



नई दिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 19/MP/2019
46/MP/2019

कोरम/Coram:

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

आदेश दिनांक /Date of Order: 15th of October, 2019

IN THE MATTER OF:

Petition under section 79(1)(b) read with section 79(1)(f) of the Electricity Act, 2003 for (i) declaration of 'change in law' event; and (ii) grant of consequential relief to compensate for the increase in capital cost due to introduction and imposition of Safe Guard Duty by way of notification no. 01/2018- Customs-SG dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, in terms of Article 17 of the Power Purchase Agreements between Petitioners and Respondents viz. M.P. Power Management Company Limited and Delhi Metro Rail Corporation.

AND IN THE MATTER OF:

1) Petition No. 19/MP/2019

ACME Jaipur Solar Power Private Limited
Through its authorized signatory
B 4, Plot No. 12, Basement – 2,

Gopi Nath Marg, Purohit ji ka bagh,
MI Road, Jaipur – 302001,
Rajasthan, India.

...Petitioner

Versus

1. M.P Power Management Company Limited,
Represented Through Chairman,
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh - 482008
2. Delhi Metro Rail Corporation,
Represented Through Managing Director,
Metro Bhawan, Fire Brigade Lane,
Barakhamba Road, New Delhi – 11001
3. Rewa Ultra Mega Solar Limited
Represented through Chairman,
Urja Bhawan, Link Road No. 2,
Shivaji Nagar, Bhopal,
Madhya Pradesh - 462003

...Respondents

AND IN THE MATTER OF:

2) Petition No. 46/MP/2019

Arinsun Clean Energy Private Limited
Unit No FF-48 A, First Floor,
Omaxe Square, Plot No.14,
Jasola District Centre,
New Delhi

...Petitioner

Versus

1. M.P Power Management Company Limited,
Represented Through Chairman,
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh - 482008
2. Delhi Metro Rail Corporation,
Represented Through Managing Director,
Metro Bhawan, Fire Brigade Lane,
Barakhamba Road, New Delhi – 11001

3. Rewa Ultra Mega Solar Limited
Represented through Chairman,
Urja Bhawan, Link Road No. 2,
Shivaji Nagar, Bhopal,
Madhya Pradesh - 462003

...**Respondents**

Parties Present: Shri Hemant Sahai, Advocate, ACME and ACEPL
Shri Apoorva Mishra, Advocate, ACME and ACEPL
Ms. Himangini Mehta, Advocate, ACME and ACEPL
Shri M. G. Ramachandran, Sr. Advocate, MPPMCL
Ms. Poorva Saigal, Advocate, MPPMCL
Ms. Tanya Sareen, Advocate, MPPMCL
Shri V. Bharadwaj, MPPMCL
Shri Tarun Johiri, Advocate, DMRC

आदेश/ ORDER

The Petitioners, ACME Jaipur Solar Power Private Limited in Petition No. 19/MP/2019 and Arinsun Clean Energy Private Limited in Petition No. 46/MP/2019 (hereinafter referred to as 'Petitioners') are generating companies which are engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. Further, ACME Jaipur Solar Power Private Limited is a project company of ACME Solar Holdings Limited (hereinafter referred to as 'ACME Solar') whereas Arinsun Clean Energy Private Limited is a subsidiary of Solenergi Power Private Limited (hereinafter referred to as 'Solenergi') and is the Special Purpose Vehicle for setting up the Project.

2. The Respondent No. 1, MP Power Management Company Limited (hereinafter referred to as 'MPPMCL') is a company incorporated under the Companies Act created with the principal object of engaging in the business of distribution and supply of electricity and is the holding company of the three Discoms in the State of Madhya Pradesh.

3. The Respondent No. 2, Delhi Metro Rail Corporation (hereinafter referred to as 'DMRC') is a company incorporated under the Companies Act for implementation of the construction and operation of metro rapid transport system in the State of Delhi.
4. The Respondent No. 3, Rewa Ultra Mega Solar Limited (hereinafter referred to as 'RUMSL') has been incorporated as a joint venture company between Solar Energy Corporation of India Limited and Madhya Pradesh Urja Vikas Nigam Limited with the stated objective to develop and facilitate the development of large scale solar projects.
5. The Petitioners have made the following prayers:

In Petition No. 19/MP/2019

- a) *Declare the imposition of safeguard duty on the import of solar modules as Change in Law in terms of the PPA which has led to an increase in the additional capital expenditure for the Project;*
- b) *Evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
- c) *Grant carrying cost from the date of impact till reimbursement by the Respondents;*
- d) *Grant interest on the incremental working capital*
- e) *Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.*

In Petition No. 46/MP/2019

- a. *Declare and hold that introduction of Safeguard Duty qualifies as 'Change in Law' in terms of Article 17 of the PPAs executed between the Petitioner and the Respondent 1 and 2 and that the Petitioner is entitled to relief thereunder;*
- b. *Direct the Respondents to compensate and pay the Petitioner in terms of Article 17 of the PPAs for the additional cost and the carrying cost incurred by the Petitioner until the date of filing of this Petition on account of the 'Change in Law' and is to be incurred by the Petitioner, post the filing of the Petition as result of the imposition of the Safeguard Duty on the import of solar modules under the terms of the Module Supply Agreements executed for the Project;*
- c. *Pursuant to grant of prayer (a) and (b) above, approve the necessary consequential*

amendments to the PPAs;

d. Grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the Petitioner.

BRIEF FACTS OF THE CASE

6. The Respondent No 3, issued a 'Request for Selection' (hereinafter referred to as 'RfS') dated 16.03.2013 for Solar Power Developers (hereinafter referred to as 'SPDs') for development of 750MW (3 x 250MW) Grid connected Ground Mounted Solar Photovoltaic Project split into three units of 250MW capacity each, identified as Unit 1, Unit 2 and Unit 3.
7. The Petitioners have entered into two separate Power Purchase Agreements (hereinafter referred to as 'PPAs') dated 17.04.2017 with the Respondents, for the development of Unit 1 of 250 MW of Rewa Solar Power Project in the State of Madhya Pradesh and for the consequent sale of solar power to the Respondents 1 and 2. The Scheduled Date of Commissioning (hereinafter referred to as 'SCoD') of the Unit 1, in terms Article 4.1 (b) of the PPAs is 18 months from the date of completion of the conditions set out in Article 2.1(b) (i) and Article 2.1(b)(ii) of the PPAs by the Respondent No. 2. Therefore the SCoD of the projects were 16.11.2018.
8. The Petitioner in Petition No. 19/MP/2019 has submitted that it has engaged ACME Cleantech Solutions Pvt. Ltd. (hereinafter referred to as 'Acme Cleantech') as its contractor for the supply of goods and executed an Agreement for Supply dated 21.02.2018. The Petitioner in Petition No. 46/MP/2019 has submitted that after following the said due Process, inter alia, it entered into agreements for procurement of modules which are a key component of solar power projects and constitute a major portion of a solar power project's total cost viz. Module Supply Agreement dated 27.04.2018 executed with GCL System Integration Technology Pte Ltd. (hereinafter referred to as 'GCL'); Agreement dated 14.05.2018 executed with Chint Solar (Hong Kong) Co. Ltd. (hereinafter referred to as 'Chint') and Agreement dated 25.09.2018 executed with Renesola Jiangsu Ltd. (hereinafter referred to as 'Renesola'). All the Agreements mention in the instant paragraph are hereinafter collectively referred to as 'Supply Agreements'.

9. Thereafter, vide Notification No. 1/2018 (SG) dated 30.07.2018 (hereinafter referred to as ‘Safeguard Duty Notification’), the Central Government imposed safeguard duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels” (hereinafter referred to as ‘solar cells and modules’):-
- a. 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
 - b. 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
 - c. 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.
10. 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

11. The Petitioners have submitted that the term “Applicable Laws” has been defined in the Article 1.1 of the PPAs as:-
- “Applicable Laws means the Constitution of India and all laws, promulgated or brought into force and effect by the GoI, the GoMP, any Government Authority or any local government having jurisdiction over the Parties, Rewa Solar Project or the Unit, including rules, regulations, guidelines and notifications made/issued thereunder, and/or judgments, decrees, injunctions, writs and orders of any court of record, statutory or regulatory authority, tribunal, board or stock exchange in any jurisdiction as may be applicable to the execution of this Agreement and the performance of the respective rights and obligations of the Parties, as may be in force and effect during the subsistence of this Agreement.”*
12. The Petitioners have submitted that accordingly, the term ‘Applicable Laws’ includes:-
- a) All laws in India;

- b) Any statute, ordinance, regulation or 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 Government Authority.

13. The Petitioners have submitted that the term ‘Applicable Laws’ includes rules, regulations by any Government Authority. The term ‘Government Authority’ has been defined in the PPAs as :-

“Government Authority(ies) means one or more of the GoI, the GoMP, any local government or any other ministry, governmental department, commission, board, body, bureau, agency, authority, instrumentality, inspectorate, statutory corporation or body corporate over which the GoI or the GoMP exercises control, court or other judicial or administrative body or official or Person, having jurisdiction over the SPD, the Unit or any portion thereof and the performance of obligations and exercise of rights of the Parties in accordance with the terms of this Agreement.”

