केन्द्रीय विद्युत विनियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION

नई दिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 342/MP/2018 and 343/MP/2018

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: 2nd of May, 2019

IN THE MATTER OF:

Petition under Section 79 of the Indian Electricity Act, 2003 seeking that the imposition of safeguard duty on the import of solar modules is covered as event of Change in Law in terms of the Article 12 of PPA which have led to an increase in the non-recurring expenditure for the Project and to evolve a suitable mechanism to compensate the Petitioners.

AND IN THE MATTER OF:

1) Petition No. 342/MP/2018

ACME Rewa Solar Energy Private Limited
Plot No.152, Sector – 44,
Gurugram – 122002, Haryana (India)

…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, Delhi

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:

2) Petition No. 343/MP/2018

ACME Jodhpur Solar Power Private Limited
Through its authorized signatory
Plot No.152, Sector – 44,
Gurugram – 122002, Haryana (India)

…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, Delhi

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

Parties Present: Shri Sujit Ghosh, Advocate
Ms. Mannat Waraich, Advocate
Shri M.G. Ramachandran, Advocate, SECI
Shri Shubham Arya, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Swapna Seshadri, Advocate, Rajasthan Discoms

आदेश/ ORDER

1. The Petitioners, ACME Rewa Solar Energy Private Limited in Petition No. 342/MP/2018 and ACME Jodhpur Solar Energy Private Limited in Petition No. 343/MP/2018 are generating companies and are project companies of M/s ACME Solar Holdings Limited which is 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.

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 (VGF) mode in India.

3. The Respondent No. 2 is Jaipur Vidyut Vitran Nigam Ltd, the Respondent No. 3 is Ajmer Vidyut Vitran Nigam Ltd and the Respondent No. 4 is Jodhpur Vidyut Vitran Nigam Ltd., (hereinafter collectively referred to as "Rajasthan Discoms"). They 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.

4. The Petitioners have made the following prayers in both the Petitions:

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 non-recurring expenditure for the Project;*
b) *Evolve a suitable mechanism to compensate the Petitioners for the increase in expenditure incurred by the Petitioners on account of Change in Law;*
c) *Grant interest/carrying cost from the date of impact till reimbursement by the Respondent; and*
d) *Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.*

Brief facts of the case

5. The Respondent No. 1, issued a Request for Selection (hereinafter referred to as 'RfS') of Solar Power Developers (hereinafter referred to as 'SPDs') for setting up grid-connected Solar PV Projects in Bhadla Phase III Solar Park, Rajasthan for an aggregate capacity of 500 MW. Pursuant to the aforementioned RfS, the Petitioners (through ACME Solar Holdings Limited) were selected by SECI as SPDs for setting up of a solar power project based on photo voltaic technology of 100 MW capacity in the State of Rajasthan.

6. The Petitioners entered into a Power Purchase Agreement (hereinafter referred to as "PPAs") dated 26.09.2017 with SECI, for the setting up of solar power project of 100 MW capacity in the State of Rajasthan and for the consequent sale of solar power to the SECI.

7. Thereafter, vide Notification No. 1/2018 (SG) dated 30.07.2018 (hereinafter referred to as "Safeguard Duty Notification"), the Central Government has 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

8. 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

9. The Petitioners have submitted that the term 'Law' has been defined in 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.

10. 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.

11. 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."

12. 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.

13. The Petitioners have submitted that it is also relevant to refer to the provision of 'Effective Date' for ascertaining the effect of 'Change in Law' on account of enactment of a Law. The Effective Date is defined under Article 2.1 of the PPA and is reproduced hereunder:-

"2.1 Effective Date
2.1.1 This Agreement shall come into effect from 16.09.2017 and such date shall be referred to as the Effective Date."

14. The Petitioners have submitted that accordingly, on the basis of the above 'Change in Law', provisions under the PPA are triggered if there has been an enactment of a new law after the Effective Date or there has been any change in tax or introduction of any tax for setting up of solar power project which has resulted in increase in recurring or non-recurring expenditure by the Petitioner.

15. 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"). Section 8B of the Customs Tariff Act 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."*

16. 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 thereunder 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.

17. The Petitioners have submitted that they incur expenditure in the nature of one–time capital expenses on the import of solar cells and modules for setting up of the solar power project as per the PPA. These expenses qualify as 'non-recurring expenditure'. As on the Effective

Date, safeguard duty was not levied upon the import of solar cells and modules. Hence, with effect from 30.07.2018, the import of solar cells and modules required for setting up of solar power project as per the PPA would be subject to levy of 25% safeguard duty (which would be progressively liberalized) along with an additional IGST of 5% leviable on the value of modules which would be inclusive of safeguard duty amount. Thus, effectively the additional non-recurring expenditure incurred by the Petitioners would be 25% of the cost of modules as well as additional IGST of 5% on safeguard duty.

Re: Increase in Working Capital and decrease in 'Return on Equity'

18. 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 to the same economic position as if change in law has not occurred.

19. The Petitioners have submitted that they have engaged ACME Cleantech Solutions Pvt. Ltd. as its contractor for supply of goods and executed an Agreement for Supply of Goods ("Supply Contract"). The Supply Contract expressly provides that any increase in the taxes/ duties on the supplies shall be passed on to the Petitioners. Hence, Petitioners are affected by the Safeguard Duty Notification.

20. The Petitioners have submitted that they will place on record the relevant documents invoices etc. to show the actual impact of safeguard duty on its project in due course of proceedings. On account of the Safeguard Duty Notification, the Petitioners served a notice dated 12.09.2018 to the Respondent No. 1. In spite of the notices, the Respondent No. 1, SECI has failed and neglected to give any adequate response.

21. The Petitioners have submitted that applying the provision of Article 12 of the PPA to the facts of the present case, the following emerges:

(i) Imposition of safeguard duty by virtue of the 'Safeguard Duty Notification' would be covered by the phrase '*introduction of a new tax on the setting up of solar power plant'* on account of the fact that safeguard duty qualifies as a tax imposed on the 'solar cells and modules' which are the primary components in the setting up of a solar power plant. Thus, the imposition of safeguard duty on imported solar cells and modules would in effect tantamount to an incremental tax cost accrued on the setting up of the solar power plant.

(ii) Further, since the safeguard duty has been imposed after the Cut-Off Date which was bid submission date as per RfS, the effective date would be the date of the imposition *viz.* 30.07.2018.

(iii) Alternatively, the imposition of safeguard duty is in the nature of an enactment of a new law in as much as the same has been imposed by a notification of the Ministry of Finance which has been made on 30.07.2018 i.e. beyond the effective date of the PPA, the effective date of the PPA being 16.09.2017 (as per clause 2.1.1 of the PPA)

(iv) Such imposition of safeguard duty would result in an additional expenditure of 25% duty ad valorem being incurred by the Petitioners for the first year (which would be progressively liberalized).

Thus, the imposition of safeguard duty clearly qualifies as a 'Change in Law' under Article 12 of the PPA.

22. The Petitioners have submitted that the Respondent Nos. 2 to 4 have contended that the specific entry for change in law on account of taxes ought to be interpreted as necessarily excluding taxes. Further, the Respondents have averred that change in law on account of taxes under the sixth bullet of Article 12.1.1 of the PPA are restricted to "setting up of Solar Power Project" and "supply of power" and as such the imposition of safeguard duty which is on the event of import of solar cells/ modules is not covered by the said bullet and is

consequently not an event of 'change in law'. The said submission of the Respondents are refuted on the basis of the following arguments:

a) The Commission had analysed the change in law provision which are pari materia with the provision under the present PPA and held that introduction of GST which is actually a tax, apart from being an enactment, promulgation, etc. of a Law covered by the first bullet has also resulted in changes in taxes on inputs required for power generation and was thus also a tax on the supply of power covered by the sixth bullet therein. The relevant portion of the decision is reproduced below:-

> "*313. From the above it is apparent that the Hon'ble Appellate Tribunal for Electricity has already held that any tax levied through an Act of Parliament after the cut-off date which results in additional expenditure by the Petitioner, the same is covered as "change in Law". In the same judgment it is also held that and 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 the "GST Laws" have been enacted by the Indian Government Instrumentalities i.e. by the Act of Parliament and the State Government. The change in duties/ tax imposed by various Government Instrumentalities at Centre and State level has resulted in the change in cost of the inputs required for generation and hence the same is to be considered as "Change in Law". Hence, the Commission holds that the enactment of "GST laws" is squarely covered as "Change in Law" under the first, second and sixth bullet in seriatim of Article 12 of the PPA*

b) The aforementioned decision of the Commission is squarely applicable to the facts of the present case in as much as similar to GST, safeguard duty is also leviable on import of 'solar cells and modules' and as such is covered under the first bullet as an enactment, promulgation, etc. of Law. The 'solar cells and modules' are the basic components for setting up of solar power project. Accordingly, since the sixth bullet of Article 12.1.1 includes taxes for setting up of solar power project, hence, imposition of safeguard duty on the import of solar cells and modules would also be covered by the sixth bullet. Accordingly, safeguard duty would be covered as a change in law event under the first and sixth bullet of Article 12.1.1 of the PPA.

23. The Petitioners have further submitted the following grounds to buttress its submission that 'imposition of safeguard duty' is covered by the first bullet of Article 12.1.1 also apart from being covered by the sixth bullet:

(i) On a Perusal of Article 12.1.1, it is clear that to qualify for change in law, any one of the listed events must have occurred. This in itself suggest that the burden of proof on the Petitioners is to demonstrate whether its case falls under one of the listed events, without being required to prioritize any one of them over the other. Accordingly, so long as imposition of safeguard duty has been introduced through an enactment which was not in force prior to the effective date, it would continue to fall under the first bullet.

(ii) The concept of change in law is a principle of restitution and equity. Under such circumstances, the very purpose is to enable a party to seek contractual remedies for incremental cost that have arisen which was beyond its control post the effective date.

(iii) Being a concept in restitution and equity, an equitable interpretation must necessary follow as opposed to a hair splitting approach as sought to be represented by the Respondents. Accordingly, on application of such equitable approach, it would be abundantly clear that imposition of safeguard duty will fall under first bullet of Article 12.1.1.

(iv) The Respondent's averment that adoption of bullet 1 over bullet 6 would make bullet 6 redundant is a fallacious proposition of interpretation of contracts. This is on the basis that Article 12.1.1 does not per se create any such restriction that bullet 6 being specific in nature will override bullet 1, which is wide in its amplitude. Instead it clearly states that occurrence of any of the following events would qualify as a change in law without any conditionality attached thereto for picking up any one of the events over the other.

(v) Further, in case of any ambiguity in the interpretation of the PPA, the rule of *Contra Proferentem* will apply. The rule of *Contra Proferentem* provides that in case of ambiguity or two possible interpretations, the Court will prefer that interpretation which

is more favorable to the Party which has not drafted the PPA. Basis the aforementioned rule, in the present, as the PPA is a standard document prepared by the Respondent No. 1, the interpretation that bullet 1 will cover imposition of safeguard duty ought to prevail, being an interpretation in favour of Petitioner, who has not drafted the PPA.

24. The Petitioners have further submitted that the expression "supply of power" used in the latter part of the sixth bullet subsumes within itself taxes on inputs required for such generation and supply of power. In this regard, the Petitioners have placed their reliance on the decision of the APTEL in the case of *Adani Power Rajasthan Ltd. Vs. RERC &Ors., dated 14.08.2018* where it has been held as follows:-

> *"11. We have heard learned counsel appearing for the Appellants and learned counsel appearing for the second Respondents at considerable length of time.*
>
> *……..*
> *……..*
> *……*
>
> *d) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgment of Hon'ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC 203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgment, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted than the Change in Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.*
>
> *e) APRL has further contended that the reliance of the Discoms on the maxim 'expressum facit cessare tacitum' meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon'ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.*
>
> *f) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under*

Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgments of the Hon'ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by GoI under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.

g) In view of our discussions as above and after duly considering the earlier judgments of this Tribunal, we are of the considered opinion that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms."

25. The Petitioners have further submitted that in accordance with the aforementioned decision, the imposition of safeguard duty on the import of solar modules being in the nature of tax on inputs required for generation and supply of power would in any case be covered by the expression "tax on the supply of power" under the latter half of the sixth bullet to Article 12.1.1.

