



नईदिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 47/MP/2019

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I.S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

आदेश दिनांक/ Date of Order: 24th of August, 2020

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreements executed between the Petitioner and the Respondent for seeking approval of Safeguard Duty as an event under 'Change in Law'.

AND IN THE MATTER:

Avaada Clean Energy Private Limited
3rd Floor, PTI Building
4 Parliament Street,
New Delhi- 100001

...Petitioner

Versus

1. Ordnance Factory Board
Ministry of Defence,
Kalpi Road, Kanpur
Uttar Pradesh –208009
2. Solar Energy Corporation of India
1st Floor, A-Wing, D-3,
District Center- Saket,
New Delhi: 110017

...Respondents

Parties Present: Shri Ankoor Sood, Advocate, ACEPL
Shri Amit Ojha, ACEPL
Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Rajiv Srivastava, Advocate, OFC, Kanpur
Shri R. K. Singh, OFC, Kanpur

आदेश/ ORDER

The Petitioner, Avaada Clean Energy Private Limited is a project company of M/s. Giriraj Renewables Private Limited. The Petitioner is a solar generating company and has set up 5 MW of solar capacity project in Kanpur, Uttar Pradesh. The project was sanctioned and implemented under 'Defence Scheme' of Jawaharlal Nehru National Solar Mission (JNNSM). The Petitioner has filed the petition under Section 79 of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPA) executed between the Petitioner and the Ordnance Factory Board, Kanpur (Petitioner No. 1) for seeking approval of Safeguard Duty as an event under 'Change in Law'.

2. The Respondent No. 1, Ordnance Factory Board, Kanpur, is a unit of Ordnance Factory Board, Ministry of Defence (hereinafter referred to as 'OFC'). As the solar power generation is not the core area of OFC, Solar Energy Corporation of India (SECI), Respondent No. 2, was nominated to serve as consultant by the Ministry of New and Renewable Energy, Government of India (hereinafter referred to as 'MNRE'), to work on the project, including the authority to disburse Viability Gap Funding (VGF), if any, under the Defence Scheme.
3. The Respondent No. 2, Solar Energy Corporation of India (SECI), is responsible for implementation of a number of schemes of MNRE, the major one being the VGF schemes for large scale grid connected projects under Jawaharlal Nehru National Solar Mission (JNNSM), solar park scheme and grid connected solar rooftop scheme.
4. The Petitioner has made the following prayers:
 - (a) *Hold and declare that the **imposition of the Safeguard Duty** on "Solar Cells whether or not assembled in modules or panels" by Notification No. 01/2018-Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India is an event under 'Change in Law' under Article 12 of the PPA;*

- (b) *Restore the Petitioner to the **same economic condition prior** to occurrence of the Change in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff through suitable mechanism as prayed for in the present Petition;*
- (c) *In the alternative, direct a lump sum compensation of Rs. 3,60,11,266/- to be paid to the Petitioner in lieu of the additional levy of Safeguard Duty and IGST on importing solar cells plus **interest/carrying cost** at the rate of 15% p.a. from the date of impact till reimbursement by the Respondent; and*
- (d) *Pass such other orders that this Commission deems fit in the interest of justice.*

Submissions of the Petitioner

5. The Petitioner has submitted that SECI has been designated by MNRE as the nodal agency for implementation of the scheme for setting up of over 300 megawatts of grid connected and off-grid solar PV power projects by the Defence establishments with VGF funding under JNNSM.
6. The Petitioner has submitted that M/s Giriraj Renewables Private Limited was declared as a successful bidder against RFS (Request for Selection) dated 21.07.2017 issued by SECI for selection of Solar Power Developer (SPD) for development of 5 megawatt solar power project in OFC, Kanpur and was issued letter of intent dated 18.01.2018 for development of solar power projects, generation and sale of solar power under JNNSM. M/s Giriraj Renewables Private Limited formed a special purpose vehicle (SPV) namely M/s Avaada Clean Energy Private Limited (the Petitioner) within the provisions of the RFS. The Petitioner has agreed to set up a solar power project based on photo voltaic technology of five (5) megawatts capacity in OFC, Kanpur at a tariff of Rs. 4.18/kWh.
7. The Petitioner has submitted that it had executed viability gap funding (VGF) Securitization Agreement with SECI and also executed Power Purchase Agreement (PPA) dated 19.02.2018 (effective date being 18.02.2018) with OFC, Kanpur. It had also submitted the performance bank guarantee (PBG) to SECI as per the RFS document. As per the PPA, the scheduled commissioning date was 18.08.2018. However, the project was delayed and was actually commissioned on 14.09.2018.
8. The Petitioner has submitted that after execution of the PPA, i.e. after 18.02.2018, and before the commissioning of the project, i.e. 14.09.2018, a new law imposing Safeguard Duty on

solar cells was notified and brought into force vide Notification No. 01/2018-Customs (SG) dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, Government of India. The notification imposed Safeguard Duty based on the final findings F.No.22/1/2018-DGTR dated 16.07.2018 published in the Gazette of India, Extraordinary, Part I, Section 1 recommending imposition of Safeguard Duty on solar cells for a period of two years.

9. The Petitioner has submitted that Article 12 of the PPA contains the provisions relating to 'Change in Law' and in terms of this provision, it is clear that:
 - a. A change in law event includes enactment of a new law as well as a change in tax structure or introduction of any tax for setting up of solar power projects;
 - b. Such change in law event must occur after the Effective Date, i.e. 18.02.2018;
 - c. The change in law should result in additional recurring/ non-recurring expenditure or income.

10. The Petitioner has submitted that on 21.12.2018, it received a notice from the EPC (engineering, procurement & construction) contractor regarding the additional charges/ impact on account of the levy of Safeguard Duty on import of solar modules and cells in terms of the Notification No. 01/2018-Customs (SG) dated 30.07.2018. The Petitioner, on 25.01.2019, sent a notice of 'Change in Law' under the PPA to OFC, Kanpur explaining the impact on the cost of the project and increase in the total project cost on account of the imposition of Safeguard Duty.