14. The Petitioners have submitted that in view of the above, the definition of Government Authority 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 including the Ministry of Finance.

15. The Petitioners have submitted that Article 1.1 of the PPA defines the ‘Change in law’ clause in the following terms:-

“Change in Law means the occurrence of any of the following events in India, subsequent to the Proposal Due Date (as defined in the RFP), and such event(s) has/have an impact on the Unit or on any of the rights and obligations of the Parties under any of the Project Agreements:

- (a) the modification, amendment, variation, alteration or repeal of any existing Applicable Laws;*
- (b) the enactment of any new Applicable Law or the imposition, adoption or issuance of any new Applicable Laws by any Government Authority;*
- (c) changes in the interpretation, application or enforcement of any Applicable Laws or judgment by any Government Authority;*
- (d) the introduction of a requirement for the SPD to obtain any new Applicable Permit;*
or
- (e) the modification, amendment, variation, introduction, enactment or repeal of any Tax, resulting in a change in the incidence of Tax liability, including pursuant to any Applicable Laws promulgated or to be promulgated in furtherance of the Constitution (122nd Amendment) Bill, 2014.*

It is clarified that for the purposes of Change in Law, Taxes shall not include taxes on corporate income, any withholding tax on dividends distributed to the shareholders of the SPD or income tax.”

16. The Petitioners have submitted that as per the provision of the PPAs dealing with change in law, the following points become clear for determination of a change in law event:-

- a) A change in law event is any of the events enumerated therein. Enactment of any new Applicable Law as well as introduction of any tax resulting in change in the incidence of tax liability pursuant to any applicable laws are listed as events of Change in Law;
- b) Such change in law event must have occurred after the proposal due date as defined in the RfS dated 16.03.2016. The proposal due date which assumes relevance for determination of change in law event is 23.01.2017 as per Schedule 1 of the RfS dated 16.03.2016 read with Addendum-39 dated 06.01.2017; and
- c) The change in law event has a resultant impact on the Unit and on the rights and obligations of the Parties under the PPAs.

17. The Petitioners have submitted that the term ‘Taxes’ has been defined under the PPAs as follows:-

“Taxes means any Indian taxes, whether direct or indirect, including levies, imposts, cesses, duties and other forms of taxation, including income tax, sales tax, value added tax, octroi, entry tax, corporation profits tax, advance corporation tax, capital gains tax, residential and property tax, customs and other import and export duties, excise duties, stamp duty or capital duty (whether central, state or local) on the goods, materials, equipment and services incorporated in and forming part of the Unit charged, levied or imposed by any Government Authority, but excludes any interest, penalties and other sums in relation thereto imposed on any account whatsoever.”

Accordingly, Governmental Authority on the goods, materials, equipment incorporated in and forming part of the Unit are in the nature of Taxes as per the definition of the said term under the PPA. The imposition of safeguard duty on the import of solar cells and modules which are incorporated in the Unit for generation of solar power, would be in the nature of a tax imposed.

Re: Jurisdiction

18. The Petitioners have submitted that as per Article 17 of the PPAs, the aggrieved party is required to approach the Appropriate Commission after following the stipulated procedures

for seeking approval of change in law and the consequent relief in terms of the PPA. The relevant portions of Article 17 are extracted below:-

“17. Change in Law

17.1 Consequences of Change in law

(a) If a Change in Law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether:

- (i) any changes are required to the scope of work to be performed by the SPD under this Agreement;*
- (ii) any changes are required to the terms of this Agreement to deal with such Change in Law;*
- (iii) relief from compliance with any obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
- (iv) any increase or decrease in costs (other than incurring additional capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
- (v) any capital expenditure is required or no longer required as a result of a Change in Law.*

(b) As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 170 1 (a), the Parties shall discuss the issues referred to therein and any ways in which the Parties can mitigate the effect of the Change in Law, including:

- (i) demonstrating that the SPD has used reasonable endeavours (including, where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*
- (ii) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD;*
- (iii) demonstrating as to how the Change in Law has affected prices charged by similar businesses to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
- (iv) demonstrating to the Procurer that the Change in Law is the direct cause of the increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profits after Tax could not reasonably be expected to be mitigated or recovered by the SPD acting in accordance with Good Industry Practice; and*
- (v) demonstrating that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Change in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1 (a).*

(c) If the Parties have complied with Article 17 .1 (b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including

capital expenditure, at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Threshold Limit.

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.

(d) If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax, then any financial benefit accruing to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer in its entirety.

(e) The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease or increase in revenues or net profits after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff Payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly.

Additionally, the PPA with Respondent No. 2 has following provisions under Article 17.1 (c).

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.....

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Parties agree and confirm that the decision of the Appropriate Commission applicable to the SPD and MPPMCL for such Change in Law event under the MPPMCL PPA shall be applicable to DMRC and the SPD, under this Agreement. The SPD shall immediately forthwith inform the Procurer of the decision of the Appropriate Commission or the appellate authority as the case may be.

19. The Petitioners have submitted that in light of above, it can be derived that :-
- a) If a change in law event occurs or is likely to occur, then a Party is required to notify the other Parties on the likely effect of such change in law event. Further, such party

is also required to provide its opinion in relation to *inter alia* any increase in taxes or capital expenditure as is required as a result of the change in law event, in accordance with Clause 17.1 (a) (iv) and (v) of the PPA;

- b) Within a period of 15 days from receipt of such notice, the Parties ought to discuss the issues referred therein as also ways in which the Parties can mitigate the effect of the change in law event, in accordance with Clause 17.1 (b) of the PPA;
- c) As per Clause 17.1 (c) of the PPA, once the parties have complied with Clause 17.1 (b) or upon elapse of the time specified therein i.e. 15 days from receipt of the notice and if the SPD is required to incur any additional capital expenditure, interest and associated costs exceeding the Threshold Limit of INR 20,000,000 (twenty millions), then the Procurer or the SPD is required to approach the Appropriate Commission seeking approval of such change in law and the consequent impact on the Applicable Tariff.
- d) The decision of the Appropriate Commission in the PPA with Respondent No. 1 shall be applicable to the Respondent No. 2 and the Petitioner under the PPA with Respondent No. 2.

20. The Petitioners have submitted that they have issued notices dated 13.09.2018 & 28.09.2018 in compliance with its obligations under Clause 17.1 (a) of the PPAs to Respondents intimating them that the imposition of safeguard duty on the import of solar cells and modules (which approximately constitute 60% to 70% of the total project cost) would directly impact the project by considerably increasing the entire project cost. Further, vide the aforesaid notices, the Petitioners have also requested that the imposition of safeguard duty ought to be acknowledged as a change in law event under the PPAs and consequently any additional costs incurred should be reimbursed to the Petitioner.

21. The Petitioner in Petition No. 19/MP/2019 has submitted that Respondent No. 2 vide Letter dated 29.10.2018 has denied that any 'Change in Law' event has occurred and requested Petitioner to withdraw the Change in Law notice. The Petitioner vide its Letter No. ACME/BUS/161118/1541 and 1542 dated 16.11.2018 submitted its claims under Change in Law notices to Respondent No. 1 and Respondent No. 2 respectively along with details of safeguard duty and GST already paid till 03.11.2018.

22. The Petitioner in Petition no. 46/MP/2019 has submitted that the Respondent No. 1 vide letter dated 26.10.2018 required furnishing of documents detailing date of procurement of goods, invoice raised and goods which are custom cleared. The Petitioner vide letters dated 26.12.2018 issued to MPPMCL and DMRC, shared the additional cost incurred by the Petitioner upto 30.11.2018 on account of imposition of safeguard duty and prayed that relief in terms of the PPAs towards costs incurred by Petitioner be borne by Respondent No.1 and 2 within a reasonable period. The Petitioner had also shared its estimate of the total projected liability towards taxes as a result of introduction of Safeguard Duty on import of solar modules till project completion.
23. The Petitioner in Petition no. 19/MP/2019 has submitted that subsequently, the Respondent No. 1 vide Letter No. CGM/Com 3/MPPMCL/18-19/1565 dated 20.12.2018 informed the Petitioner that it ought to approach the Appropriate Commission seeking approval of such change in law.
24. The Petitioners have submitted that the term ‘Appropriate Commission’ has been defined under the PPAs as:-

“Appropriate Commission shall mean the Central Electricity Regulatory Commission referred to in sub-section (1) of section 76 or the State Electricity Regulatory Commission referred to in section 82 of the Joint Electricity Regulatory Commission referred to in Section 83 of the Electricity Act 2003, as the case may be;”

25. The Petitioners have submitted that accordingly, given that the term Appropriate Commission means the Central Electricity Regulatory Commission, hence, this Commission has jurisdiction to adjudicate the instant petition.

