



नई दिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 176/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/ Shri. I.S. Jha, Member

आदेश दिनांक /Date of Order: 5th of February, 2020

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreement dated 07.02.2018 between the Petitioner and NTPC Limited seeking relief on account of Change in Law event, viz., the imposition of Safeguard Duty by Notification No. 01/2018 Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India.

AND IN THE MATTER OF:

Solairepro Urja Private Limited
Office No. 203, Level-2, Pentagon-3,
Magarpatta City, Hadapsar,
Pune – 411 013

...Petitioner

Versus

1. NTPC Limited

Through its Managing Director
NTPC Bhawan, SCOPE Complex,
7 Institutional Area,
Lodhi Road, New Delhi - 110003

2. NTPC Vidyut Vyapar Nigam Limited
Through its Chief Executive Officer
NTPC Bhawan, Core 7, SCOPE Complex
7 Institutional Area, Lodhi Road,
New Delhi – 110 003
3. Southern Power Distribution Company of A.P. Limited
#19-13-65/A
Srinivasapuram Tiruchanoor Road
Tirupati- 517503
Chittoor District
Andhra Pradesh
4. Eastern Power Distribution Company of A.P. Limited
P&T Colony,
Seethammadhara,
Visakhapatnam

...Respondents

Parties Present: Shri Jafar Alam, Advocate, Solairepro Urja
Shri Saahil Kaul, Advocate, Solairepro Urja
Ms. Sheela, Solairepro Urja
Shri Venkatesh, Advocate, NTPC
Ms. Nishtha Kumar, Advocate, NTPC
Shri Vikas Maini, Advocate, NTPC
Shri Suhael Buttan, Advocate, NTPC

आदेश/ ORDER

The Petitioner, Solairepro Urja Private Limited is developing a 250 MW Solar Power Generating System in Kadapa Ultra Mega Solar Park based on the photo voltaic technology in the State of Andhra Pradesh.

2. The Respondent No.1, NTPC Ltd. (hereinafter referred to as ‘NTPC’), was appointed as the nodal agency for facilitating purchase and sale of solar power under the Government of India’s National Solar Mission, Phase II, Batch II, Tranche I Bidding Guidelines.
3. The Respondent No. 2, NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to ‘NVVN’) is a wholly owned subsidiary of NTPC and an inter-state trading licensee. As per the NSM Guidelines and the Power Purchase Agreement, NTPC purchases solar power from the Petitioner through NVVN and after bundling with thermal power generated at NTPC’s generating stations in the manner allocated by the Ministry of Power, Government of India, sells the same to various distribution licensees located in various States in India.
4. The Respondent No. 3, Southern Power Distribution Company of A.P. Limited (hereinafter referred to as ‘APSPDC’) and the Respondent No. 4, Eastern Power Distribution Company of AP Limited (hereinafter referred to as ‘APEPDC’) are the distribution companies of Andhra Pradesh.
5. The Petitioner has filed the petition under Section 79 of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the Power Purchase Agreement (hereinafter referred to as ‘PPA’) dated 07.02.2018 seeking relief on account of ‘Change in Law’ event, viz., the imposition of Safeguard Duty by Notification No. 01/2018 Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India. The Petitioner has made the following prayers:
 - a) *Declare that the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India is a Change in Law under Article 12 of the Power Purchase Agreement executed between the Petitioner and NTPC Limited;*
 - b) *Direct the Respondent to pay a lump sum compensation of Rs. 154,67,13,701/- (Rupees One Hundred and Fifty Four Crore Sixty Seven Lacs Thirteen Thousand Seven Hundred and One Only) as relief for the Change in Law effected by notification no. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance,*

Government of India as elaborated in the instant Petition, along with carrying costs and income tax implications, if any, at actuals, as elaborated in detail in the instant Petition;

- c) Direct the Respondent to additionally compensate the Petitioner for the Goods & Services Tax in the amount of Rs. 7,73,35,685/- (Rupees Seven Crore Seventy Three Lacs Thirty Five Thousand Six Hundred and Eighty Five Only) levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the PPA;*
- d) Direct the Respondent to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*
- e) Pass such other orders that this Commission deems fit in the interest of justice.*

Background

6. In furtherance of the National Solar Mission, Phase II, Batch II, Tranche I Bidding Guidelines (hereinafter referred to as 'NSM Guidelines'), NTPC issued Request for Selection (hereinafter referred to as 'RfS') dated 27.0.2016 for the purchase and sale of grid-connected solar power under the NSM Guidelines. Pursuant to the aforesaid, the Petitioner emerged as a successful bidder. The Petitioner is developing the project in Andhra Pradesh for supplying the solar power generated at the Project to NTPC.
7. On 16.07.2018, the DGTR recommended the Government of India for the imposition of Safeguard Duty on solar panels/modules imported from certain countries which included the People's Republic of China and Malaysia.
8. Consequent to the issuance of the Directorate General of Trade Remedies (hereinafter referred to as 'DGTR') Recommendations to the Government of India, the Ministry of Finance, Government of India, issued Notification No. 01/2018-Customs (SG) dated 30.07.2018 (hereinafter referred to as 'Safeguard Duty Notification') imposing Safeguard Duty on the import of solar panels/modules for a period of two (2) years at the rate specified therein. The import of such solar panels / modules from developing countries (notified under

Notification No. 19/2016-Customs except China PR and Malaysia has been exempted from the imposition of Safeguard Duty. The Ministry of Finance (Department of Revenue) vide 'Safeguard Duty Notification' notified the imposition of 'Safeguard Duty' in the Official Gazettes under:-

- “(a) twenty five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2018 to 29th July, 2019 (both days inclusive);*
- (b) twenty per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2019 to 29th January, 2020 (both days inclusive); and*
- (c) fifteen per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2020 to 29th July, 2020 (both days inclusive)...*
- 2. Nothing contained in this notification shall apply to imports of subject goods from countries notified as developing countries vide notification No. 19/2016-Customs (N.T.) dated 5th February, 2016, except China PR, and Malaysia.”*

9. Due to the imposition of the Safeguard Duty through the 'Safeguard Duty Notification', the Petitioner has incurred additional expenditure in the procurement of solar modules required for its Projects.