11. The Petitioner has submitted that in terms of Article 12 of the PPA, the Commission is empowered to acknowledge a "change in law" and to provide relief that will be binding on both parties. In the instant case, the imposition of the Safeguard Duty on imported solar cells by the Department of Revenue, Ministry of Finance, Government of India clearly falls under the ambit of the 'Change in Law' clause of the PPA since it constitutes enactment, coming into effect, adoption, promulgation of a new law and also introduction of a new tax. Safeguard Duty qualifies as a tax imposed on the solar cells and modules which are the primary components in the setting up of a solar power plant.

12. The Petitioner has submitted that imposition of Safeguard Duty has resulted in additional cost for it because this cost was not contemplated by the Petitioner at the time of the bid and execution of the PPA. The Safeguard Duty has been levied subsequently leaving the

Petitioner with no choice but to bear the additional burden. The EPC contractor, on behalf of the Petitioner, has imported a total of 32 shipments of solar cells/ modules on which total impact of Safeguard Duty and IGST (Inter-State Goods and Services Tax) on Safeguard Duty is Rs. 3,60,11,266/- in terms of notification dated 30.07.2018. Further, it is also incurring carrying or interest cost since the compensation has not been received by it till date. It is entitled to compensation for the carrying cost/ interest calculated at the rate of 15% per annum from the date of the impact till reimbursement by OFC, Kanpur (Respondent No. 1).

13. The Petitioner has relied on the order dated 07.04.2016 passed by the Appellate Tribunal For Electricity (hereinafter referred to as 'the Tribunal') in the matter of *Uttar Haryana Bijli Vitran Nigam Limited v. CERC*. The Petitioner has also relied upon the order dated 20.07.2018 in Petition No. 98/MP/2017 passed by the Commission in *NTPC Ltd. v. Uttar Pradesh Power Corporation Ltd.*

Submission of Respondent No. 1 (OFC, Kanpur)

14. The Respondent No.1, OFC, Kanpur has submitted that the project was sanctioned and implemented under the Defence Scheme of JNNSM. As the solar power generation was not its core area, SECI (the Respondent No. 2) was nominated to serve as consultant to work on the project, including the authority to disburse Viability Gap Funding (VGF), if any, under the Defence Scheme. The detailed tender specifications and terms and conditions were framed by SECI. The entire contract was finalized by SECI and SECI can only elaborate on different provisions and aspects of the contract. Therefore, OFC, Kanpur cannot be made respondent in the case.
15. The Respondent No.1 has submitted that the PPA with the Petitioner is a fixed price agreement for 25 years, which has no nexus with the cost of setting up the said solar plant. The PPA also does not mention cost of inputs and taxes thereon in any manner. Further, the source(s) for procurement of the equipment required has been solely and independently decided by the Petitioner without any consultation or intervention by the Respondents. The equipment was available in India also. There was no compulsion on the Petitioner to import the equipment from China or from any other country or from a particular source. It has no role in procurement and the assets are owned by the Petitioner for the entire duration of the project.
16. The Respondent No.1 has submitted that the prices of solar equipment used in the plant have

decreased significantly during the implementation of the project. Further, the PPA for such solar plants are being concluded at much lesser tariffs these days than that mentioned in the instant PPA. The Petitioner has not bothered to revise the tariff downward for the solar energy being sold to OFC, Kanpur nor has it made any claim for the same, as the same is not provided in the PPA.

17. The Respondent No.1 has submitted that in terms of Article 12 of the PPA, in a '*Change in Law*' situation of "*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*", the aggrieved party shall be required to approach the Central Commission. This provision can, in no way, be extended to apply on the purchase of solar modules which remains a matter completely internal to the Petitioner.
18. The Respondent No.1 has submitted that Article 11.4 of the PPA has excluded "*Unavailability, late delivery or changes in the cost of the plant, machinery, equipment, material, spare parts or consumables for the power project*" from the condition of Force Majeure, which implies that fall-out of all these conditions is to be borne by the Petitioner. The change in cost may also result from change in any taxes/ levies/ duties. Thus, it is clearly provided that the Petitioner has not adhered to the letter and spirit of the PPA.

Submission of Respondent No. 2 (SECI)

19. The Respondent No. 2 (SECI) has submitted that the petition filed is liable to be dismissed for misjoinder of necessary parties. 'SECI' is not a party to PPA executed on 19.02.2018. There is no privity of contract between the Petitioner and SECI. For the present matter, SECI has acted as an implementing nodal agency of OFC, Kanpur and, therefore, was only an agent of OFC, Kanpur in its dealings with the solar power project. Any claim of the Petitioner is maintainable only against OFC, Kanpur and not against SECI.
20. The Respondent No. 2 has submitted that in terms of the clause 4.1(iv) of the Memorandum of Understanding (MoU), the implication on account of statutory levies due to Change in Law shall be governed in terms of the applicable provisions of the PPA i.e. Article 12 of the PPA dealing with Change in Law and the issue has to be construed and applied in terms of the PPA between the Petitioner and the Respondent No.1 and not against SECI.
21. The Respondent No. 2 has submitted that the PPA executed on 19.02.2018 is a binding document for all purposes on the contracting parties to the agreement. In terms of the PPA,

the Petitioner has agreed to sell solar power generated from the 5 MW solar PV project to OFC, Kanpur which in turn has agreed to procure such power. Accordingly, OFC, Kanpur being the beneficiary of the solar power, any relief for 'Change in Law' has to be pursued by the Petitioner against the OFC, Kanpur bilaterally and SECI has no involvement of any nature in regard to such claim.

