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Supersession of Contractual Rights by Change in Policy: The Judgment in the Case of APM Terminal vs. Union of India

By Rohit Jaiswal & Abhimeet Sinha

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**POLICY
TRACKER**

The decision of the Supreme Court in this case lays down that policy decision could supersede the contractual right; however, the change in policy must be free from arbitrariness, irrationality, bias and malice thus enabling to eliminate monopolisation and to encourage competition.

Supersession of Contractual Rights by Change in Policy: The Judgment in the Case of APM Terminal vs. Union of India

By Rohit Jaiswal & Abhimeet Sinha

The Supreme Court, in its judgment in the case of **APM Terminals B.V. vs. Union of India & Anr.**, has held that the Central government is within its powers to adopt a policy to prevent the port facilities from being concentrated in the hands of one private group or consortium which could have complete control over the use of the facilities of the ports to the detriment of the shipping industry as a whole.

The government policy of not allowing existing operators to bid for the immediate next terminals was challenged before the Supreme Court. The question, which fell for consideration of the Supreme Court was whether despite the contractual right vested in an operator to participate in future tender processes for developmental work within the port area, such right could be taken away and/or curtailed by a unilateral policy decision of the Central Government.



The court while upholding the government policy asserted that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. It said that the Government has the right to make a policy to prevent companies from bidding for the immediate next terminals so that no monopoly of cargo firm is created.

The Appellant, APM Terminals B.V., is an existing operator in the Jawaharlal Nehru Port Trust ("JNPT"), and had challenged the decision of JNPT to exclude Appellant from participating in the tender process for the Fourth Container Terminal under the JNPT. In pursuance of a 1996 policy, the Central Government introduced the process of privatization in JNPT, subject however, to the regulatory role of the JNPT that it should be ensured that private investment did not result in the creation of private monopolies and that private facilities were available to all users on equal and competitive terms.

The court while upholding the government policy asserted that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. It said that the Government has the right to make a policy to prevent companies from bidding for the immediate next terminals so that no monopoly of cargo firm is created. The Appellant, APM Terminals B.V., is an existing operator in the Jawaharlal Nehru Port Trust ("JNPT"), and had challenged the decision of JNPT to exclude Appellant from participating in the tender process for the Fourth Container Terminal under the JNPT.

In pursuance of a 1996 policy, the Central Government introduced the process of privatization in JNPT, subject however, to the regulatory role of the JNPT that it should be ensured that private investment did not result in the creation of private monopolies and that private facilities were available to all users on equal and competitive terms.

Appellant's Joint Venture Company "Gateway Terminals India Pvt. Ltd.", ("GTI"), was awarded the Tender for the Second Container Terminal, and in terms of Clause 8.31 of the License Agreement, GTI was required not to participate in any subsequent bids invited by the JNPT for operation of Container Terminal during the validity of the license period of 30 years. By the circular dated 26th September, 2007, the Appellant was specifically excluded from bidding for the Third Container Terminal.

Therefore, for the subsequent bid for the Fourth Container Terminal, neither Appellant nor its associate companies/allied organizations and/or consortium of GTI was precluded from participating in the said Tender. However, when the Appellant participated in the said Tender, Appellant was informed that GTI and/or its associates/allied organizations had been disqualified from bidding for the Fourth Container Terminal in view of Clause 8.31 of the Licence Agreement. Appellant submitted that Clause 8.31 of the Licence Agreement would have to be read with the 2007 Policy and could not be read in isolation. It was also submitted that the problem has arisen on account of the fact that the tender for the Third Container Terminal is yet to be finalised, and, in the meantime the tender for the Fourth Container Terminal was floated. Consequently, the said tender for the Fourth Terminal was treated by the Government to be the tender for the Third Container Terminal. That being so, in terms of 2007 policy, the Appellant Company stood disqualified from participating in the said tender also, since under the said policy it could only participate in the next but one subsequent tender after the one awarded to it. The Appellant, therefore, suffered prejudice on account of no fault on its part.

