure contracts, can manage the risk of change in law in PPAs, improve bankability, and enable projects to operate smoothly throughout their life cycle. To be effective for all parties, PPAs must include

- a provision that expressly allocates the risk of change in law;
- a clear, comprehensive definition of 'change in law' that distinctly sets out the scope of the Applicable Law, what constitutes change in law, authorities which can authorise the change in law, and the date after which a change in law event should have occurred;
- a time-bound procedure for parties to discuss the impact of a change in the law, arrive at a preliminary understanding, and sort out differences before approaching an ERC to enable it to dispose of the proceedings expeditiously;
- a provision whereby pending litigation, the liable party is required to pay a partial amount of the compensation for the change in law event into an escrow account (if the plea for the change in law event is denied, the amount paid would be refunded with interest); and
- a compensation mechanism that expressly states that the parties are to be restored to the same economic position as if such change in law had not occurred to truly reflect the spirit of the change in law provision. Further, it should provide for an extension in the scheduled commercial operation date in case the law changes during the construction period, and provides a minimum impact threshold beyond which the compensation for change in law will be available so that parties factor in the minimum risk arising on account of changes in law and minor claims are not raised.

⁵² Order dated February 15, 2019 issued by MERC in Case No. 276 of 2018 titled as Tata Power Renewable Energy Ltd v. Maharashtra State Electricity Distribution Co. Ltd.

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Annexures

Table 1 Solar PPAs

Year	PPA	Change in law clause	Comments
2010	PPA with GUVNL	There is no clause to address change in law.	Tariff as determined by GERC is fixed at INR 15/KWh for the first 12 years and at INR 5/KWh from the 13 th year to the 25 th year. There is no provision that directly or even indirectly considers the possibility of change in law or allocation of the risks associated with the consequences.
2010	PPA with JVVNL, AV-VNL, and JdVVNL	"The PPA has been executed pursuant to the 'Policy for promoting Generation of Electricity through Non-Conventional Energy Sources-2004 Any change to such Act, Policies, Rules, Regulations and regulatory directions shall be binding." ⁵³	The clause is loosely drafted. It does not cover several important aspects of a robust change in law clause such as the scope of the law, dimensions of change in law, procedure, or the compensation in case of change in law.
2011/ 2012/ 2014	Standard PPA for Procurement of Solar Power on Long-term Basis, issued under JNNSM ⁵⁴	Party aggrieved by a change in law event is required to approach the CERC for its approval. The CERC's decision regarding the date of change in law and relief will be final. ⁵⁵	The PPA has no scope for mutual discussion or agreement between the parties in case of any change in law event. Further, there is no averment regarding the nature of compensation to the aggrieved party.
2014	Model solar PPA approved by the APERC for all solar projects being established pursuant to competitive bidding as part of the solar policy of the Government of Andhra Pradesh	<p>The PPA does not have a specific provision for change in law, defined as <i>any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of India, Government of Telangana including the erstwhile Government of Andhra Pradesh from time to time</i>.⁵⁶</p> <p>Further a change in law has been included as a force majeure event and in case of a force majeure event, the scheduled COD will be deferred for a maximum of 12 months⁵⁷.</p>	<p>The PPA does not have a separate clause addressing change in law. Change in law definition is limited to amendments of the extant laws without including</p> <ul style="list-style-type: none"> (a) any new law that may be enacted or a law that may be repealed; (b) the need to acquire new clearances, permits, or change in terms of existing consents and permits; or (c) imposition of any new tax/cess. <p>Change in law has been treated as a force majeure event. The corresponding relief available is extension of the COD. Though a change in law may impact project timelines, it is very likely to impact the income/expenditure incurred by the aggrieved party. However, the clause does not provide a mechanism for monetary compensation.</p>

⁵³ Re: Article 11 of the PPA

⁵⁴ Re: PPAs issued by NVVN in 2011 and PPAs issued by SECI in 2014.