Re: Enactment of a new Law resulting in a change in the incidence of tax liability

26. 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 (hereinafter referred to as “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, 1975 is as under:

“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.”

27. The Petitioners have submitted that Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty Rules) 1997 (hereinafter referred to as the ‘Safeguard Duty Rules’) provides that the Central government may impose safeguard duty on the product covered under the final finding and which duty shall not exceed the amount found adequate to remedy the serious injury to the domestic industry. In this context and in exercise of the powers conferred *inter alia* under Rule 12 of the Safeguard Duty Rules, the Central Government issued the Safeguard Duty Notification on 30.07.2018 imposing safeguard duty on the import of solar cells and modules at the rates prescribed under the said notification.
28. The Petitioners have submitted that 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 a safeguard duty (in the nature of a tax) at the rate of 25% ad valorem for the first year of imports. Thereafter, the safeguard duty will be progressively liberalized. Thus, on the basis of the above, the imposition of safeguard duty on the import of solar cells and modules, pursuant to the Safeguard Duty Notification would qualify as a Change in Law event in terms of the PPA in as much as:-
- a. Such imposition of safeguard duty by virtue of the Safeguard Duty Notification would be covered by the phrase *introduction, enactment, ... of any Tax resulting in a change in the incidence of Tax liability....* on account of the fact that safeguard duty qualifies as a tax imposed on the solar cells and modules which are the primary component in the setting up of solar power project unit. Thus, the imposition of safeguard duty would qualify as a change in law event under Clause (e) of the definition of the term ‘change in law’ in Clause 1.1 of the PPA

- b. Alternatively, the imposition of safeguard duty is in the nature of an enactment of a new applicable law in as much as the same has been imposed by a notification of the Ministry of Finance. Thus, the imposition of safeguard duty vide Safeguard Duty Notification would also qualify as a change in law event under Clause (b) of the definition of the term ‘change in law’ in Clause 1.1 of the PPA

Re: ‘Change in Law’ event has resulted in additional capital expenditure

29. The Petitioners have submitted that as per the definition of the term change in law under the PPAs, a change in law event is triggered if there is an enactment of a law or introduction of any tax after the Proposal Due Date (23.01.2017). As per Clause 17.1 (c) of the PPAs, the SPD can approach the Appropriate Commission only if the SPDs incur any additional capital expenditure, interest and associated costs exceeding the Threshold Limit of Rs. 2,00,00,000 (Rs. Two Crores). The Petitioners 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 PPAs. As these expenses are incurred on a one-time basis and are capitalized in the books of the account of the Petitioner, the same would qualify as ‘additional capital expenditure’. Prior to imposition of safeguard duty, the import of modules was only subjected to IGST at 5% (BCD was free). However, with the imposition of safeguard duty as per Notification No. 1/2017 dated 30.07.2018 which would be applicable for a period of two (2) years i.e. till 29.07.2020, the import of solar cells and modules required for the setting up of solar power project as per the PPAs would be subject to 25% safeguard duty (which would be progressively liberalized) along with an additional IGST of 5% on the value of safeguard duty. Thus, it is highly plausible that the import of modules as replacements during the Operation and Maintenance period would also be subject to safeguard duty. Thus, such imposition of safeguard duty may result in increase in associated costs as well, if certain modules are imported as a part of O&M/repowering. Thus, it is claimed that import of solar modules would result in increase in the additional capital expenditure and associated cost beyond the threshold limit.
30. The Petitioner in Petition No. 46/MP/2019 has additionally submitted that it has commissioned 90 MW capacity upto 21st January 2019 and the balance capacity is likely to

be commissioned by the Scheduled Commercial Operation Date under the PPAs. The imposition of Safeguard Duty has adversely affected the capital cost of the Project on account of the fact that the landed cost of the solar PV modules, which constitute majority of the total capital cost of the Project Unit, has increased substantially resulting in an escalation in the capital cost of the Project, as set out below:

Particulars	Amount (INR Crores) *	Estimated Amount (INR Crores) after the imposition of the Safeguard Duty
Total Cost of modules (post imposition of Safeguard Duty including IGST on on Safeguard Duty)	6,08,75,45,652	7,64,07,40,175
Total Cost of modules (prior to imposition of Safeguard Duty including Safeguard Duty)	4,87,65,59,891	6,10,68,12,979
Increase in Tax incidence (including IGST) on account of Safeguard Duty	1,21,09,85,761	1,53,39,27,196

Accordingly, the estimated increase will be more than Rs. 32.29 Crores on the landed cost of the solar PV modules on account of imposition of the Safeguard Duty.

Re: ‘Change in law’ event resulting in increase in non-recurring expenditure

31. The Petitioners have submitted that they have already executed ‘Supply Agreement’ dated 21.02.2018 with ACME Cleantech Solutions Pvt. Ltd. in Petition No. 19/MP/2019 and ‘Supply Agreements’ dated 27.04.2018 with GCL System Integration Technology Pte Ltd.; dated 14.05.2018 executed with Chint Solar (Hong Kong) Co. Ltd. and dated 25.09.2018 executed with Renesola Jiangsu Ltd. in Petition No. 46/MP/2019.
32. The Petitioners have submitted that as per the definition of the term ‘change in law’ read with Clause 17.1 (c) of the PPA, a change in law event resulting in additional capital expenditure and associated cost being incurred by the Petitioners must have occurred after the proposal due date. In the instant Petitions, the Proposal Due Date was 23.01.2017. Thus, as the

Safeguard Duty Notification came into effect on 30.07.2018, much after the Proposal Due Date, the additional capital expenditure pursuant to Safeguard Duty Notification would qualify as a change in law event under Clauses (b) and (e) of the definition of the term 'Change in Law' under Clause 1.1 of the PPAs in as much as the same is an enactment of a new Applicable Law and has led to introduction of taxes resulting in a change in the incidence of tax liability. Further, such change in law has led to increase in additional capital expenditure and associated cost for the Petitioner after the Proposal Due Date.

33. The Petitioners have submitted that Ministry of Power vide Letter dated 27.08.2018 issued directions under section 107 of the Electricity Act, 2003 to the CERC that any change in domestic duties, levies, cesses and taxes imposed by the Central Government, State Government or Union territories or any Governmental Instrumentality which leads to corresponding changes in cost may be treated as 'Change in Law' and be allowed as pass through. Further, Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE') vide Letter No. 283/56/2017 – Grid Solar dated 20.12.2018 to the representations made by the Solar Power Developers Association for resolution of critical issues impacting the solar sector acknowledged that pass through of safeguard duty ought to be allowed by way of appropriate tariff revision. The Petitioners have submitted that the safeguard duty being a domestic duty, ought to be treated as a pass through and thereby allowed as a 'Change in Law'.

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

34. 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 Petitioner has factored in 'interest on working capital' and return on equity based on the taxes and duties prevalent at the time of bid. With the increase in the tax 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 Petitioner is entitled to interest on incremental working capital at normative interest rate to put Petitioner in the same economic position as if change in law had not occurred.

35. The Petitioners have submitted that ‘Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects’ have been issued by Ministry of Power vide Notification bearing no.: No. 23/27/2017-R&R., dated 03.08.2017 (hereinafter referred to as ‘Tariff Guidelines’). The aforementioned Tariff Guidelines are applicable to the Petitioner’s solar power project. 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.”

36. Accordingly, from the above it can be seen that 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 Petitioners are granted interest on working capital at normative interest rate in order to put Petitioners to the same economic position as if change in law had not occurred. On the basis of the above, the Petitioners seek approval of this Commission to claim as an adjustment / recovery of

additional tax cost which will be accrued to the Petitioner on account of Safeguard Duty Notification on account of Change in Law event. As per Article 17.1 (c) of the PPA, once a change in law has occurred leading to additional capital expenditure over and above the threshold limit, the aggrieved party is required to approach the Commission for seeking approval of change in law. Accordingly, the Petitioners have approached the Commission seeking relief on account of the change in law.