Submissions of the Petitioner

10. The Petitioner has submitted that due to the issuance of 'Safeguard Duty Notification' and the consequent imposition of safeguard duty, the Petitioner has incurred additional expenditure to procure the solar modules. As a direct result of the imposition of the Safeguard Duty, the Petitioner is also bearing an additional financing cost and paying 5% Goods and Services Tax (hereinafter referred to as 'GST') on the amount paid as Safeguard Duty. The GST paid on Safeguard Duty is in addition to the GST at the rate of 5% paid by the Petitioner on the import price of the solar modules. The additional expenditure incurred in developing the project on account of the issuance of the 'Safeguard Duty Notification' is Rs. 154,67,13,701/- (Rupees One Hundred and Fifty Four Crores Sixty Seven Lacs Thirteen Thousand Seven Hundred and One only). Further, the GST paid by the Petitioner on the above Safeguard Duty amounts to Rs. 7,73,35,685/- (Rupees Seven Crores Seventy Three Lacs Thirty Five Thousand Six Hundred and Eighty Five only).

11. The Petitioner has 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 Petitioner and have thus adversely impacted the business of the Petitioner. The Petitioner has preferred to file the Petition 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’.

Re: Issuance of the ‘Safeguard Duty Notification’ is a change in law event under the PPA

12. The Petitioner has submitted that issuance of the ‘Safeguard Duty Notification’ is a ‘*Change in Law*’ event as per Article 12 of the PPA, entitling the Petitioner to relief that would restore the Petitioner to the same economic position as if no change in law had taken place. Article 1.1 of the PPA defines ‘Law’ as under:

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

13. Article 12 of the PPA stipulates as under:

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for*

obtaining such Consents, Clearances and Permits; except due to any default of the SPD;

- any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.

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

12.2 Relief for Change in Law

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

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

14. The Petitioner has submitted that Article 12 of the PPA sets out the scope and extent of the change in law events for which the Petitioner can claim compensatory and restitutive relief. It provides that (a) the occurrence of *any* of the events listed in the five bullets of the clause; (b) after the effective date under the PPA; and (c) which results *inter alia* in the Petitioner incurring any additional expenditure; qualifies as a change in law event that entitles the Petitioner to approach this Commission to seek relief.
15. The Petitioner has submitted that the ‘Safeguard Duty Notification’ occurred after the effective date of 10.01.2018 set out under Article 2.1 of the PPA. Further, the first bullet of Article 12.1.1 includes the notification of the ‘Safeguard Duty Notification’, as it is a Law in the meaning of Law under the PPA. The fifth bullet of Article 12.1.1 of the PPA specifically covers “any change in tax” or “introduction of any tax” which is made applicable for supply of power by the solar power developer in terms of the PPA. Therefore, the ‘Safeguard Duty Notification’ amounts to a change in law both under the first and fifth bullet of Article 12.1.1. Accordingly, the Petitioner is entitled to compensatory relief provided thereunder.
16. The Petitioner has submitted that Ministry of Power vide letter dated 27.08.2018 issued directions under section 107 of the Electricity Act, 2003 to CERC that any change in domestic duties, levies, cess 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 MNRE also has issued O.M. on 02.04.2018 in relation to the “*Guidelines*

for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects”, which clarifies that the term taxes appearing in clause 5.7.2 of the aforesaid MNRE Guidelines includes duties and cess. The said clarification by the MNRE and Directive establishes the intention of the Central Government, to give a wide meaning the Change in Law Provision under the PPA.

17. The Petitioner has submitted that taking note of MNRE’s Office Memorandum, the DGTR in its final findings dated 16.07.2018 (hereinafter referred to as ‘Final Findings’) while recommending the imposition of Safeguard Duty, specifically noted that the safeguard duty would not have to be borne by solar power developers and its burden would be passed on to the power procurers and consumers as a change in law event.
18. The Petitioner has submitted that pass through of the Safeguard Duty will maintain the viability of the tariff at which the Petitioner would supply power under the PPA. On the other hand, if the pass through is disallowed, the same would render the project unviable. Therefore, this Commission ought to exercise its powers under Section 79(1)(a) and 79(1)(b) of the Electricity Act, 2003 to compensate the Petitioner for the additional expenditure incurred on account of the ‘Safeguard Duty Notification’.

Submissions of Respondent No. 1 (NTPC)

19. The Respondent No. 1 has submitted as under:

Re: Safeguard Duty: Application and its impact

20. The Respondent No.1 has submitted that:-
 - a. It is merely a trader in the present case and has entered into a back to back agreement with Respondent No.2 (APSPDCL) and Respondent No. 3 (APEPDCL) as per Clause 1.1 of the RfS of NSM Scheme. Hence, in the eventuality that the present petition is allowed and the relief sought by the Petitioner is granted, then the compensation/ relief shall be paid by the ultimate beneficiaries i.e. APSPDCL and APEPDCL.

- b. The Commission vide its Order dated 02.05.2019 (hereinafter referred to as ‘ACME Order’) in petition no. 342/MP/2018 and 343/MP/2018, titled *ACME Rewa Solar Energy Private Limited v. Solar Energy Corporation of India Limited and Ors* has observed that the ‘Safeguard Duty Notification’ does in fact qualify as a ‘Change in Law event’ under the Article 12 of the PPA. However the relief granted was subject to:
- i. Solar Power Developer (hereinafter referred to as ‘SPD’) demonstrating that the ‘Safeguard Duty Notification’ has genuinely impacted its procurement of solar modules and that the obligation to comply with the ‘Safeguard Duty Notification’ is upon the SPD.
 - ii. Quantum of the relief claimed on account of the ‘Safeguard Duty Notification’ was subject to submission of relevant documentary proof to the procurers with regard to actual costs incurred and subsequent reconciliation of amounts thereof mutually between the parties.
 - iii. The issue of admissibility of carrying cost as a part of restitutive relief was, however, rejected as being a relief not contemplated under the PPA.
- c. The Commission vide its ‘Acme Order’ has approved the levy of Safeguard duty under the ‘Safeguard Duty Notification’ as a Change in Law event subject to submission of relevant documents. Therefore, even in the present case, based on the position of law as on date, the ‘Safeguard Duty Notification’ *prima facie* would qualify as a Change in law event under Article 12 of the PPA dated 07.02.2018 executed between the Petitioner and NTPC. The said relief is subject to:-
- i. The Petitioner being able to demonstrate through documentary evidence with one to one correlation that the impact claimed in the present petition has been actually borne by the Petitioner. However, the Petitioner in filing the present petition has only placed on record a sample data of the total safeguard duty assessed and paid. Therefore, in the absence of complete information and verification of data, the Respondent is not in a meaningful position to respond to the claim of the Petitioner. Therefore, the relief if granted ought to be strictly in terms of the Order of the Commission passed in the Acme Order.
 - ii. Further, unlike the Acme Order, the Petitioner in the present case has not demonstrated some key aspects which are germane while claiming relief of Change in