26. The Petitioners have further submitted that a number of activities (setting up of the power plant, generation and ultimately supply) are undertaken by the generator to ensure supply of power. Thus, supply cannot be restricted to the last leg of sale of electricity also. Further, the Hon'ble Supreme Court of India in the case of *State of Andhra Pradesh v. National Thermal Power Corporation [(2002) 5 SCC 203]* has held that generation and supply of electricity are instantaneous and have to be treated as one transaction. The relevant extract is quoted as under:-

"29. ... However, we are dealing with the case of electricity as goods, the property whereof, as we have already noted, is that the production (generation). transmission, delivery and consumption are simultaneous, almost instantaneous. Electricity as goods comes into existence and i consumed simultaneously; the event of sale in the sense of transferring property in the goods merely intervenes as a step between generation and consumption.... "

Re: The purpose of imposition of safeguard duty would be defeated with allowing it as a Change in Law

27. The Petitioners have submitted that the objective of the imposition of safeguard duty is to encourage domestic manufacturers so as to prevent imports from other countries. However, as per Article 12 of the PPA, it is specifically provided that in case of any event which qualifies as a 'Change in Law' and results in increase in additional recurring or non-recurring expenditure, the Petitioners are entitled to file a petition before the Commission seeking compensation in relation to the additional expenditure as incurred by the Petitioner. Accordingly, as long as the event qualifies a 'change in law' under Article 12 of the PPA which has resulted in increase in the recurring/non-recurring expenditure as incurred by the Petitioners, the Petitioners are contractually entitled under the terms of the PPA to approach the Commission seeking approval of the 'Change in Law' and for appropriate relief as compensation for the additional expenditure. Therefore, the jurisdiction of this Commission is confined to adjudicating upon whether the imposition of safeguard duty qualifies as an event of 'change in law' under Article 12 of the PPA.

28. The Petitioners have submitted that the writ of the Commission does not extend to analysing whether the objectives of the imposition of safeguard duty are being met as the same is the domain of the Department of Revenue in the Ministry of Finance. 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 itself 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 to the DISCOMS. The relevant portion is reproduced as follows:-

> *"67. As far as the interest of the power developers are concerned, the domestic industry has raised certain arguments. Power developers could be sub-divided into three categories i.e. (a) developers who entered into PPAs with DISCOMS and have already imported the product under consideration; (b) developers who entered into PPAs with DISCOMS but have not yet imported the product under consideration, and (c) developers which may bid on future projects and are hoping to import the product under consideration would incorporate the enhanced import price into their tariff quotations and may become uncompetitive. The power developers who would be presently affected are those that have entered into PPAs with DISCOMS and quoted the tariff based on prevailing import prices of product under consideration but have not yet imported the product under consideration. However, as Central Government has already taken steps to balance the interests of such affected power developers with the Ministry of New and Renewable Energy having notified a pass-*

through facility through a clarification on "change in law" clause of the agreements and therefore, I feel that the imposition of safeguard duty is covered under the 'change in law' clause and the impact of duty will be passed on to the DISCOMs.

29. The Petitioners have submitted that DG Safeguard is the appropriate authority *vis a vis* recommendation of safeguard duty on imports of 'solar cells and modules', which has itself held that such imposition would be a pass through to the DISCOMS and that the findings form the very edifice for levy of safeguard duty under section 8B of the Customs Tariff Act levied vide Notification No. 1/2018-Cus (SG) dated 01.07.2018.

Re: The methodology for grant of benefit/relief on account of Change in Law event

30. The Petitioners have submitted that the Commission vide Order dated 05.02.2019 in Petition No. 187/MP/2018, 192/MP/2018, 193/MP/2018, 178/MP/2018 and 189/MP/2018 in one of the Petitioner's own case i.e. *ACME Jodhpur Solar Energy Private Limited*, at para 183, has allowed the Petitioners to obtain the compensation, either as a one-time payment or as a percentage of the tariff on an annuity basis, not exceeding the duration of the PPA. On this basis, the Petitioners submit that the Commission may allow the Petitioners to obtain the compensation in the manner of a revised tariff which is computed on the basis of the principles as laid down by this Commission. Applying the financial parameters considered by the Commission in the Central Electricity Regulatory Commission (Terms and conditions for tariff determination from Renewable Energy Sources) Regulations, 2017, a tariff increment of Rs 0.01 per MW per Rs. One lakh increase in the project is arrived.

Re: The provisions of the EPC Contract affecting the claim of the Petitioners

31. The Petitioners have submitted that they entered into an Agreement dated 15.02.2018 with ACME Cleantech Solutions Private Limited for design, engineering, manufacture/ procurement and supply of materials i.e. solar photovoltaic modules, inverters, power and distribution transformers, junction boxes and all other items essential for Solar power plant to be construed together as Solar Power Generating System for the Project. The Contract documents *inter alia* consisted of the following documents:

(i) Agreement of Supply

(ii) General Conditions of Contract including all Annexures

(iii) Special Conditions of Contract including all Annexures

(iv) Technical Specifications: Annexure 1

(v) Supply Project Schedule: Annexure 2

Tentative Schedule

S. No.	*Activity*	*No. of Days*	*Start Date*	*End Date*
1	*PPA Signing*	*1*	*26-Sep-17*	*26-Sep-17*
2	*Fulfilment of Conditions Subsequent*	*180*	*27-Sep-17*	*25-Mar-18*
3	*Land*	*45*	*04-Oct-17*	*17-Nov-17*
4	*Engineering*	*125*	*03-Oct-17*	*04-Feb-18*
5	*Manpower mobilization*	*95*	*18-Oct-17*	*20-Jan-18*
6	*Ordering*	*149*	*04-Oct-17*	*01-Mar-18*
7	*Site Infrastructure*	*150*	*14-Oct-17*	*12-Mar-18*
8	*Equipment Delivery*	*214*	*08-Nov-17*	*09-Jun-18*
9	*Construction*	*225*	*15-Nov-17*	*27-Jun-18*
10	*Commissioning*	*64*	*04-May-18*	*06-Jul-18*

32. The Petitioners have submitted that the Contract Agreement contained a ***tentative*** Supply Project Schedule which formed a part of the Contract documents and detailed out various activities which were purported to be performed by the Supplier and timelines to be followed therein under the present Contract. Within few days of signing the Contract Agreement, the Petitioners amended the Agreement to replace the Tentative Schedule with the Actual Project Schedule which correlated with the actual work and timelines to be undertaken in relation to the present Contract Agreement. The fact that the Project Schedule was tentative and did not correlate with the actual work undertaken by the Petitioners is evident from the following:

S. No.	*Activity*	*No. of days*	*Start date*	*End date*	*Comments showing anomalies*
1	*PPA signing*	*1*	*26-Sep-17*	*26-Sep-17*	
2	*Fulfillment of Conditions subsequent*	*180*	*27-Sep-17*	*25-Mar-18*	

3	*Land*	*45*	*04-Oct-17*	*17-Nov-17*	*As the Agreement was solely for Supply, Access of Land was irrelevant and superfluous.* *Further, as per the tentative Schedule, the timeline for access of land was between 04.10.2017 to 17.11.2017. However, as the Land Lease Agreement itself was signed between SPD and Solar Park on 27.02.2018, much after the Supply Agreement, it is clear this part of the Schedule becomes irrelevant and erroneous*
4	*Engineering*	*125*	*03-Oct-17*	*04-Feb-18*	*As the Agreement was solely for Supply, this was irrelevant and superfluous.*
5	*Manpower mobilization*	*95*	*18-Oct-17*	*20-Jan-18*	*As the Supply Agreement was dated 15.02.2018, the timeline for Manpower Mobilization between 18.10.2017 and 20.01.2018 becomes erroneous and irrelevant*
6	*Ordering*	*149*	*04-Oct-17*	*01-Mar-18*	*As the Supply Agreement was dated 15.02.2018, the timeline for Ordering starting from 04.10.2017 was never factually possible and thus becomes erroneous, irrelevant and illogical*
7	*Site infrastructure*	*150*	*14-Oct-17*	*12-Mar-18*	*As the Agreement was solely for Supply, this was irrelevant and superfluous.*
8	*Equipment delivery*	*214*	*08-Nov-17*	*09-Jun-18*	*As the Supply Agreement was dated 15.02.2018, the timeline for Equipment Delivery starting from 08.11.2017 was never factually possible and thus becomes erroneous, irrelevant and illogical*

9	*Construction*	*225*	*15-Nov-17*	*27-Jun-18*	*As the Agreement was solely for Supply, this was irrelevant and superfluous.*
10	*Commissioning*	*64*	*04-May-18*	*06-Jul-18*	*As the Agreement was solely for Supply, this was irrelevant and superfluous.*

33. The Petitioners have submitted that in order to rectify the inadvertent errors and irrelevant points (which was anyways indicated as a Tentative Schedule), the Petitioners entered into an Amendment Agreement dated 20.02.2018 with ACME Cleantech Solutions Private Limited to set right the defects and replace the Tentative schedule with a final Schedule which reflected the true and correct intention of the Parties entering into the Contract. Thus, with effect from 20.02.2018, the tentative Project Schedule enclosed as Annexure 2 to the Supply Agreement was replaced by a fresh Project Schedule. Further, this amendment also clearly states that in case of any conflict with respect to the amended terms, the terms of the amendment shall prevail over the terms of the agreement. Hence, in case of any dates, reference to time schedule, etc. in other terms of the Agreement which is not in line with the Amendment shall be nullity and shall be read in consonance with the terms of the Amendment.

Re: Questioning the commercial considerations involved in procurement of modules.

34. The Petitioners have submitted that the provisions of the PPA nowhere specify or prescribe that the goods required for setting up of the Project are required to be imported from a specific location or sourced domestically and it was therefore upto the generator to make specific sourcing decisions on various commercial factors. The commercial decision of the Petitioners cannot have a bearing or disentitle the Petitioners from claiming relief under Article 12 of the PPA.

35. The Petitioners have submitted that at the time of bidding for the present Projects, the Petitioners have factored in the price of the modules on basis of its prior arrangements with module suppliers from certain countries which offer competitive rates and good quality of modules and determined its tariff on basis of the same. Solely due to imposition of safeguard duty, the Petitioners are not liable to source inferior goods from other module suppliers in

countries wherein safeguard duty may not be applicable. At the time of bidding, the Petitioners were never aware that imposition of safeguard duty would be applicable on imports from China and that its import from exporters based in China would get hit by the said imposition.

36. The Petitioners have submitted that the Final Findings dated 16.07.2018 of the Directorate General (Safeguards) which form the basis for imposition of safeguard duty vide Notification dated 30.07.2018 itself provides a huge gap between the demand for solar cells/ modules and the capacity of the domestic industry to supply the same. The huge gap in the demand for solar modules and the installed capacity of the domestic industry as is provided at para 49(i) read with para 49(iv) of the final findings is sufficient evidence of the fact that the domestic industry would not be in a position to meet the increasing demand for the solar modules. The same has been depicted below in a tabular format as follows:

Particulars	Unit	2014-15	2015-16	2016-17	2017-18	2017-18 Annualised
Domestic demand	MW	1419	4381	6918	5309	10618
Installed Capacity	MW	292	373	373	185	373
Capacity utilization (if complete installed capacity utilized)	%	20.57	8.51	5.39	3.48	3.51

37. The Petitioners have submitted that as is evident from above, even at its full capacity, the Domestic Industry would only be able to meet 3.51% of the total demand. In fact such gap between the demand and supply would continue to increase till the Domestic Industry expands its production capacity to meet the huge demand, which would require atleast 4-5 years.

Re: Claim in Petition is pre-mature

38. The Petitioners have submitted that the present petition is not liable to be dismissed on the ground that it is not supported by actual details and documents evidencing payment of

safeguard duty and showing a co-relation between the import of the modules and the present Project due to following reasons:-

i) Article 12.2.1 of the PPA specifically provides that the Petitioners can approach the Commission for seeking approval of the 'Change in Law'. Once the Commission approves the imposition of safeguard duty on solar modules as a 'Change in law' event 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 Petitioners towards safeguard duty.

ii) The Commission has itself in Petition No. 13/SM/2017 allowed the imposition of Goods and Services Tax (GST) in principle, only on the basis of incremental impact on per ton basis without considering the actual monetary impact in absolute terms.

iii) The imposition of safeguard duty has resulted in severe and formidable incremental costs for the Petitioner's Project. In order to arrange such additional funds, the Petitioners have entered into financial arrangements with its lenders due to which Petitioner's Projects have additional financial burden of recurring loan repayment. The imposition of safeguard duty being declared as a 'Change in Law' under Article 12 of the PPA by the Commission is critical for the viability of this Project.

Re: Carrying Cost

39. The Petitioners have submitted that 'Change in Law' is based upon principle of restitution and equity and the very 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 necessary follow as opposed to a hair-splitting approach as sought to be made by the Respondents. Accordingly, while the phrase 'the parties must be restored to the same economic position' may not be present in the PPAs, the same must be read in, having regard to the purpose of the 'change in law' clauses.