22. The Respondent No. 2 has placed its reliance on the judgment of the Hon'ble Supreme Court in the matter of *Vivek Automobiles Ltd. v. Indian Inc.*, (2009) 17 SCC 657. It has been wrongly joined as a party to the proceedings. It is for the Petitioner and OFC, Kanpur to settle all claims and counter-claims either bilaterally or by adjudication process.

Rejoinder of the petitioner to the reply by Respondent No.1 (OFC, Kanpur)

23. The Petitioner has submitted that OFC, Kanpur has not contested the details of increase in the project cost on account of the levy of Safeguard Duty. Accordingly, the costing details submitted by it are deemed to have been accepted by OFC, Kanpur. Further, OFC, Kanpur and SECI, both are necessary and relevant party in the present petition.
24. The Petitioner has submitted that OFC, Kanpur has wrongfully submitted that the Petitioner has filed the present petition under Article 11.4 i.e. the Force Majeure clause and since the changes in the cost of the plant are excluded from the condition of Force Majeure, such changes in cost are payable by the Petitioner. This submission is completely flawed since the Petitioner is seeking relief under Article 12 i.e. 'Change in Law' clause and not under Force Majeure clause as submitted by OFC, Kanpur.
25. The Petitioner has submitted that Safeguard Duty on solar cells was introduced after execution of the PPA and was applicable to solar cells to be used in the solar power projects, which were previously exempted. The Petitioner's bid and the resulting tariff did not factor in the additional financial burden on account of introduction of Safeguard Duty. On and from 30.07.2018, the Petitioner has incurred additional financial burden on various solar components. Hence, the imposition of Safeguard Duty after the bid and execution of the PPA falls under Article 12 as an event under 'Change in Law'.
26. The Petitioner has also submitted that as per Article 12 of the PPA, the following conditions have to be satisfied to claim relief on account of 'Change in Law':-

- (i) The coming into effect of the enactment or coming into force of any law provided that such 'Change in Law' results in an additional recurring/ non-recurring expenditure.
- (ii) To determine the consequence of 'Change in Law' and to compensate a party affected by such 'Change in Law' so that the party is restored to the same economic position as if such 'Change in Law' had not occurred.

27. The Petitioner has submitted that all the conditions for "change in law" event prescribed under Article 12 of the PPA are duly satisfied as under:

- (i) A new law imposing Safeguard Duty on solar cells has been notified and brought into force with effect from 30.07.2018 which is after the execution of the PPA on 18.02.2018, and before the commissioning of the project, i.e. 14.09.2018,
- (ii) 'Change in Law' has resulted in an additional recurring/ non-recurring expenditure which the Petitioner is liable to pay.
- (iii) The introduction of Safeguard Duty on imported solar cells by the government is an event beyond the control of the Petitioner and the same is a 'Change in Law' event that has resulted in increased project cost for the Petitioner.

28. The Petitioner has submitted that there are multiple judgments passed by the Tribunal and/or other State Electricity Regulatory Commissions holding the introduction and imposition of Safeguard Duty on solar modules and cells as an event under Change in Law and has accordingly granted relief to such solar power developers. The Petitioner has referred to various orders of MERC (Maharashtra Electricity Regulatory Commission) that has allowed levy of Safeguard Duty as an event of Change in Law in respect of import of solar modules and cells for setting up solar power projects.

29. The Petitioner has submitted that contention of OFC, Kanpur for restricting the benefit of "change in law" only to costs affecting the supply of power is erroneous and liable to be rejected. Further, it is incurring carrying or interest cost since the compensation has not been received by it till date. In the context of the claim for carrying cost, the Petitioner has relied upon Order of the Commission dated 17.09.2018 in petition No. 235/MP/2015 and order of RERC (Rajasthan Electricity Regulatory Commission) dated 23.04.2019 in petition No. RERC-577/2015.

30. The Petitioner submitted that the total escalation in construction cost incurred by the

Petitioner due to imposition of Safeguard Duty and IGST on Safeguard Duty is Rs. 3,60,11,266/- plus interest/ carrying cost. To the extent of the aforementioned cost escalation, relief should be provided to the Petitioner by adjusting the tariff or, in the alternative, by way of lump sum compensation.

Rejoinder by the petitioner to the reply by Respondent No. 2 (SECI)

31. The Petitioner has submitted that SECI has not contested the details of the increase in project cost on account of the levy of Safeguard Duty submitted by the Petitioner. Accordingly, the costing details submitted by the Petitioner are deemed to have been accepted by SECI. Further OFC, Kanpur and SECI both are necessary and relevant parties in the present petition.
32. The Petitioner has submitted that Respondent No.2, even though not a party to the PPA, may be a relevant party for the present proceedings since:
- (a) It is the nodal agency responsible for implementation of the VGF scheme for large scale grid connected projects under JNNSM, solar park scheme and grid connected solar rooftop scheme.
 - (b) It has been designated by the Government of India as the primary nodal agency for implementation of the scheme for setting up of over 300 MW capacity of grid connected and off-grid solar PV power projects.
 - (c) The project commenced pursuant to RFS dated 21.07.2017 for selection of SPD for development of 5 MW solar power project in OFC, Kanpur issued by the Respondent No.2.
 - (d) The Letter of Intent dated 18.01.2018 was issued to the Petitioner by Respondent No. 2 after being the successful bidder in terms of the aforesaid RFS dated 21.07.2017.
 - (e) Under the Request for Selection issued by Respondent No.2 and as per the MOU executed between Respondent Nos.1 & 2, the Respondent No.2 is inter alia responsible for:
“Construction Monitoring etc., including commissioning and synchronisation for implementation of the solar project on mutual agreed terms and as per the scheme of MNRE...”
33. The Petitioner has submitted that the relief in the petition is directed against OFC, Kanpur i.e. the signatory to the PPA. The compensation in terms of the above prayers is payable by OFC, Kanpur, which is the party to the PPA. Hence, the petition has been correctly framed.