Law for the SGD Notification such as:

- its procurement contract/ EPC Contract to demonstrate whether it is obligated under the said agreement to discharge the obligation of Safeguard Duty Notification.
- the procurement schedule in the EPC contract to ascertain whether there has been any delay in procurement causing the import of Solar Modules to take place beyond 30.07.2018 i.e. the date from which the Safeguard Duty Notification became effective.

d. In accordance with the finding of the Commission in the Acme Order, the Petitioner/SUPL is under a duty to place on record the entire details relating to the contracting of modules and actual payment of Safeguard Duty with regard to the solar cells.

e. The Respondent No. 1 has additionally submitted that:

- i) It is incumbent upon the Petitioner/SUPL to establish the one-to-one correlation between the project, import of solar cells and the invoices and other relevant documents for proof of the payment of safeguard duty along with the Auditor's certificate.
- ii) Apart from a certificate issued by a Chartered accountant certifying the claim for additional non-recurring expenditure, the Petitioner has only submitted a few sample bills, the total of which amounts to a figure which is substantially below the total relief of Rs.154,67,13,701/- (Rupees One Hundred Fifty Four Crores Sixty Seven Lakhs Thirteen Thousand Seven Hundred One only) claimed in the Petition.
- iii) In absence of the entire details substantiating the claim, and not satisfying the one to one co-relation as required, it is not possible to grant the quantum of claim prayed for in the petition. Therefore, in order to support their claim, it is imperative that the Petitioner places on record the additional documents for which they have craved leave for in this petition.
- iv) Further, the Petitioner is also mandated to satisfy that the obligation of payment of Safeguard Duty has been vested upon the Petitioner as per its EPC Contract. Moreover, it is also the duty and obligation of the Petitioner to demonstrate that there

has not been any delay in procurement of solar modules which has resulted into imposition of Safeguard Duty upon such import. These critical aspects/ justifications are completely missing in the present petition and in the absence of the same it cannot be conclusively ascertained that the impact of 'Safeguard Duty Notification' has been validly discharged by the Petitioner.

- v) It is submitted that as per Section 101 of the Indian Evidence Act, 1872 the onus of proof solely vests upon the Petitioner to demonstrate that the 'Safeguard Duty Notification' qualifies as Change in Law qua the Petitioner. The relevant extracts are reproduced as follows:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

- vi) Since the said burden has not been conclusively discharged as highlighted above, no relief can be granted to the Petitioner at this stage.

Re: Duty of Cost Mitigation by the Petitioner

21. The Respondent No.1 has submitted that the quantum of relief that can be granted is largely dependent on the actions and omissions of the Petitioner i.e. the *bona fides* of the Petitioner. Further:
- a. Under the PPA, the Petitioner is duty bound to employ a cost-effective approach as it was under an obligation to mitigate and procure the solar cells from such countries where the import is not subject to Safeguard Duty.
 - b. The cost of procurement of solar cells from China and/or Malaysia etc. inclusive of the cost of the safeguard duty is bound to be more than the cost of procurement of solar cells from those countries where the import of solar cells was not subject to the imposition of safeguard duty.
 - c. From the records available with NTPC and as also borne from the bills placed on record in the petition, it is evident that the Petitioner has procured solar cells primarily from China and Malaysia. The Petitioner has failed to demonstrate any action taken to mitigate increase in cost, by continuing to procure the solar cells from China even after the

safeguard duty was imposed, eventually leading to the increase in landed cost of the equipment.

- d. Therefore, the orders placed by the Petitioner after the imposition of the safeguard duty for import of solar cells from China and/or Malaysia etc., amounted to an imprudent utility practice. Hence, the Commission may consider disallowing the higher costs paid without taking mitigating measures and the same should not be allowed to be passed on to the Respondent and the consumers at large.
- e. The Petitioner has also critically omitted to place on record the relevant details of its EPC Contract to ascertain whether the impact of ‘Safeguard Duty Notification’ is to be borne by the Petitioner or not and further whether there has been any inordinate delay in procurement of the relevant Solar Modules in the EPC Contract and if yes what action has been taken by the Petitioner to mitigate the said delay.
- f. The Petitioner in filing the present petition has failed to appreciate: -
 - i. That ‘Safeguard Duty Notification’ unlike GST etc. is purely dependent upon the date of import and the relevant party being affected by the said Notification in the EPC Contract. Admittedly, such details are missing in the present petition.
 - ii. As considered by the Commission in the Acme Order, the party seeking relief on account of ‘Safeguard Duty Notification’ is required to demonstrate the actual delivery period agreed under the EPC Contract and only in a given case when such delivery has not been delayed on account of any reason attributable to SPD then only relief under Article 12 for ‘Safeguard Duty Notification’ can be claimed.
 - iii. Further, promulgation of ‘Safeguard Duty Notification’ in itself is not a ground to seek relief under Article 12 of the PPA. It is only when the Petitioner is conclusively able to demonstrate that the said notification has had a bonafide impact on the procurement of Solar Modules, can the relief of compensation be granted to the Petitioner.
- g. In the absence of relevant information, the relief sought by the Petitioner cannot be granted. The Commission may direct the Petitioner to place on record the relevant information as highlighted in Para 8 to 10 of the present reply and then grant the Respondent an opportunity to respond to the claim of Change in Law made by the Petitioner.

Re: Inadmissibility of the claim for carrying cost

22. The Respondent No.1 has submitted that Article 12 does not have a restitutive provision requiring the affected party to be restored to the same economic position as if the Change in law event had not occurred. The relief for Change in law under Article 12 is restricted only to the actual costs incurred by the affected party, and duly raised in invoices. The PPA provides for Late Payment Surcharge/Delayed Payment Charges in the event the invoices are not paid within the stipulated time frame. However, the PPA itself does not contemplate restitution or permit any additional Carrying Cost or interest on equity. This factum was duly noted and considered by this Commission in the ACME Order and accordingly the plea for carrying cost was rejected thereof. The Respondent No.1 has placed its reliance on the Hon'ble Supreme Court's judgment in *Uttar Haryana Bijli Vitran Nigam Ltd. and Anr. v. Adani Power Limited and Ors.*, (2019) 5 SCC 325, wherein it held that in presence of a provision in the PPA with regard to restoration to the same economic position, the party should be benefitted by employing the principle of restitution as understood in civil law. The Judgment of APTEL dated 14.08.2018 in *Appeal No. 111 of 2017 in M/s GMR Warora Energy Ltd. v. CERC and Ors*, held that only if there is a provision in the PPA to provide for restoring the seller to the same economic position, the seller will be eligible for carrying cost for such Change in Law event. The Respondent No. 1 has submitted that this Commission vide its Acme Order relying on the above two judgments of the Appellate Tribunal had arrived at the finding, that the prayer to allow carrying cost or any interest on working capital till a decision is reached is liable to be rejected in absence of any provision under the PPA regarding relief of carrying cost/interest on working capital for the period till a decision is arrived at by the Commission.