On the issue of the overriding effect of the policy over the contractual terms, the Court observed that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party if the same was in the general public interest and provided such change in policy was guided by reason and that such change in policy must be free from arbitrariness, irrationality, bias and malice. The Supreme Court relied upon its decision in **Shimnit Utsch India Private Ltd. v. West Bengal Transport Infrastructure Development Corporation Limited and Ors. MANU/SC/0382/2010 : (2010) 6 SCC 303**, where it was held that the Government was entitled to change its policies with changing circumstances and only on grounds of change, a policy does not stand vitiated.

In the facts and circumstances of the present case, since, the decision to debar the Appellant from the bid for the Fourth terminal was contrary to the Government's policy, the Court, held that the Appellant having been excluded from one bid on the basis of an existing policy, cannot be debarred from participating in the next bid, by taking recourse to a different yardstick.

The decision of the Supreme Court in this case lays down that policy decision could supersede the contractual right; however, the change in policy must be free from arbitrariness, irrationality, bias and malice. The decision to change the policy is required so as to eliminate monopolisation and to encourage competition, which is in the greater public interest.



Rohit Jaiswal
Partner
rohit@singhania.in



Abhimeet Sinha
Sr. Associate



MMRDA plans to invest US\$ 336 million crore on 26-km road network

The Mumbai Metropolitan Region Development Authority plans to invest Rs 1,512 crore on a 26-km road network to ease congestion in Mumbai and its suburbs. The network would include three flyovers, one rail over bridge, one elevated road and the Eastern Freeway. "The very intent of undertaking the Mumbai Urban Infrastructure Project was to improve road connectivity and also provide east-west connectivity. This network is being developed keeping in view the present and future demands of vehicular movement", Dilip Kawathkar, joint project director, was quoted as saying in a MMRDA release.

[SOURCE](#)

407-km long highway sanctioned in Arunachal Pradesh

The Union Road Transport & ministry has approved the 407 km Putin-Pangin road which passes through three districts of Arunachal Pradesh. The road, part of the ambitious Trans-Arunachal Highway (TAH), which will touch Ziro, Daporijo and Aalo was approved by Union Road Transport & National Highways Minister C P Joshi, Lok Sabha member from Arunachal Takam Sanjoy said.

[SOURCE](#)

Government approves road projects of US\$ 1 billion in three states

The government has approved three road projects in the states of Himachal Pradesh, Haryana and Andhra Pradesh entailing a total investment of US\$1 billion. The Cabinet Committee on Infrastructure cleared widening of Kiratpur-Ner Chowk section in Himachal Pradesh at a cost of US\$ 524 million, six-laning of Vijaywada -Gundugolanu section in Andhra Pradesh worth US\$ 447 million and US\$ 227 millionscheme for four-laning of Uttar Pradesh/Haryana border- Panchkula section in Haryana.

[SOURCE](#)



Centre to fine-tune national solar policy

The Ministry of New and Renewable Energy (MNRE) is in the process of fine-tuning the National Solar Mission policy to adapt to evolving technology changes in the sector, said Bharat Bhargava, director (Solar photo voltaic), MNRE. The Indian government's National Solar Mission has created a \$19-billion plan to produce 20 giga watts of solar power by 2022."The policy has created momentum and many states like Gujarat, Rajasthan and Karnataka have made strides. But the policy requires mid-term correction and careful monitoring to make sure needs of all stakeholders are met," he said while delivering the inaugural keynote at Solarcon 2011.

[SOURCE](#)

Wind power capacity likely to rise 5,000 MW in 12th plan

The government plans to add 5,000 MW of capacity in the 12th Five-Year Plan by encouraging retrofitting of older wind power farms, and tightening existing rules that let promoters enjoy tax breaks even without producing electricity. Although the ministry of new and renewable energy resources has not finalised a policy yet, its draft paper aims to re-power, or install new turbines, at these old farms, most of which were set up in the 90s. This 5,000 MW target is in addition to the 15,000 MW planned through new projects.

