



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 365/MP/2019

कोरम/Coram:

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 January, 2021

IN THE MATTER OF:

Petition under section 79(1)(b) read with section 79(1)(f) of the Electricity Act, 2003 for (i) declaration of 'change in law' event; and (ii) grant of consequential relief to compensate for the increase in capital cost due to introduction and imposition of Safeguard Duty by way of notification no. 01/2018- Customs-SG dated 30.07.2018 issued by the Department of Revenue, Ministry of Finance, in terms of Article 17 of the Power Purchase Agreements dated 17.04.2017 between Petitioner and Respondents viz. M.P. Power Management Company Limited and Delhi Metro Rail Corporation.

AND IN THE MATTER OF:

Mahindra Renewables Private Limited
Mahindra Towers,
Dr. G.M. Bhosale Marg,
P.K. Kurne Chowk, Worli
Mumbai- 400 018

...Petitioner

Versus

1. M.P. Power Management Company Limited
Shakti Bhawan, Rampur,

Jabalpur,
Madhya Pradesh 482001

2. Delhi Metro Rail Corporation
Metro Bhawan, Fire Brigade Lane,
Barakhamba Road,
New Delhi – 110001
3. Rewa Ultra Mega Solar Limited
Urja Bhawan, Link Road No.2,
Shivaji Nagar, Bhopal,
Madhya Pradesh

...Respondents

Parties Present: Shri Hemant Sahai, Advocate, MRPL
Ms. Anukriti Jain, Advocate, MRPL
Shri Apoorva Misra, Advocate, MRPL
Shri Aditya Kumar Singh, Advocate, MRPL
Shri Devjeet Ghosh, MRPL
Shri G. Umamathy, Advocate, MPPMCL
Shri Tarun Johri, Advocate, DMRC

आदेश/ ORDER

The Petitioner, Mahindra Renewables Private Limited, a generating company has been declared a successful bidder for development of one unit of 250 MW capacity (hereinafter referred to as the “Project”) of the 750 MW solar power project in Rewa District in the State of Madhya Pradesh (Rewa Solar Project). The Petitioner has filed the Petition for (i) declaration of change in law event; and (ii) grant of consequential relief to compensate for the increase in capital cost due to introduction and imposition of Safeguard Duty in terms of Article 17 of the Power Purchase Agreements (PPAs) dated 17.04.2017.

2. The Respondent No.1, M.P. Power Management Company Limited (MPPMCL) is the holding company for all the distribution licensees in the State of Madhya Pradesh. It acts as a single source from which the three distribution companies within the State, purchase power in terms of their requirements. MPPMCL is off-taking approximately 78% of the power generated by the project under the power purchase agreement with the Petitioner (hereinafter referred to as the MPPMCL PPA).

3. The Respondent No.2, Delhi Metro Rail Corporation (DMRC), is a company incorporated under the Companies Act, 1956 and is off-taking approximately 22% of the power generated by the project under the power purchase agreement with the Petitioner (hereinafter referred to as the DMRC PPA).
4. The Respondent No. 3, Rewa Ultra Mega Solar Limited (RUMSL), is a joint venture company of Madhya Pradesh Urja Vikas Nigam Limited (MPUVN) and Solar Energy Corporation of India (SECI) with both the entities holding equal share in RUMSL. MNRE has designated RUMSL as the solar power park developer for the Rewa Solar Project.
5. The Petitioner has made the following prayers:
 - a) *Declare and hold that introduction of Safeguard Duty qualifies as 'Change in Law' in terms of Article 17 of the PPAs executed between the Petitioner and the Respondents and that the Petitioner is entitled to relief thereunder;*
 - b) *Accordingly evolve a suitable mechanism to compensate the Petitioner for the increase in expenditure incurred by the Petitioner on account of Change in Law;*
 - c) *Grant carrying cost from the date of impact till reimbursement by the Respondents;*
 - d) *Grant interest on the incremental working capital;*
 - e) *Pass any other such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable.*