40. The Petitioners have submitted that the very purpose of a 'Change in Law' clause is to restore the affected parties to the same economic position as it was prior to such change. Therefore, even if specific words to that effect may not be couched in the provisions of Change in Law, the said concept of restoration of party to the same economic position has to be read into it by necessary implication.

To illustrate: Where pre-change in law the price was INR 100/-, the yield for supplier being INR 100/-, post change in law if INR 20/- of taxes are incurred, then unless an extra INR 20/- is paid by the procurer, the yield of the supplier will diminish to INR 80/. Therefore, by making an additional payment of INR 20/- over and above INR 100 by the procurer through change in law, the yield of the supplier is maintained at INR 100 i.e. the supplier is put at same economic position of INR 100/- that it was before the imposition of tax of INR 20/-. Thus, it is evident that even without using the phrase "restoration of parties to the same economic position" the objective of change in law is nothing but restoring the parties to the same economic position.

41. The Petitioners have submitted that restoration of the party to same economic position is not a concept over and above the concept of change in law. Instead, it is deeply meshed into the very concept of change in law. By way of illustration, the Petitioners seek to bring to the notice of the Commission a typical change in law clause found in the PPA for thermal power:-

> *".....*
> *13.2 Application and Principles for computing impact of Change in Law*
> *While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.*
> *...".*

42. The Petitioners have submitted that it is also pertinent to refer to '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 ("Tariff Guidelines"). Para 5.7.1 of the Tariff Guidelines states that 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 it would have been, had it not been for the occurrence of the Change in Law event. The relevant provision has been reproduced 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."*

43. The Petitioners have submitted that the intention as reflected by the Tariff Guidelines ought to be read into the PPA. Thus, the Tariff Guidelines as issued under the provisions of Section 63 of the Electricity Act, 2003 clearly 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, basis the Tariff Guidelines, it is imperative that the Petitioners are granted an interest on working capital at normative interest rate in order to put Petitioners to the same economic position as if change in law has not occurred.

44. The Petitioners have submitted that the principle of Carrying Costs has already been allowed by the Hon`ble Tribunal (APTEL) in various judgments including A. No. 210 of 2017, A. No. 193 of 2017 and A. No. 111 of 2017 as also allowed by the Commission in its Order 235/MP/2015 dated 17.09.2018 pursuant to remand.

45. The Petitioners have submitted that "carrying cost" is a compensation for the time value of money and is an inherent provision under the change in law clause of a PPA. Since the Change in Law clause is based on the principles of restitution, relief of carrying cost on the additional cost incurred on account of Change in Law is implicit in the PPA. The 'economic position' which is sought to be restored in terms of the Change in Law clause does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but ought to also include compensation in terms of carrying costs incurred with respect to the said Change in Law Events. This is also supported by the principle of business efficacy, in the case of Nabha Power Limited v. Punjab State Power Corporation Limited and Anr. [Civil Appeal No. 179 of 2017] which provides that a contractual term can be implied in light of the express terms of the contract, commercial common sense and the facts known to both parties at the time of entering into the contract. Further, a Change in Law clause being a restitution clause, demands that the Petitioners' should be compensated for all necessary and reasonable extra costs including carrying cost and/or interest on the additional cost incurred on account of Change in Law. In this regard, the Petitioners would like to place reliance on the case of Sumitomo Heavy Industries Limited v. ONGC Limited, reported at [2010 (1J) SCC 296J].

46. The Petitioners have submitted that in the alternative scenario, they would be entitled to carrying cost under the principles of quantum meruit. Assuming the alternative argument that there is no implied clause in the PPA for payment of carrying cost and/or interest, the principles of quantum meruit as statutorily enshrined in Section 70 will be attracted and the Petitioners would be entitled to carrying cost. Section 70 provides that where a person lawfully does anything for another person and does not 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. In view thereof, since the Petitioners have not incurred additional capital cost on account of introduction of GST Law gratuitously, the Petitioners are entitled to compensation for the same and such compensation has to be for all reasonable costs, including carrying cost. The Petitioners have placed reliance on the decision in the case of *Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona, [(1970) 1 SCC 213.*

Written Submissions of SECI, Respondent No. 1

47. The Respondent No. 1 SECI has submitted that the Petitioners have filed the Petition claiming the effect of change in law in terms of Article 12 of the PPAs with reference to imposition of Safeguard Duty on the import of solar cells whether assembled or not in modules or panels. The PPAs were executed in pursuance of the competitive bidding conducted by SECI under the National Solar Mission Guidelines for selection of 5000 MW Grid connected Solar PV Power Projects under Phase-II Batch –IV notified on 14.03.2016. SECI has entered into a back to back Power Sale Agreement (hereinafter referred to as the 'PSA') for sale of electricity purchased from the Petitioners to Respondents No. 2 to 4.

48. The Respondent No.1 has submitted that the SPD i.e. the Petitioners having participated in the competitive bidding for generation and sale of electricity, accepting the terms of the bid documents, is bound by the terms thereof and particularly the all-inclusive tariff quoted by the SPD and incorporated in the PPAs. Being a competitively bid project, there cannot be any additional claim except as allowed under the PPAs, namely the provisions of 'Change in law' under Article 12.

49. The Respondent No.1 has submitted that the Petitioners have basically made three broad claims in the Petitions viz. (a) Effect of the Safeguard duty; (b) Interest on Working Capital/ Return on Equity and (c) Carrying Cost.

Re: Jurisdiction of the Commission

50. The Respondent No.1 has submitted that the jurisdiction of this Commission to decide the matter is not denied or disputed.

Re: Application of the relevant guidelines

51. The Respondent No.1 has submitted that 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 dated 14.03.2016.

This is clear from the stipulation contained in the PPAs - Article 1 where the term Guideline has been defined. Article 1 of the PPAs dealing with Guidelines dated 14.03.2016 reads as under:

> *"ARTICLE 1: DEFINITIONS AND INTERPRETATIONS*
> *1.1 DEFINITIONS*
> ***Guidelines*** *shall mean the "NSM Guidelines for selection of 5000 MW Grid Connected Solar PV Power Projects under Phase-II Batch IV" notified vide No. 32/3/2014-15/GSP dated 14th March 2016 including its subsequent amendments and clarifications.*
>
> *"**National Solar Mission or NSM**" shall mean the National Solar Mission launched by the Government of India vide resolution No.5/14/2008-{&C dated 11th January 2010, as amended from time to time."*

52. The Respondent No.1 has submitted that accordingly, the claim made by the SPD that the PPAs is governed by Guidelines dated 03.08.2017- Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Project, is erroneous and liable to be rejected.

Re: Safeguard Duty*: *Nature and scope of application of Safeguard Duty

53. 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. The safeguard duty has been imposed on the import of solar cells and modules when the import is from certain specific countries, namely, China PR, Malaysia and from developed countries. The safeguard duty has not been imposed on the import of solar cells from other developing countries as provided in Notification No.19/2016- Customs (N.T) dated 05.02.2016. The Notification dated 30.07.2018 imposing the safeguard duty is prospective in its operation. The notification has not been given effect to any period prior to 30.07.2018.

54. 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 PPAs and dealt with as Change in Law in Article 12 of the PPAs. However, there cannot be any relief to the SPD in the following cases:

a) If the SPD or its contractors or sub-contractors had delayed the importation of the solar cells and in the meanwhile the safeguard duty levy had come into effect, the delay being an act attributable to the SPD or its contractors/sub-contractors, no relief can be given to the SPD. The Hon'ble Appellate Tribunal in *Power Grid Corporation of India Limited v. Central Electricity Regulatory Commission and Ors.,(Appeal No. 281 of 2014)*Order dated 13.08.2015 has held as under:

> "9.3……..*Thus, the delay is on account of the contractor hired by the Appellant/petitioner. We further approve the view adopted by the Central Commission that the beneficiaries cannot be saddled with cost as result of the default of the contractor……"*

b) The Appellate Tribunal in *Maharashtra State Power Generating Company Limited v. Maharashtra Electricity Regulatory Commission and Ors.(Appeal No.161 of 2011)* Order dated 18.10.2012 has held as under:

> *"12. The crux of the arguments of the Appellant is that the faults and deficiencies of work in setting up the Generating Units committed by the Contractor cannot be attributable to the Appellant and that, therefore, the Appellant should not be penalised for the faults committed by its contractor.*
>
> *13. At the outset, it shall be stated that in principle, no generating unit or utility ought to be permitted to avoid the application of operational norms mandated by the Regulations on the ground of failure or inaction of contractors appointed by it. The parameters mandated by the Regulations would apply to Generating Company. Such parameters have to be complied with by the Generating Company. The Regulation cannot be concerned as to the inter-se relations between the generating company and its contractors. According to the Appellant, the contractor has failed in its task in setting-up a good generating plant. This argument does not deserve acceptance.*
>
> *14. It is the responsibility of the Generating Company to ensure that the plant performs in accordance with the technical parameters mandated by the Regulation. If the Generating Plant does not perform in accordance with the parameters, as per the Regulation, it is the Generating Company which has to bear the cost of such a non-performance. Whether such non-performance is on account of failure of the Generating Company's internal management systems or on account of the failure of the Generating Company's contractors are the issues which are to be dealt with by the Generating Company either by itself or with its contractors.*
>
> *59. Summary of Our Findings*

……..
(2) The Appellant cannot be permitted to avoid the application of the operational norms mandated by the Regulations on the ground of failure or inaction of its contractor. The deviation in operational performance parameters due to contractor's default could not be considered as uncontrollable factor for passing on the consequential cost to the consumers."

c) The Commission has also refused relief in cases where delay being attributable to not only on part of the utility but also its contractors/sub-contractors. If the SPD does not establish to the satisfaction of the Commission that there has been an actual expenditure and outflow of the money on account of payment of safeguard duty to the revenue authorities, no relief can be granted.

55. The Respondent No.1 has submitted that it is incumbent on the SPD to place on record transparently the entire details relating to the payment of safeguard duty in regard to the solar cells and further establish the one to one correlation between the project, importation of solar cells and the invoices and other relevant documents for proof of the payment of safeguard duty (Ref: Order dated 09.10.2018 in Petition No.188/MP/2017 and Batch, Order dated 05.02.2019 in Petition no.187/MP/2018 and Batch). In the absence of the above details, and particularly satisfying the one to one co-relation, it is not possible to consider any such claim and the petition filed should to be rejected.

56. The Respondent No.1 has submitted that despite the above aspect having been specifically raised by SECI in the reply filed on 27.12.2018 before the Commission and also having been submitted during the oral arguments in the hearing dated 07.02.2019, the SPD, in the present case, has not given the requisite documentation in support of the claim for safeguard duty.

57. The Respondent No.1 has submitted that perusal of the records of the case, particularly, the documents filed by SPDs establish the following:

(a) As per Agreement dated 15.02.2018 entered into by the SPDs with Acme Cleantech Solution Private Limited for supply of goods and services, the SPD had envisaged the import of solar cells much before 30.07.2018 i.e. before the safeguard duty notification was issued.

(b) The SPD had entered into a legally binding and enforceable contract with Acme Cleantech Solution Private Limited (hereinafter referred to as **'Acme Cleantech'**) where under the import and the delivery was stipulated to be by 09.06.2018 and further in case of delay on part of Acme Cleantech, the liability to compensate specifically for all taxes and duties that may arise during the delayed period was on Acme Cleantech.

(c) The SPD is not acting in a transparent and bonafide manner. It is guilty of abusing the process of the Court. The SPD has been attempting to change documents upon being shown that the documents filed by the SPD along with petition establish the ineligibility to claim the impact of the Safeguard duty levy.

(d) During the hearing before this Commission on 07.02.2019, the SPDs placed a document dated 20.02.2018 purporting to be Amendment to the agreement for supply dated 15.02.2018 entered into by the SPD with Acme Cleantech for supply of goods and services**.** The Agreement dated 15.02.2018 provides the terms and conditions including the timeline/project schedule for completion of the work. In the Amendment document, the time schedule is shown to have been substituted. The document filed is patently an attempt to improve the case as would be clear from the fact that in other places as more fully set out hereunder, the project schedule clearly implies the contrary that the equipment delivery was to be undertaken by 09.06.2018 i.e. before the imposition of the safeguard duty on 30.07.2018;

(e) In the written submissions now filed, the SPDs have not explained the discrepancy in the claim now made by SPDs *qua* the written documents filed along with the petition in a satisfactory manner acceptable to any bystander.