[SOURCE](#)



India eyes elite oil club & US shale for energy needs

In what could open up an alternative and more affordable route for the country to import fuel and strengthen energy security, New Delhi has sought entry into Shanghai Cooperation Organisation (SCO), an elite club of Asian and European oil-producing nations. By becoming a full-fledged member of SCO, India could get access to the region's crude and reduce its reliance on supplies from West Asia and Africa, which form the bulk of Indian crude imports at present. The government has also approached the US for shale gas shipments, eyeing the price advantage this relatively new source of energy could bring.

[SOURCE](#)

ONGC Said to Develop Arabian Sea Gas Field by 2016, May Spend \$4 Billion

Oil & Natural Gas Corp. (ONGC), India's biggest energy explorer, plans to produce natural gas from discoveries off the country's west coast in four years in a move that may boost its output of the fuel by 13 percent. The reservoir in the Arabian Sea is located about 50 kilometers (31 miles) from the federal territory of Daman and may hold more than 100 billion cubic meters of gas, or about half the size of India's largest deposit, said three people with direct knowledge of the matter, asking not to be identified because the information isn't public.

[SOURCE](#)



MINING

Australia Governing Party Backs End to India Uranium Export Ban

Australia's governing party Sunday backed a push for the country to end its ban on selling uranium to India, in a move that could further the opening up of trade in fissile materials with the nuclear-armed power at a time of fast-rising energy demand. A total of 206 delegates to the Labor party's national conference in Sydney voted in favor of the motion, which is backed by the party's leadership, while 185 opposed the measure. But the move has evoked strong emotions in the Pacific nation, where opposition to nuclear energy is strong despite the country's holding around a third of the world's uranium reserves.

[SOURCE](#)



Government to award US\$ 4 billion port projects

The government today said it would award 23 port projects worth US\$ 4 billion during the current financial year in an attempt to increase the port capacity in the country by about 237 million tonne a year. The government has identified 23 projects for award during the current fiscal to increase the capacity of major ports by 237 million tonne a year, Minister of Shipping GK Vasan informed the Rajya Sabha. These port projects worth US\$ 4 billion would come up under the PPP (public-private-partnership) mode, Vasan said. The existing port capacity of major ports, as on March, 2011, is 670 million tonne.

[SOURCE](#)

30 more airports will be needed in next 5 yrs: Planning Commission

The growth projections for air passenger traffic suggest an additional requirement of 30 functional airports over the next five years and 180 in the next decade, according to Planning Commission estimates. The passenger terminal capacity in all airports, expected to be 230-240 million this year, is likely to grow to 370 million, the estimates, drawn up in accordance with the investment plans of the airport operators, show.

[SOURCE](#)

India sitting on unused flying rights

Indian air carriers are well behind foreign peers in utilising the traffic allocated under the bilateral services agreements India has signed with 109 countries. There are 834,000 weekly seats on international air routes connecting all these countries with India. The Indian airlines have been able to utilise only 22.7 per cent of the total seat allocations. Air India utilises 11.9 per cent and the other four private carriers that fly abroad utilise a combined average of 10.8 per cent. International carriers utilise 37.9 per cent of the total. (All flights together fill only about 60 per cent of the seat allocations, done in absolute numbers, under the agreements).

[SOURCE](#)

US trade mission coming to India next month

A senior Obama administration official will lead the first-ever US ports and maritime technology trade industry mission to India next month as New Delhi embarks on a plan to modernise its maritime security.

Led by Francisco Sanchez, US Under Secretary of Commerce for International Trade, the trade mission consisting of top American executives, would make stops in Chennai, Mumbai and Ahmedabad during their trip from February 20 to 24. The mission would comprise representatives from 14 US firms that provide latest cargo handling equipment, port security and maritime technology equipment.