⁵⁵ Re: Clause 12.2 of the PPA

⁵⁶ Re: Clause 1.2 of the PPA

⁵⁷ Re: Clause 9.1 (b) (iii) and 9.2 of the PPA

Table 1 Solar PPAs

Year	PPA	Change in law clause	Comments
2014	PPA issued by TSSPD-CL along with bid documents for procuring 2,000 MW solar power in Telangana	-same as above-	-same as above-
2016	PPA with M.P. Power Management Company Limited	<p>Change in LAW has been defined to include⁵⁸</p> <ul style="list-style-type: none"> (a) modification/ amendment of existing laws; (b) enactment of any new law; (c) change in the interpretation or enforcement of any laws or judgments; (d) requirement to obtain any new permit; or (e) the modification, amendment, or repeal of any tax, resulting in a change in the incidence of tax liability including pursuant to any applicable laws promulgated or to be promulgated in furtherance of the Constitution (122nd Amendment) Bill, 2014. <p>Further, the PPA sets out a procedure to be adopted by parties in case of change in law, including the requirement to notify the other party about the impact of the change in law on the scope of work, time and cost implications, and the manner in which the impact can be mitigated.⁵⁹</p>	<p>The definition of change in law is unambiguous and all-encompassing. The definition specifically includes changes associated with the introduction of the GST and helps assuage concerns of developers regarding implications of implementation of the GST regime. Further, the clause provides a detailed procedure for claiming relief, including the need for mutual discussions. Unlike any other PPA, the need to demonstrate how the change in law has impacted a party and ways in which it can be mitigated is a good practice. It can help ensure that no frivolous claims are raised and there is no attempt at unjust enrichment. By keeping both parties engaged, the process is expedited.</p>
2017	PPA issued by GUVNL along with bid documents for procuring 500 MW solar power in Gujarat	<p>Change in law includes the enactment/amendment of any law, rules, notifications as also change in interpretation thereof by courts/ the government. Change in taxes, surcharge, cess have also been specifically included⁶⁰ for impact on the final output or sale of electricity. The relief in terms of tariff adjustment is available in case the costs are impacted by 1% of the estimated revenue.⁶¹</p>	<p>The definition of change in law is exhaustive. Pertinently, the reference to a minimum of 1% cost impact is helpful from the point of view of lenders, making it easier for them to assess the risk involved. However, the relief is limited to the generation and sale of electricity; the impact on capital and revenue expenditure is excluded.</p>

58 Re. Article 1 of the PPA

59 Re. Clause 17.1 of the PPA

60 Clause 9.1.1 of the PPA

61 Clause 9.2.1 of the PPA

Table 1 Solar PPAs

Year	PPA	Change in law clause	Comments
2017	PPA issued by TANGEDCO along with bid documents for procuring 1500 MW solar power in Tamil Nadu	The PPA does not have any clause addressing change in law.	The PPA does not have reference either specifically or otherwise to the risk with respect to change in law. This lacuna may give rise to complications in case of change in the applicable legal framework including requirement for any clearances or imposition of a new tax/cess, which may have time and cost implications.
2018	Standard PPA for procuring solar power on long-term basis, issued by SECI	Change in law includes (a) modification/ amendment of existing laws; (b) enactment of a new law; (c) requirement to obtain any new permit; or modification of prevailing conditions of a consent (d) change in rates of taxes or duties; and (e) change in law specifically excludes imposition of or change in SGD as well as extension in the duration of any existing tax. ⁶²	Change in law does not include change in the interpretation or enforcement of any applicable laws or judgments. Further, the exclusion of change to SGD from the ambit of change in law creates uncertainty, since it will have a significant cost impact for the bidders.
2018	PPA issued by GUVNL along with bid documents for procuring 500 MW solar power	Change in law clause specifically includes introduction/modification in the rates of SGD and/or anti-dumping duty. ⁶³ In such a case the developer will be allowed an increase/decrease in tariff of 1 paisa/unit for every increase/decrease of INR 2 lakh/MW in project cost.	The PPA not only has a comprehensive change in law clause, but by clarifying the impact of imposition of safeguard/anti-dumping duty, it also explicitly addresses an imminent issue grappling the solar sector. However, like the PPA issued in 2017, the relief is limited to the generation and sale of electricity and impact on capital and revenue expenditures have been excluded.
2019	Amendment to PPA issued by SECI for setting up 750 MW solar PV project (non-solar park) in Rajasthan		SGD which was specifically excluded from the ambit of change in law has been included in the ambit of change in law.