58. The Respondent No.1 has submitted that Annexure-2 of the Petition contains a project schedule agreed to between the SPD and Acme Cleantech as under:

"Annexure 2
Project Schedule

S. No.	***Activity***	***No. of Days***	***Start Date***	***End Date***

1	*PPA Signing*	*1*	*26-Sep-17*	*26-Sep-17*
2	*Fulfillment of Conditions Subsequent*	*180*	*27-Sep-17*	*25-Mar-18*
3	*Land*	*45*	*04-Oct-17*	*17-Nov-17*
4	*Engineering*	*125*	*03-Oct-17*	*04-Feb-18*
5	*Manpower mobilisation*	*95*	*18-Oct-17*	*20-Jan-18*
6	*Ordering*	*149*	*04-Oct-17*	*01-Mar-18*
7	*Site Infrastructure*	*150*	*14-Oct-17*	*12-Mar-18*
8	*Equipment Delivery*	*214*	*08-Nov-17*	*09-Jun-18*
9	*Construction*	*225*	*15-Nov-17*	*27-Jun-18*
10	*Commissioning*	*64*	*04-May-18*	*06-Jul-18*

59. The Respondent No.1 has submitted that in terms of the above, all the solar equipment including the solar cells were to be delivered to the SPD (after importation is complete between 08.02.2017 and 09.06.2018) much before 30.07.2018. The above project schedule has also been referred to in the following clauses of the agreement dated 15.02.2018:

> "*Article – 3 COMPLETION SCHEDULE*
> *Time is the essence of the Contract. The Supplier undertakes to complete the Supplies strictly as per the Completion Schedule attached hereto subject to such extensions as may be allowed in the contract, failing which the Supplier shall be liable to pay Liquidated Damages as mentioned in this Contract. It is hereby clarified that the Supplier shall not be liable to pay Liquidated Damages in the event the delay in completing the Supplies as per the Completion Schedule is attributable to or is caused due to any act and/or omission of the Owner or any Owner caused delays*
> ……
>
> GENERAL CONDITIONS OF CONTRACT (GCC)
>
> *1.0 DEFINITION OF TERMS AND INTERPRETATION*
> *1.1 DEFINITIONS*
>
> *"Time for Completion" Shall mean the time within which completion of the Statement of Supplies as a whole) (or of a part of the Statement of Supplies where a separate Time for Completion of such part has been prescribed) is to be attained in accordance with the stipulations in the SCC and relevant provisions of the Contract, including "Final Acceptance" and Anenxure-2."*
>
> *"10.0 SCOPE OF STATEMENT OF SUPPLIES*
> ……
> *10.6 The detailed Scope of Supplies to be supplied by the Supplier under the contract is attached as Annexure-2 to this Contract.*

11.0 DELIVERY AND TIME FOR COMMISSIONING

11.1 The date the Final Acceptance issued shall be deemed to be the essence of the Contract and the Statement shall have to be completed not later than the date(s) specified in the Annexure"

……

SPECIAL CONDITIONS OF CONTRACT (SCC)

"TIME FOR COMPLETION

Solar Power Generating System comprising of Solar PV Modules including all equipment, associates with the Project under the Scope of the Suppliers shall be completed within the period as specified in Annexure-2.

The Date specified in the Final Acceptance Certificate shall be considered as the date of completion of Work/Facilities.

4.1 The completion of Statement of Supplies as per Schedule is the essence of the Contract and if the Statement of Supplies are not completed within the stipulated Time for Completion, Owner will be at liberty to get the Statement of Supplies done by any other person at Supplier's risk and cost and if thereby any extra expenditure is involved, the same will be debited to Supplier's account.

4.3 "Port Handling and Clearance, Reconciliation with Customs Authorities for the Imported Goods Unloading, Storage, Handling at Site, Pre-Commissioning of Solar Power Generating System i.e. Solar PV Modules including all equipment associated with the Power Plant shall be carried out in such a way that the Solar PV system shall be Commissioned by 10th may 2017."

60. The Respondent No.1 has submitted that Acme Cleantech had also agreed to the implication of delay in the delivery and time for commissioning in Article 11 as under:

"11.0 DELIVERY AND TIME FOR COMMISSIONING

11.1 The date the Final Acceptance issued shall be deemed to be the essence of the Contract and the Statement of Supplies shall have to be completed not later than the date(s) specified in the Annexure-2. Unless such failure is attributable to the Owner, in the event of failure by the Supplier in commissioning the Facilities or any part thereof within the specified period, the Owner shall be entitled as its option;

(i) To recover from the Supplier Liquidated Damages as stated in GCC Sub-Clause 11.3 below.

(ii) Source from elsewhere of similar description Statement of Supplies required for Commissioning after giving due notice to the Supplier on Supplier's risk and cost.

(iii) Take such other action as required to protect its rights hereunder.

11.2 Unless the delay is on account of failure by the Owner to perform its obligations, any financial liability i.e. increase in rate of taxes & duties, levies, cost of raw material, freight charges, insurance tariff, fines, penalties etc., arising consequent upon failure of the Supplier to adhere to each of the stipulated (i) Completion, (ii) Commissioning and/or (iii) Final acceptance schedule shall be to the account of Supplier.

11.3 Liquidated Damages

11.3.1 The Owner shall, be entitled to recover from the Supplier, Liquidated Damages at a sum set out in the SCC for delay or failure in Commissioning, till the date of issuance of the Final Acceptance Certificate.

11.3.2 The Parties agree that the amount of Liquidated Damages as set out in the SCC has been estimated in good faith as fair compensation (and not as a penalty) and represents a genuine pre-estimate of the Owner's loss and damages in the event of delay or failure to achieve Commissioning.

11.3.3 The payment of Liquidated Damages shall not relieve the Supplier from its obligations of Commissioning the Project, nor from any other obligations and liabilities under the Contract, and shall not prejudice any other remedy the Owner may have in relation to the Supplier's non-compliance with the Contract."

61. The Respondent No.1 has submitted that the agreement dated 15.02.2018 further stipulates the conditions to be satisfied for undertaking amendment/variation of the said agreement. In this regard, Clause 2 deals with Amendment to the contract and reads as under:

"2.0 AMENDMENT TO THE CONTRACT

2.1 No amendment or other variation of the Contract shall be effective unless it is in writing, is dated, expressly refers to the Contract, and is signed by a duly authorized representative of each Party hereto. However in the event of any material amendments prior consent of Lenders shall be obtained before such change is effective."

The above provision has not been followed.

62. The Respondent No.1 has submitted that the Amendment dated 20.02.2018 has been incorporated with a non-judicial stamp paper of Rs.50. The back page of the stamp paper of

Rs.50 on which the Amendment is entered into has not been provided which would have indicated the date, the person from whom and the purpose for which the stamp paper was purchased. In contrast, the agreement for supply dated 15.02.2018 is on an e-stamp paper of Rs.100. Similarly, the PPA dated 26.09.2017 has also been entered on an e-stamp paper of Rs 100.

63. The Respondent No.1 has submitted that in the circumstances mentioned hereinabove, the claim made by the SPDs that amendment to the agreement was made for correcting the time schedule given in the project schedule is an after-thought and needs to be rejected. The remedy of the SPDs for non-import of the solar cells by 09.06.2018 is provided in the agreement dated 15.02.2018. The SPD should recover all the consequential effects including any payment on safeguard duty from Acme Cleantech. In view of the above, though the safeguard duty notified on 30.07.2018 is a law, the same does not qualify for a Change in Law within the scope of Article 12 of the PPA entered into between the parties.

64. The Respondent No.1 has submitted that the claim made by the SPDs in its written submissions to the effect that Amendment was made to replace the Tentative Schedule with the Actual Project schedule which correlated with actual works and timelines to be undertaken in relation to the contract agreement is preposterous and is liable to be rejected. It is not open to the SPDs to file the main agreement without any whisper of any subsequent amendment and thereafter when confronted with the relevant material in the documents, abandon the project schedule on vague pleas, particularly, when the document is a legally binding agreement entered into by the SPDs with the Contractor/Supplier who had agreed to supply the goods and services required for the project.

65. The Respondent No.1 has submitted that it has specifically raised the issue on the project schedule in the reply dated 27.12.2018 filed before the Commission. In the rejoinder filed by the SPDs on 16.01.2019, the SPDs did not give any detail or explanation to the specific issue raised. The so called Amendment to explain the discrepancy has been filed only on the conclusion of the arguments by SECI before the Commission in the reply to the opening documents of the SPD.

66. The Respondent No.1 has submitted that in the event , the Solar Cells have been imported by the SPD from China and/or Malaysia etc., where the orders for the solar cells were placed by SPDs closer to the imposition or after the imposition of the safeguard duty, it was an imprudent utility practice. This is particularly so if the cost of procurement of solar cells from China and/or Malaysia etc. inclusive of the cost of the safeguard duty is more than the cost of procurement of solar cells from those countries where the import of solar cells is not subject to imposition of the safeguard duty. The Petitioners had the obligation to mitigate and procure the solar cells from such countries where it is cost effective. It is not open to the Petitioners to continue to procure the solar cells from China even after the imposition of the safeguard duty where the landed cost of the equipments is more as compared to the import of equipments from countries which are not subject to levy of the safeguard duty.

Re: The methodology for grant of benefit/ relief on account of 'Change in Law'

67. The Respondent No.1 has submitted that the SPDs have the primary and fundamental obligation to place all the relevant material with supporting documents before the Commission in the first instance along with the petition. It is the duty of the SPDs to satisfy the Commission of the admissibility of the claim. The SPDs cannot proceed on the basis that it will not give the date of actual import of the solar cells and proceed to claim the amount on some vague and un-substantiated plea. The verification of the documents can be done only if the SPDs in a transparent manner place material documents along with the petition or in the proceedings before the Commission. The SPDs have deliberately failed to furnish the requisite material.

Re: Allegation that the provisions of the EPC Contract do not have any bearing on the Claim of the Petitioners

68. The Respondent No.1 has submitted that the EPC Contract has been entered into by the SPDs and the SPDs are responsible for the completion of the project in time. The default, delay etc. on the part of the EPC Contractor is to the account of the SPDs when the EPC Contract itself specifically provides for the project schedule and further provides for the consequences of delay on the part of the Contractor, Acme Cleantech. The allegation made by the SPD to the contrary in the written submissions are erroneous and without any merit.

Re: Allegation that the Commercial considerations involved in the procurement of modules cannot be questioned

69. The Respondent No.1 has submitted that in the present case, the issue is not of dealing with the commercial consideration between the SPDs and Acme Cleantech. The issue is the date on which the solar cells were intended to be taken delivery of by the SPDs i.e. by 09.06.2018 meaning thereby before 30.07.2018 when the safeguard duty was notified by the Government of India. The contract entered into with Acme Cleantech clearly establishes that the delivery was by 09.06.2018. There is also a provision for the SPDs to recover the extra outflow on account of the taxes etc. from Acme Cleantech for the delay on its part.

Re: Inadmissibility of interest on Working Capital, Return on Equity

70. 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 element of tariff 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 including return on equity 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. These aspects are no longer a res integra and has been decided by the Hon'ble Tribunal in the following judgments:

a) Judgment dated 19.04.2017 in Appeal No. 161 of 2015 - *Sasan Power Limited –v- Central Electricity Regulatory Commission*
b) Order dated 14.08.2018 in Appeal No. 111 of 2017 - *GMR Warora -v- Central Electricity Regulatory Commission and Ors.*
c) 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- Central Electricity Regulatory Commission and Ors.*

d) 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.*

Re: Inadmissibility of carrying cost

71. The Respondent No.1 has submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission acknowledging the change in law and deciding on the amount to be paid for such change in law namely '*provide for relief for the same*', as specified in Article 12.2.2 of the PPA. The Change in Law claim of the Petitioners is yet to be adjudicated and the amount if any, due to the Petitioners have to be determined/computed first. Thereafter, only after the amount is determined, are the Petitioners required to raise a Supplementary invoice for the amount so computed as per Article 10.7 of the PPA. It is only in case of default on the part of SECI in not making the payment by the due date as per supplementary invoices, the issue of Late Payment Surcharge would arise i.e. for the period after the due date. The reference in Article 12.2.2 as regards the Commission deciding on the date from which the change in law will be effective, refers to the principal amount to be computed from the date on which change in law comes into force and not to the payment of interest and carrying cost.

72. The Respondent No.1 has submitted that the provision of Article 10.3.3 of the PPAs dealing with late Payment Surcharge and definition of the 'Due Date' in Article 1 read with Article 10.3.1 of the PPA are relevant. The due date is the forty-fifth (45^{th}) day after a Monthly Bill or a Supplementary Bill is received and duly accepted by the Answering Respondent, if such day is not a Business day, the immediately succeeding Business Day, by which date such Monthly Bill or Supplementary is payable by SECI. In case the Monthly Bill or any other bill, including a Supplementary Bill is issued after the (fifteenth) 15th day of the next month, the Due Date for payment would be (fifth) 5th day of the next month to the succeeding Month. The supplementary bill needs to be raised by the SPD for the adjustment of the Change in Law after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge for the period prior to the due date. The Respondent No.1 has placed its reliance on the judgment of the Appellate Tribunal in *SLS Power Limited*

-v- Andhra Pradesh Electricity Regulatory Commission and Others (Appeal No. 150 of 2011) and Batch.