37. The Petitioners have submitted that the Appellate Tribunal for Electricity (hereinafter referred to as 'APTEL') in various judgments in A. No. 210 of 2017, A. No. 193 of 2017 and A. No. 111 of 2017 has permitted Carrying Costs for the allowed Change in Law items from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgment. Further, Central Commission has also allowed Carrying Costs in its Order in Petition No. 235/MP/2015 in case of *Adani Power (Mundra) Ltd. –v- Uttar Haryana Bijli Vitran Nigam Ltd.* dated 17.09.2018 pursuant to remand from APTEL.
38. Accordingly, the Petitioners have submitted that in addition to compensation for the increase in capital cost it is also entitled to carrying cost on the additional cost incurred by it as a result of introduction of Safeguard Duty and prays that the same be paid for the following two periods:
- a) Period 1 - from the date, the Petitioner incurred the additional cost on account of Safeguard Duty paid on import of solar modules until the date of approval of Change in Law by the Commission; and
 - b) Period 2 - from the date of approval of Change in Law by the Commission until the date of recovery of the additional cost incurred on safeguard duty from the Respondent No.1 and 2 to the Petitioner in terms of directions issued by the Commission.
39. Additionally, the Petitioners have submitted in the Rejoinders that:-
- a) the business and commercial decisions made by SPDs, such as opting to import modules as opposed to using domestic modules or importing modules from certain countries and not others, cannot be questioned post the award of the bid since there was no safeguard duty imposed on import of solar cells from China and Malaysia or any other country on the date of the bid. The Petitioners have set up the projects pursuant to submitting a competitive bid which had factored in the price of modules and other business

assumptions based on competitive rates being offered by suppliers manufacturing modules of good quality and having the inventory to meet the Petitioner's demand within the time frames set out under the PPAs. As the imposition of safeguard duty after the submission of bid resulted in an additional financial burden on the Petitioner exceeding the Threshold Limit, the Petitioners have the right to be compensated for the same, either in the form of a lumpsum payment or an increase in tariff under the PPAs. The provisions of PPAs nowhere specify or prescribe that modules or any goods required for setting up the project are required to be imported from a specific location or sourced domestically and it is was therefore left to the generator to make specific sourcing decisions based on its calculations and assumptions. Further, the Commission in its Order dated 09.10.2018 passed in 'Petition No. 187/MP/2018 & Others' has held that the procurers/Respondent cannot question the commercial decisions of the solar power developers for project implementation including mode of procurement of goods and services taken by the solar developers prior to Change in Law event. The relevant extract is reproduced below:

"183. ... It has been brought to our notice that in some cases, the Respondent Procurers are questioning the rationale of the commercial decisions taken by the SPDs in cases where the rates of GST are on the higher side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such commercial decisions on the basis of the differential rates of GST on certain goods and services, and payments should be made based on the invoices raised and supported by Auditor's Certificate..."

- b) Further, the imposition of Safeguard Duty on the import of solar cells and modules is in the nature of a tax imposed and is a Change in Law event in terms of the PPAs as the same has been imposed subsequent to the Proposal Due Date and has substantially increased the incidence of tax liability of the Petitioner. The delivery schedule for procurement of solar modules as set out in the Supply Agreements has no significance in the present facts and circumstances, as the same is irrelevant in terms of the criteria laid down in the PPAs for declaration of a Change in Law event. Any alleged delay on the part of Suppliers to comply with the delivery schedule stipulated in the Supply Agreements would therefore have no bearing on the adjudication of the issue qua declaration of issuance of the Safeguard Duty Notification as a Change in Law event. The Petitioner had submitted its bid after considering the market and economic conditions

prevailing then and since the Safeguard Duty Notification was issued subsequent to the Proposal Due Date as provided in the RFP, its impact could not be factored in, at the time of bid submission. Further the Petitioner had submitted its bid on an assurance that relief for any event of Change in Law under the PPA post the submission of bid would be provided to Petitioner under the PPA. Moreover, as has been demonstrated in para 4 above, in terms of the definition of Change in Law provided in the PPAs, the date of signing the supply agreements has no relevance for the purpose of ascertaining whether an event is a Change in Law event or not.

- c) The Respondent No.1's interpretation of the threshold limit as set out in Article 17.1(c) of the PPA is denied as it is based on an incorrect understanding of the provisions of the PPA. The Threshold Limit as specified in the PPAs applies to each event constituting a Change in Law and not each incidence of taxation. The imposition of Safeguard Duty constitutes a single event of Change in Law in terms of the relevant definitions of the PPAs, and entitles the Petitioner to claim relief under the PPAs as its financial impact exceeds the Threshold Limit set out under the PPAs. The Respondent no.1's approach of viewing each event of payment of safeguard duty as a separate event of change in law and denying the same by taking a position that its impact does not exceed Threshold Limit is unjustifiable and is also based on an incorrect reading and interpretation of the PPAs.
- d) In terms of Clause 2.1(b) of the PPAs dated 17.04.2017, RUMSL was obligated to provide the Petitioners with at least 90% of the unit land within one month of the date of signing the PPAs i.e.by 16.05.2017. However, the said requirement was fulfilled by RUMSL only by 14.10.2017 and the construction period (for Unit III) thus commenced only from 14.10.2017. In this regard, RUMSL had issued a letter dated 01.11.2017 to the Petitioners, giving notice of fulfilment of conditions subsequent and commencement of construction of Unit III of the Project.
- e) As per Clause 4.1 of the PPAs, the Petitioners are required to achieve Unit COD within 18 (Eighteen) months from the date of completion by RUMSL of its condition subsequent set out in Article 2.1(b)(i) and Article 2.1(b)(ii). However, Clause 2.2(b) entitles the Petitioner to a day for day extension to achieve the Unit SCoD in case RUMSL fails to satisfy its conditions subsequent under Article 2.1(b) within the prescribed time period (unless waived in accordance with Article 2.3). It is relevant to

highlight in this regard that RUMSL, vide its letter dated 21.05.2019, formally completed all three handovers of the substation to the Petitioners. The 'Final Evacuation Infrastructure' was thus made available to the Petitioner on 21.05.2019 and in view of the aforesaid stated provisions of the PPAs, the Unit SCoD stood revised to 09.07.2019. The Petitioner has achieved Unit COD on 17.05.2019 which is well within the timelines as set out under the PPA and RUMSL has also issued the commissioning certificate dated 16.05.2019 to this effect.

- f) The procurement of modules can only be initiated once the land for the project has been handed over to the developer, and engineering and other related works for installation of the modules have been completed. The contention of the Respondent No.2 qua delay in execution of supply agreements is denied as being devoid of merit.

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

40. The Respondent No. 1 (MPPMCL) has submitted as under:

Re: Safeguard Duty is a 'Law' under the PPA

41. 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. However, whether the same qualifies as a 'Change in Law' within the scope of Article 17 of the PPAs has to be decided after taking into consideration submissions made hereunder:-

- a) Safeguard duty has been imposed on the import of solar cells whether or not assembled in modules or panels when the import is from certain specific countries, namely, China PR, Malaysia and from developed countries and not on the import of solar cells from other developing countries as provided in Notification No.19/2016- Customs (N.T) dated 05.02.2016.
- b) The Notification dated 30.07.2018 is prospective in nature. In other words, if the solar modules had been or ought to have been imported before 30.07.2018 in the normal course, there was no incidence of any safeguard duty, even if such import is from the specified countries, namely, China PR, Malaysia and developed countries.

- c) The Commission vide order dated 02.05.2019 in the Petition No.342/MP/2018 and Another in the matter *Acme Rewa Solar Energy Private Limited -v- Solar Energy Corporation of India Limited & Ors. and Another* has been referred as under:

“135.... 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”.

42. The Respondent No. 1 has submitted that in the instant petitions the actual commissioning dates of the part-capacities are as under:

S. No.	Particulars	19/MP/2019		46/MP/2019	
		Capacity in MW	Actual COD	Capacity in MW	Actual COD
1.	Initial Part Capacity	100	21.08.2018	10	03.08.2018
2.	Second Part Capacity	50	26.10.2018	30	02.11.2018
3.	Third Part Capacity	50	02.12.2018	50	04.01.2019
4.	Fourth Part Capacity	50	09.01.2019	50	14.02.2019
5.	Sixth Part Capacity			40	09.05.2019
5.	Seventh Part Capacity			10	16.05.2019
	Total	250		250	

43. The Respondent No. 1 has submitted that the Petitioners have entered into Supply Agreements as under:

S. No.	Supply Agreements	Date of Agreement	Date of Notification	Expected date of delivery of Solar Modules	Date of Amendment of Supply Agreements	New expected date of delivery of Solar Modules
Petition No. 19/MP/2019						
1	Acme Cleantech	21.02.2018	30.07.2018	31.05.2018	26.02.2018	09.08.2018

Petition No. 46/MP/2019						
1	GCL	27.04.2018	30.07.2018	15.07.2018	04.07.2018	15.07.2018
2	Chint	14.05.2018	30.07.2018	15.10.2018	--	--
3	Renesola	25.09.2018	30.07.2018	30.10.2018	--	--

44. The Respondent No.1 has submitted that in Petition No. 19/MP/2019, the Modules were to be delivered not later than 31.05.2018 i.e. prior to the imposition of safeguard duty by the Central Government under Section 8B of the Customs Tariff Act, 1975 whereas in Petition No. 46/MP/2019 with regard to Supply Agreement executed with Renesola, the same was executed on 25.09.2018 i.e. after coming into force of the Safeguard Duty and, therefore, the Petitioner had the ability to consider the cost competitiveness of importing Solar PV Modules from countries which are subject to the imposition of the Safeguard Duty and countries which are not subject to import of the Safeguard Duty or to procure the same from domestic market.
45. The Respondent No.1 has submitted that in Petition No. 19/MP/2019, the Petitioner vide additional affidavit dated 14.02.2019 has purported to place on record an amendment to the EPC Agreement for Supply dated 21.02.2018 entered into between the Petitioner and ACME Cleantech Solutions Private Limited, the EPC Contractor which is also a group company of ACME Group. The Amendment Agreement dated 26.02.2018 should not be considered for the following reasons:
- a) There is a dispute on the veracity of the Amendment Agreement having been entered into on 26.02.2018. The main agreement was executed on 21.02.2018 on an e-stamp paper procured on 15.02.2018 in Delhi issued by the Government of National Capital Territory of Delhi. The EPC Agreement for Supply is in a detailed form and as on 21.02.2018, the parties to the agreement had clearly and unequivocally agreed on the timeline for completion of the contracted work. In the said timeline, the delivery of the modules was stipulated to be completed by 31.05.2018.
 - b) The Amendment Agreement has been entered into on 26.02.2018 i.e. within 5 days of the execution of the EPC Agreement dated 21.02.2018 and has changed the project schedule without giving any reason or explanation or justification or otherwise any indication as to why the same was effected within 5 days of the execution of the detailed EPC Agreement for Supply dated 21.02.2018.

