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India: Enhancing Bond Guarantee Structuring Skills in India

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Prepared by Gautam Saha
AZB & Partners
Delhi, India

For India Infrastructure Finance Company Ltd.
Asian Development Bank

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Asian Development Bank

[SPECIMEN AGREEMENT]

[SUBJECT TO CHANGE]

[Please note that this specimen agreement has been drafted to capture commercial and legal negotiations between certain parties and is merely intended to serve as a template. All parties using this specimen agreement should consult their legal, business and other relevant advisors prior to entering into definitive documentation. ADB and its advisors are providing this specimen agreement on an “as-is-basis” and assume no responsibility towards any party for any consequences arising out of the use of this document]

Date: _____

India Infrastructure Finance Company Limited

8th Floor, Hindustan Times Building
18 & 20, Kasturbha Gandhi Marg
New Delhi- 110001, India

Attention: [•]

[•] (in its capacity as Security Trustee and Debenture Trustee)
[•]

Attention: [•]

Dear Sirs

RE: Counter-Indemnity by [•] (“Counter-Indemnity”)

We refer to:

- (A) the debenture trust deed dated [•], by and among [•] (“**Issuer**”, which expression shall include our successors and permitted assigns) and [•], acting in separate capacities as the debenture trustee and the security trustee, (“**Debenture Trustee**” and the “**Security Trustee**”, as the context may require) (“**Debenture Trust Deed**”) pursuant to which the Issuer has allotted and issued Debentures;
- (B) the agreement dated [•], (“**IIFCL Guarantee Agreement**”) between the Issuer, the Debenture Trustee, Security Trustee and India Infrastructure Finance Company Limited (“**IIFCL**”) entered into in connection with the Debenture Trust Deed which sets out the terms and conditions of the partial credit guarantee being provided by IIFCL; and
- (C) the back-stop guarantee(s) (the “**Back-Stop Guarantee(s)**”) that IIFCL intends to enter into with third party guarantor(s), from time to time (the “**Back-Stop Guarantor**”), in order to support IIFCL’s guarantee obligations under the IIFCL Guarantee Agreement. At or about the time of execution of this Counter Indemnity, such Back-Stop Guarantor is proposed to be Asian Development Bank, an international financial institution organised and existing under the Agreement Establishing the Asian Development Bank by and among its member countries and accordingly, IIFCL has entered/ will enter into a Back-Stop Guarantee with Asian Development Bank on or about the date of this Counter-Indemnity.

Unless otherwise defined or specified, capitalised terms in this Counter-Indemnity shall have the meaning given to them in the IIFCL Guarantee Agreement or, if not otherwise defined in the IIFCL Guarantee Agreement, in the Debenture Trust Deed (as applicable). In the event of a conflict between any definitions in the IIFCL Guarantee Agreement and the Debenture Trust Deed, for the purposes of this Counter-Indemnity, the definitions in the IIFCL Guarantee Agreement shall prevail to the extent of such conflict/inconsistency. For the purposes of this Counter-Indemnity, the term "Financing Documents" shall mean, collectively the Debenture Documents and this Counter-Indemnity.

1. Acknowledgment

We, the duly authorised signatories of the Issuer, for and on behalf of the Issuer, hereby acknowledge and confirm that:

- 1.1 IIFCL has at the request of the Issuer, entered into the IIFCL Guarantee Agreement for the benefit of the Debenture Holders for the provision of a partial credit guarantee whereby it guarantees subject to the provisions of such IIFCL Guarantee Agreement, to pay to the Debenture Trustee any shortfall in the amount the Issuer is required to pay to the Debenture Holders under the Debenture Trust Deed in respect of Redemption Amounts (to the extent of Principal Amounts and Interest payable) up to a maximum amount specified in the IIFCL Guarantee Agreement;
- 1.2 IIFCL, as guarantor under the IIFCL Guarantee Agreement, is entitled to exercise all the rights and remedies available to a surety under Applicable Law following payment by it of any amounts in respect of any such shortfall;
- 1.3 no contract, agreement or arrangement of any nature whatsoever has been entered into by or on behalf of the Issuer which in any manner restricts or limits or seeks to restrict or limit the exercise of any such rights or remedies available to a surety; and
- 1.4 it is a condition precedent to the effectiveness of the Debenture Trust Deed that this Counter-Indemnity is entered into.