73. The Respondent No.1 has submitted that further, the PPAs do not have a provision dealing with principle of restoration to same economic position. Therefore, the Petitioners are not entitled to claim relief which is not provided for in the PPA. The Respondent No.1 has placed its reliance on the following Judgments:

a. The Appellate Tribunal vide judgment 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

b. The Appellate Tribunal vide 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.*, held 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.

c. Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, the Commission re-iterated the aforementioned findings of the Tribunal.

d. Commission's Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch*.

74. The Respondent No.1 has submitted that the present case is 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 by the Commission 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. Accordingly, the carrying cost admissible (if any) to the Petitioners shall be from the date of furnishing of the complete

prescribed information. 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.

Re: Allegation of allowing Carrying Cost under the Business Efficacy

75. The Respondent No.1 has submitted that 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 can it be said that the intent of the PPA 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 PPA and other event is excluded, it clearly indicates that the events which are not included are not to be considered. Further, in the case of *Sumitomo Heavy Industries Limited v ONGC Limited (2010) 11 SCC 296* the Hon'ble Supreme Court had only opined that the Award given by the Arbitrator is a possible view and cannot be said to be either a law on the admissibility of interest or a precedent on the above aspect. Incidentally, even in the *Nabha case* (as relied on by the Petitioners), the interest was granted only from three months after the decision of the Hon'ble Supreme Court and not before.

76. The Respondent No.1 has submitted 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. Reference in this regard may be made to the following judgments:

a) *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793: AIR 1960 SC 588* wherein it was held that the Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet, this does not in itself affect the bargain they have made.

b) *Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968) 1 SCR 821: AIR 1968 SC 522* wherein it was held that where the contract makes provision (that is,

full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name. In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term.

77. The Respondent No.1 has submitted that 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.

Re.: Allegation of allowing carrying cost under the principle 'Quantum Meriut'

78. 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 (Safeguard Duty) 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. Further, the principle of Quantum Meruit has to be specifically pleaded. Reference in this regard may be made to the following extracts from Pollock and Mulla, Fourteenth Edition (Vol II), which reads as under:

"Quantum Meruit
The principle of quantum meruit is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the work is to be done contracts to pay reasonably for the work done, to the person who does the work. The provisions of his section are based on the doctrine of quantum meruit, "but the provisions of the Contract Act admit of a more liberal interpretation; the principle of the section being wider than the principle of quantum meruit". The principle has no application where there is a specific agreement in operation. A case based on quantum meruit must be pleaded."

Re.: Claims, if any allowed to SPDs, should be recovered on Back to Back basis from the Respondent no.2 to 4

79. The Respondent No.1 has submitted that the PPAs have been entered into by SECI in its capacity as an intermediary company for the bulk purchase of electricity from the Petitioners for bulk supply of electricity to the Respondent No.2 to 4, Distribution licensees under **PSAs**. Such purchase and resale of electricity is under a scheme envisaged under NSM scheme. SECI is in a position to discharge its obligations under the PPA including the payment for any change in Law implication etc. only upon the distribution licensees remitting the amount to the SECI in terms of the respective PSAs. The obligation of the distribution licensee under the PSAs is therefore on a back to back basis with the obligation of the SECI to the Petitioner. The Respondent No.1 has placed its reliance on Order dated 09.10.2018 in case of *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*. and Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited Batch*.

80. The Respondent No.1 has submitted that in the circumstances mentioned above, the objections raised by the SPD are irrelevant and without any merit.

Written Submissions of Respondents No. 2 to 4 – Distribution Companies in the State of Rajasthan

81. The Respondent DISCOMS have submitted that the Petitioners have made the following broad claims in its Petition:

a. Imposition of Safeguard Duty;
b. Interest on Working Capital/Return on Equity;
c. Carrying Cost.

Re: Imposition of Safeguard Duty

82. The Respondent DISCOMS have submitted that in terms of the Statutory Notification dated 30.07.2018, safeguard duty becomes payable on "import" of solar cells whether or not assembled in modules or panels. Therefore, the imposition is on the importer of the Solar Cells if such import is on or after the date of notification i.e. 30.07.2018. The Petitioners are

not procuring the solar cells from any imported sources, but is procuring from its own group company. The Petitioners have stated in their Petitions that they have engaged one ACME Cleantech Solutions Pvt. Ltd. as its contractor for supply of goods and executed an Agreement for Supply of Goods dated 15.02.2018. Therefore, the Petitioners have no agreement for import of solar cells or even for use of imported solar cells. The imposition of assessment of this "tax" is therefore not even on the Petitioners, but on the importer of Solar Cells. The increased cost for the Petitioners is only in terms of the commercial agreement entered into by the Petitioners for purchase of the Solar Cells. The difference is between the liability under law and mere commercial arrangement. In the case of the Petitioner, it is the latter and therefore, no claim for change in law is made out before the Commission. The terms of this agreement are subject to negotiation between the parties. It is settled law that an increase in cost by virtue of the terms of a commercial agreement cannot by any stretch of imagination be a change in law.

83. The Respondent DISCOMS have submitted that the validity of the claim of the Petitioners with regard to 'Change in Law' is required to be considered within the scope of Article 12 of the PPAs dealing with the Change in Law. The Petitioners have quoted an all-inclusive tariff which has been incorporated under the PPAs, and further the PPAs having been accepted and signed by the parties is a binding document, and no claim can be made by the Petitioners de-hors the provisions of the PPAs. Article 12 of the PPA deals with the implication of occurrence of any Change in Law event mentioned therein after the effective date (i.e.16.09.2017), to be allowed to the Developer as per the conditions contained in the said Article. Article 12 recognises only certain events as "Change in Law" and not every change in law. Article 12 of the PPAs comes into play only when the additional expenditure is incurred on account of an occurrence of 'Change in Law' event as mentioned therein. Therefore, if the expenditure is incurred for a reason other than occurrence of the Change in Law event, Article 12 does not come into the picture at all, and no relief could be claimed under the same. Therefore, the Commission has to adjudicate upon:

a. Whether the imposition of Safeguard Duty is a change in law event for the purposes of Article 12 and the qualifications set out therein; and

b. Whether the additional expenditure (if at all) incurred is on account of occurrence of the alleged Change in Law event, and not due to any other fault of the developer or any other entity such as the EPC contractor;

84. The Respondent DISCOMS have submitted that the claim of the Petitioners with regard to imposition of Safeguard Duty fails in both the above aspects under Article 12 of the PPA.

RE: Imposition of Safeguard Duty as a Change in Law event under Article 12 of the PPA.

85. The Respondent DISCOMS have submitted that in terms of Article 12, for any relief being claimed by the Petitioners under Change in Law, it is to be demonstrated beyond doubt that the Change in Law event is one that is admissible under Article 12 and the qualifications set out therein. There are three legal implications of the provision under Article 12 in respect of **taxes**, which are summarized as under:

a) The Change in Law definition in Article 12.1.1 is exhaustive in nature and not inclusive, on account of use of the expression 'means'.
b) Tax is specifically dealt with only under the sixth bullet and therefore other five bullets have to be interpreted to deal with aspects other than taxes.
c) The fifth bullet specifically restricts tax to only tax on ***"****setting up of Solar Power Project****"*** *and "supply of power****"***. Therefore, tax on any other event other than setting up of Solar Power Project and supply of power is not covered by the Change in Law clause.

86. The Respondent DISCOMS have submitted that with regard to any taxes, duties etc., the relevant entry is the sixth bullet of the Change in Law clause. Taxes also cannot form part of any other entry in the Change in Law clause. This is based on the basic and well settled principles of interpretation of deeds and documents, whether interpretation of statutes or interpretation of contracts. The Petitioners have contended that the imposition of safeguard duty is on solar modules which are the primary component in the setting up of a solar plant, and therefore to that extent the change in tax would tantamount to an increase in tax on setting up of the solar power plant. The contentions of the Petitioners in this regard are misconceived, as the incidence of safeguard duty is not on the event of *"setting up of a solar*

power plant", but is on transaction of "*import of solar modules*". The provision under the PPAs explicitly deals only with the event of setting up of solar power plant, and not on a tax on any input for setting up the plant. Similarly, the incidence of Safeguard Duty is also not on *"Supply of Power"*. It also not correct for the Petitioners to contend that the imposition of Safeguard would be a tax on input costs in the process of supplying power. For a claim to be admissible under Article 12, the tax incidence either has to be on the event of ***"****setting up of Solar Power Project****"*** *or on the event of "supply of power****",*** and not on any input for either setting up the plant or supplying power.

87. The Respondent DISCOMS have submitted that the definition of *supply* as defined in the Electricity Act, 2003 is required to be used for the purpose of the sixth bullet in Article 12.1.1 of the PPA. The term supply in Article 12.1.1 – Sixth Bullet means sale of electricity. Therefore, what is covered in the PPAs for Change in Law in respect of taxes is only tax for "*setting up a Solar Power Plant*" and "*supply*" (sale) of electricity and not taxes for anything else. In the present case, the imposition of Safeguard Duty in terms of the Statutory Notification is admittedly only on the event of "import of Solar Cells/modules". The change in price of Solar Cells/Modules is only a change in input price, which is not covered under the Change in Law clause. The Petitioners have wrongly placed its reliance on the order of the Commission in the case of *ACME Bhiwadi Solar Power Private Limited v. SECI* dated 09.10.2018 since the same deals with the change in law event namely, "*GST Laws"*. The Petitioners cannot seek parity in the present case of Safeguard Duty with a case dealing with GST Laws as the change in law event. Further, 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.* have not attained finality, and is currently pending adjudication before the Hon'ble Supreme Court in Civil Appeal No. 11910/2018. Therefore, the reliance placed on the order of the Commission dated 09.10.2018 is misplaced.

88. The Respondent DISCOMS have submitted that the Petitioners have alternatively argued that taxes could also form part of the first bullet i.e. "*the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal"*, as there is no restriction that the sixth bullet overrides the first bullet. The contention of the Petitioners in this regard is

misconceived since such an interpretation would render the sixth bullet otiose and redundant. There was no need to then have a specific bullet dealing with tax.

89. The Respondent DISCOMS have submitted that the Petitioners have sought to argue that the concept of Change in Law is a principal of restitution and equity, and that therefore an equitable interpretation is to be made. The contention of the Petitioners is fundamentally flawed. Having entered into PPAs, which is a binding contract, the Petitioners cannot seek any relief under equity. It is settled law that there is no equity in contracts, and that the rights and liabilities of the parties are strictly governed by the terms of the contract.

90. The Respondent DISCOMS have submitted that provision under the PPA is crystal clear and that the change in tax is circumscribed by certain qualifications which necessarily have to be read and given meaning to therefore the rule of *Contra Proferentem* is not applicable.

91. The Respondent DISCOMS have submitted that in view of the above the imposition of Safeguard Duty is not a Change in Law admissible under Article 12 of the PPA.

RE: Additional expenditure whether on account of imposition of Safeguard Duty or delay by EPC Contractor.

92. The Respondent DISCOMS have submitted that Article 12 itself does not come into play in the present case, as the additional expenditure being incurred by the Petitioners (if at all) is in fact on account of a delay in importing the Solar Cell modules, and the same would not have been applicable had the delay not taken place. In this regard the Commission and the Appellate Tribunal have consistently taken the view that even under the plenary powers available to the Commission under Section 62 of the Electricity Act, 2003, any fault of the executing entity or of its contractor ought to be dealt contractually between them, and that the impact of such fault could not be passed on to the consumers in the tariff. Therefore, under Section 63, especially when the developer has taken a commercial risk and quoted an all-inclusive tariff, he cannot claim a relief from the consumers, if there is a delay which otherwise ought to be dealt with contractually with the contractor. The reliance is placed on the following judgments of APTEL / Commission:-

a. *Order dated 26.05.2015 in Petition No. 257 / 2010* passed by the Commission and

b. Judgment dated 05.05.2015 in *Appeal No. 129 of 2014 – PGCIL v CERC &Ors*

93. The Respondent DISCOMS have submitted that in the present case, while the Safeguard Duty has been imposed vide Statutory Notification No. 01/2018 dated 30.07.2018, the effect of the same is only prospective. The Petitioners have placed on record along with its Petition the agreement dated 15.02.2018 that it has entered into with ACME Cleantech for supply of the said Solar Modules. The terms of the contract and the subsequent conduct of the Petitioners clearly shows that the Petitioners by way of the present Petitions are only seeking to gain from its own wrong. In terms of the given schedule the equipment was to be ordered not later than 01.05.2018, and delivered not later than 09.06.2018. Further, even the Construction and Commissioning dates in terms of the above schedule were to be prior to the notification dated 30.07.2018. Therefore, the additional expenditure that the Petitioners are claiming to have incurred is in fact on account of a delay in performing the obligations as per the timeline given in the schedule of the Agreement. Further, the Agreement also envisaged the situation of delay or non-adherence to the timelines as per the schedule. Article 11.2 of the Agreement clearly provides that any increase in taxes/duties on account of the delay attributable to the supplier i.e. ACME Cleantech shall be to the account of the supplier. On the other hand, if the delay is on account of the Petitioners, the same has to be borne by the Petitioners itself. This is also in consonance with the principle that has been consistently upheld by this Commission as well as the Appellate Tribunal, that such delays and the consequences shall not be passed on to the consumers, but are to be contractually dealt with by the generator.