Re: Claim for GST in inadmissible

23. The Respondent No.1 has submitted that the Petitioner has arbitrarily also sought additional compensation of Rs.7,73,35,685/- allegedly on account of GST levied on the Safeguard Duty paid by the Petitioner, as there is no justification or basis for making such an additional claim for GST on the Safeguard Duty (which is again in the nature of a relief of restitution). The

same legally untenable as:

- a) The Petitioner has sought compensation for taxes on taxes, which is impermissible in law and on facts.
- b) As per Article 12.1.1 of the PPA, 'any change in tax or introduction of any tax' may be claimed as Change in Law. Therefore, the claim of 'Safeguard Duty Notification' subject to submission of documentary evidence may be considered as Change in law.
- c) In the present case, there has not been any change in GST after the effective date i.e. 10.01.2018. Moreover, it is also not the case of the Petitioner that GST has increased after the effective date. Therefore, the consequent impact of GST on account of safeguard duty is not an event which is covered under Article 12 of the PPA.
- d) If the claim of the Petitioner is to be accepted, then Article 12 of the PPA would be read as a 'restitutive' provision which this Commission in the case of Acme Order has already held that it is not. The relief as per the PPA can be only claimed qua impact of Change in law i.e. introduction of new tax or increase in tax. It cannot be extended to other commercial implications which is otherwise not envisaged under Article 12.
- e) If the interpretation of the Petitioner is to be accepted, then even 'Carrying Cost' may form part of the relief of Change in law under Article 12 of the PPA, which the Hon'ble Commission has already held that it cannot be granted in terms of Article 12 of the PPA.
- f) Moreover, the issue of GST on 'Safeguard Duty Notification' was also raised in the Acme Order. However, the Commission while passing the Judgment has not granted any relief on account of GST to the Petitioner.
- g) Accordingly, the additional claim for compensation on account of GST on Safeguard Duty, being without merit, and wholly unsustainable, ought not to be granted to the Petitioner.

Re. Any Claim should be recovered on Back to Back Basis from the Distribution licensees

24. The Respondent No.1 has submitted that NTPC through its wholly owned subsidiary NVVN is under the obligation to purchase power from the Petitioner and sell it to various distribution licensees located in any State in India after bundling such solar power with thermal power generated at NTPC's generating stations. NTPC is in a position to discharge its obligations under the PPA including the payment of compensation for any impact due to any change in

law event. However, it is subject to the distribution licensees i.e. APSPDCL and APEPDCL remitting the amount to NTPC in terms of their respective Power Sale Agreements (hereinafter referred to as “PSAs”). The Respondent No. 1 has submitted that the distribution licensees under their respective PSAs are under a back-to-back obligation to make timely and full payments to NTPC and ultimately to the Petitioner. Therefore, any amount so paid by the Respondent to the Petitioner shall be subject to the amounts recovered from the Distribution Licensees. The Respondent No. 1 has placed its reliance on the Commission’s Order dated 09.10.2018 in Petition No. 188/MP/2017 and Batch in *Acme Bhiwadi Solar Power Private Limited vs. Solar Energy Corporation of India and Ors.*, and Order dated 05.02.2019 in Petition No.187/MP/2018 and Batch in the matter of *M/s. Renew Wind Energy (TN2) Private Limited vs. NTPC Limited*.

Submission of the Petitioner in Rejoinder

25. The Petitioner has placed on record the bills of entry by it to the customs authorities for obtaining clearance of the imported solar modules. The Petitioner has submitted that the aforesaid bills of entry clearly mention the name of the Petitioner as the “importer” of solar modules. Since as per Custom Act, 1962 the obligation of payment of all applicable import duties to the customs authorities for getting such imported goods cleared for home consumption is upon the importer of goods, it naturally follows that the Petitioner being specifically mentioned as an ‘importer’ of solar modules in the bills of entry has indeed made the payment of the applicable Safeguard Duty.
26. The Petitioner has submitted that it has provided bills of entry evidencing the payment of Safeguard Duty on a sample basis in order to avoid burdening the Commission’s record with voluminous pleadings.
27. The Petitioner has submitted that it is not required to place on record ‘Module supply agreement’ executed by the Petitioner with the module supplier to demonstrate that the burden of payment of Safeguard Duty has been borne by the Petitioner, as the same is irrelevant for adjudication of the instant claim.
28. The Petitioner has submitted that none of the provisions of the PPA prescribe that the goods

required for establishing the solar power generating stations be sourced from a specific location to avoid the impact of a Change in Law event. Moreover, the Petitioner takes such sourcing decisions at the time of the bid, based on several techno-commercial factors such as the price of goods, reliability of the supplier to supply the desired quantity within the stipulated timelines and the quality of material. Further, it submits that the Change in Law clause does not require the Petitioner to alter its position in order to avoid the result of a Change in Law. That, the Petitioner's decision to source its supplies from a specific module supplier cannot be considered imprudent merely due to a subsequent imposition of Safeguard Duty.

29. The Petitioner has submitted that Article 12 of the PPA entitles the Petitioner to claim relief for any additional expenditure incurred by the Petitioner as a result of the occurrence of a Change in Law event. The carrying cost is the additional expenditure incurred by the Petitioner to finance the Safeguard Duty.
30. The Petitioner has submitted that GST amount is computed as a percentage of the applicable Safeguard Duty and forms part of the same transaction. The Petitioner is claiming the GST paid on Safeguard Duty as relief under Change in Law since the obligation to pay Safeguard Duty arising out of the issuance of the SGD Notification could only be discharged upon payment of the applicable Safeguard Duty amount, inclusive of the corresponding GST amount and not otherwise.
31. The Petitioner has submitted that the contention of NTPC on back to back arrangement is wrong since the rights of the Petitioner arising out of the PPA with NTPC cannot be made contingent on any other contractual arrangement to which the Petitioner is not a party.