Brief facts of the case

6. The Government of Madhya Pradesh (“GoMP”) and the Government of India (“GoI”), with a view to provide a boost to renewable energy development in the State of Madhya Pradesh, decided to set up 750 MW Rewa Solar Project. In furtherance thereof, MPUVN and SECI have incorporated RUMSL as a joint venture of both the companies, for development of 3 units (total 750 MW) of grid-connected solar photovoltaic power plants of 250 MW capacity each. Accordingly, RUMSL issued Request for Proposal (RfP) on 16.03.2016 in which the Petitioner submitted the bid tariff of Rs. 2.979/kWh with escalation of 5 paise/kWh every year till 16th year of PPA. The Petitioner was declared as successful bidder and RUMSL issued Letter of Intent (LoI) on 21.02.2017 for development of the project and onward sale to MPPMCL and DMRC. Pursuant to the issuance of the LOI, the Petitioner executed MPPMCL PPA on 17.04.2017 for a Guaranteed Energy Offtake of at least 411 MU per

annum of solar energy, in terms of Article 8.2(a) of the MPPMCL PPA; and executed DMRC PPA on 17.04.2017 for a Guaranteed Energy Offtake of at least 115 MU per annum of solar energy, in terms of Article 8.1(a) of the DMRC PPA.

7. The Petitioner entered into a 'Supply and Erection & Commissioning Services Agreement' dated 05.02.2018 with Mahindra Susten Private Limited ("the EPC contractor") for, inter alia, supply of solar PV modules, key component of a solar power plant constituting a major portion i.e. approximately 60% of a solar power project's total cost.
8. The Directorate General of Trade Remedies, Ministry of Commerce and Industry, Government of India ("DGTR"), pursuant to an application filed by Indian Solar Manufacturers Association, by way of Final Findings dated 16.07.2018 ("Final Findings") recommended the imposition of Safeguard Duty under Section 8B(1) of the Customs Tariff Act, 1975 on imports of "Solar Cells whether or not assembled in modules or panels".
9. Thereafter, Department of Revenue, Ministry of Finance vide Notification No. 1/2018 (SG) dated 30.07.2018 (hereinafter referred to as 'Safeguard Duty Notification'), imposed Safeguard Duty as per the following rates on the import of "Solar Cells whether or not assembled in modules or panels" (hereinafter referred to as 'solar cells and modules'):-
 - a. 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
 - b. 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
 - c. 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.
10. The Petitioner in terms of Article 17.1(a) of the PPAs, issued notice of occurrence of Change in Law dated 26.03.2019 to MPPMCL and dated 27.03.2019 to DMRC.

Submissions of the Petitioner

11. The Petitioner has submitted that the imposition of Safeguard Duty @25% (First Year) on the import of solar modules has adversely affected the capital cost of the project as the landed cost of the solar PV modules, which constitute majority of the total capital cost of the Project, has increased substantially thereby resulting in escalation in the capital cost of the Project as set out below:

Particulars	Amount (Rs Crore)
Total Cost of modules post- Safeguard Duty	818.40
Total Cost of modules pre-Safeguard Duty	685.99
Increase in Tax incidence	132.41

** Cost incurred upto 5th September, 2019*

12. The Petitioner has submitted that it has commissioned 235 MW capacity till the date of filing of the petition and the balance capacity was likely to be commissioned by 15th October, 2019. The order for modules was placed vide agreement dated 05.02.2018 with the EPC Contractor. The Petitioner has on the date of filing the petition imported modules after due payment of Safeguard Duty on the invoice amount.
13. The Petitioner has submitted that prior to imposition of the Safeguard Duty, the import of modules was solely subjected to IGST (inter-State Goods and Services Tax) at 5% (Basic Customs Duty was free). However, with effect from 30.07.2018, the import of solar cells and modules required for the setting up of project is leviable with 25% Safeguard Duty (which would be progressively liberalized) along with an additional IGST of 5% on the value of Safeguard Duty. Safeguard duty as per the Safeguard Duty Notification would be applicable for a period of two (2) years i.e. till 30.07.2020. Since the Safeguard Duty Notification remains in operation for a period till 30.07.2020 and the project is likely to be commissioned within the year 2019, there may be instances, where during the O&M period, the project requires modules as replacement. Accordingly, this will cause additional capitalization, which will be subjected to payment of Safeguard Duty. The Safeguard Duty on import of solar modules would result in additional capital expenditure and associated costs beyond the threshold limit.
14. The Petitioner has submitted that at the time of the submissions of bid(s), it had factored in 'interest on working capital' and return on equity based on the taxes and duties prevalent at

the time of bid. With the increase in the tax liability on account of the imposition of the Safeguard Duty, the working capital requirement, and consequently, the interest on working capital have also increased as compared to requirement and rate prevalent at the time of submission of the bid for the Project. Thus, it is entitled to interest on incremental working capital at normative interest rate to put the Petitioner in the same economic position as if change in law had not occurred.