34. The Petitioner has submitted that SECI has not addressed the substantive issue regarding the “change in law” on account of levy of Safeguard Duty. There is no denial that the levy of Safeguard Duty constitutes a “change in law” event in terms of the PPA and the Petitioner is entitled to compensation in respect of the same.

Supplementary Reply by Respondent No.1 (OFC, Kanpur)

35. The Respondent No. 1 has submitted that no proof has been furnished that the Safeguard Duty was actually paid on solar panels imported from China. The only document referring to the payment is the Auditor’s certificate dated 07.01.2019. The custom invoice submitted to the Respondent by the Petitioner is in the name of M/s Giriraj Renewables Pvt. Ltd. There is nothing mentioned in the custom invoice to suggest that the solar modules imported were for installation by the Petitioner in OFC, Kanpur. The custom invoice pertained to the Badlapur projects being developed by the Petitioner whose COD was 16.09.2018.

36. The Respondent No.1 has referred to the letter dated 30.07.2018 written by the Petitioner, informing that their vendor vide their letter had informed about the delay in despatch of shipment of modules due to truck union strike. The shipment was received by the vendor before 30.07.2018, the date on which Safeguard Duty became payable. The Respondent has also referred to the Petitioner’s letters dated 01.06.2018 and 30.06.2018 wherein the date of synchronisation and commissioning has been mentioned as 31.07.2018 while in another letter dated 20.07.2018, the date of synchronisation and commissioning has been mentioned as 10.08.2018. The Respondent No. 1 has submitted that the letter of 20.07.2018 is significant to demonstrate that if the Petitioner had not been supplied the modules before 20.07.2018, how could the date of synchronisation and commissioning be indicated as 10.08.2018. The SCoD for the project was 18.08.2018. Accordingly, the Respondent invoked Article 4.6.1 of the PPA and charged an amount of Rs 27 lakhs to the Petitioner towards liquidated damages for the delay of 27 days in commissioning of project which was paid by the Petitioner.

Rejoinder by the petitioner to the Supplementary reply by Respondent No.1 (OFC, Kanpur)

37. The Petitioner has submitted that it has furnished the Auditor’s Certificate which contains all details of the additional burden on the Petitioner on account of the imposition of Safeguard duty and certifies impact of the Safeguard Duty. The auditor’s certificate has been prepared

after reviewing all the back-up material and documents to establish the additional cost incurred by the Petitioner on account of levy of Safeguard Duty. The auditor's certificate has been considered adequate, sufficient and appropriate document by this Commission for determining the impact of a Change in Law event at the petition stage, subject to verification at a later stage. In this context, the Petitioner has placed its reliance on the order of the Commission dated 19.09.2018 in Petition Nos. 50/MP/2018 and 52/MP/2018, and Order dated 14.03.2018 in Petition No. 13/SM/2017.

38. The Petitioner has submitted that M/s Giriraj Renewable Pvt. Ltd. (now known as Avaada Energy Private Limited) is the Engineering, Procurement and Construction contractor of the Petitioner. The Petitioner has placed on record a letter dated 21.12.2018 bearing no. GRPL/ACEPL/EPC/001 sent by the EPC contractor (M/s. Giriraj Renewable Pvt. Ltd.) to the Petitioner demanding for payment of the additional cost incurred by the EPC contractor on account of levy of Safeguard Duty.
39. The Petitioner has submitted that the delay of 27 days in commissioning the project is a separate issue and is not linked with the compensation payable for a "Change in Law" event. Article 12 of the PPA, which deals with "Change in Law" does not make any exclusions based on delay in commissioning the project. The delay in commissioning was due to extraneous and unforeseen factors (force majeure events) which were completely outside the control of the Petitioner. As on date, the project has been commissioned with the consent and concurrence of OFC, Kanpur. The Petitioner was constrained to pay the applicable liquidated damages on this account under protest due to threat regarding invocation of Performance Bank Guarantee (PBG) from OFC, Kanpur. Hence, the Respondent No.1 cannot deny the Safeguard Duty on the ground of delay in commissioning.
40. The Petitioner has submitted that it imported the solar modules/ panels on a date after the imposition of the Safeguard Duty on 30.07.2018. The scheduled date of commissioning of the project being 18.08.2018 and it being a small project of 5 MW only, the Petitioner was under the impression that the project will not require much installation time. Reliance by OFC, Kanpur on the letter dated 30.07.2018 is flawed and erroneous. The letter does not deal with or refer to solar modules at all and only states that some material has been delayed on account of the strike of the truck union. As a matter of fact, the import by the Petitioner for the purposes of the project was after 30.07.2018 and this has been duly confirmed through the

Auditor's certificate.

41. The Petitioner has submitted that OFC, Kanpur has contended that as per the provisions of the Defence Procurement Manual, 2009, it is not liable to compensate. This contention is liable to be rejected since the relationship between the parties is governed by the PPA and Article 12 of the PPA specifically provides for compensation/ relief to a party that incurs additional cost on account of a "Change in Law" event. The Defence Procurement Manual, 2009 was not part of the tender terms and has no application in the present case.