2. General Counter-Indemnity

- 2.1 The Issuer agrees, confirms and undertakes that:
- 2.2 it shall fully comply with the terms of the Credit Enhancement Scheme (a copy of which is set out herein as Schedule A);
- 2.3 it shall make the payment of the (A) Upfront Fee, IIFCL Guarantee Fee and Annual Administration Fee ("**Fees**") to IIFCL in accordance with Clause 3 of the IIFCL Guarantee Agreement and (B) costs, fees and expenses to IIFCL in accordance with Clause 3.6 of the IIFCL Guarantee Agreement and funds to meet all such payments shall be transferred to the Trust and Retention Account;
- 2.4 it shall/has on or around the date of this Counter-Indemnity, make/made the payment (as the case may be) of the (A) Upfront Fee in an amount of [•] (comprising the Upfront Fee in an amount of [•] *plus* applicable service tax paid on such Upfront Fee), (B) Annual Administration Fees in an amount of [•] for the period commencing on the date of the IIFCL Guarantee Agreement and ending on the first anniversary thereof and (C) IIFCL Guarantee Fee (net of the Upfront Fee paid by the Issuer) due on the first IIFCL Guarantee Fee Payment Date;

- 2.5 has and will comply with all Applicable Laws and has obtained and will maintain all relevant approvals required from any Governmental Authority in connection with this Counter-Indemnity and its obligations hereunder;
- 2.6 shall, at all times during the pendency of the IIFCL Guarantee Agreement and this Counter-Indemnity and until the Final Settlement Date, whichever is the later, comply with the Safeguard and Integrity Provisions;
- 2.7 without prejudice to any other express or implied right to which IIFCL may be entitled under the Financing Documents (including this Counter-Indemnity), we agree at all times as a continuing security to fully indemnify IIFCL immediately on receipt of a written demand in respect of (a) all sums for which IIFCL is or may become liable to pay under the IIFCL Guarantee Agreement, (b) all claims and demands which may be made on IIFCL under the Financing Documents and (c) all losses, costs, damages, fees and expenses which IIFCL may sustain or incur in any manner in connection with the IIFCL Guarantee Agreement, this Counter-Indemnity or any other Financing Document.

3. Counter-Indemnity to Reimburse

- 3.1 We undertake to reimburse and pay to IIFCL, immediately upon the occurrence of the events in clause 4.2, an amount in Indian Rupees equal to:

- (i) each Shortfall Amount Paid under the IIFCL Guarantee Agreement; and
- (ii) interest on (A) each Shortfall Amount Paid, and (B) on all other monies accruing due to IIFCL pursuant to the IIFCL Guarantee Agreement (including the Fees and the costs fees and expenses recoverable pursuant to Clause 3.6 thereof) and other Financing Documents and outstanding, compounded on an annual basis and calculated at the rate that is the higher of (the "**IIFCL Interest Rate**"):
 - (A) the aggregate of (i) [•] basis points, (ii) the rate of Default Interest as specified in Clause 4.3(a) of Schedule III of the Debenture Trust Deed, and (iii) the Interest Rate of the Debentures as specified in the Debenture Trust Deed (excluding any increase in the Interest Rate on account of Interest Step Up Events), calculated on a per annum basis; and
 - (B) (i) [•] basis points over the secondary market yield of [•] years Government of India security (calculated on a per annum basis), prevailing on the date on which the Shortfall Amount Paid was made available by IIFCL, or (ii) the IIFCL Benchmark Rate (calculated on a per annum basis), whichever is higher.

- 3.2 Notwithstanding anything contained in Clause 3.1, the Issuer agrees, confirms and undertakes that it shall reimburse to IIFCL on an indemnity basis, all costs, fees and expenses (including fees and expenses payable to legal counsel, consultants and other third parties) incurred by IIFCL in exercising all or any of its rights under this Counter-Indemnity (including in respect of any claims, demand enforcement steps and actions) to recover amounts payable hereunder.

4. Payments

- 4.1 Each payment (including in respect of costs, fees, damages, losses, expenses and taxes) made under or in connection with this Counter-Indemnity shall be made in the currency in

which such payment was incurred.