[SOURCE](#)

Ministry seeks US\$ 4.4 billion for Air India in next Plan

The Union civil aviation ministry has asked for US\$ 4.4 billion as budgetary support from the government for Air India in the 12th Plan (2012-17), a part of the US\$ 5.1 billion a Group of Ministers (GoM) had said should be infused till 2020-21 in the ailing state-owned airline. "But these recommendations are conditional and the airline will also have to meet certain targets to get the fund," said a senior civil aviation ministry official.

[SOURCE](#)



Delhi-Mumbai corridor to get \$4.5bn from Japan

Japan announced its intention to invest \$4.5 billion in the Delhi-Mumbai Industrial Corridor (DMIC) in the next five years with visiting PM Yoshihiko Noda emphasizing during his meeting with Indian PM Manmohan Singh that the project would redefine the character of infrastructure growth in India through advanced technology and green growth. The amount includes finances from Japan Bank for International Cooperation as well as Official Development Assistance (ODA) loan.

[SOURCE](#)

Railways plans new policy to attract private investments

The Railway Ministry is once again mulling a new policy to attract private investments in rail connectivity and capacity augmentation projects. The policy would be of interest to any investor eyeing for rail connectivity including logistics players, rail link users such as ports, steel, or coal companies, State Governments and local bodies, ministry officials claimed.

[SOURCE](#)



ADB keen to fund infra projects

The Asian Development Bank (ADB) is keen to finance infrastructure development projects in the state in sectors like roads, irrigation and power transmission. "We had discussions with the executive director of ADB. They are enthusiastic on funding projects in the state. ADB is already financing a few irrigation projects and also road projects under Pradhan Mantri Grameen Sadak Yojana", said state Chief Secretary B K Patnaik.

[SOURCE](#)

India to launch US\$1 bn innovation fund by June-July 2012

India plans to launch a \$1 billion fund by June-July, with an initial capital of Rs 5 billion, to invest in innovations that can generate services and products to uplift the poor, a top government official said. The fund, named India Inclusive Innovation Fund, will invest in sectors such as agriculture, water, energy and healthcare, Pitroda said, after delivering the keynote address at Grid Week Asia Summit, organised by Indian Electrical & Electronics Manufacturers' Association.

[SOURCE](#)



Government revives reforms in power sector

In an attempt to force loss-making state utilities to undertake long-pending reforms, Power Finance Corp. Ltd (PFC) and Rural Electrification Corp. Ltd (REC) have made short-term loans conditional on them meeting criteria which could make electricity more expensive for consumers. The lenders, controlled by the Union government, have introduced a new qualification system requiring the utilities to pledge their commitment to a preset reform agenda, including regular tariff increases, to be eligible for availing short-term loans. The first batch of states to accept these norms include Rajasthan, Punjab, Haryana, Uttar Pradesh and Delhi.

[SOURCE](#)

Government confident of generating surplus power for export

With half a dozen power equipment firms slated to set up units in India, the government today expressed confidence of meeting the domestic power demand and generating surplus for export. "We had only Bharat Heavy Electricals Ltd (BHEL). Now, six big companies are coming in joint ventures and the country will not face any power problem. I am confident that the country will export power to other countries," Power Minister Sushilkumar Shinde said.

[SOURCE](#)

India, Russia in talks on JV to circumvent Nuclear Suppliers Group (NSG) restrictions

India and Russia are discussing a deal that could help New Delhi skirt restrictions passed by the Nuclear Suppliers Group (NSG) that make it difficult for India to access sensitive nuclear technology, Russia's ambassador to India Alexander Kadakin said on Wednesday. The NSG controls global nuclear commerce. with Russian leader Vladimir Putin. Singh will be visiting Russia next week. The deal envisages setting up a joint venture company that will be based in Russia, Kadakin told reporters at a press conference.

[SOURCE](#)

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