



नई दिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 14/MP/2019
69/MP/2019
27/MP/2019
13/MP/2019

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson
डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member
श्री आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 4th of October, 2019

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement executed between the Petitioners and Respondents for seeking declaration of and relief for 'Change in Law' and seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset commercial impact of change in law events on account of imposition of safeguard duty on the import of solar cells and modules.

AND IN THE MATTER OF:

1) Petition No. 14/MP/2019

Renew Solar Power Pvt. Ltd.
Through its authorized signatory
138, Ansal Chambers II, Bhikaji Cama Place,
New Delhi. 110066

...Petitioner

Versus

1. Solar Energy Corporation of India Limited
Represented Through Director (Finance)
1st Floor, D-3, A Wing,
Religare Building District Centre,
Saket, New Delhi – 110017
2. Jaipur Vidyut Vitran Nigam Ltd
Represented through Superintending Engineer (IT)
Vidyut Bhawan, Jyoti Nagar,
Jaipur - 302005, Rajasthan
3. Ajmer Vidyut Vitran Nigam Ltd
Represented through Additional Chief Engineer (IT)
Vidyut Bhawan, Panchsheel Nagar Makarwali Road,
Ajmer - 305004, Rajasthan
4. Jodhpur Vidyut Vitran Nigam Ltd.
Represented through Nodal officer, Superintending Engineer (IT)
New Power House, Industrial Area
Jodhpur - 342003, Rajasthan
5. Uttar Pradesh Power Corporation Ltd.
10th Floor, Shakti Bhawan, Extn. 14,
Ashok Marg, Lucknow,
Uttar Pradesh - 226001

...Respondents

AND IN THE MATTER OF:

2) Petition No. 69/MP/2019

Phelan Energy India RJ Pvt. Limited,
Through its authorized signatory,
435 Regus Centre, 4th floor, Rectangle 1 Building,
Saket District Centre, New Delhi – 110017

...Petitioner

Versus

1. Solar Energy Corporation of India Limited

Represented Through Director (Finance)
1st Floor, D-3, A Wing, Religare Building District Centre,

Saket, New Delhi – 110017

2. Jaipur Vidyut Vitran Nigam Ltd
Represented through Superintending Engineer (IT)
Vidyut Bhawan, Jyoti Nagar,
Jaipur - 302005
3. Ajmer Vidyut Vitran Nigam Ltd
Represented through Additional Chief Engineer (IT)
Vidyut Bhawan, Panchsheel Nagar Makarwali Road,
Ajmer - 305004
4. Jodhpur Vidyut Vitran Nigam Ltd.
Represented through Nodal officer, Superintending Engineer (IT)
New Power House,
Jodhpur - 342003

...Respondents

AND IN THE MATTER OF:

3) Petition No. 27/MP/2019

Clean Sustainable Energy Private Limited
Hubtown Solaris, 4th Floor, 406
N.S. Phadke Marg, Mumbai-400069

...Petitioner

Versus

1. Solar Energy Corporation of India Limited
1st Floor, A-Wing, D-3,
District Center - Saket,
New Delhi-110017
2. Jaipur Vidyut Vitran Nigam Ltd.
Represented through Superintending Engineer (IT)
Vidyut Bhawan, Jyoti Nagar,
Jaipur – 302005, Rajasthan
3. Ajmer Vidyut Vitran Nigam Ltd.
Represented through Additional Chief Engineer (IT)
Vidyut Bhawan, Panchsheel Nagar Makarwali Road,
Ajmer – 305004, Rajasthan
4. Jodhpur Vidyut Vitran Nigam Ltd.
Represented through Nodal officer,
Superintending Engineer (IT)
New Power House, Industrial Area
Jodhpur – 342003, Rajasthan

...Respondents

AND IN THE MATTER OF:

4) Petition No. 13/MP/2019

Mahoba Solar (UP) Private Limited
Adani House, Near Mithakhali, Six Roads, Navrangpura,
Ahmedabad-380009

...Petitioner

Versus

1. Solar Energy Corporation of India Limited
1st Floor, A-Wing, Prius Platinum Building,
District Centre - Saket,
New Delhi-110017
2. BSES Yamuna Power Limited
Shakti Kiran Building,
Karkardooma,
New Delhi-110017

...Respondents

Parties Present: Shri Sujit Ghosh, Advocate, RSPPL & Phelan Energy
Ms. Mannat Waraich, Advocate, RSPPL & Phelan Energy
Shri Rishabh Prasad, Advocate, RSPPL & Phelan Energy
Shri Ankur Sood, Advocate, CSEPL
Ms. Romila Mandal, Advocate, CSEPL
Shri Sourav Roy, Advocate, MSUPPL
Shri Harsh Anand, Advocate, MSUPPL
Shri Gaurav Majumdar, Advocate, MSUPPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Rakesh Shah, MSUPPL

आदेश/ ORDER

The Petitioners, Renew Solar Power Pvt. Limited in Petition No. 14/MP/2019; Phelan Energy India RJ Pvt. Limited in Petition No. 69/MP/2019; Clean Sustainable Energy Private Limited in Petition No. 27/MP/2019 and Mahoba Solar (UP) Private Limited in 13/MP/2019 are generating companies which are engaged in the business of development, building,

owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. They are collectively referred to as the 'Petitioners' hereinafter. Further, Mahoba Solar (UP) Private Limited has formed a project company namely M/s Kilaj Solar (Maharashtra) Pvt. Ltd within the provisions of the 'Request for Selection' for development of Solar Power Project, generation and sale of solar power whereas Clean Sustainable Energy Private Limited is a solar generating company, a Special Purpose Vehicle (hereinafter referred to as 'SPV') formed by M/s. Avaada Power Private Ltd.

2. The Respondent No.1, Solar Energy Corporation of India Limited (hereinafter referred to as 'SECI') is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE'). SECI has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity through Viability Gap Funding (hereinafter referred to as 'VGF') mode in India.
3. In Petition No. 14/MP/2019; 69/MP/2019 and 27/MP/2019, the Respondent No. 2, Jaipur Vidyut Vitran Nigam Ltd, the Respondent No. 3 Ajmer Vidyut Vitran Nigam Ltd and the Respondent No. 4 Jodhpur Vidyut Vitran Nigam Ltd., are the three distribution utilities created with the principal object of engaging in the business of distribution and supply of electricity across all districts in the State of Rajasthan. The Respondent No. 5, Uttar Pradesh Power Corporation Ltd. in Petition No. 14/MP/2019 is the distribution utility created with the principal object of engaging in the business of distribution and supply of electricity across all districts in the State of Uttar Pradesh. The Respondent No. 2, BSES Yamuna Power Limited in Petition No. 13/MP/2019 is the distribution utility created with the principal object of engaging in the business of distribution and supply of electricity. Together with Respondent No. 1, they are collectively referred to as the 'Respondents' hereinafter.
4. The Petitioners have made the following prayers:

In Petition No. 14/MP/2019 and Petition No. 69/MP/2019

- a. *Declare the imposition of safeguard duty on the import of solar modules as Change in Law in terms of the PPA which have led to an increase in the recurring and non-recurring expenditure for the Project;*
- b. *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*

- c. Grant interest/carrying cost from the date of impact till reimbursement by the Respondent No. 1.
- d. Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.

In Petition No. 27/MP/2019

- a. Hold and declare that the imposition of the Safeguard Duty on “Solar Cells whether or not assembled in modules or panels” by Notification No. 01/2018-Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India is an event under 'Change in Law' under Article 12 of the PPA;
- b. Restore the Petitioner to the same economic condition prior to occurrence of the Change in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff through suitable mechanism as prayed for in the present Petition;
- c. In the alternative, direct a lump sum compensation of Rs. 73,95,48,580.41 to be paid to the Petitioner in lieu of the additional levy of Safeguard Duty and IGST on importing solar cells plus interest/carrying cost from the date of impact till reimbursement by the Respondent; and
- d. Pass such other orders that this Commission deems fit in the interest of justice.

In Petition No. 13/MP/2019

- a. Admit the Petition
- b. Hold and declare that the imposition of Safeguard Duty on import of solar cells vide Notification No. 01/2018-Customs (SG) dated 30.07.2018, is an event under Change in Law;
- c. Restore the Petitioner to the same economic condition prior to occurrence of the Changes in Law by increasing the tariff and allowing the carrying cost as prayed for in the present Petition.

ALTERNATIVELY

- d. Direct the Respondent to pay the Petitioners an additional amount as one time compensation for the additional burden incurred by the Petitioners on establishing the said Solar Power Generating Systems, due to promulgation of levy of Safeguard Duty on the import of Solar Cells, whether or not assembled in modules or panels, subject to furnishing invoices by the Petitioner backed by statutory auditor certificate and also providing the carrying cost incurred by the Petitioner and to restore him to the same economic condition.
- e. Direct Respondent to pay within sixty days from the date of raising such claim by the Petitioner, post Commercial Operation Date of the Petitioner’s Solar Power Generating Systems, failing which it will attract late payment surcharge as provided under PPA.
- f. To pass such other order(s) and / or direction(s) as it may deem fit and proper in the facts and circumstances of the case.