4.2 We agree and confirm that:

- (a) Upon the earlier of (i) the IIFCL Guarantee Agreement being terminated or ceasing to be effective, (ii) the initiation of an Enforcement Action, (iii) Acceleration, (iv) the failure by the Issuer in the payment, when due in accordance with the IIFCL Guarantee Agreement, of the IIFCL Guarantee Fee, or (v) final Redemption Date of the Debentures, being [●] or the preceding Business Day if that day is not a Business Day, having occurred (“**IIFCL Payment Event**”): all IIFCL Secured Obligations accrued until such IIFCL Payment Event shall immediately become due and payable by us to IIFCL together with all fees (including the amount of any of the fees that have accrued up until such time), costs and expenses and interest payable under any of the Financing Documents. Further, any additional Shortfall Amounts Paid together with accrued interest, cost and expenses incurred after the IIFCL Payment Event, shall immediately become due and payable;
- (b) In the event an IIFCL Payment Event has not occurred as set out in clause 4.2 (a) above, and the IIFCL Available Residual Guarantee becomes nil, then (i) all interest accrued in accordance with clause 3.1 (ii) above, together with all fees (including the amount of any of the fees that have accrued up until such time), costs and expenses payable under any of the Financing Documents, shall immediately become due and payable by us to IIFCL, and (ii) the Shortfall Amounts Paid, shall become due and payable by us to IIFCL upon the date that is the final Redemption Date of the Debentures, being [●] or the preceding Business Day if that day is not a Business Day;
- (c) In the event an IIFCL Payment Event has not occurred as set out in clause 4.2 (a) above, and the IIFCL Available Residual Guarantee has not reduced to nil, then all interest accrued in accordance with clause 3.1 (ii) above, along with Shortfall Amounts Paid together with all fees (including the amount of any of the fees that have accrued up until such time), costs and expenses payable under any of the Financing Documents shall become due and payable by us to IIFCL upon the date that is the final Redemption Date of the Debentures, being [●] or the preceding Business Day if that day is not a Business Day;
- (d) Notwithstanding the other provisions of this clause 4.2 (a), (b) or (c) above, and irrespective of any due dates for payment of IIFCL Secured Obligations as set out in such aforesaid clauses of this Counter-Indemnity, we agree and undertake to immediately pay (or if applicable, prepay) to IIFCL, all interest accrued in accordance with clause 3.1 (ii) above along with Shortfall Amounts Paid together with all fees (including the amount of any of the fees that have accrued up until such time), costs and expenses payable to IIFCL under any of the Financing Documents, from our available funds (in accordance with the priority of payments set out in the Cash Flow Waterfall under the Trust and Retention Account Agreement), prior to making any payments into any Sub-Account lower in priority to the Guarantor’s Debt Service Account in the Cash Flow Waterfall. Further we undertake and agree not make payments to the Sponsor or to any Person that is our Affiliate or the Sponsor’s Affiliate from the Cash Trap Sub-Account or the Surplus Sub-Account or transfer any amounts into any Sub-Account lower in priority to the Guarantor’s Debt Service Account in the Cash Flow Waterfall, until all amounts payable by us to IIFCL in accordance with the provisions of this Counter-Indemnity, have been paid;

(e) We shall promptly notify IIFCL and send a copy of the notice to the Security Trustee and the Backstop Guarantor (at the address notified by IIFCL to us from time to time) of any amounts we have paid to the Secured Parties (including as a result of any recovery proceedings initiated against us in accordance with the provisions of any of the Financing Documents).

4.3 All payments to be made by us under this Counter-Indemnity shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim.

4.4 Any payment to be made by us under this Counter-Indemnity that is due to be made on a day that is not a Business Day shall be made on the immediately preceding Business Day.

4.5 All amounts, interest, charges, expenses etc., as are payable by us under this Counter-Indemnity shall accrue from day to day, and shall be computed on the basis of the actual number of days elapsed.

4.6 Any payment made by us to IIFCL under this Counter-Indemnity shall be first applied by IIFCL towards (i) any fees, costs and expenses (other than the Guarantee Fee) payable to IIFCL, under any Financing Document, (ii) the Interest Recovery Amount, and (iii) the Shortfall Amount Paid.