Analysis and Decision

42. The Petition was filed on 21.02.2019 and was admitted on 06.03.2019. The Petition came up for hearing on 17.07.2019, 11.12.2019 and was reserved for Orders on 30.06.2020. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
43. We think it appropriate to first deal with preliminary objections raised by the Respondents. The Respondent No. 1 (OFC, Kanpur) has submitted that since solar power generation was not its core area, SECI (Respondent No. 2) was nominated to serve as consultant to work on the project, including the authority to disburse Viability Gap Funding (VGF). The detailed tender specifications and terms and conditions were framed by SECI and entire contract was finalized by SECI. Therefore, OFC, Kanpur cannot be made Respondent in the case. On the other hand, the Respondent No. 2 (SECI) has submitted that the petition is liable to be dismissed for misjoinder of necessary parties. It has submitted that SECI is not a party to the PPA and, there is no privity of contract between the Petitioner and SECI. It has further submitted that in terms of the clause 4.1(iv) of the Memorandum of Understanding (MoU) between OFC, Kanpur and SECI, any implication on account of statutory levies due to Change in Law shall be governed in terms of the applicable provisions of the PPA. Therefore, it has submitted that the issue has to be construed and applied in terms of the PPA between the Petitioner and Respondent No.1 and not against SECI.
44. We have considered the submission of the parties. On 07.01.2015, MNRE issued guidelines for setting up over 300 MW of grid-connected and off-grid solar PV power projects by defence establishments under Ministry of Defence and para-military forces (under Ministry of Home Affairs) with Viability Gap Funding (VGF) under Phase-II/ Phase III of JNNSM during 2014-2015 and onwards. The relevant extract of the MNRE guidelines reads as under:

“6. Role of SECI: The SECI will be responsible for Fund Management i.e. release of VGF, on behalf of MNRE. For Fund Management, SECI will be entitled for a Management Fee @ 1% of the subsidy component. Besides handling VGF fund, SECI will also do other activities as mentioned in the Scheme. It will also be monitoring the commissioning of the solar projects and the performances post-commissioning of the projects.”

45. Some relevant extracts from Memorandum of Understanding (MoU) dated 16.11.2016 that was executed between SECI and OFC, Kanpur, read as under:

“4 ROLES AND RESPONSIBILITIES

4.1 SECI's Responsibilities: SECI shall be responsible for carrying out following activities:

i) SECI shall undertake the project management consultancy activities including bid process management, preparation and publication of Request for Selection Documents for Selection of SPDs, evaluation of bids received against the RfS, Selection of SPD(s), construction monitoring etc. including commissioning and synchronization for implementation of the Solar Project on mutually agreed terms and as per the Scheme of MNRE for which OFK will not be liable to pay any fee to SECI. The capacity for project will be worked out by SECI on the basis of load data provided by OFK. The power so generated will be fully consumed by OFK.

ii) Liasoning with Ministry of New and Renewable Energy and release of viability gap fund as per the provisions of the scheme.

iii) Any other activities as deem fit and necessary by the Parties for achieving the objectives of this MOU.

iv) The implication on account of statutory levies due to Change in Law or thereof (if any) shall be addressed with appropriate provisions in PPA.

4.2 OFK Responsibilities: OFK shall be responsible for carrying out following activities:

i) To provide land free from an encumbrance for the entire term of the PPA to the SPD selected by SECI on right to use basis.

ii) To enter into long term Power Purchase Agreement for a period of 25 years with the SPD selected by SECI at the pre-fixed tariff as per the Scheme or discovered tariff (as applicable) for purchase of power generated on long term basis with an appropriate payment security mechanism built therein.

iii) OFK facilitate the necessary permits and clearances required for construction and operation of the Solar Projects.

iv) Any other activities as deem fit and necessary by the Parties for achieving the objective of this MOU.”

46. Some relevant Recitals from the PPA dated 18.02.2018 signed between the Petitioner and Respondent No. 1 (OFC, Kanpur) are as under:

A. SECI has been designated by the Government of India as the nodal agency for implementation of MNRE scheme for setting up of over 300 MW of Grid-connected & Off-Grid Solar PV Power Projects by Defence Establishments with VGF funding under Jawaharlal Nehru National Solar Mission (JNNSM) of Government of India (GoI).

B. Giriraj Renewables Private Limited has been declared as a successful bidder against RfS No. SECI/C&P/OFCK5/062017 dated 21/07/2017 issued by SECI for selection of SPD

for development of capacity of 5 MW in OFC, KANPUR and have been issued Letter of Intent (LOI) SECI/JNNSM/LOI/OFC-K/18672 dated 18/01/2018 for development of a Solar Power Project, generation and sale of solar power under the above Mission.

- C. M/s Giriraj Renewables Private Limited had formed a Project Company M/s Avaada Clean Energy Private Limited within the provisions of the RfS (hereinafter called SPD) for the development of the Solar Power Project, generation and sale of power under the above Mission. Pursuant to the issuance of LOI by SECI, the SPD has agreed to set up the Solar Power Project based on Photo Voltaic technology of 5 MW capacity in OFC, KANPUR.
- D. The SPD has agreed to execute Viability Gap Funding (VGF) Securitization Agreement, (if applicable) with SECI for creating a charge on the Project Assets based on which the SPD would be eligible to receive VGF support amounting to maximum of Rs. NIL [Insert Sanctioned VGF Amount in Figure] (Rupees in word) as per terms and conditions of the VGF Securitization Agreement. [Applicable only in case of positive VGF Amount].
- E. The SPD has agreed to sign this Power Purchase Agreement with OFC, KANPUR to sell Solar Power to OFC, KANPUR as per the terms and conditions of this Agreement.
- F. OFC, KANPUR has agreed to purchase such Solar Power from SPD as a buyer as per the provisions of the JNNSM.
- G. The SPD has submitted the Performance Bank Guarantee to SECI as per the format provided as per the RfS document.
- H. OFC, KANPUR agrees to procure power from the SPD up to the Contracted Capacity (as defined herein) at a pre-determined Tariff as per Article 9 of this Agreement and as per the terms of this Agreement.”

47. Section 230 of the Contract Act, 1872 stipulates as under:

“230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.- In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to the contrary: Such a contract shall be presumed to exist in the following cases-

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;*
- (2) Where agent does not disclose the name of his principal;*
- (3) Where the principal, though disclosed, cannot be sued.”*

48. The Hon’ble Supreme Court in the matter of Vivek Automobiles Ltd. v. Indian Inc., (2009) 17 SCC 657 has held as under:

“8. Section 230 of the Contract Act categorically makes it clear that an agent is not liable for the acts of a disclosed principal subject to a contract to the contrary. No such contract to the contrary has been pleaded. An identical issue was considered by this Court in Marine Container Services South (P) Ltd. v. Go Go Garments [(1998) 3 SCC 247: AIR 1999 SC 80] where a similar order passed under the Consumer Protection Act was set aside by this Court. It was held that by virtue of Section 230 the agent could not be sued when the principal had been disclose.”