BRIEF FACTS OF THE CASE

5. The Respondent No. 1, issued a Request for Selection (hereinafter referred to as ‘RfS’) for Solar Power Developers (hereinafter referred to as ‘SPDs’) to setup grid-connected Solar PV

Projects in Bhadla Phase IV Solar Park, Rajasthan. Pursuant to the aforementioned RfS, the Petitioners were selected by SECI as Solar Power Developers (hereinafter referred to as 'SPDs') for setting up of solar power projects based on photo voltaic technology in the State of Rajasthan. The brief details are as under:

- a. In Petition No. 14/MP/2019, the Petitioner submitted the bid on 05.12.2017 and the Power Purchase Agreement (hereinafter referred to as 'PPA') was executed on 27.04.2018 for the contracted capacity of 50 MW with 27.04.2019 as the Scheduled date of Commissioning.
 - b. In Petition No. 69/MP/2019, the Petitioner submitted the bid on 19.04.2017 and the PPA was executed on 26.09.2017 for the contracted capacity of 50 MW with 16.09.2018 as the Scheduled date of Commissioning.
 - c. In Petition No. 27/MP/2019, the Petitioner submitted the bid on 19.04.2017 and two PPAs were executed on 26.09.2017 for the contracted capacity of 50 MW each with 16.09.2018 as the Scheduled date of Commissioning.
 - d. In Petition No. 13/MP/2019, the Petitioner submitted the bid on 15.06.2018 and the PPA was executed on 30.11.2018 for the contracted capacity of 50 MW with 25.07.2020 as the Scheduled date of Commissioning.
6. Vide Notification No. 1/2018 (SG) dated 30.07.2018 (hereinafter referred to as 'Safeguard Duty Notification'), the Central Government imposed safeguard duty as per the following rates on the import of "Solar Cells whether or not assembled in modules or panels" (hereinafter referred to as 'solar cells and modules'):
- a. 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
 - b. 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
 - c. 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.
7. The Petitioners have submitted that the issuance of 'Safeguard Duty Notification' and the consequent imposition of safeguard duty have resulted in an increase in recurring and non-recurring expenditure for the Petitioners and have thus adversely impacted the business of the

Petitioners. The Petitioners have preferred to file the Petitions seeking compensation consequent to issuance of ‘Safeguard Duty Notification’ imposing safeguard duty at the rates prescribed therein on the import of ‘solar cells and modules’.

SUBMISSIONS OF PETITIONERS IN THE PLEADINGS AND DURING THE HEARINGS

8. Wordings as regards definition of “Law”, “Indian Government Instrumentality” and provisions of “Change in law” are same in all PPAs. The Petitioners have submitted that the term ‘Law’ has been defined in Article 1.1 of the PPA as:-

“Law shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;”

Accordingly, the term ‘Law’ includes:-

- a. All laws in India;
 - b. Any statute, ordinance, regulation, notification, code and rule; and
 - c. All applicable rules, regulations, orders, notifications or interpretation of the aforesaid statute, ordinance, regulation, notification, code, rule by any Indian Government Instrumentality.
9. The Petitioners have submitted that as the term ‘Law’ includes rules, regulations etc. by an Indian Government Instrumentality, it is relevant to examine the term ‘Indian Government Instrumentality’ which has been defined in the PPA as :-

“Indian Government Instrumentality shall mean the Government of India, Governments of state(s) of Rajasthan and NCT of Delhi and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;”

Accordingly, the definition of Indian Government Instrumentality includes the Government of India. Further, it also includes any ministry, department, board, authority, agency, corporation and commission under direct or indirect control of the Government of India. It is

submitted that the aforesaid definition includes all ministries and departments including the Ministry of Finance.

10. The Petitioners have submitted that Article 12 of the PPA provides for Change in law and the relief for such change in law in the following terms:-

“12. ARTICLE 12: CHANGE IN LAW

In this Article 12, the following terms shall have the following meanings:

12.1.1 *"Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:*

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- *change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- *any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD, shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes into existence shall be considered as effective date for the same; but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) any change on account of regulatory measures by the Appropriate Commission*

12.2 Relief for Change in Law

12.2.1 *The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.*

12.2.2 *The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties.”*

11. The Petitioners have submitted that as per the provision dealing with ‘Change in law’ under the PPA, the following points become clear:

- a. A change in law event is any of the events enumerated therein. Enactment of a new Law as well as a change in tax structure or introduction of any tax for setting up of solar power projects are listed as events of Change in Law ;
 - b. Such change in law event must have occurred after the Effective Date. In case of a change in tax structure or introduction of a new tax after the date of bid submission, the ‘effective date’ for considering such change shall be the date when such law comes into existence; and
 - c. The change in law results in any additional recurring/non-recurring expenditure or income.
12. The Petitioners have stated that the bids were submitted on 05.12.2017; 19.04.2017; 15.06.2018 and 19.04.2017 in Petition Nos. 14/MP/2019; 69/MP/2019; 13/MP/2019 & 27/MP/2019 respectively. On the basis of the above, ‘Change in Law’, provisions under the PPAs are triggered if any of the events enumerated in Article 12 of the PPAs occurs after the effective date of the PPAs which has resulted in increase in recurring or non-recurring expenditure by the Petitioners.
13. The Petitioners have submitted that the power to levy Safeguard Duty vests with the Central Government in terms of Section 8B of the Customs Tariff Act, 1975 (“Customs Tariff Act”). The said Section provides that the Central Government may impose Safeguard Duty by way of a notification on the import of an article into India, if it is satisfied that the said article is being imported in such increased quantities and under such circumstances so as to cause or threaten to cause serious injury to the domestic industry. The relevant portion of section 8B of the Customs Tariff Act, has been reproduced hereunder for ready reference:

“Section 8B: Power of Central Govt. to impose safeguard duty.

(1) If the Central Government, after conducting such enquiry as it deems fit, is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry, then, it may, by notification in the Official Gazette, impose a safeguard duty on that article.”

14. The Petitioners have submitted that Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty Rules) 1997 provides that the Central government may impose safeguard duty on the product covered under the final finding and which duty shall

not exceed the amount found adequate to remedy the serious injury to the domestic industry. In this context and in exercise of the powers conferred inter alia under Rule 12 of the Safeguard Duty Rules, the Central Government issued the Safeguard Duty Notification on 30.07.2018 imposing safeguard duty on the import of solar cells and modules at the rates prescribed under the said notification. Such imposition of Safeguard Duty would be in the nature of a tax imposed on the import of solar cells and modules. Thus, with effect from 30.07.2018, the import of solar cells and modules into India would be subject to levy of a Safeguard Duty (in the nature of a tax) at the rate of 25% ad valorem for the first year of imports, where after, the Safeguard Duty will be progressively liberalized.

15. The Petitioners have submitted that the imposition of safeguard duty on the import of solar cells and modules qualify as a Change in Law event in terms of the PPA in terms of:-
 - a. the last bullet of Article 12.1.1 of the PPA
 - b. Alternatively, the first bullet of Article 12.1.1 of the PPA.
16. The Petitioners have submitted that they will incur expenditure in the nature of one-time non-recurring capital expense on the import of solar cells and modules for setting up of the solar power project as per the PPAs.
17. The Petitioners have placed their reliance on *Judgment dated 20.07.2018 passed by the Commission in NTPC Ltd. v. Uttar Pradesh Power Corporation Ltd., Petition No. 98/MP/2017* in which it was held that in discharge of its functions, the Commission is required to be guided by the directions of Ministry of Power, Government of India, in exercise of powers conferred under Section 107 of the 2003 Act and conveyed vide letter dated 30.05.2018. In terms of the aforesaid direction, the appropriate means of compensating for a change in domestic duties, levies, cess and taxes is by determining the per unit impact and passing on the same through a tariff revision. Accordingly, the Petitioners have submitted that the appropriate and proper means to compensate for the additional project cost on account of introduction of Safeguard Duty is by revision of the per unit tariff and ought to be treated as a pass through and thereby allowed as a change in law.
18. The Petitioners have further submitted that reference may also be made to Combined Order dated 15.02.2019 in *Case Nos. 276, 325 and 340 of 2018* of the Maharashtra Electricity Regulatory Commission vide which imposition of Safeguard Duty on import of solar cells

and modules was held to be an event of change in law under the PPA. Accordingly, the MERC directed that additional expenditure shall be considered on actual basis for reimbursement subject to prudent check. Thus, based on the above, it is amply clear that in the present case, the imposition of Safeguard Duty qualifies as a Change in Law event under Article 12 of the PPA.

Increase in recurring expenditure under O&M Agreement

19. The Petitioners have further submitted that the imposition of Safeguard Duty as per Notification No. 1/2017 dated 30.07.2018 would be applicable for a period of two (2) years i.e. till 30.07.2020. The Scheduled date of Commissioning of various projects are as under:

S.No.	Petition No.	Scheduled date of Commissioning
1	14/MP/2019	27.04.2019
2	69/MP/2019	16.09.2018
3	27/MP/2019	16.09.2018 (both PPAs/projects)
4	13/MP/2019	25.07.2020

20. The Petitioners have submitted that in view of the above, it is highly plausible that the import of modules as replacements during the Operation and Maintenance period would also be subject to Safeguard Duty. Thus, such imposition of Safeguard Duty may result in increase in non-recurring expenditure as well, if certain modules are imported as a part of O&M upto 30.07.2020.