Source: Author's analysis

⁶² Re. Clause 12.1 of the PPA

⁶³ Re. Clause 9.1.1 (b) of the PPA

Table 2 Wind PPAs

Year	PPA	Change in law clause	Comments
2011	PPA with TANGEDCO	There is no separate provision for change in law. The tariff is fixed for 20 years. Parties have the option to renegotiate the agreement in accordance with Orders of TNERC. ⁶⁴	The PPA does not directly address change in law. Hence, the risk has not been specifically identified, compensation on this account not envisaged, and there is no procedure for making claims in this regard. However, the PPA allows the parties to renegotiate the agreement, subject to the prevailing Order of TNERC. While a party aggrieved with change in law may raise claims in terms of this clause, the absence of a direct provision leaves room for subjectivity, greater complexity, and may lead to unreasonable delays in processing claims.
2013	Draft Wind Energy Purchase Agreement issued by MSSEDCL	The PPA does not have any provision addressing change in law. Further, the seller is responsible for any present as well as future taxes. ⁶⁵	The PPA is silent on the risk relating to change in law. As regards any imposition of a new tax or change in existing rates of any tax, the same will be accountable to the seller, despite this variable being unforeseeable and uncontrollable by either of the parties.
2014	PPA with M.P. Power Management Company Limited	The PPA does not have any provision addressing change in law. Tariff for the project life of 25 years is fixed, which is firm and will not vary for any reason including change in taxes. ⁶⁶	The PPA does not factor any change in law in the entire 25 years of project life. Further, the PPA clearly restricts any change in tariff for any reason, including for change in taxes, a development not in the control of either party.
2016	Draft PPA issued by GUVNL pursuant to GERC's Tariff Order No. 2/2016, dated 30.08.2016 for purchase of wind power	The PPA does not have any specific provision addressing change in law. The tariff is fixed at INR 4.19/kWh. Either party may file for a review of the tariff before GERC; however, the tariff will be subject to a maximum of INR 4.19/kWh. ⁶⁷	The PPA does not address the risk of change in law. While either parties may file a review petition for revision in tariff, the ceiling for tariff has been set at the existing tariff under the PPA. There is scope for decrease in the prevailing tariff but not for an increase.
2017	Draft PPA issued by MSSEDCL for procuring 500 MW wind power	Change in law includes enactment or amendment or change in interpretation of a law as well as any change in taxes. In case of a change in law, the power producer is entitled to be compensated such that it is placed in the same economic position as if such an event had not occurred. ⁶⁸	The change in law clause is comprehensive. Unlike many other PPAs, this PPA clearly sets out the principle to be adopted by the regulator when compensating for a change in law: the power producer should be placed in the same economic position as if such an event had not occurred.

64 Re. Clause 8 (c) of the PPA

65 Re. Clause 19.12 of the PPA

66 Re. Clause 8.1 of the PPA

67 Re. Clause 5.2 of the PPA

68 Clause 9.2.1 of the PPA

Table 2 Wind PPAs

Year	PPA	Change in law clause	Comments
2017	PPA issued by NTPC along with bid documents for procuring wind power on a long-term basis	Change in law includes the enactment/amendment of any law, rules, notifications as also change in interpretation thereof by courts/ the government. Change in taxes, surcharge, cess have also been specifically included. ⁶⁹ To claim relief in case of a change in law, the parties are required to approach the CERC.	While the scope of change in law is exhaustive, the PPA has no scope for discussion and agreement between the parties before approaching the CERC in case of any change in law event. Further, there is no averment regarding the nature of compensation to the aggrieved party.
2018	Draft PPA issued by SECI with bid documents for purchase of wind power	Change in law includes the enactment/ amendment of any law, rules, notifications as also change in interpretation thereof by courts/the government. Change in taxes, surcharge, cess have also been specifically included. ⁷⁰ To claim relief in case of a change in law, the parties are required to approach the CERC.	While the scope of change in law is exhaustive, the PPA has no scope for discussion and agreement between the parties before approaching the CERC in case of any change in law event. Further, there is no averment regarding the nature of compensation to the aggrieved party.
2018	Draft PPA issued by GUVNL with bid documents for purchase of 500 MW wind power	Change in law includes the enactment/amendment of any law, rules, notifications as also change in interpretation thereof by courts/ the government. Change in taxes, surcharge, cess have also been specifically included ⁷¹ for impact on the final output or sale of electricity. The relief in terms of tariff adjustment is available in case the costs are impacted by 1% of the estimated revenue. ⁷¹	The definition of change in law is exhaustive. Pertinently, the reference to a minimum of 1% cost impact is helpful from the point of view of lenders, making it easier for them to assess the risk involved. However, the relief is limited to the generation and sale of electricity; the impact on capital and revenue expenditure is excluded.