49. The Commission observes that as per the bidding documents, SECI's role has been broadly provided to be that of the implementing nodal agency with regard to setting up the 5 MW grid-connected solar PV power project at OFC, Kanpur under the Defence Scheme of JNMSM. Further, the MoU dated 16.11.2016 entered into between SECI and OFC, Kanpur details responsibilities of SECI with regard to setting up of the solar project including rendering of project management consultancy activities, preparation and publication of the RFS documents, selection of the solar power developer (successful bidder), construction monitoring, releasing VGF as per the terms and conditions of the Guidelines of MNRE etc. Clause 4.1(iv) of the MoU between SECI and OFC, Kanpur states that the implication on account of statutory levies due to Change in Law shall be governed in terms of the applicable provisions of the PPA i.e. Article 12 of the PPA dealing with Change in Law.
50. In terms of the above, in our view, the Change in law issue has to be adjudicated and decided. in terms of the PPA between the Petitioner and Respondent No.1 and not against SECI as SECI is not a party to the PPA and no other document has been placed on record which shows that SECI has accepted the responsibility under the PPA on behalf of OFC, Kanpur including to compensate the Petitioner for Change in Law event. Further, the PPA is a binding document for all purposes between the Petitioner and Respondent No.1 in terms of which the Petitioner has agreed to sell solar power generated from the 5 MW solar PV project to Respondent No.1 (OFC, Kanpur) which in turn has agreed to procure such power at the rate agreed in the PPA and also to compensate for the consequences of change in law. Merely because SECI was entrusted with consultancy for setting up of the solar project in terms of the policy of Government of India and MoU between the Petitioner and Respondent No.1 does not render SECI liable for the claims under change in law. In fact, there is no privity of contract between the Petitioner and SECI with regard to generation and supply of power from the project of the Petitioner and payment thereof. The Commission is of the view that the preliminary objection of Respondent No.1 cannot be sustained as it is the Respondent No.1 which is liable to compensate the Petitioner for events of Change in Law in terms of the PPA.
51. SECI has also taken objection to its being impleaded as Respondent No.1 in the petition and has sought deletion of its name on the ground of misjoinder of parties. In this connection, we note that even though SECI has been impleaded as a party by the Petitioner, no claims have been made by the Petitioner against SECI. In the matter of Udit Narayan Malpaharia Vs.

Board of Revenue [AIR 1963 SC 786], the Hon,ble Supreme Court has explained the concepts of necessary party and proper party to a proceedings as under:

“7. To answer the question raised, it would be convenient at the outset to ascertain who are necessary and proper parties in a proceedings. The law on the subject is well settled: It is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decisions on the questions involved in the proceedings.”

52. In the light of the above exposition of law, we are of the view that SECI is not a necessary party to the proceedings since an effective order for change in law can be passed in its absence and no relief qua SECI is required to be granted in the present case. However, SECI is a proper party for the purpose of effective and final decision in the disputes involving the projects implemented under the defence scheme of JNNSM for the reasons recorded hereafter. SECI is the nodal agency responsible for the implementation of the VGF scheme for large scale grid-connected projects under JNNSM. Further, SECI has been designated by MNRE as the nodal agency for implementation of scheme for setting up of over 300 MW capacity of grid connected and off-grid solar PV power projects. Since SECI is involved in the project from the stage of issue of RFP, selection the project developer, signing of the PPA between the selected project developer and OFC Kanpur, release of VGF funding etc., the presence of SECI is necessary for assistance of the Commission for effective and final decision on the questions of disputes involved in the petition. Accordingly, the contention of SECI for deletion of its name as a respondent in the petition is rejected.
53. Another objection raised by OFC, Kanpur is that the project was sanctioned and implemented under Defence Scheme of JNNSM and that as per the provisions of the Defence Procurement Manual, 2009, it is not liable to compensate for any change in law. On the other hand, the Petitioner has submitted that the Defence Procurement Manual, 2009 was not a part of the RFP and any other bidding document and, therefore, has no bearing in the instant case.
54. In our view, PPA entered into between the Petitioner and OFC, Kanpur is a binding document. In terms of the PPA, the Petitioner has agreed to sell solar power generated from the 5 MW Solar PV Project to OFC, Kanpur which in turn has agreed to procure such power. As the Defence Procurement Manual, 2009 does not find mention either in the bid document or the PPA, the Petitioner cannot be held bound by its terms. OFC, Kanpur has itself invoked Article 4.6.1 of the PPA and charged an amount of Rs 27 lakhs to the Petitioner towards

liquidated damages for the delay of 27 days in commissioning of project and thus acted in terms of the PPA thereby accepting its provisions. In view of above, contention of OFC, Kanpur that it is not bound by provisions of PPA in compensating the Petitioner for change in law taking recourse to provisions of the Defence Procurement Manual, 2009, is not tenable. In our view, OFC, Kanpur cannot selectively invoke provisions of PPA for its advantage. Therefore, this contention of OFC, Kanpur is rejected.

55. Having dealt with preliminary objections, the following issues arise before this Commission:

Issue No. 1: Whether the 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 Ordnance Factory, Kanpur? And whether the Respondents should be directed to pay compensation as relief for the Change in Law effected by 'Safeguard Duty Notification'?

Issue No. 2: Whether the Respondent No.1 should be directed to additionally compensate the Petitioner on account of the Goods and Services Tax levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the Power Purchase Agreement?

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 Petitioner regarding carrying cost is sustainable?