Increase in Working Capital and decrease in ‘Return on Equity’

21. The Petitioners have submitted that although there is no concept of ‘return on equity’ and ‘interest on working capital’ in a competitively bid tariff, the increase in costs due to change in law events have an indirect bearing on the two. These components are integral to the all-inclusive tariff bid. At the time of the submissions of bid(s), the Petitioners have factored in ‘interest on working capital’ and return on equity based on the costs prevalent at the time of bid. With the increase in the costs due to the change in law events explained above, the working capital requirement, and consequently, the interest on working capital have also

increased as compared to requirement and rate prevalent at the time of bid. Thus, the Petitioners are entitled to interest on incremental working capital at normative interest rate to put Petitioners in the same economic position as if change in law had not occurred.

22. The Petitioners in Petition No. 14/MP/2019 & 69/MP/2019 have submitted that it is pertinent to refer to the ‘Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects’ issued by Ministry of Power vide Notification bearing no. No. 23/27/2017-R&R., dated 03.08.2017 (hereinafter referred to as ‘2017 Guidelines’). The said 2017 Guidelines have been issued under the provisions of Section 63 of the Electricity Act, 2003 for the long term procurement of electricity by distribution licensees, from grid-connected Solar PV Power Projects having a size of 5 MW and above, through competitive bidding. As per Clause 5.7.1 of the ‘2017 Guidelines’, if any Change In Law event results in any adverse financial loss/ gain to the Solar Power Generator, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, in order to ensure that the Solar Power Generator is placed in the same financial position as if the Change in Law event had not occurred. The relevant provision has been re-produced hereunder for ready reference:

“5.7.1. In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

5.7.2. In these Guidelines, the term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.”

23. The Petitioners have submitted that the ‘2017 Guidelines’ recognize that the SPDs are required to be placed in the same financial position as it would have been, had the Change in

Law not occurred, which is essentially the principle of restitution. Thus, it is imperative that the Petitioners are granted interest on working capital at normative interest rate in order to put Petitioners in the same economic position as if change in law has not occurred.

The commercial considerations involved in the procurement of modules

24. The Petitioners have submitted that the Respondent cannot question the commercial consideration of the Petitioners including cost effectiveness of the modules imported from China in as much as in a competitive bidding scenario, the SPDs are required to bid a firm and fixed levellised tariff for supply of power and construction of the project. Further, the design of the bid levellised tariff being unique, confidential and commercially sensitive and being solely a decision of the SPDs, the SPDs are not required to disclose the component wise details of the calculations of the project cost. Thus, the commercial considerations of the Petitioners cannot be questioned in a fixed tariff regime. The Petitioners have placed their reliance on the decision of the Commission in the case of *Prayatna Developers v. NTPC in Petition No. 50/MP/2018; Order dated 19.09.2018.*

25. The Petitioners have submitted that the cost structures and module supply arrangements were factored by the Petitioners while arriving at its bid tariff for supply of power, before the imposition of safeguard duty which was not foreseeable at that point in time and thus could not have been factored in the bid tariff for supply of power. Accordingly, since all decisions in relation to module supply arrangements were taken prior to the imposition of Safeguard Duty, it is impossible to question the investment and structuring decisions of the Petitioners at this late stage. The Petitioners have placed their reliance on the decision of the Commission in the case of *Renew Solar Power Private Limited v. NTPC in Petition No. 187/MP/2018; Order dated 05.02.2012.*

26. The Petitioners have submitted that the Director General Safeguard vide Final Findings dated 16.07.2018, while recommending the imposition of Safeguard Duty on the import of solar cells and modules has held that such safeguard duty imposition would be covered as an event of ‘change in law’ under the PPAs of the Solar Power Developers and would be a pass through.

The Petitions are not premature

27. The Petitioners have submitted that the Respondents have averred that no change in law relief can be granted to the Petitioners since they have not filed any details such as the date of import, bills of entry, the date on which solar module were taken delivery or established one to one co-relation which is required for evaluating the claim. The aforementioned averments of the Respondents are liable to be set aside for the reasons as follows:-

- (i) Article 12.2.1 of the PPA specifically provides that the Petitioners can approach this Commission for seeking approval of the 'Change in Law'. Once imposition of Safeguard Duty on solar modules as a Change in law event is accepted under Article 12.1.1 of the PPAs, it is well accepted and acknowledged practice that the appropriate relief would be granted based on the submission of documents evidencing actual costs incurred by the Petitioner towards Safeguard Duty.
- (ii) The Petitioners have submitted that the Commission in Order dated 19.09.2018 in *Petition No. 50/MP/2018* in the case of *Prayatna Developers Pvt. Ltd. v. NTPC Ltd. And Ors.* has allowed the introduction of GST, in principle, as a change in law event under the PPAs while directing that a clear one-to-one correlation and reconciliation of the increase in costs on account of GST must be made between the Solar Power Developer and the Discoms.
- (iii) The Petitioners have entered into financial arrangements with its' lenders due to which additional financial burden of recurring loan repayment is being suffered by the Petitioner. In such a scenario, if the Petition is determined as inadmissible on the sole ground of non-submission of actual documents, it would have a cascading impact on the Petitioner's Projects as also on their ability to service loans leading to detrimental financial impact for the Petitioners.
- (iv) In any case, sample copies of the bills of entry depicting import of solar modules by the Petitioners and the consequential levy of Safeguard Duty suffered on such modules is enclosed as Annexures to the Petitions.

28. The Petitioners have submitted that Article 12.1.1 provides that a change in law event is any event listed thereunder "*resulting into any additional recurring/ non-recurring expenditure by the SPD*". In this regard, it is submitted that the usage of the words "*resulting into any additional.....expenditure*" signifies the parties' intent to allow change in law relief, to cases where additional expenditure would be subsequently incurred (but has not yet incurred) by

the parties. Had the parties' intent been to restrict relief for change in law only once actual expenditure has been incurred, the parties would have used the word "resulted into any additional.... expenditure". Thus, the relief for change in law is predicated solely on the happening of the events listed under the change in law clause and is applicable even in cases where actual expenditure has not been incurred but will only be subsequently incurred.

The methodology for grant of relief on account of Change in Law event

29. The Petitioners have submitted that the Commission vide Order dated 02.05.2019 in *ACME Rewa* case (Petition No. 342/MP/2018 and 343/MP2018) has allowed the solar power developer to obtain compensation on account of imposition of safeguard duty on the import of solar cells and modules. It has been directed that such compensation be recovered from the Respondents either as a one-time payment or as a percentage of the tariff on an annuity basis, not exceeding the duration of the PPA. The Commission ought to allow compensation in the form of a one-time payment for increase in costs on account of imposition of Safeguard Duty on the import of solar cells and modules. This is on the basis that costs on account of Safeguard Duty are incurred by the Petitioners immediately at the time of the import of solar cells and modules, as opposed to other change in law events (like introduction of GST laws) where the burden of increase in costs, is borne over a longer time period by the Petitioners.

The Petitioner is entitled to claim expenses incurred in relation to carrying cost and interest on working capital

30. The Petitioners have submitted that 'Change in Law' is a principle of restitution and equity and the primary purpose of such a clause is to enable a party to seek contractual remedies for incremental cost that have arisen which was beyond its control post the effective date. Being a concept in restitution and equity, an equitable interpretation must necessarily follow as opposed to a hair-splitting approach as sought to be made. The restoration of the party to same economic position is a concept deeply meshed into the very concept of change in law. The principle binds SECI to restore Petitioners to the same position as they would have been if not for the imposition of safeguard duty.

The Petitioner has privity of the contract with the Respondent and is accordingly entitled to relief from the Respondent

31. The Petitioners have submitted that the privity of contract between the Petitioner and the Respondent is evidenced on a reading of the following clauses:-
- a. Article 15.1 bars the parties to the PPAs to assign their rights and transfer their obligations to anyone without the mutual agreement between the parties in writing. The assignment is permissible on mutual agreement in writing only to the lenders of the parties.
 - b. Article 17.2.1 stipulates that the PPAs are solely for the benefit of the parties and cannot be construed as creating any duty, standard of care or liability to any person not a party to the PPAs.

ADDITIONAL SUBMISSIONS OF THE PETITIONER IN PETITION NO. 13/MP/2019:

Reasons for Grant of Carrying Cost

32. The Petitioner has submitted that in comparison to Order dated 02.05.2019 in Petition No. 342/MP/2018 case titled *ACME Rewa Solar Energy Private Limited Vs. Solar Energy Corporation India Limited and Ors.* (hereinafter referred to as 'ACME'), the Petitioner's case stands on a better footing because the applicable guidelines qua the Petitioner provide for carrying cost, whereas the applicable guidelines in ACME did not provide for carrying cost. It is crucial to note that in ACME, the bidding was pursuant to "Guidelines for Implementation of Scheme for Setting up over 5000 MW Grid-connected Solar PV Power Projects under Batch-IV" (hereafter referred to as '2016 Guidelines') dated 14.03.2016 issued by Ministry of New & Renewable Energy, Government of India that did not have any stipulation on 'Change in Law' whereas in the present case, the bidding was pursuant to '2017 Guidelines. In ACME, the Commission was aware that the '2016 Guidelines' were applicable to the PPAs therein and the fact that no carrying cost was provided for in those guidelines. In the present case, the applicable guideline i.e. '2017 Guidelines' has a stipulation on carrying cost for 'Change in Law'.
33. The Petitioner has submitted that 'Request for Selection' document for "Selection of Solar Power Developers for Setting up of 2000 MW (250 MW x 8) ISTS-Connected Solar Power

Projects under Global Competitive Bidding” bearing no. SECI/C&P/SPD/RfS/2000MW/012018 dated 30.01.2018 stipulates as under:

“2.0 Ministry of Power has issued “Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects” vide Gazette Resolution dated 03.08.2017. These Guidelines have been issued under the provisions of Section 63 of the Electricity Act, 2003 for long term procurement of electricity by the ‘Procurers’, from grid-connected Solar PV Power Projects, having size of 5 MW and above, through competitive bidding. This RfS document has been prepared in line with the above Guidelines issued by MoP dated 03.08.2017.”