15. The Petitioner has submitted that paragraphs 5.7.1 and 5.7.2 of the Guidelines issued on 03.08.2017 by Ministry of Power vide notification no. 23/27/2017-R&R provide as under:

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

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.”

16. The Petitioner has submitted that MNRE vide its Letter No. 283/56/2017-GRID SOLAR dated 20.12.2018 issued in response to a representation made by the Solar Power Developers Association for resolution of critical issues impacting the solar sector, acknowledged that pass through of Safeguard Duty ought to be allowed by way of appropriate tariff revision.

17. The Petitioner has submitted that the imposition of Safeguard Duty should be considered as an event of Change in Law under the PPAs and consequential relief may be allowed so as to compensate the Petitioner for the increase in capital cost in terms of Article 17 of the PPAs on the following grounds:

- a. The Safeguard Duty is a tax as defined in the Article 1 of the PPAs and came into force on 30.07.2018 after the Proposal Due Date i.e. 23.01.2017.
- b. Article 17 of the PPAs clearly envisages a compensation to be made to the Petitioner, either by way of adjustment in tariff or an upfront lump sum payment, for

any additional capital expenditure, interest and additional costs incurred as a result of Change in Law.

c. It is settled law that a generating company must be compensated by way of adjusted tariff by a power purchaser to compensate for expenditure incurred due to Change in Law, if provided for in the power purchase agreement. In addition, MPPMCL is bound to compensate the Petitioner by the general law of contract and the prevalent industry practice.

d. The additional capital expenditure, interest and associated costs exceed the Threshold Limit of Rs. 20,000,000 (twenty million) and as such, the Petitioner is empowered under Article 17.1(c) of the PPAs, to approach this Commission to seek approval of such Change in Law and consequential relief to compensate for the increase in capital cost due to introduction of Safeguard Duty.

e. The Petitioner while submitting its bid on 23.01.2017 could not have factored in the impact of Safeguard Duty on the cost of solar PV modules and had only taken into consideration the existing taxes, duties, levies, cess etc. prevailing at the time.

f. The Petitioner has followed the process specified in Article 17.1(a) and (b) of the PPAs and has kept MPPMCL and DMRC informed at every stage regarding issues being faced by the Petitioner on account of introduction of Safeguard Duty.

g. The Petitioner has placed its reliance on the Order dated 30.03.2015 of the Commission in Petition No. 06/MP/2013, wherein the Commission while dealing with the introduction of clean energy cess held as follows:

“33. We have considered the submissions made by both petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean energy cess on the date of submission of the bid, the petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers.”

h. The Commission, in its Order dated 02.05.2019 passed in Petition No.342/MP/2018 and Petition No. 343/MP/2018- ACME Rewa Solar Energy Pvt. Ltd.

Vs SECI & Ors. and ACME Jodhpur Solar Power Pvt. Ltd. Vs SECI & Ors. respectively, has *inter alia* held that the imposition of Safeguard Duty is a Change in Law event in terms of the PPAs thereto.

i. Clause 6.2(4) of the Tariff Policy clearly states that any change in taxes imposed by the Central Government after the award of bids has to be treated as Change in Law unless otherwise provided for in the power purchase agreement.

j. Ministry of Power, Government of India, issued a direction dated 27.08.2018 to this Commission, under Section 107 of the Electricity Act, to treat any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Governments/Union Territories or by any government instrumentality, leading to any corresponding change in cost, as Change in Law event.