5. Principal Obligor

Our obligation to make any payment under this Counter-Indemnity:

5.1 is unconditional and irrevocable and is as principal obligor;

5.2 is in addition to, and not in substitution or derogation of, any other right or remedy which IIFCL may have with respect to us or any other person, including under the IIFCL Guarantee Agreement, the Backstop Guarantee, or any other document or from any other source, including any rights of subrogation and any assigned or transferred rights and IIFCL is not obliged to exercise any such right or remedy before exercising its rights under this Counter-Indemnity; and

5.3 will not be impaired, discharged or otherwise affected by any termination of the IIFCL Guarantee or any other Finance Documents or any act, omission, matter or thing whatsoever which, but for this provision, would reduce, release or prejudice any of our obligations under this Counter-Indemnity.

6. No Waiver

We acknowledge that any delay by IIFCL in exercising, or any failure by IIFCL to exercise, any right or remedy it has under this Counter-Indemnity will not be construed to be a waiver of such right or remedy and nor will any single or partial exercise of any such right or remedy prevent any further or other exercise of such right or remedy or any other such right or remedy.

7. Representations and Warranties

We represent and warrant to IIFCL and the Backstop Guarantor, which representations and warranties shall survive until the IIFCL Secured Obligations are paid in full to the satisfaction of IIFCL, that:

- 7.1 we are a company, duly incorporated and validly existing under the laws of India;
- 7.2 we have the power to enter into, perform and deliver, and have taken all necessary action to authorise its entry into, performance and delivery of, this Counter-Indemnity, the IIFCL Guarantee Agreement, the Financing Documents to which we are a party and the transactions contemplated by them;
- 7.3 all representations, warranties and undertakings given by us in the Debenture Trust Deed are true and correct in all respect;
- 7.4 we are not in breach of any Safeguard and Integrity Provisions;
- 7.5 our obligations under this Counter-Indemnity and the IIFCL Guarantee Agreement are legal, valid, binding and enforceable obligations; and
- 7.6 neither us, nor any of our Affiliates, has been engaged in:
 - (A) Corrupt Practices, Fraudulent Practices, Collusive Practices or Coercive Practices in connection with the Project, including the procurement or the execution of any contract for goods or works relating to the Project;
 - (B) Money Laundering or acted in breach of any Applicable Law relating to Money Laundering; or
 - (C) the Financing of Terrorism.

8. Further Assurances

- 8.1 We undertake to use our best endeavours where requested by IIFCL to secure, perfect or exercise rights of subrogation, rights of assignment and other rights of IIFCL and/or the Backstop Guarantor under the Financing Documents, including:
 - (a) obtaining and maintaining in full force and effect, all consents, approvals, clearances, licenses, actions, authorisations, rulings, permits of required pursuant to Applicable Law (including the making of any submissions and filings as may required under such law) that may be required in connection with the performance, validity and enforceability of each of our obligations under this Counter-Indemnity;
 - (b) executing and delivering of all instruments and documents in the form required by IIFCL and the Backstop Guarantor; and
 - (c) providing all documentation requested by IIFCL and the Backstop Guarantor to establish our indebtedness to IIFCL and the Backstop Guarantor (as the case may be) as arising under this Counter-Indemnity.
- 8.2 Until the IIFCL Secured Obligations are unconditionally paid and discharged in full to the satisfaction of IIFCL, we undertake to:
 - (a) permit, and use reasonable endeavours to assist, the duly authorised representatives of IIFCL and the Backstop Guarantor to:
 - (i) examine, audit and copy all of the Issuer's books, records and financial statements, wherever located; and

- (ii) inspect the Project, examine any property of the Issuer, wherever located in connection with the Project, and interview any officers, employees, independent accountants, consultants and attorneys of the Issuer on matters reasonably related to the IIFCL Guarantee or the Project.
- (b) promptly provide to IIFCL (with a copy to the Backstop Guarantor) such statements, data or other information as IIFCL may reasonably request which relate to the IIFCL Guarantee or the Debentures, including statements, data and information provided by the Issuer to the Debenture Trustee;
- (c) provide to IIFCL (with a copy to the Backstop Guarantor) within [•] days of the date of any amendment made to any Project Documents as permitted pursuant to the Financing Documents (or such later date as may be agreed by IIFCL), a true and complete copy thereof of any such Project Documents, as amended and executed by the parties thereto;
- (d) promptly after becoming aware thereof, notify IIFCL in reasonable detail of:
 - (i) any event or circumstance that could be reasonably be expected to cause, or materially increase the likelihood of, a Shortfall Instruction under the IIFCL Guarantee or an IIFCL Event of Default (regardless of the cause) under the IIFCL Guarantee, keeping IIFCL regularly informed as to all relevant developments;
 - (ii) any Event of Default;
 - (iii) any material change in the nature or scope of the Project or the Issuer's activities;
 - (iv) any acceleration or prepayment of the Debentures (or part thereof);
 - (v) the institution of any material court proceedings or arbitration against the Issuer (including insolvency or winding up proceedings);
 - (vi) any change in the name, corporate identity or legal nature of the Issuer;
 - (vii) any repudiation by the Issuer of, or any evidence of any intention by the Issuer to repudiate, any of the Financing Documents or the Project Documents; and
 - (viii) any repudiation by any person (other than the Issuer) who is party to a Project Document of, or any evidence of any intention by any such person to repudiate, a Project Document.