“11.0 This RfS document has been prepared based on the “Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects” issued by Ministry of Power vide Gazette Resolution dated 03.08.2017.....”

“6.3 The bidding documents including the RfS and the draft PPA shall be prepared by the Procurer in consonance with these Guidelines and the SBDs.....”

34. The Petitioner has submitted that the expression “shall” used in clause 6.3 of the 2017 Guidelines shows that it is mandatory upon the Procurer to prepare the draft PPAs in accordance with the 2017 Guidelines. There cannot be a departure from the language of the 2017 Guidelines.
35. The Petitioner has submitted that Clause 5.7.1 of the ‘2017 Guidelines’ stipulates as under::

“5.7.1. In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

The Petitioner has submitted that the stipulation in Clause 5.7.1 namely, “.....Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law.....” makes it clear that the remedy for the Solar Power Developer such that its economic position gets restored is restitution. Restitution herein would mean grant of compensation of such value that is inclusive of and not without carrying cost. The inclusion of carrying cost in the quantum of compensation will ensure that

the Solar Power Developer economic position, despite the passage of time, is at par with what it would have been had it not been for the Change in Law.

36. The Petitioner has submitted that Clause 5.7 read with clause 6.3 of the 2017 Guidelines have to be given their natural meaning and therefore, the Petitioner has to be granted carrying cost as part of change in law relief. It is a cardinal principle of statutory construction that the words in a statute must be given their natural meaning (unless it results in any absurdity or is not permitted by the context). The Petitioner has placed reliance on following judgments: *Gurudevdatla VKSS Maryadit v State of Maharashtra (2001) 4 SCC 534*; *Dental Council of India and Anr. v Hariprakash and Ors. (2001) 8 SCC 61*; *Shankar Ram v Kasi Naicker (2003) 11 SCC 699*; *Ramanna Dayaram Shetty v International Airport Authority of India 1979 SCR (3) 1014*. Further, when clause 5.7 has been included in the 2017 Guidelines, then it must be given its natural meaning, the resultant effect of which will be that as the Government of India Notification constitutes change in law. Respondent No. 1 must compensate the Petitioner for the loss suffered due to imposition of safeguard duty. The Petitioner has placed its reliance on the judgment of the Hon'ble Supreme Court in *Mithilesh Singh v Union of India (2003) 3 SCC 309*. The consequence is that the Petitioner has to be given the full benefit of restitution and it cannot be merely left with a declaration of change in law. The next step is that the loss suffered by the Petitioner must be made good so that the Petitioner is brought to the position it would have been in, had the change in law not occurred.

Guidelines and PPA have to be read together

37. The Petitioner has submitted that PPAs cannot derogate or depart from the applicable guidelines. The Commission has to conjointly read the 2017 Guidelines' clause on change in law and the corresponding clause in the PPA. The Commission is bound by the 2017 Guidelines. The Petitioner has placed the reliance on the judgment of the Hon'ble Supreme Court in *Energy Watchdog v CERC & Ors. (2017) 14 SCC 80*. The relevant extract is as under:

“19.....One thing is immediately clear, that the appropriate commission does not act as a mere post office under section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government....”

20.....It is clear that in a situation where the guidelines issued by the Central Government under section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under section 79 (1) (b), only in accordance with those guidelines.....”.

38. The Petitioner has submitted that the PPAs contain a stipulation on change in law but IT IS equally important when the ‘2017 Guidelines’ covers the field, the Commission has to abide by the stipulations thereof. From the aforesaid judgment of the Hon’ble Supreme Court, it is clear that the Commission is bound by the 2017 Guidelines and it has to act in obedience thereof. Since the ‘2017 Guidelines’, allow for compensation and restitution in the event of change in law, the Commission must give effect to the 2017 Guidelines. It has already held in ACME that the Government of India Notification is change in law. In terms of clause 5.7.1 of 2017 Guidelines what remains for determination is the quantum of compensation and the mechanism of its disbursement and the date with effect from which it has to be reckoned. Additionally, the Petitioner has relied on the following judgments: *Energy Watchdog v CERC & Ors. (2017) 14 SCC 80*; *South Eastern Coalfield Limited v State of Madhya Pradesh (2003) 8 SCC 648*; *APTEL judgment dated 20.12.2012 in Appeal No. 150 of 2011 titled SLS Power Ltd. v Andhra Pradesh Electricity Regulatory Commission & Ors.*
39. The Petitioner has submitted that Clause 12.2.2 of the PPAs, besides providing for the power to acknowledge change in law, also provides the power to grant relief therefor. The power to grant relief must be read as granting effective relief instead of merely acknowledging an event as change in law. The Commission’s power extends beyond grant of one time compensation and is inclusive of the power to grant carrying cost so that the relief is an effective relief. If carrying cost is denied, then mere compensation after lapse of time will have diminished value and the economic position of the affected party will not be restored.

Methodology

40. The Petitioner has submitted that for the purposes of working out the methodology by which compensation for change in law is to be granted, the Commission can adopt the model of Gujarat Urja Vikas Nigam Limited, which in its tender has inter alia allowed Safeguard Duty as a pass through. In clause 9.2.2 of RfS No. GUVNL/500 MW/Solar (Phase IV) dated 29.12.2018 a stipulation has been given whereby “the Power Producer shall be allowed an

increase/decrease in tariff of 1 paise/unit for every increase/decrease of Rs. 2 lakh per MW in the Project Cost..... ”. A like compensation model can also be adopted by this Commission for the purpose of granting compensation for loss occasioned due to change in law.

Procurer’s Liability

41. The Petitioner has submitted that Respondent No. 1’s liability for reimbursement of amount(s) expended by the Petitioner due to change in law coupled with payment of carrying cost is absolute. In this regard, clause 14.5.1 of the PPA which encapsulates the Respondent No. 1’s payment obligation is quoted hereafter, to the extent relevant-

“14.5.1.....It is however, specifically agreed that the payment of money becoming due from the SECI to the SPD under this Agreement for supply of Solar Power to the extent of the Contracted Capacity shall not be on back to back basis. SECI shall discharge the tariff payment obligation in terms of the provision of this Agreement.”

42. The Petitioner has placed its reliance on the judgment in Union of India v KP Traders 2015 SCC OnLine Bom 1509 (hereinafter referred to as ‘KP Traders’). The principle enunciated in the aforesaid judgment makes it clear that a specific stipulation in a contract (such as clause 14.5.1) will prevail over a general stipulation (such as clause 10.3.3). Clause 14.5.1 of the PPA quoted hereinabove and the principle enunciated in KP Traders makes it indisputable that the Respondent No. 1 cannot shirk its obligation to reimburse the amount (s) expended by the Petitioner consequent to change in law and further pay carrying cost. In any case, even in cases of back to back contracts, the courts determine which obligations stipulated therein are back to back and which are self-contained.

SUBMISSIONS OF RESPONDENT NO.1 IN THE PLEADINGS AND DURING THE HEARINGS

43. The Respondent No. 1 (SECI) has submitted as under:

Back to back obligations of SECI under the PPA and PSA

44. The Respondent No. 1 has submitted that as per Jawaharlal Nehru National Solar Mission scheme, SECI has entered into the PPAs with the Petitioners for procurement of solar power from the SPD’s project. The electricity procured by SECI from the SPD under the PPAs is
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for onward sale on back to back basis to the Respondent Discoms. SECI is acting as an intermediary (as appointed by the Central Government) utilizing its trading license to facilitate such purchase and resale of electricity. SECI is not acting as a merchant trader or otherwise independently purchasing the electricity from the SPD having the option to sell electricity to any person at such time and on such terms and conditions including the price as SECI may decide from time to time. SECI is also not retaining the powers to trade electricity so purchased in the open market or through the platform of Power Exchange or otherwise on a long term basis to earn a trading margin, without being constrained to the fixed trading margin of 7 Paisa/kWh decided by the Ministry of New and Renewable Energy Government of India. The obligations and liabilities of SECI to the SPDs on one part and to the Respondent Discoms on the other part are on a back to back basis to the obligation to be performed and liabilities to be discharged by Respondent Discoms.