Analysis and Decision

32. The Petition was filed on 01.07.2019, was admitted on 27.08.2019 and reserved for Orders on 25.11.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records.
33. The Petitioner is developing a 250 MW Solar Power Generating System (SPGS) in the Kadapa Ultra Mega Solar Park based on photo voltaic technology in the State of Andhra

Pradesh. The Petitioner executed the PPA on 07.02.2018. The Respondent No.1 (NTPC) has agreed to purchase solar power from the Petitioner and after bundling with thermal power, to sell the same to Respondent Nos. 3 & 4. Pursuant to execution of PPA 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:

- 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.

34. The Petitioner has submitted that it has imported the solar modules from the People's Republic of China, and hence on account of 'Safeguard Duty Notification', the Petitioner has incurred additional expenditure to procure the solar modules. The Petitioner is also bearing an additional financing cost and paying 5% GST on the amount paid as Safeguard Duty. The additional expenditure incurred by the Petitioner in developing the project on account of the issuance of the 'Safeguard Duty Notification' is Rs. 154,67,13,701/- towards safeguard duty. Further, the GST paid by the Petitioner on the above safeguard duty amounts to Rs. 7,73,35,685/-. The Petitioner has further submitted that the 'Safeguard Duty Notification' is a "Change in Law" event as per Article 12 of the PPA entitling the Petitioner to relief that would restore the Petitioner to the same economic position as if no change in law had taken place. The Petitioner has also claimed carrying cost from the date of impact of 'Change in law' till reimbursement by the Respondents. **Per Contra**, the Respondent No.1 has submitted that the 'Safeguard Duty Notification' came up before this Commission in Petition No. 342/MP/2018 & 343/MP/2018 and relief granted was subject to demonstration of the fact that notification has genuinely impacted its procurer and submission of documentary proof regarding the quantum of actual cost incurred by the Petitioner. Therefore, prima facie the 'Safeguard Duty Notification' would qualify as a change in law event under Article 12 of the PPA dated 07.02.2018. However, it will be subject to demonstration through documentary evidence with one to one correlation that the impact claimed in the present petition has been

actually borne by the Petitioner. The Respondent No. 1 has submitted that the Petitioner is duty bound to employ a cost-effective approach as it was under an obligation to mitigate and procure the solar cells from such countries where the import is not subject to Safeguard Duty. Further, there is no justification or basis for making an additional claim for GST on the Safeguard Duty which is again in the nature of a relief of restitution and the same is legally untenable. The Respondent No. 1 has further submitted that it is merely a Trader in the present case and has entered into a back to back agreement with Respondent No.2 (APSPDCL) and Respondent No. 3 (APEPDCL). Hence, in the eventuality that the present petition is allowed and relief sought by the Petitioner is granted, then the compensation/relief shall be paid by the ultimate beneficiaries i.e. APSPDCL and APEPDCL.

35. From the submissions of the parties, the following issues arise before this Commission:

Issue No. 1: Whether the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India is a Change in Law under Article 12 of the Power Purchase Agreement executed between the Petitioner and NTPC Limited? And Whether the Respondent should be directed to pay compensation as relief for the Change in Law effected 'Safeguard Duty Notification'?

Issue No. 2: Whether the Respondent should be directed to additionally compensate the Petitioner on account of the Goods & Services Tax levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the Power Purchase Agreement? AND

Issue No. 3: Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law And Whether the claim of Petitioners regarding 'Carrying Cost' by the Respondents is sustainable?

36. No other issue was pressed or claimed.

37. We now discuss the issues one by one:

Issue No. 1: Whether the issuance of Notification No. 01/2018-Customs (SG) dated 30.07.2018 by the Department of Revenue, Ministry of Finance, Government of India is a Change in Law under Article 12 of the Power Purchase Agreement executed between the

Petitioner and NTPC Limited? And Whether the Respondent should be directed to pay compensation as relief for the Change in Law effected 'Safeguard Duty Notification'?
AND

Issue No. 2: Whether the Respondent should be directed to additionally compensate the Petitioner on account of the Goods & Services Tax levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the Power Purchase Agreement?

38. Since Issue No. 1 and Issue No. 2 are interconnected the same are taken together for discussion. The Petitioner has 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 Petitioner and thus adversely impacted the business of the Petitioner. The imposition of safeguard duty is covered under Article 12 of the PPAs which provides for 'Change in law' and the relief for such 'Change in Law' and requested that the same may be allowed. The Petitioner has submitted that it is also bearing an additional financing cost and paying 5% GST on the amount paid as Safeguard Duty as such the same should also be compensated. ***Per Contra***, 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 12 of the PPAs has to be decided after taking into consideration the submissions made in the pleadings and during hearings. The impugned notification is prospective in its operation and cannot be given effect to any period prior to 30.07.2018. Further, there is no justification or basis for making an additional claim for GST on the Safeguard Duty which is again in the nature of a relief of restitution and the same is legally untenable. The Respondent No. 1 has further submitted that in the eventuality that the present petition is allowed and the relief sought by the Petitioner is granted, then the compensation/ relief shall be paid by the ultimate beneficiaries i.e. APSPDCL and APEPDCL.
39. The Commission observes that various provisions of the PPAs provides for 'Change in Law' which stipulates as under:-

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

to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commissions;”

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

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

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- any change in tax or introduction of any tax made applicable for supply of power by the SPD as per the terms of this Agreement.*

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

12.2 Relief for Change in Law

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

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

40. The Commission observes that vide Notification No. 1/2018 (SG) dated 30.07.2018, the Central Government imposed safeguard duty as per the following rates on the import of ‘Solar Cells whether or not assembled in modules or panels’:-

- 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.

41. From the above, the Commission notes 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'.
42. The Commission is of the view that 'Safeguard Duty' became effective from 30.07.2018 and hence the date of notification becomes the 'reference date' for imposing the same, meaning that 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 reference date i.e. 30.07.2018 due to the circumstances permitted under provisions of the executed PPAs;
43. The Commission observes that in the instant petition, the bid was submitted by the Petitioner in the online e-Reverse Auction held on 11.04.2017 and the 'Letter of Intent' was issued on 11.12.2017. Further, the PPA was executed on 07.02.2018. The safeguard duty was levied vide 'Safeguard Duty Notification' on 30.07.2018 i.e. before the SCoD of the project which

is 09.02.2019. As per the 'Bill of Entry' dated 18.02.2019 the Petitioner has itself imported the "Solar Module (TYPE-JKM330PP-72-V)". The Commission observes that since the bid was submitted and the PPA was executed before the date of imposition of safeguard duty, therefore in view of the principles decided in the preceding para the protection under clause of 'Change in Law' as contained in Article 12 of the PPAs is available to the Petitioner.