Source: Author's analysis

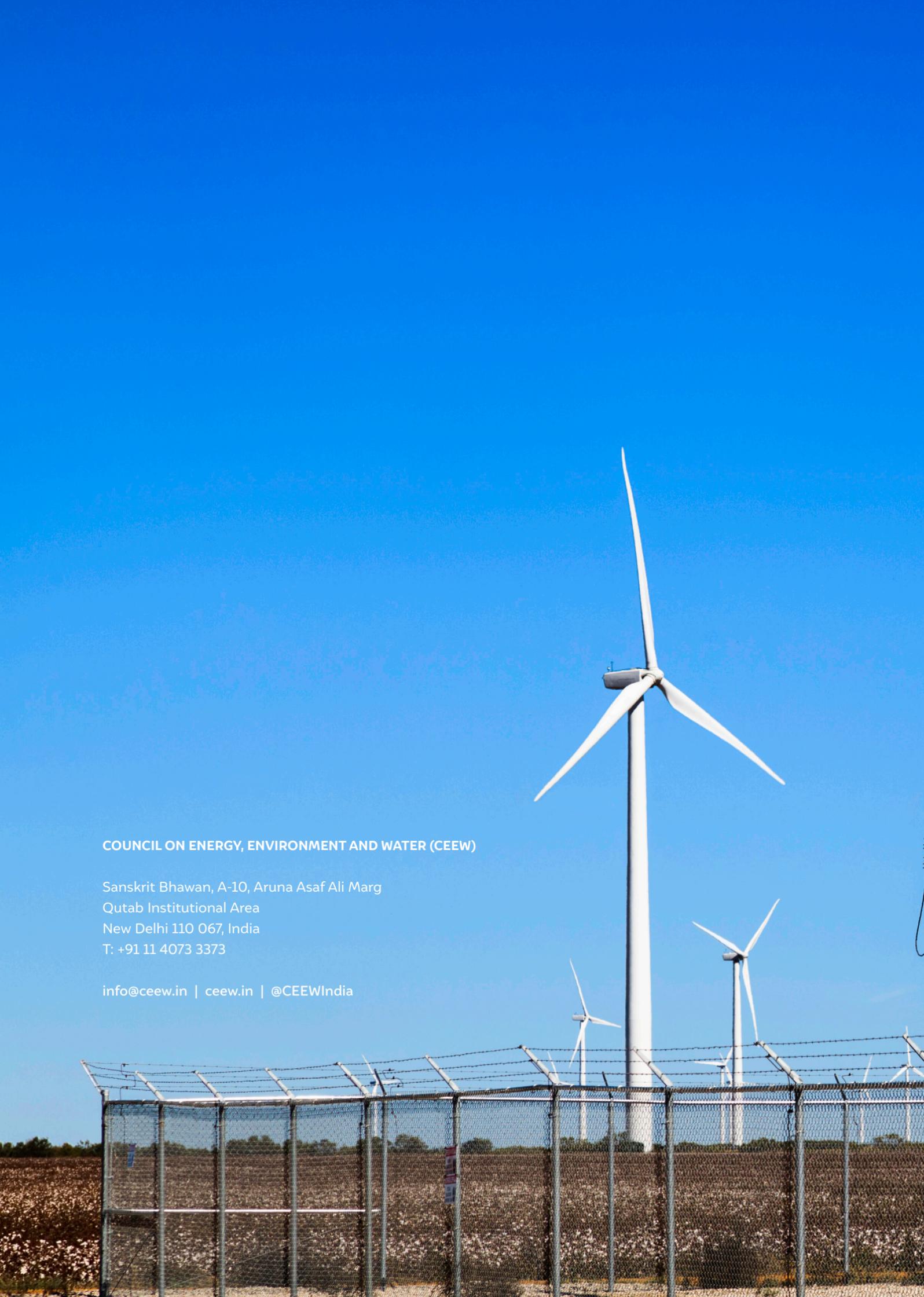
⁶⁹ Clause 12.1.1 of the PPA

⁷⁰ Clause 9.1.1 of the PPA

⁷¹ Clause 9.2.1 of the PPA



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