- c) At the time of the filing of the Petition, there was no reason for the Petitioner not to have produced the Amendment Agreement if the Amendment Agreement, in fact, was entered into on 26.02.2018. It would have been the most obvious thing for the Petitioner to have firstly made a clear reference in Petition itself of the main agreement dated 21.02.2018 having been amended by the Amendment Agreement dated 26.02.2018 and the timeline having been changed.
- d) The absence of any reference to the Amendment Agreement dated 26.02.2018 in the main Petition filed clearly and unequivocally suggest that the additional affidavit filed on 14.02.2019 is an after-thought and the documents has been now presented in view of the specific objection taken in other Petitions being Petition Nos. 342/MP/2018 and 343/MP/2018 before this Commission. The hearing in the above cases was on 07.02.2019 and the Record of Proceedings of the said hearing was uploaded on 14.02.2019.

46. The Respondent No.1 has submitted that if the SPDs or its contractors or sub-contractors had delayed the import of the solar cells and in the meanwhile the safeguard duty levy had come into effect, the delay being an act attributable to the SPDs or its contractors/sub-contractors, no relief can be given to the SPDs. It is well settled principle that the Petitioners cannot claim relief on account of actions of the contractors. The Petitioners cannot impose obligation for any additional financial exposure for reasons of delay on the part of its EPC Contractors. The Petitioners are the principal employer of the contractors and has to assume the burden of the contractor not acting in accordance with the EPC Contract/Agreement for Supply. In regard to above, the Respondent No.1 has placed its reliance on the following decisions of APTEL: decision dated 13.08.2015 passed in *Power Grid Corporation of India Limited v. Central Electricity Regulatory Commission and Ors* in Appeal No. 281 of 2014 and decision dated 18.10.2012 in *Maharashtra State Power Generating Company Limited v. Maharashtra Electricity Regulatory Commission and Ors* in Appeal No.161 of 2011. Further, the Commission has also refused relief in cases where delay was attributable to not only the utility but also its contractors/sub-contractors.

Re: One to One Correlation

47. The Respondent No.1 has submitted that it is incumbent on the Petitioners to place on record transparently the entire details relating to the payment of safeguard duty in regard to the solar

Modules, cells and further establish the one to one correlation between the project, the import of solar Modules, cells etc. and the invoices and other relevant documents for proof of the payment of safeguard duty. The Respondent No.1 has placed its reliance on the Commission's order dated 02.05.2019 in the Petition No.342/MP/2018 and Another in the matter *Acme Rewa Solar Energy Private Limited -v- Solar Energy Corporation of India Limited & Ors.*. In the absence of the requisite details and particularly satisfaction of the one to one co-relation, it is not possible to consider any such claim and the Petitions filed should be rejected. If the Petitioners do not establish that there has been an actual expenditure and outflow of money on account of payment of safeguard duty to the revenue authorities, no relief can be granted.

Re: Carrying Cost

48. The Respondent No.1 has submitted that there is no provision in the PPAs regarding carrying cost for the period till the determination of the relief amount on account of change in law. The quantum to be allowed towards Change in Law is the extra expenditure incurred by the Petitioners. The carrying cost which is for the period from the date on which the expenditure is incurred till the monthly bill/supplementary is raised by the petitioner in accordance with the amount determined by the Commission is not admissible as liability for the payment of money crystallizes when the Monthly/Supplementary Bill is raised in terms of Article 17(1)(e) read with Article 10 of the PPAs. Further, the 'Interest' referred to in Article 17.1(c) is the interest forming part of the capital cost upto the date of the commissioning of the asset and not carrying cost from the time when the claim is made by the petitioner till the claim is determined by the Commission and thereafter Supplementary bill is raised. This is amply clear from the fact that there is no mention of any interest element in Article 17.1 (d) which provides for the situation where on account of the change in law there is a decrease in cost or increase in revenue leading to the benefit being passed onto to the procurer. Accordingly, the carrying cost is not same as the term interest used in Article 17.1 (c). Article 10.10 of the PPAs dealing with 'late Payment Surcharge' and definition of the 'Due Date' in Article 1 of the PPAs is relevant. The due date is the 30th (thirtieth) day from the date of receipt of the monthly bill and 60th (sixtieth) day from the date of receipt of the Supplementary bill by the procurer, with the day after the day of receipt of the Monthly Bill or Supplementary Bill being counted as the 1st (first) day. The supplementary bill needs to be raised by the Solar

Power developer for adjustment of Change in Law after the Change in Law claim is approved by the Commission. There cannot be any claim for late payment surcharge/carrying cost for the period prior to the due date. In this regard it is also relevant to mention that there is no provision in the present PPA for restitution. The Respondent No.1 has placed its reliance on the decision of the APTEL in *SLS Power Limited -v- Andhra Pradesh Electricity Regulatory Commission and Others* (Appeal No. 150 of 2011) and Batch which recognizes that the interest will be due from the date the payment is due.

49. The Respondent No.1 has submitted that in the judgment of the APTEL dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- Central Electricity Regulatory Commission and Ors*, the Tribunal has considered two scenarios of the provisions incorporated in the two PPAs, namely, dated 02.02.2007 (Gujarat Bid-02 PPA) and 06.02.2007 (Gujarat Bid-01 PPA) both between Adani Power and Gujarat Urja Vikas Nigam Limited (GUVNL). In the case of the Gujarat Bid-02 PPA, the APTEL referring to the specific provisions of restitution contained in the PPA decided that the carrying cost is admissible. However, while referring to the Gujarat Bid-01 PPA, which did not contain the restitution clause, APTEL held that no carrying cost shall be admissible in terms of the same. Further, the decision of APTEL dated 14.08.2018 in Appeal No. 111 of 2017 in the matter of *M/s. GMR Warora Energy Limited v. Central Electricity Regulatory Commission and Ors.*, has been referred wherein the principles laid down in the Judgment dated 13.04.2018 have been followed . In the present case, there is no provision in the PPAs for carrying cost or restitution and will therefore, not be applicable. The decision dated 13.04.2018 of APTEL has been upheld by the Hon'ble Supreme Court in Judgment dated 25.02.2019 in Civil Appeal No. 5865 of 2018 in the case of *Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Anr. -v- Adani Power Limited and Ors*. However, in the present PPAs, there is no such provision for restitution/restoration to the same economic position. Therefore, the Petitioner is not entitled to any carrying cost. The Respondent No.1 has also placed its reliance on various decisions given by the Commission viz. *Order dated 09.10.2018 in Petition No. 188/MP/2018 and Batch in Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch; 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; Order dated 18.04.2019 passed in Petition No.164/MP/2018 and*

Petition No.165/MP/2018 in the case of Parampujya Solar Energy Private Limited –v- NTPC Limited; Order dated 02.05.2019 in the Petition No.342/MP/2018 and Another in the matter Acme Rewa Solar Energy Private Limited -v- Solar Energy Corporation of India Limited & Ors. and Another.

50. The Respondent No.1 has submitted that the claim for change in law has to be considered in terms of Articles 1 and 17 of the PPAs. The fact that the Statutory Notification dated 30.07.2018 imposing Safeguard Duty referred to in the Petition is ‘law’, as defined in the PPA is not disputed. However, in order to qualify for relief under the change in law provision contained in the PPAs, the conditions mentioned in Article 1 and Article 17 dealing with ‘Change in Law’ need to be satisfied, namely, claim should fall within the scope of the said provisions.

Re: Scope of Definition of Change in Law in Article 1 read with Article 17

51. The Respondent No.1 has submitted that in terms of the Change in Law provisions, the relief for change in law in the case of PPAs dated 17.04.2017 between Petitioners and the Respondent No.1 in regard to any tax is available only *‘If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).’* As per Article 17.1 (c), the threshold limit has been prescribed as INR 20,000,000 (twenty-million) for each incidence of Change in Law and not to be considered on a cumulative basis. Accordingly, each incidence of taxation has to be considered independently and separately and only if the amount of the claim in respect to such independent incidence of taxation exceeds the threshold limit, the claim will be admissible. The effect of the change in law (if any) has to be construed and applied strictly in accordance with the Article 17 of the PPA including and in particular the mitigation to be undertaken under Article 17.1(b) and further to the extent provided in Article 17.1 (b) to (e).
52. The Respondent No.1 has submitted that even in case the impact of Safeguard Duty is established, Article 17 (e) of the PPA provides for adjustment of the amount determined by the Commission to be payable on account of Change in Law either in Tariff Payment or through a lump sum payment. The impact of change in law, if any, should be recovered by way of tariff. The payment by way of lump sum is financially burdensome for the

Respondent No.1. It is also an accepted principle that the capital costs/capital expenditure is recovered by way of tariff and not as a lump-sum payment.