44. Now we deal with the issue raised by the Respondent No.1 that the Petitioner was duty bound to employ a cost-effective approach as it was under an obligation to mitigate and procure the solar cells from such countries where the import is not subject to Safeguard Duty and the Petitioner was required to place on record its procurement contract/ EPC Contract to demonstrate whether it is obligated under the said Agreement to discharge the obligation of 'Safeguard Duty Notification'.

45. The Petitioner has submitted that none of the provisions of the PPA prescribes that the goods required for establishing the solar power generating stations be sourced from a specific location to avoid the impact of a Change in Law event. Moreover, the sourcing decisions are taken at the time of the bid, based on several techno-commercial factors such as the price of goods, reliability of the supplier to supply the desired quantity within the stipulated timelines and the quality of material. Since Safeguard Duty was not prevalent at the time of bid submission, it could not have factored in the same at the time of quoting the bid tariff. The Petitioner has submitted that it had evaluated both domestic as well as international suppliers for procurement of modules and selected its module supplier after considering several techno-commercial factors and its decision to source its supplies from a specific module supplier cannot be considered imprudent merely due to a subsequent imposition of Safeguard Duty. The commercial considerations involved in the procurement of modules by the Petitioner cannot have any bearing on its entitlement for relief on account of occurrence of a Change in Law event. The Petitioner has submitted that it has placed on record the bills of entry submitted to the customs authorities for obtaining clearance of the imported solar modules alongwith the payment receipts. The bills of entry clearly mention the name of the Petitioner as the "importer" of solar modules. As per the relevant provisions of the Customs Act 1962, the obligation of payment of all applicable import duties to the customs authorities for getting such imported goods cleared for home consumption is upon the importer of goods. The Petitioner has submitted that it is not required to place on record the module supply

agreement to demonstrate that the burden of payment of Safeguard Duty has been borne by the Petitioner. In a competitive bidding scenario, the design of the bid levelized tariff and the cost structure, including the module supply arrangements, constitute confidential and commercially sensitive information. In view thereof, the Petitioner has submitted that neither it can be compelled nor required to disclose the details of the calculations of the project cost or the component wise details of the capital employed.

46. The Commission observes that 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 levelled tariff without disclosing the details of the calculations of the project cost including capital expenditure. The component wise details of the capital employed are not required to be declared by the bidders. The design of the bid levelled tariff is solely a decision of the SPDs. The Commission is of the view that the commercial decisions taken by the Petitioner for project implementation including the mode of procurement of solar modules were taken by Petitioner prior to the implementation of 'Safeguard Duty Notification'. Therefore, it would not be appropriate to question the rationale of such commercial decisions on the basis of the differential rates which may be prevailing in countries where the import of Solar Modules was not subject to 'Safeguard Duty Notification'. The Commission further observes that it 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.
47. The other issue raised by Respondent No.1 is that there is no justification or basis for making an additional claim for 'GST' on the Safeguard Duty which is again in the nature of a relief of restitution and the same is legally untenable. The Respondent No.1 has submitted that the consequent impact of GST on account of safeguard duty is not an event which is covered under Article 12 of the PPA and if the claim of the Petitioner is accepted, then Article 12 of the PPA would be read as a 'restitutive' provision which this Commission in the case of *ACME Rewa Solar Energy Private Limited v. Solar Energy Corporation of India Limited and Ors.* (Acme Order) has already held that it is not allowed. Whereas, the Petitioner has submitted that the amount assessed and payable as Safeguard Duty to the Customs Authorities is inclusive of the GST amount and the Petitioner can discharge its obligation to

pay Safeguard Duty in its entirety only upon making payment of Safeguard Duty along with the applicable GST on such Safeguard Duty.

48. The Commission observes that the Directorate General of Taxpayer Services, Central Board of Excise & Customs in its official web-site www.cbic.gov.in has clarified as under:

“In cases where imported goods are liable to Anti-Dumping Duty or Safeguard Duty, calculation of Anti-Dumping Duty or Safeguard duty would be as per the respective notification issued for levy of such duty. It is also clarified that value for calculation of IGST as well as Compensation Cess shall also include Anti-Dumping Duty amount and Safeguard duty amount.”

49. The Commission observes that IGST has been levied by the competent authority in compliance with the various directions issued by the Government of India. Accordingly, the Commission is of the view that in cases, where imported goods are liable to Safeguard Duty, value for calculation of IGST includes Safeguard duty amount and the same has to be allowed. Further, the Commission would like to reiterate that the references made by the Respondent No.1 to the Commission’s Order dated 02.05.2019 in Petition No. 342/MP/2018 and 343/MP/2018, in the matter of *ACME Rewa Solar Energy Private Limited v. Solar Energy Corporation of India Limited and Ors.* are not relevant in the context of this issue, as neither there was a prayer in the said petitions regarding the same nor the same was pressed by the contracting parties.

50. In view of the discussions in the preceding paragraphs 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, 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 Petitioners. 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. It is pertinent to mention here that the Petitioners will submit the required documentation to the Respondent No.1 which will satisfy itself and submit the same along with its recommendations to the Respondent Discoms.

51. The next issue raised in the petition is that ‘the obligations and liabilities of NTPC to the Petitioners are on a ‘back to back’ basis vis-à-vis the obligation to be performed and liabilities to be discharged by the relevant Respondents as the Buying Entities’.
52. The Commission observes that the PPAs, inter alia, provide as under:

“F. NTPC has agreed to sign a Power Sale Agreement (PSA) with the Discom to sell such bundled power as per the provisions of the National Solar Mission.”

53. The Commission observes that APTEL in its Judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors*, has, inter alia, held as under:

“18. The trading activity has been recognized as a distinct activity under the Act. The statement of objects and reasons of the Act provides as under:

“(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary”.

19. The term trading has been defined in Section 2 (71) of the Act as under:

“(71) “trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly;

20. Unlike the generation, transmission, wheeling and retail sale, there is no tariff determination for trading. The trading is based on margin only. Thus, the trading being a purchase of electricity for re-sale, the trader would get a margin to be determined by the Central Commission under Section 79(1)(j) of the Act or by the State Commission under Section 86(1) (j) of the Act. Section 66 of the Electricity Act provides for the development of the market. The same reads as below:

“66. Development of market. The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such

manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard”

21. *So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.*

.....