94. The Respondent DISCOMS have submitted that the Petitioners have made the following broad submissions:

a. Relief under Article 12 of the PPA is not to the exclusion of any other remedy that may be available under different contractual agreement;

b. Since the agreement with ACME Cleantech is solely an agreement for supply of modules, the date of commissioning and other dates are not relevant and are superfluous;

c. The dates given in the schedule were tentative dates which are prior to the date of agreement, and therefore irrelevant and never factually possible.

d. The schedule in Annexure 2 was subsequently amended vide supplementary agreement dated 20.02.2018;

95. The Respondent DISCOMS have submitted that if there is a delay or any deviation from the schedule given in Annexure 2 of the EPC agreement, it cannot be left to the Petitioners to claim the impact of the same from the consumers, when the same necessarily ought to be paid by the defaulting party. While the Petitioners have not even provided any tangible information regarding when the Solar Modules were actually imported or when the commissioning actually took place, for the Safeguard Duty to impact the Petitioners. It is clear that there has been a delay in performing of obligations under the EPC agreement. This being the case, it is not open to the Petitioners to now contend that even though there is a delay or default under its EPC agreement, the impact of the same it would claim under the PPA from the consumers. It is clear that the EPC agreement has been entered into by the Petitioners with its sister concern, and that the Petitioners are now only seeking to pass on the liability of its sister concern to the consumers.

96. The Respondent DISCOMS have submitted that the Petitioners have sought to make an impression that the agreement with ACME Cleantech was for the sole purpose of supply of solar modules, and that dates for commissioning, construction etc. under the schedule are irrelevant for this purpose and ought not to be considered. Several clauses of the agreement with ACME Cleantech show that the agreement was not only for supply of modules, but the obligation went up to even commissioning the plant. In fact, in terms of the Agreement the final acceptance by the Petitioners is only after the commissioning test is done. Therefore, it does not lie in the mouth of the Petitioners to now contend that all other dates other than ordering and delivery of equipment are irrelevant and superfluous. In this regard, the Respondent DISCOMS have drawn attention to following clauses of the Agreement dated 15.02.2018:

"1.1 DEFINITIONS

…

"Time for Completion"	*Shall mean the time within which completion of the Statement of Supplies as a whole (or of a part of the Statement of Supplies where a separate time for completion of such part has been prescribed) is attained in accordance with the stipulations in the SCC and relevant provisions of the Contract, including "Final Acceptance" and Annexure 2"*

…

4. "TIME FOR COMPLETION
Solar Power Generating System comprising of Solar PV Modules including all equipment, associates with the Project under the Scope of the Suppliers shall be completed within the period as specified in Annexure-2.

The Date specified in the Final Acceptance Certificate shall be considered as the date of completion of Work/Facilities.

…
34.6 Applicable Acceptance Tests

(e) Commissioning
After the completion of trial operation, the Work/Facilities covered under the Contract shall be operated successfully at rated Voltage and available load without any problem/interruption, and a declaration by State Nodal Agency that the ***conditions specified in 5.1of the PPA have been satisfied*** *or waived has been received by the Owner.*

….
34.8 Final Acceptance
34.8.1 Upon Final Acceptance of the Power Plant, the service Supplier will take over the care, custody and control of the Statement of Supplies. Apart from successful Commissioning, the Supplier shall have followed the required parameters of achieving Final Acceptance."

97. The Respondent DISCOMS have submitted that Article 5.1 of the PPA relates to "*Synchronization, Commissioning and Commercial Operation".* The commissioning test requires the conditions specified under Article 5.1 in the PPA to be satisfied. In view of the above, it is clear that the agreement of the Petitioners with ACME Cleantech is not merely for supply of equipment but includes commissioning of the power plant also, and therefore the dates specified in the Schedule under Annexure 2, have been inserted for a purpose, and are not irrelevant. The Petitioners are seeking to dispute the contents of its own documents which cannot be allowed. The fact that the Petitioners have entered into the agreement on 15.02.2018 does not preclude its sister concern from having started the work earlier. In fact,

the date of PPAs signing is also a part of the said schedule which only recognizes the date of PPAs signing. There is no dispute on this date by even the Petitioners. Similarly, the schedule recognizes the other dates agreed upon by the parties for ordering and delivery of equipment. The mere fact that the agreement has been entered into after these dates does not make the dates impossible or irrelevant by any stretch of imagination.

98. The Respondent DISCOMS have submitted that when the said discrepancy in the Petitioners case was pointed out by the Respondents, the Petitioners on 07.02.2019 during the hearing of the matter, for the first time handed over a Supplementary Agreement dated 20.02.2018 which it has allegedly entered into with ACME Cleantech, to revise the schedule and dates in Annexure 2 of the Agreement dated 15.02.2018. The conduct of the Petitioners would show that the supplementary agreement is only an attempt to improve its case after discrepancies have been pointed out by the Respondents. It is also pertinent to note here, that when the said discrepancies in dates was pointed out by Respondent No.1 – SECI in its reply dated 27.12.2018, the Petitioners never raised this issue of supplementary agreement in its rejoinder to SECI's reply dated 16.01.2019. The Supplementary Agreement was handed over for the first time only on 07.02.2019 at the time of hearing. The action of the Petitioners in this regard is clearly an afterthought. Further, a perusal of the Supplementary Agreement does not inspire any confidence in the submission of the Petitioner. The supplementary agreement dated 20.02.2018 has been incorporated with a non-judicial stamp paper of Rs.50. In contrast, the agreement for supply dated 15.02.2018 is on an e-stamp paper of Rs. 100. Similarly, the PPA dated 26.09.2017 has also been entered into on an e-stamp paper of Rs.100. There is no reason given in this regard by the Petitioners for using a non-judicial stamp paper of Rs.50 instead of an e-stamp paper as has been used for the original agreement. On pointing out by SECI that the back side of the non-judicial stamp paper had not been provided to show the date on which it had been purchased, the Petitioner has subsequently vide letter dated 25.02.2019 provided the same which shows a stamp of 29th June 2017. Each time a discrepancy is pointed out the Petitioners have brought forward a new document which it never produced earlier. The conduct of the Petitioners therefore attracts adverse inference that the supplementary agreement is only an afterthought.

99. The Respondent DISCOMS have submitted that the agreement dated 15.02.2018 stipulates the conditions to be satisfied for undertaking amendment/variation of the said agreement. In this regard, Clause 2 deals with Amendment to the contract and reads as under:

> ***"2.0 AMENDMENT TO THE CONTRACT***
> *2.1 No amendment or other variation of the Contract shall be effective unless it is in writing, is dated, expressly refers to the Contract, and is signed by a duly authorized representative of each Party hereto. However in the event of any material amendments prior consent of Lenders shall be obtained before such change is effective."*

100. The Respondent DISCOMS have submitted that while handing over the Supplementary Agreement, the Petitioners have not placed anything on record to show that the above provision has been followed. There are grave discrepancies even in the amended dates as per Supplementary Agreement provided by the Petitioners. In terms of the original Agreement dated 15.02.2018, the schedule under Annexure-2 recognized that orders were to be placed starting from 04.10.2017, which would then start getting delivered by 08.11.2017. Further construction would start by 15.11.2017 and finally commissioning would start by 04.05.2018. However, in the supplementary agreement dated 20.02.2018, the Annexure 2 has been amended to state that the Supplier shall complete supplies of 100MW AC by the Commissioning date of the PPA i.e. 16.09.2018. Even regardless of whether the dates provided were correct or not, the Petitioners do not dispute the time envisaged to take to deliver the equipment once it is ordered, and then, further the time would take for commissioning from that point. The schedule shows that there is a time gap of at least one month from the date of ordering to the date of delivery. Further, after delivery it would take almost six (6) months to construct and start commissioning. The said timeline is on the basis of the Petitioners own estimate in the schedule, regardless of the exact dates.

101. The Respondent DISCOMS have submitted that in view of the above, for the Safeguard Duty to have been attracted the equipment ought to have been ordered after 30.07.2018 i.e. the date of imposition. Further, the Scheduled Commissioning Date in terms of the PPA is 16.09.2018. Therefore, even if it was to be assumed without admitting that the dates given in the original schedule in Annexure 2 of the Agreement dated 15.02.2018 were amended or were not correct, it would be practically impossible considering the Petitioners own estimate,

to order, get the equipment delivered, and then commission and construct the plant within the timeframe of about 1.5 months i.e. from 30.07.2018 to 16.09.2018.

102. The Respondent DISCOMS have submitted that in view of the above, the imposition of Safeguard Duty is neither admissible as Change in Law event under the PPA, nor is the impact of such imposition on account of such Change in Law, but is only due to failure in performing the obligations under the EPC contract.

Re: Purpose of Safeguard Duty

103. The Respondent DISCOMS have submitted that the rationale behind imposition of such safeguard duty is to work as a remedial measure against import of certain articles, to protect the domestic industry, which otherwise may get seriously injured by such import. Allowing such imposition of duty as a pass through would defeat the objective and intent behind it. The reliance has been placed on the orders of the Commission with regard to the claim of Change in Law made by generators on account of Corporate Social Responsibility under the Companies Act, 2013. The Commission has looked at the intent behind the mandate for Corporate Social Responsibility under the Companies Act, 2013, and held that the purpose would be defeated if such responsibility would be passed on to the consumers. Vide *Order dated 21.02.2018 in the case of Coastal Gujarat Power Limited v. Gujarat Urja Vikas Nigam Limited* it was held as under:-

> *"46.*
>
> *...*
>
> *In our view, the expenses towards CSR activities are in the nature of the fulfilment of statutory duty by the Petitioner out of the profit of the company as per the provisions of the Companies Act, 2013.* ***If such expenses are passed on to the consumers, it would defeat the provisions of the Companies Act, 2013*** *as the expenditure would be met by the consumers and not by the Company out of its profit. Therefore, the claim of the Petitioner for relief under change in law on account of imposition of Mandate of Corporate Social Responsibility is not admissible and accordingly disallowed."*

104. The Respondent DISCOMS have submitted that even the Appellate Tribunal has upheld this principle in the case of Distribution Licensees claiming CSR expenditure as part of their ARR. The Appellate Tribunal vide Judgment dated 02.06.2016 in Appeal No. 174 of 2015 – *Noida Power Company Limited v. UPERC* has held that:

"…

e. It is very much clear from the relevant extract from Companies Act 2013 that the company should spend, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years in pursuance of its Corporate Social Responsibility Policy.

f. We are of the considered opinion that if such expenses are passed on to the consumers in the ARR, it would defeat the very purpose. in fact, such expenses are for the social development which should not be passed on to the consumers."

105. The Respondent DISCOMS have submitted that the reliance placed by the Petitioners on the recommendation of the DG Safeguard that the imposition would be a pass through is erroneous. Firstly, the DG Safeguard is not an authority vested with the jurisdiction to hold whether or not the levy of Safeguard Duty could be made a pass through under particular PPAs. The relief in any case ought to be given on a case to case basis, looking at the terms of the PPAs. Therefore, the recommendation of the DG Safeguard does not have any force of law. Secondly, the recommendation of the DG Safeguard itself recognizes that the impact would only be on developers who have entered into PPAs, but have not yet imported the product.

Re: Methodology for grant of benefit/relief on account of Change in Law

106. The Respondent DISCOMS have submitted that the Petitioners have the primary and fundamental obligation to place all the relevant material with supporting documents before the Commission in the first instance along with the petitions. It is the duty of the SPDs to satisfy the Commission of the admissibility of the claim. The Petitioners cannot proceed on the basis that it will not give the date of actual import of the solar cells and proceed to claim the amount on some vague and un-substantiated plea. The verification of the documents can be done only if the Petitioners in a transparent manner place material documents along with the petition or in the proceedings before the Commission.