45. The Respondent No. 1 has submitted that Jawaharlal Nehru National Solar Mission Guidelines for selection of 5000 MW Grid Connected Solar PV Power Project under Phase-II Batch-IV notified by the Ministry of New and Renewable Energy, Government of India on 14.03.2016 is the basis on which the transactions involving SECI is being undertaken with the SPDs. It is evident from various provisions of the PPAs and the PSAs that both the documents are inextricable and intertwined with one another. The stipulations of the back to back scheme recognizes that SECI, as an intermediary nodal agency cannot be required to pay the amounts becoming due to SPD out of its own resources, till such time the amount can be recovered by SECI from the concerned distribution licensees. The Respondent No.1 has placed its reliance on Order dated 09.10.2018 in Petition No.188/MP/2017 & connected matters; Order dated 05.02.2019 in Petition No.187/MP/2018 & Batch and Order dated 02.05.2019 in Petition No.342/MP/2018 & 343/MP/2018. The role of an intermediary Trader vis-à-vis a Merchant Trader has also been considered by the APTEL in its Judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors.*
46. The Respondent No.1 has submitted that in the instant petition, the PSA attaches the initialed PPA in draft form. The tariff payable by the Discoms under the PSA is the tariff under the PPA. There is no separate purchase price under the PPA and the PSA except that the PSA envisages payment of trading margin to SECI. The PPA and PSA being back to back

contracts and mirror images to each other are inextricably linked to each other. The role of an Intermediary Trader as a ‘conduit’ has also been considered by the Commission in the following cases i) Order dated 18.04.2016 in Petition No. 319/MP/2013 in the case of *Tata Power Delhi Distribution Company Limited v Jhajjar Power Limited and Ors.*; Order dated 18.01.2019 in Petition No. 224/MP/2018 in the case of *M B Power (Madhya Pradesh) Limited v Uttar Pradesh Power Corporation Limited and Ors.*; Order dated 30.04.2019 in Petition No. 255/MP/2017 in the case of *Adhunik Power and Natural Resources Limited v West Bengal State Electricity Distribution Company Limited and Ors.* In terms of the above decisions, the Commission has rejected the claim of absence of privity of contract between the Generator and the Distribution Licensee when the Generator sells the electricity to an intermediary Trading company and the Trading Company re-sells the electricity on a back to back basis to the Distribution Licensee. The said two transactions being under two separate agreements, it has been held that the two agreements are inextricably linked to each other and the rights and obligations arising out of one agreement are also reflected in the other agreement. It is on the above basis only that the Commission has decided on the jurisdiction to entertain the Petition filed by a generating company involving the Distribution Licensee on a sale of power through a trading company to grant the necessary relief for matters such as Penalties for shortfall in availability of contracted capacity, effect of change in law etc.

47. The Respondent No.1 has submitted that any enforcement of the claim by the SPDs against the SECI without the Respondent Discoms being obligated to pay and discharge the corresponding claim under the PSAs in advance of the discharge of the obligation of the SECI will result in serious financial issues to the SECI and thereby, effect the implementation of the scheme.

Safeguard Duty is a ‘law’ under the PPA

48. The Respondent No.1 has submitted that it is not disputed that the safeguard duty imposed by the Government of India is a Law as defined and covered under the PPA. However, whether the same qualifies as a Change in Law within the scope of Article 12 of the PPA has to be decided after taking into consideration submissions made hereunder.

Nature and scope of application of Safeguard Duty

49. The Respondent No.1 has submitted that the safeguard duty has been imposed by the Government of India vide Notification No. 01/2018 dated 30.07.2018 issued under the provisions of sub-section (1) of section 8B of the Custom Tariff Act, 1975 on the import of solar cells whether or not assembled in modules or panels when the import is from certain specific countries, namely, China PR, Malaysia and from developed countries. The Notification dated 30.07.2018 imposing the safeguard duty is prospective in its operation. In other words, if the solar modules had been or ought to have been imported before 30.07.2018 in the normal course, there was no incidence of any Safeguard Duty, even if such import is from the specified countries, namely, China, Malaysia and developed countries. The Commission in its order dated 02.05.2019 in the Petition No.342/MP/2018 and Another in the matter *Acme Rewa Solar Energy Private Limited -v- Solar Energy Corporation of India Limited & Ors.* has held as under:

*135. The Commission observes that the Notification No. 01/2018-Customs (SG) New Delhi dated 30.07.2018 stipulates that “a safeguard duty at twenty five per cent to fifteen per cent ad valorem minus anti-dumping duty payable has been levied on Solar Cells whether or not assembled in modules or panels” when imported into India “during the period from 30th July, 2018 to 29th July, 2020 (both days inclusive)”. The Commission observes that since the duration of the safeguard duty levied is two years, hence as per requirement of the Customs Tariff Act, 1975 the duty is progressively liberalized at regular intervals during the period of its imposition. The notification provides for a diminishing “Safeguard Duty” slab in the range of 25% to 15% applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. **The impact of “Safeguard Duty” notification is on/any portion of import whose point of taxation is on or after implementation of the Notification dated 30.07.2018 the same will be subjected to purview of “Safeguard Duty”.***

*136. The Commission is of the view that “Safeguard Duty” became effective from 30.07.2018 and hence the date of notification becomes the “cut-off date” for imposing the same. Meaning thereby, the notification/imposition of “Safeguard Duty” will directly affect the projects where “Solar Cells whether or not assembled in modules or panels” were imported on or after 30.07.2018 where:-
....”*

50. The Respondent No.1 has submitted that in the present case, the Scheduled Commissioning Date under the PPA in Petition No. 14/MP/2019 is 27.04.2019; in Petition No. 69/MP/2019 & 27/MP/2019 is 16.09.2019 and in Petition No. 13/MP/2019 is 25.07.2020. The Petitioners have not furnished requisite documents to support the claim for change in law with regard to imposition of safeguard duty.

Requirement to furnish relevant documents to establish one to one correlation

51. The Respondent No.1 has submitted that the Petitioners have not placed on record the relevant supply agreement entered into by the Petitioners for the supply of Solar PV modules. Further, the Petitioner needs to provide details of the actual data of importation of modules into India, the date on which the modules were taken delivery of, Bills of entry etc. to substantiate the impact of safeguard duty on the procurement of modules required for the solar power project. The above information is necessary for the purpose of deciding on the applicability of the Safeguard Duty. It is incumbent on the Petitioner to place on record transparently the entire details relating to the payment of Safeguard Duty with regard to the solar Modules, cells and further establish one to one correlation between the project, the importation of solar Modules, cells etc. and the invoices and other relevant documents for proof of the payment of safeguard duty. The Respondent No.1 has placed its reliance on Order dated 02.05.2019 in the Petition No.342/MP/2018 and Another in the matter *Acme Rewa Solar Energy Private Limited -v- Solar Energy Corporation of India Limited & Ors.*; Order dated 09.10.2018 in Petition No.188/MP/2017 and Batch in the case of *Acme Bhiwadi Solar Power Private Limited -v- Solar Energy Corporation of India and Ors. and Batch*; Order dated 05.02.2019 in Petition no.187/MP/2018 and Batch in the case of *M/s. Renew Wind Energy (TN2) Private Limited -v- NTPC Limited Batch* and Order dated 18.04.2019 in Petition No.164/MP/2018 and Petition No.165/MP/2018 in the case of *Parampujya Solar Energy Private Limited -v- NTPC Limited*. In the absence of the requisite details as mentioned above, and particularly satisfaction of the one to one co-relation, it is not possible to consider any such claim and the Petition filed should to be rejected.

Relevant guidelines applicable

52. The Petitioners have claimed that the PPAs in the present case are governed by Guidelines dated 03.08.2017 for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Project issued by Ministry of Power by Notification. However, the Respondent No.1 has contended that the PPAs are governed by the National Solar Mission Guidelines for selection of 5000 MW Grid Connected Solar PV Power Projects under Phase-II Batch IV” issued by Government of India by notification 14.03.2016. Accordingly, the claim made by the SPDs that the PPAs are governed by Guidelines dated

03.08.2017 for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Project is erroneous and is liable to be rejected.

Re: Claim for carrying cost

53. The Respondent No.1 has submitted that the claim with regard to Change in Law can be said to be crystallized only when the Commission determines the amount payable to the Petitioner. There is no provision in the PPAs which permits the carrying cost or interest for the period till the amount of the claim is determined by the Commission in pursuance to Petitions filed by the Petitioners. In the absence of any specific provision providing for carrying cost in the PPA, there cannot be any claim for the same. In terms of Article 12 of the PPA entered into between the parties, the relief for Change in Law provided is for the Petitioners to approach the Commission for seeking approval of the Change in Law and the Commission has to decide on the admissibility of the claim in the first instance. Accordingly, the amount due from Respondents to the Petitioners under change in law gets crystallized only upon the decision being made by the Commission allowing change in law and therefore, there cannot be any carrying cost for the period prior to the decision of the Commission. After the decision of the Commission, the Petitioners are required to include the amount determined in the supplementary bills raised thereafter in terms of Article 10.7 of the PPAs. The amount then becomes payable on the due date applicable for payment of such supplementary bills in terms of Article 10. The Respondent No.1 has placed its reliance on the decision of the APTEL in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011) and Batch*. The PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPAs. The Respondent No.1 has placed its reliance on the decision of the APTEL dated 13.04.2018 in *Appeal No. 210 of 2017 in Adani Power Limited –v- Central Electricity Regulatory Commission and Ors.*, wherein it was held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable. The aforementioned judgment of the Tribunal was upheld by the Hon'ble Supreme Court in Judgment dated 25.02.2019 in Civil Appeal No. 5865 of 2018 in the case of *Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Anr. -v- Adani Power Limited and Ors.* Since, in the instant petitions there is no such provision for restitution/restoration to

the same economic position in the PPAs therefore, the Petitioners are not entitled to any carrying cost.

54. The Respondent No.1 has submitted that the instant petitions are not a case of amounts being denied at appropriate time or any deprivation of amount due to actions of the procurers. The Procurers cannot make the payment for change in law until the amount is determined by the Commission. The decision on the admissibility of the monetary claim can only be after the Petitioners have submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the Petitioners. Any adverse consequences for not approaching this Commission with the full documentation/information at the first instance ought to be borne by the defaulting party i.e. the Petitioners themselves.