56. No other issue was pressed or claimed. The issues are discussed in the subsequent paragraphs.

Issue No. 1: Whether the 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 Ordnance Factory, Kanpur? And whether the Respondents should be directed to pay compensation as relief for the Change in Law effected by 'Safeguard Duty Notification'?

and

Issue No. 2: Whether the Respondent No.1 should be directed to additionally compensate the Petitioner on account of the Goods and Services Tax levied on the Safeguard Duty paid by the Petitioner, as relief under Article 12 of the Power Purchase Agreement?

57. Since Issue No. 1 and Issue No. 2 are interconnected, these are taken together for discussion. The Petitioner has submitted that it has executed the PPA dated 19.02.2018 (effective date being 18.02.2018) with OFC, Kanpur. As per the PPA, the scheduled commissioning date was 18.08.2018. However, the project got delayed and was actually commissioned on 14.09.2018. After execution of the PPA, i.e. after 18.02.2018, and before the commissioning

of the project, i.e. 14.09.2018, Safeguard Duty on solar cells was imposed vide Notification dated 30.07.2018. The imposition of Safeguard Duty has resulted in additional cost and the same is to be reimbursed by the Respondent No. 1 along with carrying or interest cost. Further, in terms of Article 12 of the PPA, the Commission is empowered to acknowledge a “change in law” and to provide relief.

58. The Commission observes that various provisions of the PPA provide for ‘Change in 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;”

“ARTICLE 12: ‘CHANGE IN LAW’

12.1. Definitions

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

12.1.1. “‘Change in Law’” means the occurrence of any of the following events after the effective date resulting into any additional recurring/ non - recurring expenditure by the SPD or any income to the SPD:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re - enactment or consolidation) in India, of any law, including rules and regulations framed pursuant to such law;*
- 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 seller;*
- any change in tax or introduction of any tax made applicable for supply of power by the seller as per the terms of this Agreement.*

but shall not include (1) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD, or (2) 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."

Thus, as per fifth bullet under Article 12.1.1 of the PPA, any change in tax or introduction of any tax made applicable for supply of power by the seller is covered under 'Change in Law'.

59. The Commission observes that the Notification No. 01/2018-Customs (SG) dated 30.07.2018 had imposed Safeguard Duty for a period of two years at the following rates:

- a) 25% *ad valorem* minus anti-dumping payable, if any, when imported during the period from 30.07.2018 to 29.07.2019 (both days inclusive);
- b) 20% *ad valorem* minus anti-dumping payable, if any, when imported during the period from 30.07.2019 to 29.01.2020 (both days inclusive); and
- c) 15% *ad valorem* minus anti-dumping payable, if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).

Thus, 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).

60. The issue of Safeguard Duty as change in law was considered by the Commission in Petition No 342/MP/2018 and Petition No. 343/MP/2018 vide order dated 02.05.2019. The relevant extract of the order is as under:

"133. From the above, it is apparent that any tax or application of new tax on "supply of power" covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case, "Safeguard Duty" has been levied on import of "Solar Cells whether or not assembled in modules or panels". The change in duties/ tax imposed by the Central Government has resulted in the change in cost of the inputs required for generation.

134. Accordingly, the Commission of the view that as per the Government of India Notification No. 01/2018-Customs (SG) dated 30.07.2018 and provision of PPAs related to "change in law" the imposition of the "Safeguard Duty" is covered under "Change in Law" under first, second and sixth bullet of Article 12 of the PPAs.

*135. The Commission observes that the Notification No. 01/2018-Customs (SG) New Delhi dated 30.07.2018 stipulates that "a safeguard duty at twenty five per cent to fifteen per cent *ad valorem* minus anti-dumping duty payable has been levied on Solar Cells whether or not assembled in modules or panels" when imported into India "during the period from 30th July, 2018 to 29th July, 2020 (both days inclusive). The Commission observes that since the duration of the safeguard duty levied is two years, hence as per requirement of the Customs Tariff Act, 1975 the duty is progressively liberalized at regular intervals during the period of its*

imposition. The notification provides for a diminishing "Safeguard Duty" slab in the range of 25% to 15% applicable ad valorem on the imports from 30.07.2018 till 29.07.2020. The impact of "Safeguard Duty" notification is on/any portion of import whose point of taxation is on or after implementation of the Notification dated 30.07.2018 the same will be subjected to purview of "Safeguard Duty".

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

a) the bids have been accepted and crystalized before 30.07.2018 or the Power Purchase Agreements have been executed before 30.07.2018 and the Scheduled Date of Commissioning of the project is after 30.07.2018; OR

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

61. Though the provisions of Clause 12 of PPA in the instant petition are slightly different from the PPAs considered in the above order dated 02.05.2019, the provision related to the fifth bullet in the instant PPA related to imposition of tax have similar implication. The Commission observes that in the instant petition, the RFS was issued on 21.07.2017, bid was submitted by the Petitioner in the online e-Reverse Auction held on 14.11.2017 and the 'Letter of Intent' was issued on 18.01.2018. Further, the PPA was executed on 18.02.2018. The Safeguard Duty was levied vide Safeguard Duty Notification on 30.07.2018 i.e. before the SCoD of the project which is 18.08.2018. The Commission observes that since the bid was submitted and the PPA was executed before the date of imposition of Safeguard Duty, the Petitioner is eligible for compensation under 'Change in Law' as contained in Article 12 of the PPA.