Re: Increase in Working Capital and decrease in "Return on Equity"

107. The Respondent DISCOMS have submitted that 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. (Reference: The Appellate Tribunal Judgment 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.).* In view of the above, the claim of the Petitioners for increase in Working Capital and decrease in "Return on Equity" is misconceived.

Re: Carrying Cost

108. The Respondent DISCOMS have submitted that firstly, there is no merit in the principal claim of the Petitioners and therefore the question of payment of carrying cost does not arise. Further, there is no dispute on the fact that there can be no payment until the decision of the Appropriate Commission on change in law. Therefore, amounts do not become due until the decision of the Appropriate Commission. This being the position there can be no claim for Carrying Cost.

109. The Respondent DISCOMS have submitted that the PPAs do not provide for any payment of carrying cost. In the absence of any specific provision for interest, there cannot be any payment for carrying cost. 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 acknowledge a Change in Law and pass an Order in regard to the same. Accordingly, the amount due get crystallised only upon the decision being made by the Commission and therefore, there cannot be any carrying cost for the period prior to the decision of the Commission.

110. The Respondent DISCOMS have submitted that the contention of the Petitioners that Change in Law is a principal of restitution and equity is completely misconceived. Having entered into a binding contract which does not provide for any restitution, the Petitioners cannot seek any relief under equity. It is settled law that there is no equity in contracts, and that the rights and liabilities of the parties are strictly governed by the terms of the contract. Unlike other PPAs, as the Petitioners have itself rightly pointed out, there is no provision for restitution in the present PPA. The phrase "*the parties must be restored to the same economic position"* being absent in the present PPA, there can be no question of any relief on a general notion of restitution. The reliance is placed on the Judgment of the Hon'ble Appellate Tribunal 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 and therefore, the 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 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. 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."*

111. The Respondent DISCOMS have submitted that with regard to carrying cost, the law stands settled by the Judgment of the Hon'ble 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*. The Hon'ble Tribunal 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. In Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch in *Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch*, the Commission reiterated the aforementioned findings of the Tribunal.

112. The Respondent DISCOMS have submitted that the present PPA is 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. This is clear from the stipulation contained in the PPA- Article 1 where the term Guideline has been defined. Article 1 of the PPA dealing with Guidelines dated 14.03.2016 reads as under:

"ARTICLE 1: DEFINITIONS AND INTERPRETATIONS
1.1 DEFINITIONS

Guidelines	*shall mean the "NSM Guidelines for selection of 5000 MW Grid Connected Solar PV Power Projects under Phase-II Batch IV" notified vide No. 32/3/2014-15/GSP dated 14th March 2016 including its subsequent amendments and clarifications.*
"National Solar Mission or NSM"	*shall mean the National Solar Mission launched by the Government of India vide resolution No.5/14/2008-{&C dated 11th January 2010, as amended from time to time."*

113. The Respondent DISCOMS have submitted that it is settled law that terms cannot be implied into a contract, contrary to the express provisions set out therein. Therefore, when the PPAs clearly do not envisage restitution to the same economic position unlike other PPAs, there can be no question of providing relief under a general notion of business efficacy. In fact, the stark contrast to other PPAs which expressly contemplate economic restitution makes it clear that the same was never intended by the parties while entering into the agreement at the first instance. Thereafter, the Petitioners have made a vague contention regarding entitlement of carrying costs under Section 70 of the Indian Contract Act, 1872 following the principles of quantum meriut. The principle of quantum meriut has no application where the parties are governed by a Contract. Section 70 of the Indian Contract Act, 1872 deals with "certain relations resembling those created by contract". The Hon'ble Supreme Court has in its Judgment dated 27.02.2019 in the case of *Mahanagar Telephone Nigam Ltd. V. Tata Communications Ltd.* upheld this principle and held as under:

> *"2. 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 Indian 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."

114. Therefore in view of the above, there can be no question of any relief de hors the provisions of the PPA, under some general principle of quantum meriut.

Analysis and decision

115. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since, Petition No. 342/MP/2018 and Petition No. 343/MP/2018 are likely worded and contain similar issues to be adjudicated the same are clubbed together.

116. The brief facts of the case are that the Petitioners, ACME Rewa Solar Energy Private Limited and ACME Jodhpur Solar Energy Private Limited are generating companies and are project companies of M/s ACME Solar Holdings Limited which is 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 III Solar Park, Rajasthan for an aggregate capacity of 500 MW. Pursuant to the aforementioned RfS, the Petitioners (through ACME Solar Holdings Limited) were selected by the SECI as SPDs for the setting up of a solar power project based on photo voltaic technology of 100 MW capacity in the State of

Rajasthan. The Petitioners entered into PPAs dated 26.09.2017 with SECI, for the setting up of solar power project of 100 MW capacities in the State of Rajasthan and for the consequent sale of solar power to the SECI. SECI has also entered into back to back PSAs for sale of electricity purchased from the Petitioners to Respondents No. 2 to 4 ("Rajasthan Discoms"). The Petitioners have engaged one ACME Cleantech Solutions Pvt. Ltd. as its contractor for supply of goods and executed an Agreement for Supply of Goods dated 15.02.2018 which was subsequently amended on 20.02.2018. 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

117. The Petitioners have submitted that issuance of 'Safeguard Duty Notification' 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 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, 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 Petitioner has 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, 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. The Petitioners have also claimed carrying cost from the date of impact of 'Change in law' till reimbursement by the Respondent.

118. **Per Contra,** the Respondents have submitted that the SPDs, having participated in the competitive bidding and bid for the project and for generation and sale of electricity, accepting the terms of the bid documents, is bound by the terms thereof and particularly the all-inclusive tariff quoted by the SPDs and incorporated in the PPAs. Being a competitively bid project, there cannot be any additional claim except as allowed under the PPAs, namely the provisions of 'Change in law' under Article 12. The Respondent No.1 has submitted that the jurisdiction of this Commission to decide the matter is not denied or disputed. 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 and modules 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 and has not been given effect to any period prior to 30.07.2018. It is not disputed that the safeguard duty imposed by the Government of India is a Law as defined and covered under the PPAs and dealt with as 'Change in Law' in Article 12 of the PPAs. However, there cannot be any relief to the SPDs due to various reasons: Firstly, the delay in importing the solar cells and modules is attributable to SPDs or its contractors or sub-contractors and meanwhile the imposition safeguard duty levy had come into effect. Secondly, the SPDs did not establish to the satisfaction of the Commission that there has been an actual expenditure and outflow of money on account of payment of safeguard duty to the revenue authorities. Hence, no relief can be granted. 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.

119. The Respondents have also submitted that the Petitioners are not procuring the solar cells from any imported sources, but are procuring from their own group company. The Petitioners have stated in their Petitions that they have engaged one ACME Cleantech Solutions Pvt. Ltd.

as its contractor for supply of goods and executed an Agreement for Supply of Goods dated 15.02.2018. Therefore, the Petitioners have no agreement for import of solar cells or even for use of imported solar cells. The imposition of assessment of this "tax" is therefore not even on the Petitioners, but on the importer of Solar Cells. The increased cost for the Petitioners is only in terms of the commercial agreement entered into by the Petitioners for purchase of the Solar Cells. The difference is between the liability under law and mere commercial arrangement. In the case of the Petitioner, it is the latter and therefore, no claim for change in law is made out before the Commission. The terms of this agreement are subject to negotiation between the parties. It is settled law that an increase in cost by virtue of the terms of a commercial agreement cannot by any stretch of imagination be a change in law. The Petitioners have quoted an all-inclusive tariff which has been incorporated under the PPAs, and further the PPAs having been accepted and signed by the parties is a binding document, and no claim could be made by the Petitioner de-hors the provisions of the PPAs. Article 12 of the PPA deals with the implication of occurrences of any 'Change in Law' event mentioned therein after the effective date (i.e.16.09.2017), to be allowed to the Developer as per the conditions contained in Article 12. Article 12 of the PPAs comes into play only when the additional expenditure is incurred on account of an occurrence of 'Change in Law' event as mentioned therein. Therefore, if the expenditure is incurred for a reason other than occurrence of the Change in Law event, Article 12 does not come into the picture at all, and no relief could be claimed under the same. The Respondent DISCOMS have submitted that there is no concept of interest on working capital and return on equity in a competitive bidding process. Further, there is no dispute on the fact that there can be no payment until the decision of the Appropriate Commission on 'Change in Law'. Therefore, amounts do not become due until the decision of the Appropriate Commission. This being the position there can be no claim for Carrying Cost.

120. From the submissions of the parties, the following issues arise 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 the claim of Petitioners regarding interest on Working Capital, Return of Equity and 'Carrying Cost' for delay in reimbursement by the Respondents is sustainable?

121. No other issue was pressed or claimed.

122. We now discuss the issues one by one:

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'?

123. 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. Further, 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. 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 the safeguard duty imposed by the Government of India is a Law as defined and covered under Article 12 of the PPAs. However, there cannot be any relief since the SPDs (and its contractors) failed to import the 'solar cells and modules' as per agreed timelines and further the SPDs also failed to establish to the satisfaction of the Commission that there has been an actual expenditure and outflow of the money on account of payment of safeguard duty to the revenue authorities. Hence, no relief can be granted. 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 Petitioners and therefore the question of payment of 'Carrying

Cost' does not arise. The Respondents have submitted that the Petitioners are not procuring the solar cells from any imported sources, but are procuring from their own group company viz. ACME Cleantech Solutions Pvt. Ltd. As such no relief is admissible to the SPDs.

124. The Commission observes that the term 'Law' has been defined in 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;*"

125. The term 'Indian Government Instrumentality' 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;"*

From the above it is apparent that the term 'Law' includes laws, statutes, ordinances, regulations, notifications, codes and rules and all applicable rules, regulations, orders, notifications or interpretation of the aforesaid statutes, ordinances, regulations, notifications, codes, rules by the Government of India or any ministry department, board, authority, agency, corporation and commission under direct or indirect control of the Government of India.

126. Further, as per judgment dated 27.05.2009 the Hon'ble Delhi High Court in the case titled *The All India Glass Manufacturers Federation vs. Union of India &Ors.* [WP(C) No. 8761 of 2009] has held as under:

> *"12. Under the Act, i.e., Customs Tariff Act, 1975, the Government of India in order to protect the domestic industry has power to impose broadly; Anti-Dumping Duty, Countervailing Duty or the Safeguard Duty. Broadly, Anti-Dumping duty is imposed by the Government of India where goods are imported into the country at a dumped price. Dumped price is a price less than the normal value which is judged with*

reference to the comparable price of an article imported to the country in the ordinary course of trade when exported from the exporting country. As against this, Countervailing Duty is imposed generally if goods are subsidized in the country of export. Similarly, resort is taken to imposition of safeguard duty if increased quantities of goods enter the country. The determining factor as to which of the three measures ought to be adopted when the goods are imported into country, at a dumped price or are subjected to subsidy in the country of export or in increased quantities, is dependent upon whether these actions result in causing or threaten to cause material injury or material retardation in the establishment of domestic industry or result in causing or threaten to cause serious injury to domestic producers of like or competitive products. In the case of the former, recourse may be had to Anti-Dumping duty or Countervailing Duty, while in case of the latter situation; resort may be had to safeguard duty. 12.1 Under Section 8B of the Act, the Central Government has been given power to impose safeguard duty if after conducting an enquiry it is satisfied that the article imported into the country in such increased quantities and under such conditions, will cause or threaten to cause serious injury to domestic industries. This is a general power available to the Government of India. A specific provision i.e., Section 8C was introduced in the Act by Finance Act, 2003 w.e.f. 11.05.2002 in respect of specific safeguards duty with regard to imports from China. Under Sub-Section (6) of Section 8C, the Central Government has been empowered to make rules for the purposes of giving effect to the provisions of Section 8C. By a notification no. 34/2002-Customs dated 11.06.2002 the Central Government has framed the necessary Rules.

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14. A reading of the aforementioned provisions of clause 1(a) and 2 of Article XIX shows that if on account of increased quantities of import of an article into the territory of a contracting party causes or threatens to cause serious injury to the domestic producers in that territory of like or directly competitive products then the contracting party so effected, is free to suspend the obligation in whole or in part or to withdraw or modify the concession in respect of such an article to the extent it is considered necessary to prevent or remedy such injury. Similarly, under clause 2, before taking any action, the contracting party is required to give notice in writing to the other contracting party as far as may be practicable. However, in critical circumstances where delay would cause damage, which would be difficult to repair, action under Paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation will be effected immediately after taking such action."