Claim for interest On Working Capital, Return on Equity

55. The Respondent No.1 has submitted that there cannot be any consideration for individual tariff elements such as interest on working capital or return on equity or any other in a competitive bid process under Section 63 of the Electricity Act, 2003 and there cannot be any computation of the same. There is no concept of interest on working capital or other individual tariff elements in competitively bid process and bidders are required to give the bid based on all-inclusive tariff. Further, there cannot be any issue of return on equity on incremental working capital and margin. The Respondent No.1 has placed its reliance on the judgment of APTEL dated 19.04.2017 in Appeal No. 161 of 2015- *Sasan Power Limited –v- Central Electricity Regulatory Commission*; Decision dated 14.08.2018 in Appeal No. 111 of 2017 in the case of *GMR Warora -v- Central Electricity Regulatory Commission and Ors.*; Judgment dated 21.12.2018 in Appeal No. 193 of 2018 *GMR Kamalanga Energy Limited and Anr. –v- Central Electricity Regulatory Commission and Ors.*; Order dated 05.02.2019 passed by the Commission in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited*; Order dated 18.04.2019 passed by the Commission in Petition No.164/MP/2018 and Petition No.165/MP/2018 in the case of *Parampujya Solar Energy Private Limited –v- NTPC Limited* and Order dated 02.05.2019 passed by the Commission in the Petition No.342/MP/2018 and Another in the matter *Acme Rewa Solar Energy Private Limited -v- Solar Energy Corporation of India Limited & Ors.*

Miscellaneous Issues

(I) Business efficacy

56. The Respondent No.1 has submitted that the reliance on the principle of business efficacy in the context of the aforementioned PPAs is misconceived. It is a settled law that terms cannot be implied into a contract, contrary to the express terms of the PPAs. Thus, if the PPAs already contemplate for the provision of 'Late Payment Surcharge' for the delay in payment of the bill, supplementary or otherwise (as stated above), then by no stretch of means can it be said that the intent of the PPAs was to restore/restitute the parties to the same economic position in case of such contingency. Thus, if one event was specifically provided in the PPAs and other event is excluded, it clearly indicates that the events which are not included are not to be considered. Further, the reliance on the decision in the case of *Sumitomo Heavy Industries Limited v ONGC Limited (2010) 11 SCC 296* is misconceived. The said decision is under the Arbitration Act where the scope of judicial interference is limited. The Hon'ble Supreme Court had only opined that the Award given by the Arbitrator is a possible view and did not interfere in the matter. This cannot be said to be either a law on the admissibility of interest laid down by Hon'ble Supreme or a precedent on the above aspect. It is a well settled principle that in matters of contract, relief cannot be granted on principles of equity. The contract becoming onerous is not a ground for relief to be granted. The Respondent No.1 has placed its reliance on the following judgments *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588; Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 522.*

(II) Quantum Meruit

57. The Respondent No.1 has submitted that the Petitioners have also raised the issue of applicability of Section 70 of the Indian Contract Act, 1872 namely that when a person does or delivers something to another without intending to do so gratuitously, he is entitled to receive compensation for the thing or restoration of the thing delivered if the other party has enjoyed the benefit of the thing done or delivered. Quite apart from the fact that compliance with the prevailing law is not a thing done or delivered to SECI, the principle has no application where there is a specific agreement in operation. Quantum Meruit has application when the contract is held to be invalid. The issue of whether, when parties are governed by

contract, a claim in quantum meruit under Section 70 of the Contract Act, 1872 would be permissible has been settled by Hon'ble Supreme Court in the decision of *MTNL -v- Tata Communications Ltd.*, (2019) 5 SCC 341 as under:

“4. Having heard the learned counsel for both sides, one neat question arises before this Court, which is, whether, when parties are governed by contract, a claim in quantum meruit under Section 70 of the Contract Act, 1872 [“Contract Act”] would be permissible. Section 70 of the Contract Act reads as under:

“70. Obligation of person enjoying benefit of non-gratuitous act.— Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

This section occurs in Chapter V of the Contract Act, which chapter is headed, “Of Certain Relations Resembling Those Created by Contract”. There are five sections that are contained in this Chapter. Each of them is posited on the fact that there is, in fact, no contractual relationship between the parties claiming under this Chapter. For example, under Section 68, if a person incapable of entering into a contract is supplied necessaries by another person, then the person who has furnished such supplies becomes entitled to be reimbursed from the property of the person so incapable of entering into the contract. Section 69 also deals with a case where a person has no contractual relationship with the other person mentioned therein, but who is interested in the payment of money which the other person is bound by law to pay, and who, therefore, pays it on behalf of such person. Such person is entitled to be reimbursed by the other person. Under Section 71, again, the finder of goods spoken of is a person who is fastened with the responsibility of a bailee as there is no contractual relationship between the finder of goods and the goods which belong to another person. Equally, under Section 72, a person to whom money has been paid or anything delivered by mistake or coercion must repay or return it, or else, such person would be unjustly enriched. Here again, there is no contractual relationship between the parties. It is in this setting that Section 70 occurs.

.....
6. In Kanhayalal Bisandayal Bhiwapurkar v. Indarchandji Hamirmalji Sisodia [Kanhayalal Bisandayal Bhiwapurkar v. Indarchandji Hamirmalji Sisodia, 1946 SCC OnLine MP 48 : AIR 1947 Nag 84] , a learned Single Judge of the High Court was dealing with an application by an eye-specialist of repute who wished to recover an amount of INR 188 as the price of professional work i.e. getting a cataract removed in accordance with an agreement with one Mt Laxmibai and her son-in-law, Mohan Lal, by which agreement, the said operation was to be performed. An appeal to Sections 68 and 70 of the Contract Act was turned down in the following terms: (SCC OnLine MP para 10)

“10. In the course of the argument, an appeal was made to the principles underlying Sections 68 and 70 of the Contract Act, for making the husband liable. Indeed Section 68, deals with the supply of necessaries but that is in respect of a person incapable of entering into a contract or “any one whom he is legally bound to support” i.e. the dependent of a person incompetent to contract. Indarchandji

was not incompetent to contract and this section is inapplicable to him. As to Section 70, it must be observed that this section cannot be availed of by a person who relies on an express contract as the plaintiff alleged to have entered into with Mt Laxmibai in this case. The husband never entered into the picture when the plaintiff settled the terms with her. Nor is there anything to show how the husband received any benefit. It is only actual benefit which will furnish a ground of action. If the wife had been cured of her ailment completely, perhaps that circumstance might be material; but there is no evidence on the point.”

7. In *Alopi Parshad and Sons Ltd. v. Union of India* [*Alopi Parshad and Sons Ltd. v. Union of India*, (1960) 2 SCR 793 : AIR 1960 SC 588] , this Court dealt with an arbitration award which, inter alia, awarded certain amount on the basis of quantum meruit. In setting aside the award on the ground of error apparent on the face of the record, this Court held: (AIR p. 595, para 24 : SCR p. 809)

“24. ... Ghee having been supplied by the agents under the terms of the contract, the right of the agents was to receive remuneration under the terms of that contract. It is difficult to appreciate the argument advanced by Mr Chatterjee that the agents were entitled to claim remuneration at rates substantially different from the terms stipulated, on the basis of quantum meruit. Compensation quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable.”

8. In *Mulamchand v. State of M.P.* [*Mulamchand v. State of M.P.*, (1968) 3 SCR 214 : AIR 1968 SC 1218] , this Court held that the provisions of Section 175(3) of the Government of India Act are mandatory in character and based on public policy. Therefore, the formalities that are stipulated when contracts are entered into on behalf of the Government cannot be waived or dispensed with. In dealing with a claim made under Section 70 of the Contract Act, this Court then went on to hold: (AIR p. 1222, para 6 : SCR pp. 221-22)

“6. ... In other words if the conditions imposed by Section 70 of the Contract Act are satisfied then the provisions of that section can be invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the

other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution.”

9. Indeed, the aforesaid position in law is made clearer by Section 73 of the Contract Act. Section 73 reads as follows:

.....
This section makes it clear that damages arising out of a breach of contract is treated separately from damages resulting from obligations resembling those created by contract. When a contract has been broken, damages are recoverable under Paragraph 1 of Section 73. When, however, a claim for damages arises from obligations resembling those created by contract, this would be covered by Paragraph 3 of Section 73.

58. Therefore in view of the above, there can be no question of any relief de hors the provisions of the PPAs, under some general principle of quantum meruit.

ANALYSIS AND DECISION

59. The Petition No. 14/MP/2019; 27/MP/2019 and 13/MP/2019 were admitted on 07.02.2019 and Petition No. 69/MP/2019 was admitted on 16.04.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since, Petitions are similarly worded and involves similar issues to be adjudicated, the same are clubbed together.