24. *In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for re-sale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA.*

25. *According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2).*

26. *Now let us see as to whether there has been nexus between the PPA and PSA.*

.....

38. *In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that that PPA is linked to the PSA. Those clauses are reproduced herein:*

“(C) The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project for onward sale by PTC.

(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, for sale of such power from the Project.

(F) A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such

Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement”. {emphasis added}

39. *These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).*

.....

42. *Thus, it is clear that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Appellant which is the power generator and the Haryana Power (R-2) which is a deemed licensee who is the ultimate beneficiary of the PPA as well as the party to the PSA.*

.....

50. *As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC was required to enter into power sale agreement with the purchaser for onward sale of power from the Appellant’s project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance. In order to refer to this aspect, it would be proper to quote the relevant provisions of the PPA.*

.....

55. *It may be pointed out that on 21.9.2006, PTC (R-3) executed the PSA with the Haryana Power (R-2) as per its inexorable obligations under the PPA. This PSA was in fact veritable reproduction of the PPA. This is borne out from not only the findings of the State Commission while passing the impugned order but also from the very clauses of the PSA. Some of the relevant clauses of the PSA demonstrating that the said PPA and PSA were entwined and that the sustenance on one was dependent on the other which are reproduced below:*

“Recital C-

PTC has entered into a Power Purchase Agreement (hereinafter referred to as “PPA) on 19thOctober, 2005 as amended further vide an amendment agreement dated 18thSeptember, 2006 with M/s. Lanco Amarkantak Power Private Ltd., (the “Company”), a Generating Company as defined under the Electricity Act, 2003 and which the implementing a coal based thermal power station at Pathadi Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the “Project”), for a period of twenty five (25) years from the Commercial Operation Date of the Project”.

56. *In fact, Clause 3.1 (i) states that the PSA will not be effective until the conditions precedent as laid down in the PPA are duly satisfied. In terms of the clause 4.1 (v) of the PSA, it was explicitly agreed that PTC could not terminate the PPA except with prior consent of the Purchaser. As per clause 4.1 (ix), it was PTC’s obligation to*

participate and require the Company to participate in the Tariff Determination process as required by the Appropriate Commission.

57. As per clause 4.2 (i), it was the purchaser's obligation to make available any information required by the PTC in order to assist the Company to achieve Financial Close. Clause 15.1.2 (iii) of the PSA, is a provision which has been introduced specifically keeping in mind the clause 16.6.5 introduced into the PPA through the amendment dated 18.9.2006. The reading of the said clause of the PSA will conclusively demonstrate that the same has been drafted in consonance with the amended PPA for the benefit of Haryana Power (R-2)."

54. From the above, the Commission is of the view that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Petitioners which are the power generators and the Respondents which are the Discoms and the ultimate beneficiaries of the PPA as well as parties to the PSA. The back to back nature of the PPA and PSA implies that the Respondent Discoms are liable to pay to the Respondent NTPC all that the said Respondent NTPC has to pay to the Petitioners. However, in so far as payment mechanism is considered, the issue raised for decision of the Commission is as to whether in view of the back to back nature of PPA and PSA, NTPC was liable to pay to the Petitioners only when/if the Respondent Discoms make payment to the Respondent NTPC. In this context, the Commission notes the Provisions of Article 10 of PPA and Article 6 of PSA.

55. Article 10 of the PPAs stipulates that:

"ARTICLE 10: BILLING AND PAYMENT

10.1 General

10.1.1 From the commencement of supply of power, NTPC shall pay to the SPD the monthly Tariff Payments, in accordance with this Article and Article 9. All Payments by NTPC shall be in Indian Rupees.

10.2 Delivery and Content of Monthly Bills/Supplementary Bills

10.2.1 The SPD shall issue to NTPC a signed Monthly Bill/Supplementary Bill for the immediately preceding Month between the 5th day & up to the 15th day of the next Month. In case the Monthly Bill/Supplementary Bill for the immediately preceding Month is issued after the 15th day of the next Month, the Due Date for payment of such Monthly Bill/ Supplementary Bill shall be as detailed at Article 10.3.1 below.

Each Monthly Bill shall include all charges as per this Agreement for the energy supplied for the relevant Month based on Energy Accounts issued by RLDC/SLDC or any other competent authority which shall be binding on both

the Parties. The Monthly Bill amount shall be the product of the energy metered and the applicable tariff.

10.3 Payment of Monthly Bills

10.3.1 NTPC shall pay the amount payable under the Monthly Bill/Supplementary Bill by the (fifth) 5th day of the immediately succeeding Month (the Due Date) in which the Monthly Bill/ Supplementary Bill is issued by the SPD to the NTPC to such account of the SPD, as shall have been previously notified by the SPD in accordance with Article 10.3.2 (iii) below. In case the Monthly Bill or any other bill, including a Supplementary Bill is issued after the (fifteenth) 15th day of the next month, the Due Date for payment would be (fifth) 5th day of the next month to the succeeding Month.

10.3.2 All payments required to be made under this Agreement shall also include any deduction or set off for:

- i) deductions required by the Law; and*
- ii) amounts claimed by NTPC, if any, from the SPD, through an invoice to be payable by the SPD, and not disputed by the SPD within fifteen (15) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed, it is clarified that NTPC shall be entitled to claim any set off or deduction under this Article, after expiry of the said fifteen (15) Days period.*
- iii) The SPD shall open a bank account at Pune (the "SPD's Designated Account") for all Tariff Payments (including Supplementary Bills) to be made by NTPC to the SPD, and notify NTPC of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. NTPC shall also designate a bank account at New Delhi ("NTPC's Designated Account") for payments to be made by the SPD to NTPC, if any, and notify the SPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. NTPC and the SPD shall instruct their respective bankers to make all payments under this Agreement to the SPD' Designated Account or NTPC's Designated Account, as the case may be. and shall notify other Party of such instructions on the same day.*
- iv) Performance Guarantee Deposit (PGD) @Rs 10 lakh/MW shall be raised in two seats by deducting from payments to SPDs in 24 equal installments. It will stay with NTPC for 25 years. PGD shall be refunded to the SPDs without interest within three (3) months after expiry of 25 year term of PPA subject to satisfactory performance of the project. In case the SPD winds up his project or terminates PPA prior to completion of 25 year term of PPA the PGD shall be forfeited.*

10.3.3 Late Payment Surcharge

In the event of delay in payment of a Monthly Bill by NTPC within thirty (30) days beyond its Due Date, Late Payment Surcharge shall be payable to the SPD at the rate of 1.25 % per month on the outstanding amount calculated on a day to day basis subject to such late payment is duly received by NTPC

under the PSA. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.