9. Not Used

10. Allocation

If at any time IIFCL receives less than the full amount then outstanding from us under any of the Financing Documents, IIFCL shall have the right (as between IIFCL and us) to allocate and apply the amount received in any way or manner and for such purpose or purposes under this Counter-Indemnity or any other Financing Document as IIFCL in its sole discretion

determines, notwithstanding any instruction by us to the contrary.

11. Counterparts

This Counter-Indemnity may be executed in any number of counterparts. This has the same effect as if the signatures on the counterparts were on a single copy of this document.

12. Tax gross-up

12.1 We undertake to make all payments to be made by us to IIFCL under this Counter-Indemnity free and clear of and without deduction for or on account of any Taxes unless we are required to make such a payment subject to the deduction or withholding of taxes, in which case the sum payable by the Issuer in respect of which such deduction or withholding is required to be made shall be increased to the extent necessary to ensure that, after the making of such deduction or withholding, IIFCL receives and retains (free from any liability in respect of any such deduction or withholding) a net sum equal to the sum which it would have received and so retained had no such deduction or withholding been made or required to be made, except if such deduction or withholding was made in respect of any Taxes calculated with reference to the income received by IIFCL in accordance with Applicable Law, in which case we shall deliver to IIFCL, tax withholding or tax deduction certificates in respect of such withholding or deduction.

12.2 Notwithstanding Clause 12.1, if a deduction on account of any Taxes is required by law to be made by us (not being Taxes imposed on or calculated by reference to the income received by IIFCL), or any liability in respect of any such payment is asserted, imposed, levied or assessed against IIFCL, we hereby agree, confirm and undertake to indemnify IIFCL against such payment or liability, together with any interest, penalties, costs and expenses payable or incurred in connection therewith.

13. Governing Law

This Counter-Indemnity and all obligations whether contractual or otherwise arising out of or in connection with it are governed by Indian law.

14. Jurisdiction

The courts and tribunals at [•] shall have exclusive jurisdiction to deal with any matters or disputes arising out of or incidental to this Counter-Indemnity.

15. Duration of Liability

Our liability under and in connection with this Counter-Indemnity shall continue until the IIFCL Secured Obligations have been paid in full to the satisfaction of IIFCL.

16. Assignment

We agree and acknowledge that IIFCL's rights and benefits arising under or in connection with this Counter-Indemnity may be assigned by it to any bank, financial institution, multilateral financial institution, multilateral development bank or non-banking financial company without our consent and the Issuer shall execute all such deeds, documents, instruments and agreements as may be required by IIFCL to assign such rights. Provided however, the cost of any assignment by IIFCL of its rights and benefits arising under or in connection with this Counter-Indemnity shall not be borne by the Issuer.

This Counter-Indemnity has been signed and executed as a deed by the Issuer and is intended to be and is hereby delivered by the Issuer as a deed on the date specified above.

[Signature page follows]

EXECUTED AS A DEED by:

THE COMMON SEAL OF [•] has pursuant to the Resolutions of its Board of Directors passed in that behalf on [•] hereunto been affixed in the presence _____ of _____, its Director/Managing Director, who has signed these presents in token thereof.

In the presence of:

Witness signature:

Witness name:

Witness address:

We acknowledge the contents of this Counter-Indemnity:

India Infrastructure Finance Company Limited

By:

Name:

Title:

Date:

[•], as the Debenture Trustee

By:

Name:

Title:

Date:

[•], as the Security Trustee

By:

Name:

Title:

Date:

Schedule A

[*Copy of Credit Enhancement Scheme*]