Re: Inadmissibility of interest on working capital, return of equity

53. The Respondent No.1 has submitted that there cannot be any consideration for individual tariff elements such as interest on working capital or return on equity or any other in a competitive bid process under Section 63 of the Electricity Act, 2003 and there cannot be any computation of the same. There is no concept of interest on working capital or individual tariff elements in competitively bid process and bidders are required to give the bid based on all-inclusive tariff. The Respondent No.1 has placed its reliance on the following orders: Order dated 21.12.2018 passed by APTEL in Appeal No. 193 of 2018 in case of *GMR Kamalanga Energy Limited and Anr. –v- Central Electricity Regulatory Commission and Ors.*; Order dated 14.08.2018 passed by APTEL in Appeal No. 111 of 2017 in the case of *GMR Warora v Central Electricity Regulatory Commission and Ors.*; Order dated 19.04.2017 passed by APTEL in Appeal No. 161 of 2015 in case of *Sasan Power Limited –v- Central Electricity Regulatory Commission*; 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: Inapplicability of the MNRE guidelines dated 03.08.2017

54. The Respondent No.1 has submitted that reliance placed by the Petitioners on Guidelines for Tariff based Competitive Bidding Process issued by Ministry of Power by Notification dated 03.08.2017 is misplaced. In the present case, the Request for Proposal was issued on 16.03.2016, Letter of Award was issued on 21.02.2017 and the PPAs were executed on 17.04.2017. Therefore, the documents governing bidding and procurement process of the solar power from the Petitioners were executed prior to issuance of the Guidelines dated 03.08.2017. Further, Guidelines dated 03.08.2017 of the Government of India has a prospective effect and not retrospective. In terms of RfP, the 750 MW solar power project was to be setup in Rewa district of Madhya Pradesh with support from MNRE in accordance with the scheme for Development of Solar Parks and Ultra Mega Solar Power Projects effective from 12.12.2014.

Re: Adjustment of relief (if any) as a part of the Tariff and not lump sum payment

55. The Respondent No.1 has submitted that the impact of change in law on account of imposition of Safeguard Duty, if any, should be recovered by way of tariff. The payment by way of lump sum is financially burdensome for the Respondent No.1. It is also an accepted principle that the capital costs/capital expenditure is recovered by way of tariff and not as a lump-sum payment. One of the reasons for the same is that the increased costs have been claimed to have been incurred for the purpose of supply of power, the costs should be recovered only if the Petitioners makes available the power. If the Petitioners do not supply the requisite power, the Petitioners should not be entitled to recover the cost similar to any other capital cost. On the other hand, if the Petitioners are allowed to recover the same in lump sum, then the Respondent No.1 would have paid for capital cost even if the Petitioners makes short supply of power in the future.

Re: Miscellaneous Issues

(I) Business efficacy

56. The Respondent No.1 has submitted that as contented by the Petitioners that even if the PPAs are silent on the aspect of carrying cost, the document must be read under the principle of “business efficacy” wherein the explicit terms of the contract are final with regard to the intention of the parties to the contract. Reliance in this regard is made on the judgment dated 05.10.2017 of the Hon’ble Supreme Court in Civil Appeal No. 179 of 2017 in the case of *Nabha Power Limited v. Punjab State Power Corporation Limited and Anr.*
57. The Respondent No.1 has submitted that the reliance on the principle of business efficacy in the context of the aforementioned PPAs is misconceived. It is a settled law that terms cannot be implied into a contract, contrary to the express terms of the PPAs. Thus, if the PPAs already contemplate for the provision of Late Payment Surcharge for the delay in payment of the bill, supplementary or otherwise (as stated above), then by no stretch of means can it be said that the intent of the PPA was to restore/ retribute the parties to the same economic position in case of such contingency. The reliance of the Petitioners on the decision in the case of *Sumitomo Heavy Industries Limited v ONGC Limited (2010) 11 SCC 296* is

misconceived. The said decision is under the Arbitration Act where the scope of judicial interference is limited. Incidentally, even in the Nabha case (as relied on by the Petitioner), the interest was granted only from three months after the decision of the Hon'ble Supreme Court and not before.

58. The Respondent No.1 has submitted that it is a well settled principle that in matters of contract, relief cannot be granted on principles of equity. The contract becoming onerous is not a ground for relief to be granted. Reference in this regard may be made to the following judgments: *Alopi Parshad and Sons Ltd. v. Union of India*, (1960) 2 SCR 793 : AIR 1960 SC 588; *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, (1968) 1 SCR 821 : AIR 1968 SC 522. The business efficacy rule can be considered as a part of interpretative rule where the provision is vague and cannot be relied upon to create a substantive right in favour of the Petitioners.

(II) Quantum Meruit

59. The Respondent No.1 has submitted that the Petitioner has also raised the issue of applicability of Section 70 of the Indian Contract Act, 1872 namely that when a person does or delivers something to another without intending to do so gratuitously, he is entitled to receive compensation for the thing or restoration of the thing delivered if the other party has enjoyed the benefit of the thing done or delivered. Quite apart from the fact that compliance with the prevailing law is not a thing done or delivered to SECI, the principle has no application where there is a specific agreement in operation. Quantum Meruit has application when the contract is held to be invalid. Reference in this regard may be made to the following extracts from Pollock and Mulla, Fourteenth Edition (Vol II):

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 this 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.”

60. The Respondent No.1 has submitted that the issue of whether, when parties are governed by contract, a claim in quantum meruit under Section 70 of the Contract Act, 1872 would be permissible has been settled by Hon'ble Supreme Court in the decision of *MTNL -v- Tata Communications Ltd.*, (2019) 5 SCC 341.

SUBMISSIONS OF RESPONDENT NO. 2 IN THE PLEADINGS AND DURING THE HEARINGS

61. The Respondent No. 2 (DMRC) has submitted that:
- a) the Petitions are liable to be dismissed on account of Petitioner's own admission as made in the Petitions with regard to execution of 'Supply Agreements' with ACME Cleantech, GCL, Chint and Renesola. The Petitioners have executed these agreements during the period from February, 2018 to September, 2018 while the PPAs were executed on 17.04.2017 which evidences the delay on the part of Petitioners in execution of 'Supply Agreements' for supply of modules. The Project was scheduled to be commissioned by the Petitioner within 18 months from the date of completion of its obligations by RUMSL. RUMSL was to complete the obligations within 30 days from the date of execution of PPAs. Therefore the Scheduled Date of Commissioning of the project was 16.11.2018. However, the supply agreements were executed after completion of more than one year from the date of execution of PPAs. The Petitioners have failed to provide any detailed reasons as to steps or action taken against the supplier for delay if any in supply of solar modules. The obligation for timely supply of modules rests with the supplier.
 - b) The Petitioners are not entitled to claim any interest on working capital in view of the law settled on the subject by APTEL, which clearly provides that there is no concept of interest on working capital for individual tariff elements in competitively bid process. The claim for carrying cost is not entertainable in law as claimed by Petitioners as these have not been determined in its favour by the Commission.

ANALYSIS AND DECISION

62. The Petition No. 19/MP/2019 was admitted on 07.02.2019 while Petition No. 46/MP/2019 was admitted on 06.03.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. Since, Petitions are likely worded and contain similar issues to be adjudicated, the same are clubbed together.
63. The brief facts of the petitions are that the Petitioners are generating companies engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The Respondent No.1, MPPMCL issued a 'RfS' dated 16.03.2013 for 'SPDs' for development of 750MW (3 x 250MW) Grid connected Ground Mounted Solar Photovoltaic Project split into three units of 250MW capacity each, identified as Unit 1, Unit 2 and Unit 3. The Petitioners have entered into two separate PPAs dated 17.04.2017 with the Respondents, for the development of Unit 1 of 250 MW of the Rewa Solar Power Project in the State of Madhya Pradesh and for the consequent sale of solar power to the Respondents 1 and 2. The SCoD of the projects were 16.11.2018. The Petitioners executed Supply Agreements with ACME Cleantech, GCL, Chint and Renesola for procurement of modules which are a key component of solar power projects and constitute a major portion of a solar power project's total cost. Thereafter, vide the 'Safeguard Duty Notification', the Central Government imposed safeguard duty as per the following rates on the import of "Solar Cells whether or not assembled in modules or panels" (hereinafter referred to as 'solar cells and modules'):-
- a. 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
 - b. 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
 - c. 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.
64. The Petitioners have submitted that issuance of 'Safeguard Duty Notification' has resulted in an increase in recurring and non-recurring expenditure for the Petitioners and has adversely impacted the business of the Petitioners. The Petitioners have submitted that imposition of safeguard duty is covered under Article 17 of the PPAs which provide for 'Change in law' and the relief for such 'Change in Law' may be allowed. Further, the Petitioners are entitled

to interest on incremental 'working capital' and 'decrease in Return of Equity' to put Petitioners in the same economic position as if change in law has not occurred. The Petitioners have also claimed carrying cost from the date of impact of 'Change in law' till reimbursement by the Respondent. **Per Contra**, the Respondents have submitted that it is not disputed that the safeguard duty that has been imposed by the Government of India vide Safeguard Duty Notification 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 is a Law as defined and covered under the PPAs. However, whether the same qualifies as a Change in Law within the scope of Article 17 of the PPAs has to be decided after taking into consideration the submissions made in the pleadings and during hearings. Further, the Safeguard Duty 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. The Commission and the APTEL have repeatedly hold in various cases 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.