56. Article 6 of the PSA stipulates as:

ARTICLE 6: BILLING AND PA YMENT

6.1 General

6.1.1 From the commencement of supply of power by NTPC, the APDISCOM(S) shall pay to NTPC the monthly Tariff Payments, on or before the Due Date, in accordance with Tariff as specified in Article 5. All Tariff Payments by the APDISCOM(S) shall be in Indian Rupees.

6.2 Delivery and Content of Monthly Bills

6.2.1 NTPC shall issue to the APDISCOM(S) a signed Monthly Bill for the month on the last Business Day of the billing Month.

6.2.2 The Monthly Bill prepared as detailed in Schedule-! of the PSA shall include the following;

i) Provisional Bill for Bundled Power Supplied in the Month;

ii) (a) Adjustments against the Provisional Bill(s) based on Energy Accounts for the Bundled Power Supplied in the Months) preceding to the billing month;

(b) Any other adjustments to cover changes in tariff of NTPC Power, open access related charges and any other prior-period;

iii) Late Payment Surcharge, if any; and

iv) Taxes, Duties, Levies etc. as applicable.

6.3 Payment of Monthly Bills

6.3.1 The APDISCOM(S) shall pay the amount payable under the Monthly Bill on the Due Date to such account of NTPC, as shall have been previously notified to the APDISCOM(S) in accordance with Article 6.3.2 below.

6.3.2 NTPC shall open a bank account at New Delhi ("NTPC's Designated Account") for all Tariff Payments to be made by the APDISCOM(S) to NTPC, and notify the APDISCOM(S) of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. The APDISCOM(S) shall also designate a bank account at Vijayawada (the "APDISCOM(S) Designated Account") for payments to be made by NTPC to the APDISCOM(S), if any, and notify NTPC of the details of such account ninety (90) Days before the dispatch of the first Monthly Bill. NTPC and the APDISCOM(S) shall instruct their respective bankers to make all payments under this Agreement to the APDISCOM(S)' Designated Account or NTPC's Designated Account, as the case may be, and shall notify either Party of such instructions on the same day.

6.3.3 Late Payment Surcharge

In the event of delay in payment of a Monthly Bill by the APDISCOM(S) thirty (30) days beyond its Due Date, a Late Payment Surcharge shall be payable by the APDISCOM(S) to NTPC at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis. The Late Payment Surcharge shall be claimed by NTPC through the next Monthly Bills."

57. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondent NTPC are not conditional upon billing and payment between the Respondent NTPC and the Respondent Discoms. Although, the above provisions (Article 10 of PPA and Article 6 of PSA) deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg can be applied to the payment towards incremental impact on account of Safeguard Duty being a change in law, as well. In view of the above, Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondent NTPC all that the said Respondent NTPC has to pay to the Petitioner. However, payment to the Petitioner by Respondent NTPC is not conditional upon the payment to be made by the Respondent Discoms to Respondent NTPC . The Commission having held that Safeguard Duty is a change in law, the Respondent NTPC is liable to pay to the Petitioners as per discussion above. The Respondent NTPC is eligible to claim the same from the Respondent Discoms on back to back basis.

58. The issues are decided accordingly.

Issue No. 3: Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law And Whether the claim of Petitioners regarding 'Carrying Cost' by the Respondents is sustainable?

59. The Petitioner has submitted that Article 12 of the PPA sets out the scope and extent of the change in law events for which the Petitioner can claim compensatory and restitutive relief. Further, “*Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects*” clarifies that the term “taxes” appearing in Clause 5.7.2 includes duties and cess. The clarification establishes that the intention of the Central Government should be given a wide meaning to the Change in Law provision under the PPA. Accordingly, the Petitioner is entitled to compensatory relief and for restitution to the same economical position. ***Per Contra***, the Respondent No. 1 has submitted that the provisions of the PPAs have become final and binding on the parties. Therefore, the PPA governs the contractual rights and obligations. The PPAs do not have any clause regarding restitution to the same financial position.

60. The Commission observes that *'The Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid connected Solar PV Power Projects'* (hereinafter referred to as *'Bidding Guidelines'*) dated 03.08.2017 issued by MNRE with regard to the Change in Law provides, inter alia, as under:

"5.7. CHANGE IN LAW

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."

61. From the above, the Commission observes that the Bidding Guidelines provide for placing the SPD in the same financial position as if it would have been, had it not been for the occurrence of the Change in Law. However, the Petitioner has neither approached the Commission for the alignment of the PPAs with the *'Bidding Guidelines'* nor there is a prayer in the petitions to this effect. However, the Petitioner executed the PPA with the Respondent No.1 (NTPC). The Petitioner did not raise any objection to the scope of the provisions contained in the PPA being not consistent with the Guidelines prior to or at the time of execution of the PPA. In view of the above, the provisions of the PPA has become final and binding on the contracting parties. The PPA does not contain any provision relating to economic restitution. In view of the above, the Commission does not consider it appropriate to consider the issue of restitution. Hence, the Commission decides to proceed with the matter taking into consideration only the PPA as presented before it.

62. 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.”

63. 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/ judgment. 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 judgment 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.”

64. The Commission observes that since the PPA does not have a provision dealing with restitution principles of restoration to same economic position therefore, the claim regarding separate 'Carrying Cost' is not admissible.

65. Our decisions in this Order are summed up as under:

- a. **Issue No. 1 and Issue No. 2:** 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 IGST on Safeguard duty amount is allowed as discussed in para 49. The Commission directs the Petitioner 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, duly supported by relevant invoices and Auditor’s Certificate as discussed in para 50 above. The Respondent NTPC is liable to pay to the Petitioner and it is not conditional upon the payment to be made by the Respondent Discoms to Respondent NTPC. However, the Respondent NTPC is eligible to claim the same from the Respondent Discoms on ‘back to back’ basis as discussed in para 57 above. The claim based on discussions in para 50 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 Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for 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. 3:** The claim regarding restoration to same economic condition prior to occurrence of change in law and separate ‘Carrying Cost’ is not admissible.

66. Accordingly, the Petition No. 176/MP/2019 is disposed of.

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