60. The brief facts of the petitions are as under:

Details	14/MP/2019	69/MP/2019	27/MP/2019	13/MP/2019
RfS	SECI/NSM/P2/B4/T 12/RfS/RJ/062017/ Bhadla-IV dated 21.06.2017	SECI/NSM/P2/B4/ RfS/RJ/112016/ Bhadla-IV dated 08.11.2016	SECI/NSM/P2/B4/ RfS/RJ/112016/ Bhadla-IV dated 08.11.2016	SECI/C&P/SPD/ RfS/2000MW/01 2018 dated 30.01.2018
Bid Submission date	05.12.2017	19.04.2017	19.04.2017	15.06.2018
LoI	28.03.2018	16.08.2017	16.08.2017	27.07.2018
Capacity	50 MW	50 MW	50 MW; 50 MW	50 MW
State	Rajasthan	Rajasthan	Rajasthan	Rajasthan
Date of PSA	28.03.2018	12.05.2017	12.05.2017	02.08.2018
Imposition of Safe-guard Duty	30.07.2018	30.07.2018	30.07.2018	30.07.2018
No. of PPAs	1	1	2	1

Date of PPA	27.04.2018	26.09.2017	26.09.2017	30.11.2018
SCoD	27.04.2019	16.09.2018	16.09.2018	25.07.2020

61. The Petitioners are generating companies engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The Respondent No.1, SECI issued a 'RfS' for setting up grid-connected Solar PV Projects in Bhadla Phase IV Solar Park, Rajasthan. Pursuant to the aforementioned RfS, the Petitioners were selected by the SECI as SPDs for setting up of solar power projects based on photo voltaic technology in the State of Rajasthan. The Petitioners entered into PPAs for the setting up of solar power project of 50 MW (each) capacities in the State of Rajasthan and for the consequent sale of solar power to the SECI. SECI has also entered into PSAs for sale of electricity purchased from the Petitioners to Respondent Discoms. Vide Notification No. 1/2018 (SG) dated 30.07.2018, the Central Government imposed 'Safeguard Duty' as per the following rates on the import of "solar cells and modules":-

- a. 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
- b. 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
- c. 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020

62. The Petitioners have submitted that issuance of 'Safeguard Duty Notification' has resulted in an increase in recurring and non-recurring expenditure for the Petitioners and has adversely impacted the business of the Petitioners. The Petitioners have submitted that imposition of Safeguard Duty is covered under Article 12 of the PPAs which provide for 'Change in law' and the relief for such 'Change in Law' and the same may be allowed. Further, the Petitioners are entitled to interest on incremental working capital to put Petitioners to the same economic position as if change in law has not occurred. The Petitioners have also claimed carrying cost from the date of impact of 'Change in law' till reimbursement by the Respondent. **Per Contra**, the Respondents have submitted that it is not disputed that the safeguard duty has been imposed by the Government of India vide Notification No. 01/2018

dated 30.07.2018 issued under the provisions of sub-section (1) of section 8B of the Custom Tariff Act, 1975 on the import of solar cells and modules when the import is from certain specific countries, namely, China, Malaysia and from developed countries is a Law as defined and covered under the PPA. However, whether the same qualifies as a Change in Law within the scope of Article 12 of the PPA has to be decided after taking into consideration the submissions made in the pleadings and during hearings. Further, the Notification dated 30.07.2018 imposing the safeguard duty is prospective in its operation and has not been given effect to any period prior to 30.07.2018. Further, the Commission and the Appellate Tribunal have repeatedly upheld that there is no concept of interest on 'Working Capital and 'Return on Equity' in a competitive bidding process. Also, there is no merit in the principal claim of the Petitioner and therefore the question of payment of 'Carrying Cost' does not arise.

63. From the submissions of the parties, the following issues arise for decision before this Commission:

Issue No.1: Whether the imposition of safeguard duty on the import of solar modules can be considered an event covered under 'Change in Law' in terms of the Article 12 of the PPAs? And Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of 'Change in Law'?

Issue No. 2: Whether in view of the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" dated 03.08.2017 the Petitioners may be restored to the same economic condition prior to occurrence of the Change in Law through suitable mechanism as prayed for in the present Petitions And Whether the claim of Petitioners regarding interest on Working Capital, Return of Equity and 'Carrying Cost' for delay in reimbursement by the Respondents is sustainable?

64. No other issue was pressed or claimed.

Issue No.1: Whether the imposition of safeguard duty on the import of solar modules can be considered an event covered under 'Change in Law' in terms of the Article 12 of the PPAs? And Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of 'Change in Law'?

65. The Petitioners have submitted that vide Notification No. 1/2018 (SG) dated 30.07.2018, the Central Government imposed 'Safeguard Duty'. The imposition of Safeguard Duty has

resulted in an increase in recurring and non-recurring expenditure for the Petitioners and thus adversely impacted the business of the Petitioners. The imposition of Safeguard Duty is covered under Article 12 of the PPAs which provides for 'Change in law' and the relief for such 'Change in Law' and requested that the same may be allowed. **Per Contra**, the Respondents have submitted that it is not disputed that the safeguard duty imposed by the Government of India is a Law as defined and covered under the PPA. However, whether the same qualifies as a 'Change in Law' within the scope of Article 12 of the PPA has to be decided after taking into consideration the submissions made in the pleadings and during hearings. Further, the impugned notification is prospective in its operation and cannot be given effect to any period prior to 30.07.2018.

66. The Commission observes that Article 12 of the PPAs provides for 'Change in Law' and the relief for such change in law in the following terms:-

"12. ARTICLE 12: CHANGE IN LAW

In this Article 12, the following terms shall have the following meanings:

12.1.1 "Change in Law" means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- Any statutory change in tax structure or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD shall be treated as per the terms of this Agreement. For the purpose of considering the effect of this change in Tax structure due to change in law after the date of submission of Bid, the date such law comes into existence shall be considered as effective date for the same;*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) any change on account of regulatory measures by the Appropriate Commission

12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.

12.2.2 The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties.”

67. The Commission observes that the Respondents have raised the issue of applicability of Article 12 of PPA in case of import of solar cells. It is observed that the Appellate Tribunal for Electricity by the Judgment dated 14.08.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors. has decided on interpretation of ‘Change in Law’ provision similar to the present PPAs. It was held as under:

“This Tribunal has decided that any tax or application of new tax on supply of power also covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees.”

68. From the above, it is apparent that any tax or application of new tax on ‘supply of power’ covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case, ‘Safeguard Duty’ has been levied on import of ‘Solar Cells whether or not assembled in modules or panels’. The change in duties/ tax imposed by the Central Government has resulted in the change in cost of the inputs required for generation.
69. Accordingly, the Commission of the view that as per the Government of India Notification No. 01/2018-Customs (SG) dated 30.07.2018 and provision of PPAs related to ‘change in law’ the imposition of the ‘Safeguard Duty’ is covered under ‘Change in Law’ under first, and last bullet of Article 12 of the PPAs.
70. The Commission observes that the Notification No. 01/2018-Customs (SG) New Delhi dated 30.07.2018 stipulates that “a safeguard duty at twenty five per cent to fifteen per cent ad valorem minus anti-dumping duty payable” has been levied on Solar Cells whether or not assembled in modules or panels” when imported into India “during the period from 30th July, 2018 to 29th July, 2020 (both days inclusive)”. The notification provides for a diminishing ‘Safeguard Duty’ slab in the range of 25% to 15% applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. The impact of ‘Safeguard Duty’ notification is on any portion of

import whose point of taxation is on or after implementation of the Notification dated 30.07.2018.

71. The Commission is of the view that 'Safeguard Duty' became effective from 30.07.2018 and hence the date of notification becomes the 'cut-off date' for imposing the same meaning thereby, the notification/imposition of 'Safeguard Duty' will directly affect the projects where "Solar Cells whether or not assembled in modules or panels" were imported on or after 30.07.2018 where:-

- a) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is after 30.07.2018; OR
- b) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is before 30.07.2018 but the same stands extended after the cut-off date i.e. 30.07.2018 due to the circumstances permitted under provisions of the executed PPAs;

72. In the instant petitions the bid submission dates are before 30.07.2018 and the SCoD in the petitions are after 30.07.2018. Therefore, in view of the above discussion, the protection under clause of 'Change in Law' as contained in Article 12 of the PPAs is available to the Petitioners.

73. Another point of contention raised by the Respondent is that the Petitions are pre-mature and no 'change in law' relief can be granted to the Petitioners since they have not filed any details such as the date of import, bills of entry, the date on which solar module were taken delivery or established one to one co-relation which is required for evaluating the claim. The Petitioners have submitted that Article 12.2.1 of the PPAs specifically provides that the Petitioners can approach this Commission for seeking approval of the 'Change in Law' and once imposition of safeguard duty on solar modules as a Change in law event is accepted under Article 12.1.1 of the PPA, it is well accepted and acknowledged practice that the appropriate relief would be granted based on the submission of documents evidencing actual costs incurred by the Petitioner towards safeguard duty. The Petitioners have submitted that Article 12.1.1 provides that a change in law event is any event listed thereunder "resulting

into any additional recurring/ non-recurring expenditure by the SPD". The usage of the words "*resulting into any additional.....expenditure*" signifies the parties' intent to allow change in law relief, to cases where additional expenditure would be subsequently incurred (but has not yet incurred) by the parties. Had the parties' intent been to restrict relief for change in law only once actual expenditure has been incurred, the parties would have used the word "*resulted into any additional.... expenditure*". Thus, the relief for change in law is predicated solely on the happening of the events listed under the change in law clause and is applicable even in cases where actual expenditure has not been incurred but will only be subsequently incurred.