65. 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 17 of the PPAs? And Whether there is a need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure incurred by the Petitioners on account of 'Change in Law'?*

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

66. No other issue was pressed or claimed.

67. 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 17 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’?*

68. The Petitioners have submitted that vide Safeguard Duty Notification 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 17 of the PPAs which provides for ‘Change in law’ and the relief for such ‘Change in Law’ and requested that the same may be allowed. **Per Contra**, the Respondents have submitted that it is not disputed that the safeguard duty imposed by the Government of India is a Law as defined and covered under the PPAs. However, whether the same qualifies as a ‘Change in Law’ within the scope of Article 17 of the PPAs has to be decided after taking into consideration the submissions made in the pleadings and during hearings. Further, the impugned notification is prospective in its operation and cannot be given effect to any period prior to 30.07.2018.

69. The Commission observes that Article 1.1 of the PPAs defines the ‘Change in law’ clause as under:-

“Change in Law means the occurrence of any of the following events in India, subsequent to the Proposal Due Date (as defined in the RFP), and such event(s) has/have an impact on the Unit or on any of the rights and obligations of the Parties under any of the Project Agreements:

(a) the modification, amendment, variation, alteration or repeal of any existing Applicable Laws;

(b) the enactment of any new Applicable Law or the imposition, adoption or issuance of any new Applicable Laws by any Government Authority;

(c) changes in the interpretation, application or enforcement of any Applicable Laws or judgment by any Government Authority;

(d) the introduction of a requirement for the SPD to obtain any new Applicable Permit; or

(e) the modification, amendment, variation, introduction, enactment or repeal of any Tax, resulting in a change in the incidence of Tax liability, including pursuant to any Applicable Laws promulgated or to be promulgated in furtherance of the Constitution (122nd Amendment) Bill, 2014.

It is clarified that for the purposes of Change in Law, Taxes shall not include taxes on corporate income, any withholding tax on dividends distributed to the shareholders of the SPD or income tax.”

70. The Commission observes that the term ‘Taxes’ has been defined under the PPAs as follows:-

“Taxes means any Indian taxes, whether direct or indirect, including levies, imposts, cesses, duties and other forms of taxation, including income tax, sales tax, value added tax, octroi, entry tax, corporation profits tax, advance corporation tax, capital gains tax, residential and property tax, customs and other import and export duties, excise duties, stamp duty or capital duty (whether central, state or local) on the goods, materials, equipment and services incorporated in and forming part of the Unit charged, levied or imposed by any Government Authority, but excludes any interest, penalties and other sums in relation thereto imposed on any account whatsoever.”

71. The Commission observes that Article 17 of the PPAs provides for ‘Change in Law’ which stipulates as under:-

“17. Change in Law

17.1 Consequences of Change in law

(a) If a Change in Law occurs or is shortly to occur, then a Party shall notify the other Parties expressing its opinion on its likely effects and giving details of its opinion of whether:

- (i) any changes are required to the scope of work to be performed by the SPD under this Agreement;*
- (ii) any changes are required to the terms of this Agreement to deal with such Change in Law;*
- (iii) relief from compliance with any obligations is required, including the obligation of the SPD to achieve the Unit SCOD;*
- (iv) any increase or decrease in costs (other than incurring additional capital expenditure), or any increase in Taxes or delay is likely to result from the Change in Law; and*
- (v) any capital expenditure is required or no longer required as a result of a Change in Law.*

(b) As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 170 1 (a), the Parties shall discuss the issues referred to therein and any ways in which the Parties can mitigate the effect of the Change in Law, including:

- (i) demonstrating that the SPD has used reasonable endeavours (including, where practicable, the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;*
- (ii) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the SPD;*
- (iii) demonstrating as to how the Change in Law has affected prices charged by similar businesses to the Unit, including similar businesses in which the shareholders or their associates carry on business;*
- (iv) demonstrating to the Procurer that the Change in Law is the direct cause of the*

increase or decrease in costs and/or loss or gain of revenue or delay and the estimated increase or decrease in costs or loss or gain in net profits after Tax could not reasonably be expected to be mitigated or recovered by the SPD acting in accordance with Good Industry Practice; and

(v) demonstrating that any expenditure, which was anticipated to be incurred to replace or maintain assets that have been affected by the Change in Law, has been taken into account in the amount stated in its opinion presented under Article 17.1 (a).

(c) If the Parties have complied with Article 17.1 (b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including capital expenditure, at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Threshold Limit.

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.

(d) If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if as a result of the Change in Law, there is a decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax, then any financial benefit accruing to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer in its entirety.

(e) The amount determined in accordance with Article 17.1(c) and Article 17.1(d) in the eventuality of any increase or decrease in cost (or decrease or increase in revenues or net profits after Tax) of the SPD on account of a Change in Law shall be adjusted either in the Tariff Payment or through a lump sum payment, and shall be paid through a Supplementary Bill to be raised by either the SPD or the Procurer in terms of Article 10. In case of any change in the Applicable Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Bill to be raised by the SPD after such change in Applicable Tariff shall appropriately reflect the changed Applicable Tariff and the Procurer agrees to pay the revised Applicable Tariff accordingly.

Additionally, the PPA with Respondent No. 2 has following provisions under Article 17.1 (c).

.....
.....

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Parties agree and confirm that the decision of the Appropriate Commission applicable to the SPD and MPPMCL for such Change in Law event under the MPPMCL PPA shall be applicable to DMRC and the SPD, under this Agreement. The SPD shall immediately forthwith inform the Procurer of the decision of the Appropriate Commission or the appellate authority as the case may be.

72. The Commission observes from the above that any application of new tax is covered as 'Change in Law'. The Safeguard Duty Notification stipulates that "a safeguard duty at twenty five per cent to fifteen per cent ad valorem minus anti-dumping duty payable" has been levied on Solar Cells whether or not assembled in modules or panels" when imported into India "during the period from 30th July, 2018 to 29th July, 2020 (both days inclusive)". The notification provides for a diminishing 'Safeguard Duty' slab in the range of 25% to 15% applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. The impact of 'Safeguard Duty' notification is on/any portion of import whose point of taxation is on or after implementation of the Notification dated 30.07.2018 and the same will be subjected to purview of 'Safeguard Duty'.
73. 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;

74. The Commission observes that in the instant petitions, the Proposal Due Date which assumes relevance for determination of change in law event is 23.01.2017 as per Schedule 1 of the RfS dated 16.03.2016 read with Addendum-39 dated 06.01.2017. The PPAs were executed on 17.04.2017, and 'Safeguard Duty' has been levied on import of 'Solar Cells whether or not assembled in modules or panels' on 30.07.2018 i.e. before the SCoD of the projects which is 16.11.2018. The change in duties/ tax imposed by the Central Government has resulted in the change in cost of the inputs required for generation. Accordingly, the Commission is of the view that as per the Safeguard Duty Notification and provision of PPAs related to 'change in law' the imposition of the 'Safeguard Duty' is covered under 'Change in Law' Article 1.1 (a) and 17 of the PPAs.
75. It is pertinent to mention here that the Petitioners have submitted that they have entered into 'Supply Agreement' dated 21.02.2018 executed with M/s ACME Cleantech Solutions Pvt. Ltd. in Petition No. 19/MP/2019 and 'Supply Agreement' dated 27.04.2018 executed with GCL System Integration Technology Pte Ltd.; dated 14.05.2018 executed with Chint Solar (Hong Kong) Co. Ltd. and dated 25.09.2018 executed with Renesola Jiangsu Ltd. in Petition No. 46/MP/2019 as its contractor for procurement and supply of solar photovoltaic modules etc. essential for solar power plant. In view of the above, the Respondents have submitted that the imposition of the 'Safeguard duty' is on the suppliers/importers.
76. The Respondents have submitted in Petition No. 19/MP/2019 that as per schedule, the equipment was to be ordered not later than 31.05.2018, and delivered not later than 09.08.2018 i.e. before imposition of 'Safeguard Duty'. There is a dispute on the veracity of the Amendment Agreement executed on 26.02.2018 i.e. within 5 days of the execution of the EPC Agreement dated 21.02.2018 . The project schedule has been changed without giving any reason or explanation or justification or otherwise any indication as to why within 5 days of the execution of the detailed EPC Agreement for Supply dated 21.02.2018. The main agreement was executed on 21.02.2018 on an e-stamp paper procured on 15.02.2018 in Delhi issued by the Government of National Capital Territory of Delhi. The EPC Agreement for Supply is in a detailed form and as on 21.02.2018, the parties to the agreement had clearly and unequivocally agreed on the timelines for completion of the contracted work. In the said timeline, the delivery of the modules was stipulated to be completed by 31.05.2018. The Amendment Agreement has been entered into on 26.02.2018. Further, at the time of the filing

of the Petition, the Petitioner did not produce the Amendment Agreement. The absence of any reference to the Amendment Agreement dated 26.02.2018 in the main Petition suggest that the additional affidavit filed on 14.02.2019 is an after-thought and the documents have now presented in view of the specific objection taken in other Petitions being Petition Nos. 342/MP/2018 and 343/MP/2018 in case of *ACME Rewa Solar Energy Private Limited. Vs. SECI & Another* before this Commission. Further, any increase in taxes/duties on account of the delay attributable to the supplier/importer shall be to the account of the supplier/importer. 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.