62. OFC, Kanpur has raised issues such as a) no proof has been furnished that the Safeguard Duty was actually paid on the import of solar panels from China; b) custom invoice submitted by the Petitioner is in the name of M/s Giriraj Renewables Pvt. Ltd. and nothing is mentioned in the custom invoice to suggest that the solar modules imported were for installation by Petitioner in Ordnance Factory, Kanpur and that the custom invoice pertained for the Badlapur projects being developed by the Petitioner whose COD was 16.09.2018; c) by a letter dated 30.07.2018, the Petitioner was informed by their vendor that there was delay in despatch of shipment of modules due to truck union strike and, therefore, the shipment was received by the vendor before 30.07.2018 when Safeguard Duty was not levied; and d) vide

letter dated 20.07.2018, the Petitioner informed the Respondent that date of synchronisation and commissioning was 10.08.2018, meaning thereby that the Petitioner must have received the modules before 20.07.2018, else the date of synchronisation and commissioning could not have been indicated as 10.08.2018.

63. In response to objections of the Respondent No.1, the Petitioner has submitted that a) it has furnished the Auditor's Certificate which contains all details of the additional burden on the Petitioner on account of the imposition of Safeguard duty and certifies impact of the Safeguard Duty; b) M/s Giriraj Renewable Pvt. Ltd. (now known as Avaada Energy Private Limited) is the EPC Contractor of the Petitioner; c) delay of 27 days in commissioning of the project is a separate issue (OFC, Kanpur had invoked Article 4.6.1 of the PPA and charged Rs 27 lakh towards liquidated damages for a delay of 27 days in commissioning the project and thus ratified the PPA) and is not linked with the compensation payable for a "Change in Law" event; d) letter dated 30.07.2018 does not deal with or refer to solar modules at all and only states that some material has been delayed on account of strike of the truck union.
64. Another issue raised by OFC, Kanpur is 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.
65. The Petitioner has submitted that none of the provisions of the PPA stipulates 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 Auditor's Certificate

duly certifying the payment of Safeguard Duty. As such, the actual amount of the ‘Safeguard Duty’ imposed by the competent authority and paid by the Petitioner needs to be reimbursed.

66. The Commission is of the view that the decision for project implementation including the mode of procurement of goods and services were taken by SPD at the time of bidding and prior to the imposition of Safeguard Duty. It would not be appropriate to question such commercial decisions.

67. 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.”

68. The Commission observes that IGST has been levied by the competent authority in compliance with 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, the value of IGST levied on the Safeguard duty is also to be allowed.

69. In view of the discussions in the preceding paragraphs, the Commission directs the Petitioner to make available to the Respondent No.1 (OFC, Kanpur) all relevant documents exhibiting clear and one to one correlation between the project and the supply of imported goods, duly supported by relevant invoices and Auditor’s Certificate. The Respondent No.1 is further directed to reconcile the claims for ‘Change in Law’ on receipt of the relevant documents and pay the amount so claimed to the Petitioner. The Commission is of the view that the compensation on account of imposition of ‘Safeguard Duty’ w.e.f. 30.07.2018 should be paid by Respondent N0.1 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 Petitioner, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioner and Respondent No.1 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 PPA as a percentage of the tariff agreed in the PPA. This will obviate the hardship of the Respondent for one-time payment. It is pertinent to mention here that the Petitioner will submit the required documentation to the Respondent No.1 which will satisfy

itself and make the payment after reconciliation.

Issue No. 3: Whether the Petitioner may be restored to the same economic condition as was prevailing prior to occurrence of the Change in Law and whether the claim of Petitioner regarding carrying cost is sustainable?

70. The Petitioner has submitted that Article 12 of the PPA sets out the scope and extent of the change in law events under which the Petitioner can claim compensatory and restitutive relief. Article 12.2 of the PPA that provides for 'Change in Law' stipulates as under:-

"ARTICLE 12: 'CHANGE IN LAW'

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."

From the above provisions, the Commission observes that the PPA does not contain any provision relating to restitution to the same economic position as if change in law had not occurred.

71. APTEL vide judgement dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, 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."

72. While dealing with the issue of carrying cost, APTEL in its judgement 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., it was held as under:

“xiii. Now we have reached to the final issue raised by GWEL related to carrying cost on the allowed Change in Law events. For the sake of brevity we are not discussing the claims of GWEL and counter claims of the Discom/Prayas Energy Group on this issue as the said issue has been decided by this Tribunal vide judgement dated 13.4.2018 in Appeal No. 210 of 2017 in case of Adani Power Ltd. v. CERC wherein this Tribunal after detailed analysis has allowed carrying cost on the allowable Change in Law events. We straight way come to the relevant portion of the said judgement which is reproduced below:

“12 d)

.....

“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 PPA 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 (a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(b) 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. 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.”

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.”

73. The judgement of the Tribunal dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited v. Central Electricity Regulatory Commission and Ors.*, was challenged before the Hon’ble Supreme Court wherein the Hon’ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No.5865 of 2018 with Civil Appeal No. 6190 of 2018 (*Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.*) has held as under:

“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.”

16.....There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

74. In view of above judgements of APTEL and Hon’ble Supreme Court, since the PPA in the instant Petition does not have a provision dealing with restitution principles of restoration to same economic position, the claim regarding ‘carrying cost’ is not admissible.

75. 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 an event of ‘Change in Law’ under Article 12 of the PPA. The Commission directs the Petitioner to make available to the Respondent No.1 all relevant documents exhibiting clear and one to one correlation between the project and the supply of imported goods, duly supported by relevant invoices and Auditor’s Certificate. The claim

raised by the Petitioner based on this Order shall be paid within sixty days of issue of this Order or from the date of submission of claims by the Petitioner, whichever is later, failing which late payment surcharge shall be payable by Respondent No.1 as per rates provided under PPA. 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 PPA as a percentage of the tariff agreed in the PPA.

b. **Issue No. 3:** The claim regarding restoration to same economic condition prior to occurrence of change in law and grant of separate 'carrying cost' is not admissible.

76. Accordingly, the Petition No. 47/MP/2019 is disposed of.

Sd/-
अरुण गोयल
सदस्य

Sd/-
आई. एस. झा
सदस्य

Sd/-
पी. के .पुजारी
अध्यक्ष