74. The Commission is of the view that the Safeguard Duty on the 'solar cells and modules' as per Notification No. 1/2018 (SG) dated 30.07.2018 would be applicable at specified rates for the period of two years from 30.07.2018 till 29.07.2020. It can be observed from the above that the Petitioners have already submitted their bids before the date of Notification of imposition of Safeguard Duty viz. 30.07.2018. Moreover, in two Petitions viz. 14/MP/2019 and 13/MP/2019, even the LoI stands awarded to the Petitioners before 30.07.2018. Further, the SCoD in all the Petitions is after the date of notification viz. 30.07.2018 and before 29.07.2020. Therefore, the petitions filed by the Petitioners are not pre-mature. The cause of action arose on 30.07.2018 i.e. the date of notification. In any case, the Respondents have to compensate the Petitioners only on the production of the actual documents of the expenditure incurred by them.
75. Now we deal with the issue of 'the need to evolve a suitable mechanism for compensation'. As per discussion above, the Commission has already held that the imposition of the 'Safeguard Duty' is an event covered as 'Change in law' as contained under Article 12 of the PPAs. The immediate question before the Commission is what should be the basis of the calculation of the compensation? The Commission observes that as per the Notification No. 01/2018-Customs (SG) New Delhi dated 30.07.2018, Safeguard Duty is payable on Solar Cells whether or not assembled in modules or panels. The Petitioners have claimed increase of the project cost due to increase in cost of modules. However, the Commission observes that in the instant petitions, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs quote the bid levellised tariff without disclosing the

details of the calculations of the project cost including capital expenditure. The design of the bid levelled tariff is solely a decision of the SPDs. Therefore, the Commission cannot rely on the figures provided by the Petitioners in the Petitions. As such the actual amount of the 'Safeguard Duty' imposed by the competent authority and paid by the Petitioners needs to be compensated.

76. Accordingly, the Commission directs the Petitioners to make available to the Respondent No. 1 all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till Scheduled Commissioning date duly supported by relevant invoices and Auditor's Certificate. The Respondent No. 1 is further directed to reconcile the claims for 'Change in Law' on receipt of the relevant documents and pay the amount so claimed to the SPDs. Further, the Respondent No. 1 shall claim the amount from the other Respondents. The Commission is of the view that the compensation on account of imposition of 'Safeguard Duty' w.e.f. 30.07.2018 should be discharged by the Petitioners and the Respondents as one-time payment in a time bound manner within sixty days from the date of issue of this Order or from the date of submission of claims by the Petitioners, whichever is later, failing which it shall attract late payment surcharge in terms of the PPAs. Alternatively, the parties may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for one-time payment.
77. The issue is decided accordingly.

***Issue No. 2:** Whether in view of the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" dated 03.08.2017 the Petitioners may be restored to the same economic condition prior to occurrence of the Change in Law through suitable mechanism as prayed for in the present Petitions And Whether the claim of Petitioners regarding interest on Working Capital, Return of Equity and 'Carrying Cost' for delay in reimbursement by the Respondents is sustainable?*

78. The Petitioner in Petition No. 13/MP/2019 has submitted that the bidding in the instant petition was pursuant to "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" dated 03.08.2017 issued by the Ministry of Power, Government of India. Clause 6.3 of the 2017 Guidelines

shows that it is mandatory upon the Procurer to prepare the draft PPAs in accordance with the 2017 Guidelines. Further, Clause 5.7.1 of the '2017 Guidelines' makes it clear that the economic position is to be restored. Hence, the restitution would mean grant of compensation of such value that is inclusive of and not without carrying cost. The Petitioner has further submitted that Clause 12.2.2 of the PPAs, besides providing for the power to acknowledge change in law, also provides the power to grant relief therefor. The Commission's power extends beyond grant of one time compensation and is inclusive of the power to grant carrying cost so that the relief is an effective relief. If carrying cost is denied, then mere compensation after lapse of time will have diminished value and the economic position of the affected party will not be restored. The Petitioners have submitted that the components of 'Return on Equity' and 'Interest on Working Capital' are integral to the all-inclusive tariff bid. At the time of the submissions of bid(s), the Petitioners have factored in 'interest on working capital' and return on equity based on the costs prevalent at the time of bid. With the increase in the costs due to the change in law events explained above, the working capital requirement, and consequently, the interest on working capital have also increased as compared to requirement and rate prevalent at the time of bid. Thus, the Petitioners are entitled to interest on incremental working capital at normative interest rate to put Petitioners to the same economic position as if change in law has not occurred.

79. **Per Contra**, the Respondents have submitted that that the PPAs in the present petitions are not governed by '2017 Guidelines' dated 03.08.2017 for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Project issued by Ministry of Power by Notification. Rather, the present PPAs are governed by the National Solar Mission Guidelines for selection of 5000 MW Grid Connected Solar PV Power Projects under Phase-II Batch IV issued by Government of India by notification 14.03.2016. Accordingly, the claim made by the SPDs that the PPAs are governed by Guidelines dated 03.08.2017 for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Project is erroneous and is liable to be rejected. Further, the claim with regard to Change in Law can be said to be crystallized only when the Commission determines the amount payable to the Petitioner. There is no provision in the PPAs which permits the carrying cost or interest for the period till the amount of the claim is determined by the Commission in pursuance to Petitions filed by the Petitioners. In the absence of any specific provision providing for carrying cost in the PPA, there cannot be any claim for the
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same. In terms of Article 12 of the PPA entered into between the parties, the relief for Change in Law provided is for the Petitioners to approach the Commission for seeking approval of the Change in Law and the Commission has to decide on the admissibility of the claim in the first instance. Accordingly, the amount due from Respondents to the Petitioners under change in law gets crystallized only upon the decision being made by the Commission allowing change in law and therefore, there cannot be any carrying cost for the period prior to the decision of the Commission. After the decision of the Commission, the Petitioners are required to include the amount determined in the supplementary bills raised thereafter in terms of Article 10.7 of the PPAs. The amount then becomes payable on the due date applicable for payment of such supplementary bills in terms of Article 10. The Respondents have submitted that there is no concept of interest on working capital or other individual tariff elements including return on equity in competitively bid process and bidders are required to give the bid based on all-inclusive tariff. There cannot be any issue of return on equity on incremental working capital and margin. These aspects are no longer a res-integra and has been decided in judgment dated 19.04.2017 in Appeal No. 161 of 2015 - *Sasan Power Limited –v- CERC*; Order dated 14.08.2018 in Appeal No. 111 of 2017 - *GMR Warora -v- CERC and Ors.*; judgment dated 21.12.2018 passed by Hon'ble Appellate Tribunal of Electricity in Appeal No. 193 of 2018- *GMR Kamalanga Energy Limited and Anr. –v- CERC and Ors.* Order dated 05.02.2019 passed by the Commission in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited*.

80. The Respondents have further submitted that it is a settled law that terms cannot be implied into a contract, contrary to the express terms of the PPA. Thus, if the PPAs already contemplate for the provision of 'Late Payment Surcharge' for the delay in payment of the bill, supplementary or otherwise (as stated above), then by no stretch can it be said that the intent of the PPAs was to restore/restitute the parties to the same economic position in case of such contingency. In matters of contract, relief cannot be granted on principles of equity. The business efficacy rule can be considered as a part of interpretative rule only where the provision is vague and cannot be relied upon to create a substantive right in favour of the Petitioners. Quantum Meruit has application when the contract is held to be invalid.

81. The Commission is of the view that the PPAs stand executed and the provisions of the PPAs have become final and binding on the Petitioners and Respondents. The PPAs do not contain any provisions relating to economic restitution. In view of the above, the Commission does not consider it appropriate to consider the issue of restitution.
82. The Commission observes that in the judgment of the Appellate Tribunal for Electricity dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors., it was held that since Gujarat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”

83. The Commission further observes that in the Judgment of the Appellate Tribunal dated 14.08.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors., it was held that if there is a provision in the PPAs for restoration of the Sellers to the same economic position as if no Change in Law event has occurred, the Sellers are eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgement. In the present case, there is no provision in the PPAs either for carrying cost or restitution. The relevant extract from the decision in GMR Warora case on the aspect of carrying cost reads as under:

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for

working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondents Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of redetermination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondents Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2 the adjustment in Monthly Tariff Payment shall be effective from:

the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

the date of order/ judgment of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law. (c) the date of impact resulting from the occurrence of Article 13.1.1.

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Enviro Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority.

This Tribunal vide above judgement has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment.”

84. The Commission observes that since the PPAs do not have a provision dealing with restitution principles of restoration to same economic position therefore, the claim regarding separate 'Interest on Working Capital'/'Carrying Cost' is not admissible.
85. The decisions in this Order are summed up as under:
- a. **Issue No. 1:** The imposition of the 'Safeguard Duty' vide Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as the event classified as 'Change in Law' under first, second and last bullet of Article 12 of the PPAs. The Commission directs the Petitioners to make available to the Respondent No.1 all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till Scheduled Commissioning date duly supported by relevant invoices and Auditor's Certificate. The Claim based on discussions in paragraph 76 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioners whichever is later failing which it will attract late payment surcharge as provided under PPAs. To ensure time bound compliance within sixty days of the Order, it is directed that the Respondent No.1 shall reconcile the claim related documents within 15 days of submission of claim by Petitioners. Alternatively, the Petitioners and the Respondent No. 1 may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.
- b. **Issue No. 2:** The claim regarding separate 'Interest on Working Capital'/'Carrying Cost' is not admissible.
86. Accordingly, the Petition No. 14/MP/2019, Petition No. 69/MP/2019, Petition No. 27/MP/2019, and Petition No. 13/MP/2019 are disposed of.

Sd/-

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