127. Further, Section 8B of the Customs Tariff Act, 1975 stipulates as under:

"8B. Power of Central Government 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:

Provided that no such duty shall be imposed on an article originating from a developing country so long as the share of imports of that article from that country does not exceed three per cent or where the article is originating from more than one developing countries, then, so long as the aggregate of the imports from[3] [developing countries each with less than three per cent import share] taken together does not exceed nine percent of the total imports of that article into India.

Provided further that the Central Government may, by notification in the Official Gazette, exempt such quantity of any article as it may specify in the notification, when imported from any country or territory into India, from payment of the whole or part of the safeguard duty leviable thereon.

(2) The Central Government may, pending the determination under sub-section (1), impose a provisional safeguard duty under this sub-section on the basis of a preliminary determination that increased imports have caused or threatened to cause serious injury to a domestic industry:

Provided that where, on final determination, the Central Government is of the opinion that increased imports have not caused or threatened to cause serious injury to a domestic industry, it shall refund the duty so collected:

Provided further that the provisional safeguard duty shall not remain in force for more than two hundred days from the date on which it was imposed."

128. From the above, the Commission observes that under Section 8B of the Customs Tariff Act, 1975, the Government of India enjoys the general power to impose 'safeguard duty' if it is satisfied that the article imported into the country is in such increased quantities that it will cause or threaten to cause serious injury to domestic industries. Further, in critical circumstances, the Government of India is empowered to impose 'safeguard duty' provisionally without prior consultation. However, it is pertinent to mention here that The Directorate General of Trade Remedies vide final findings F.No.22/1/2018-DGTR, dated the 16th July, 2018, published in the Gazette of India, Extraordinary, Part I, Section 1, on 16th July, 2018, has recommended the imposition of safeguard duty on subject goods after considering submissions of 205 interested stakeholders including M/s ACME Solar Holdings Limited (mentioned at Sr. No. 93 at page no.5 of the said report). Hence, the notification dated 30.07.2018 is a conscious view of the Government of India after taking into consideration various suggestions and request of the stakeholders.

129. The Commission observes that vide Notification No. 01/2018-Customs (SG)New Delhi, the 30.07.2018G.S.R.(E), The Government of India, Ministry of Finance (Department of Revenue) has imposed Safeguard Duty as under:

"Whereas, in the matter of import of "Solar Cells whether or not assembled in modules or panels" (hereinafter referred to as the subject goods), falling under heading 8541or tariff item 8541 40 11of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act), the Directorate General of Trade Remedies vide final findings F.No.22/1/2018-DGTR, dated the 16th July, 2018, published in the Gazette of India, Extraordinary, Part I, Section 1, on 16th July, 2018, has recommended the imposition of safeguard duty on subject goods falling under heading 8541or tariff item 8541 40 11of the First Schedule to the Customs Tariff Actor a period of two years at the rate specified here in below. Now, Therefore, in exercise of the powers conferred by sub-section (1) of section 8B of the Customs Tariff Act, read with rules 12, 14 and 17of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997,after considering the said findings of the Directorate General of Trade Remedies and subject to the provisions of paragraph 2, hereby imposes on subject goods falling under heading 8541or tariff item 8541 40 11of the First Schedule to the Customs Tariff Act, when imported into India, a safeguard duty at the following rate, namely:-

(a)twenty five per cent.ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2018 to 29th July, 2019 (both days inclusive);

(b)twenty per cent.ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2019 to 29th January, 2020(both days inclusive);and

(c) Fifteen per cent.ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2020to 29th July, 2020(both days inclusive).

2. *Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries vide notification No. 19/2016-Customs (N.T.) dated 5th February, 2016, except China PR, and Malaysia."*

130. The Commission further 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."

131. The Respondents have raised the issue of applicability of Article 12 of PPA in case of import of solar cells and argued that this levy is neither as regards 'setting up of solar power projects' nor is for 'supply of power'. They have argued that safeguard duty is not covered under the sixth bullet of Article 12.1.1 of the PPAs dealing with change in law. They have submitted that there being specific provision as regards taxes (i.e. bullet sixth), other bullets are not applicable.

132. The Commission observes 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."

133. 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.

134. 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, second and sixth bullet of Article 12 of the PPAs.

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:-

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;

137. It is pertinent to mention here that the Petitioners have submitted that they have entered into Agreements dated 15.02.2018 and 20.02.2018 with one M/s ACME Cleantech Solutions Pvt. Ltd. as its contractor for design, engineering, manufacture/ procurement and supply of solar photovoltaic modules, inverters, power and distribution transformers, junction boxes and all other items essential for solar power plant. The Respondents have submitted that the imposition of the 'Safeguard duty' is on the importer viz. M/s ACME Cleantech Solutions Pvt. Ltd. since as per schedule the equipment was to be ordered not later than 01.05.2018, and delivered not later than 09.06.2018 i.e. before imposition of 'Safeguard Duty'. Further, Article 11.2 provides that any increase in taxes/duties on account of the delay attributable to the supplier shall be to the account of the supplier. However, the Petitioners are seeking to pass on the said cost on the procurers and the consumers at large. This is only to benefit itself and its own sister concern and the same may not be allowed.

138. The Respondents have further submitted that the 'Supplementary Agreement' was handed over for the first time only on 07.02.2019 at the time of hearing. Further, a perusal of the 'Supplementary Agreement' dated 20.02.2018 shows that the same has been incorporated with a non-judicial stamp paper of Rs.50 which were purchased on 29.06.2017. In contrast, the "Supply Contract" for supply dated 15.02.2018 and the PPA dated 26.09.2017 is on an e-stamp paper of Rs. 100 each. There is no reason given in this regard by the Petitioner for using a non-judicial stamp paper of Rs.50 instead of an e-stamp paper as has been used for the original agreement.

139. The Commission observes that the fate of the case of the Petitioners depends upon the veracity of execution of the 'Supplementary Agreement' dated 20.02.2018. The execution of the 'Supplementary Agreement' has been challenged by the Respondents on following basis:

firstly, conduct of the Petitioners viz. disclosure of the execution of the 'Supplementary Agreement' to the Commission after completion of pleadings and at the time of final arguments on 07.02.2018 and Secondly, the 'Supplementary Agreement' is a created document.

140. The Commission observes that as per Judgment dated 11.08.2016 of Hon'ble Delhi High Court in case titled *Shri Ramanand vs. Delhi Development Authority (Thru Its Vice Chairman) & Anr*. it was held that:

> *"8. Similarly in Haldiram (India) Pvt. Ltd. & Ors. vs. M/s. Haldiram Bhujiawala & Anr. (supra) this court in para 21 and 22 held as follows:-*
>
> > *"21. In any event, both under the old Order 7 Rule 18 sub-rule (1) and new Order 7 Rule 14 sub-rule (3) CPC a new document can certainly be produced on behalf of plaintiff at the final hearing of suit, but the same has to be done with leave of the Court. It is not that the plaintiff has a legal vested right to file a document at a belated stage i.e. at the final hearing of the suit. The said provision gives a discretionary power to the Court, which needless to say has to be exercised in a reasonable and legal manner. In fact, this power has to be exercised sparingly and for some overpowering reason and not as a matter of routine. If petitioners" interpretation of Sub Rule 3 is accepted, it would make it impossible for the trial court to conclude the hearing of any suit."*
>
> *9. The legal position is clear that only those documents can be permitted to be filed after the initial stage where the Court grants leave."*

141. Regarding the first objection about 'disclosure of the execution of the 'Supplementary Agreement' to the Commission after completion of pleadings and at the time of final arguments on 07.02.2018', the Commission is of the view that the 'Supplementary Agreement' dated 20.02.2018 is necessary for the ends of the justice. And, therefore, we permit it to be placed and made a part of the records.

142. Regarding, veracity of 'Supplementary Agreement' the Commission observes that the impugned 'Supplementary Agreement' has been executed on 20.02.2018 on a Non-Judicial Stamp Paper of Rs.50 alongwith the five revenue stamps of Rs. 10 each pasted on the front. Hence, the 'Supplementary Agreement' was executed on Non-Judicial Stamp Paper of Rs. 100 instead of Rs. 50 as alleged by the Respondents. The Commission further observes that Non-Judicial Stamp Paper was purchased for the execution of 'Supplementary Agreement'

on 29.06.2017 and was used for executing 'Supplementary Agreement' on 20.02.2018 i.e. after a gap of about eight months. The Commission observes that Hon'ble Supreme Court of India in its Judgment dated 19-02-2008 in the case of *Thiruvengada Pillai vs. Navaneethammal and Anr.*, has held that:

> *"the stamp papers do not have any expiry period. Relevant extract from SC judgement is reproduced herein below: The Indian Stamp Act, 1899, nowhere prescribes any expiry date for use of a stamp paper. Section 54 merely provides that a person possessing a stamp paper for which he has no immediate use (which is not spoiled or rendered unfit or useless), can seek refund of the value thereof by surrendering such stamp paper to the Collector provided it was purchased within the period of six months next preceding the date on which it was so surrendered. The stipulation of the period of six months prescribed in Section 54 is only for the purpose of seeking refund of the value of the unused stamp paper, and not for use of the stamp paper. Section 54 does not require the person who has purchased a stamp paper, to use it within six months. Therefore, there is no impediment for a stamp paper purchased more than six months prior to the proposed date of execution, being used for a document."*

143. In view of the above the Commission is of the view that there is no illegality in purchasing the Non-Judicial Stamp Paper and using the same for execution of 'Supplementary Agreement' after a gap of about eight months. It is not the case of the Respondents that the documents are forged and therefore we do not want to go into the issue further.

144. 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.

145. 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 in the range of 7.12~9.58%. 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 bid levellised tariff without disclosing the details of the calculations of the project cost including capital expenditure. The design of the bid levellised 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.

146. 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, 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.

147. The issue is decided accordingly.

Issue No. 2: 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?

148. 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 to the same economic position as if change in law has not occurred.

149. The Petitioners have further submitted that 'Change in Law' is based upon the principle of restitution and equity and the 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. Accordingly, while the phrase 'the parties must be restored to the same economic position' may not be present in the PPA, the same must be read in, having regard to the purpose of the 'change in law' clauses. Further, Para 5.7.1 of 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 stipulates that 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 it would have been, had it not been for the occurrence of the Change in Law event. Thus, the Tariff Guidelines as issued under the provisions of Section 63 clearly 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 Petitioner is granted an interest on working capital at normative interest rate in order to put Petitioner to the same economic position as if change in law has not occurred.

150. The Petitioners have submitted that the principle of Carrying Costs has already been allowed by the Tribunal in various judgments including A. No. 210 of 2017, A. No. 193 of 2017 and A. No. 111 of 2017 as also allowed by the Commission in its Order 235/MP/2015 dated 17.09.2018 pursuant to remand.

151. Per Contra, the Respondents have 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 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*.

152. The Respondents have further submitted that there is no provision in the PPA regarding carrying cost or interest for the period till the decision of the Commission. The 'Change in Law' claim of the Petitioners is yet to be adjudicated and the amount if any, due have to be determined/computed. Thereafter, only the Petitioners required to raise a Supplementary invoice for the amount so computed. It is only in case of default on the part of the Respondent SECI in not making the payment by the due date as per supplementary invoices, does the issue of Late Payment Surcharge arise i.e. for the period after the due date. The Respondents have placed reliance on the decision of the Hon'ble Appellate Tribunal in *SLS Power Limited -v- APERC and Others (Appeal No. 150 of 2011) and Batch*. The Respondents have further submitted that the PPAs do not have a provision dealing with restitution principles of restoration to same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPAs. The Respondents have placed reliance on the Judgment of the Hon'ble Appellate Tribunal dated 13.04.2018 in *Appeal No. 210 of 2017 in Adani Power Limited –v- CERC 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 Respondents have also placed reliance on the judgment of the Hon'ble Tribunal dated 14.08.2018 in *Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited –v- CERC and Ors.* wherein it has been 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. In the present Petitions also, there is no provision in the PPAs for carrying cost or restitution and therefore the same, will not be applicable in the case of the Petitioner.

153. 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 contemplates 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.

154. 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."*

155. 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 PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred. Therefore, 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/ 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, it 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 then 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."

156. 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.

157. Our 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 sixth 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, duly supported by relevant invoices and Auditor's Certificate. The Claim based on discussions in paragraph 146 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.

158. Accordingly, the Petition No. 342/MP/2018 and Petition No. 343/MP/2018 are disposed of.

Sd/-	**Sd/-**	**Sd/-**
आई. एस. झा	**डॉ एम के अय्यर**	**पी के पुजारी**
सदस्य	**सदस्य**	**अध्यक्ष**