77. In Petition No. 46/MP/2019, the Respondents have submitted that with regard to Supply Agreement executed with Renesola, the same was executed on 25.09.2018 i.e. after coming into force of the Safeguard Duty and, therefore, the Petitioner had the occasion to consider the cost competitiveness of importing Solar PV Modules from countries which are subject to the imposition of the Safeguard Duty and countries which are not subject to the Safeguard Duty or to procure the same from domestic market.
78. The Commission is of the view that there is no illegality in execution of the ‘Amendment Agreement’ just five days after the execution of the ‘Main Agreement’ or Supply Agreement executed after notification of the Safeguard Duty. The Petitioners are well within their rights to revise the schedule with the supplier/importer to match their plans for implementation of the project. These are purely commercial decisions made by SPDs. Further, the Commission in its Order dated 05.02.2019 passed in ‘Petition No. 187/MP/2017 & Others’ in case of *M/s Renew Wind Energy (TN2) Private Limited & Ors* has held that the procurers/Respondent cannot question the commercial decisions of the solar power developers for project implementation including mode of procurement of goods and services taken by the solar developers prior to the in Change in Law event. The relevant extract is reproduced below:

“183. ... It has been brought to our notice that in some cases, the Respondent Procurers are questioning the rationale of the commercial decisions taken by the SPDs in cases where the rates of GST are on the higher side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such commercial decisions on the basis of the differential rates of GST on

certain goods and services, and payments should be made based on the invoices raised and supported by Auditor's Certificate..."

79. Another point of contention raised by the Respondents is that in terms of the Change in Law provisions the relief for change in law in the case of PPAs dated 17.04.2017 in regard to any tax is available only *'If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).'*' As per Article 17.1 (c), the threshold limit has been prescribed as INR 2,00,00,000 (Rs. Two Crores) for each incidence of Change in Law and not to be considered on a cumulative basis. Accordingly, it has been argued that each incidence of taxation has to be considered independently and separately and only if the amount of the claim in respect to such independent incidence of taxation exceeds the threshold limit, the claim will be admissible. Further, even in case the impact of Safeguard Duty is established, Article 17 (e) of the PPAs provides for adjustment of the amount determined by the Commission to be payable on account of Change in Law either in Tariff Payment or through a lump sum payment. The Respondent has contended that the impact of change in law, if any, should be recovered by way of tariff. The payment by way of lump sum is financially burdensome for the Respondents No.1. It is also an accepted principle that the capital costs/capital expenditure is recovered by way of tariff and not as a lump-sum payment.
80. The Petitioner has submitted that the Threshold Limit as specified in the PPAs applies to each event constituting a Change in Law and not to each incidence of taxation. The imposition of Safeguard Duty constitutes a single event of Change in Law in terms of the relevant definitions of the PPAs, and entitles the Petitioner to claim relief under the PPAs as its financial impact exceeds the Threshold Limit set out under the PPAs. The Respondents' approach of viewing each event of payment of safeguard duty as a separate event of change in law and denying the same by taking a position that its impact does not exceed Threshold Limit is unjustifiable and is also based on an incorrect reading and interpretation of the PPAs.
81. The Commission observes that Article 17 (c) of the PPAs stipulates as under:-

*"17. Change in Law
17.1 Consequences of Change in law*

...

(c) If the Parties have complied with Article 17.1 (b) or upon elapse of the time specified in the Article 17.1 (b) and if the SPD is required to incur any additional costs, including additional capital expenditure due to a Change in Law the aggregate financial effect of which, over the remaining Term of the PPA, is up to INR 20,000,000 (twenty million) (Threshold Limit), then the SPD shall obtain funding for such additional costs, including capital expenditure, at its cost and expense. The SPD shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Threshold Limit.

For the avoidance of doubt, it is clarified that the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

If the additional capital expenditure, interest and associated costs that the SPD may incur as a result of the Change in Law exceeds the Threshold Limit, then the Procurer or the SPD shall approach the Appropriate Commission to seek approval of such Change in Law and the consequent impact on the Applicable Tariff.”

82. The Commission observes that Article 17.1(c) provides that the SPDs shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Rs. 2.00 Crores (Threshold Limit). Further, the Threshold Limit shall apply to each event constituting a ‘Change in Law’ and shall not be applied on a cumulative basis. The Commission is of the view that the imposition of ‘Safeguard duty’ constitutes one single event under the definition of ‘Change in Law’ and the threshold limit of Rs. 2,00,00,000/- is to be applicable accordingly.

83. 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 under ‘Change in law’ as contained under Article 17 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 Safeguard Duty Notification, safeguard duty is payable on Solar Cells whether or not assembled in modules or panels. The Petitioners have claimed increase of the project cost due to increase in cost of modules. However, the Commission observes that in the instant petitions, the tariff has been discovered under transparent e-bidding process in accordance with the NSM guidelines issued by the Central Government. In the Competitive Bidding Scenario, the SPDs 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.

84. Accordingly, the Commission directs the Petitioners to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till the Commissioning Certificate is issued in accordance with the provisions of the PPA, duly supported by relevant invoices and Auditor’s Certificate. The Respondents are 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 Respondents shall claim the amount from 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.
85. The issue is decided accordingly.

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

86. The Petitioners have submitted that ‘Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects’ have been issued by Ministry of Power vide Notification bearing no.: No. 23/27/2017-R&R., dated 03.08.2017. Under the provisions of Section 63 of the Electricity Act, 2003 for the long term procurement of electricity by distribution licensees, from grid-connected Solar PV Power Projects having a size of 5 MW and above, through competitive bidding. 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. **Per contra**, the Respondents have submitted that reliance placed by the Petitioners on the Tariff Guidelines issued by Ministry of Power by Notification dated 03.08.2017 is misplaced. In the present case, the Request for Proposal was issued on 16.03.2016, Letter of Award was issued on 21.02.2017 and the PPAs were executed on 17.04.2017. Therefore, the documents governing bidding and procurement process of the solar power from the Petitioners were executed prior to issuance of the Guidelines dated 03.08.2017. Further, Guidelines dated 03.08.2017 of the Government of India has a prospective effect and not retrospective. In terms of RfP, the 750 MW solar power project was to be setup in Rewa district of Madhya Pradesh with support from MNRE in accordance with the scheme for Development of Solar Parks and Ultra Mega Solar Power Projects effective from 12.12.2014.

87. The Commission observes that the Para 5.7.1 of the 2017 Guidelines stipulates as under:

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

88. The Commission is of the view that the PPAs stand executed and the Petitioners did not raise any objections regarding PPAs being not consistent with the ‘Tariff Guidelines’. In view of the above, the provisions of the PPAs have become final and binding on the Petitioners and Respondents. Further, the Petitioners have neither approached the Commission for the alignment of the PPAs with the ‘Tariff Guidelines’ nor there is a prayer in the petitions to this effect. In view of the above, the Commission decides to proceed with the matter taking into consideration only the PPAs as presented before us.

89. The Commission observes that in the judgment of the APTEL 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.”

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

“ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not

made in time by the Respondents Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of redetermination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondents Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

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

*the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or
the date of order/ judgment of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law. (c) the date of impact resulting from the occurrence of Article 13.1.1.*

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

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

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

91. 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/ Return of Equity’/Carrying Cost’ is not admissible.

92. 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 Article 17 of the PPAs. The Commission directs the Petitioners to make available to the Respondent No.1 all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till the Commissioning Certificate is issued in accordance with the provisions of the PPA, duly supported by relevant invoices and Auditor’s Certificate. The Claim based on discussions in paragraph 84 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/Return of Equity’/’Carrying Cost’ is not admissible.

93. Accordingly, the Petition No. 19/MP/2019 and Petition No. 46/MP/2019 are disposed of.

Sd/-

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