18. The Petitioner has submitted that in addition to compensation for the increase in capital cost, it is also entitled to carrying cost on the additional cost incurred by it as a result of introduction of Safeguard Duty and the same will have to be paid for the following two periods:

Period 1 - from when the Petitioner incurred the additional cost on account of introduction of Safeguard Duty till the approval of Change in Law by the Commission; and

Period 2 - from the date of approval of Change in Law over the period of amortisation, in the scenario that the Commission does not allow compensation by way of one-time upfront lumpsum payment.

19. The Petitioner has placed its reliance on Judgement of the Appellate Tribunal for Electricity (APTEL) dated 13.04.2018 in Appeal No. 210 of 2017 wherein it has been held that carrying cost is in the nature of compensation for money denied at the appropriate time:

Reply of the Respondent No. 1

20. The Respondent No.1 (MPPMCL) has submitted that the claim for Change in Law is liable to be dismissed for the reason that Safeguard Duty Notification regarding Safeguard Duty is prospective and not retrospective in nature. Further, import of solar cells/ modules from a specific country is not a requirement of the PPA and it is a voluntary commercial decision of the Petitioner for its own advantage and any increase in cost including on account of taxes etc. is required to be borne by the Petitioner.

21. MPPMCL has submitted that the claim of Safeguard Duty by the Petitioner is subject to challenge to the imposition of such duty pending before the Hon'ble Supreme Court/ High Court.
22. MPPMCL has submitted that in terms of Article 17 of the PPA dated 17.04.2017, the liability for increase in the rate of taxes and duties, levies, cost of raw material, freight charges, insurance, fines, penalties etc. for failure of EPC contractor to implement the project in time is entirely to the account of EPC contractor. Accordingly, the remedy of the Petitioner to claim compensation for payment of Safeguard Duty on account of imposition of Safeguard Duty effective from 30.07.2018 is against EPC contractor and not under change in law against the Respondent No.1.
23. MPPMCL has submitted that the decision to import from a particular country is entirely that of the Petitioner. Since the Petitioner had the option to procure the goods domestically or to import from countries where Safeguard Duty is not applicable, the Petitioner is not entitled to claim any relief under change in law.
24. MPPMCL has submitted that there cannot be any consideration for individual tariff elements such as interest on working capital or return on equity or any other in a competitive bid process under Section 63 of the Electricity Act, 2003 and there cannot be any computation of the same. There is no concept of interest on working capital or individual tariff elements in competitively bid process and bidders are required to bid based on all-inclusive tariff. MPPMCL has placed its reliance on Order dated 21.12.2018 passed by APTEL in Appeal No. 193 of 2018 - *GMR Kamalanga Energy Limited and Anr. –v- CERC and Ors.*; Order dated 14.08.2018 passed by APTEL in Appeal No. 111 of 2017 in the case of *GMR Warora - v- CERC and Ors.*; Order dated 19.04.2017 passed by APTEL in Appeal No. 161 of 2015- *Sasan Power Limited –v- CERC*; Order dated 05.02.2019 passed by the Commission in Petition No.187/MP/2018 and in the matter of *M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited*.
25. MPPMCL has submitted that there is no provision in the PPA regarding carrying cost for the period till the determination of the amount on account of change in law. The carrying cost for the period from the date on which the expenditure is incurred till the monthly bill/

supplementary bill is raised by the petitioner in accordance with the amount determined by CERC is not admissible as liability for the payment of money crystallizes only when the monthly/ supplementary bill is raised in terms of Article 17(1)(e) read with Article 10 of the PPA. Further, the interest referred to in Article 17.1(c) of the PPA is the interest forming part of the capital cost upto the date of the commissioning of the asset and not the carrying cost. This is amply clear from the fact that there is no mention of any interest element in Article 17.1(d) of the PPA which provides for the situation where on account of change in law, there is a decrease/ increase in revenue leading to the benefit being passed on to the procurer. Accordingly, the carrying cost is not same as the term 'interest' used in Article 17.1(c) of the PPA.

26. MPPMCL has submitted that the Change in Law claim of the Petitioner is yet to be adjudicated and the amount, if any, due to the Petitioner has to be determined/ computed first. Only after the amount is crystallized, the Petitioner is required to raise supplementary invoice as per Article 10.9 of the PPA. It is only in case of default on the part of the Respondent No.1 in not making payment within the due date of raising of the supplementary invoices that the issue of Late Payment Surcharge would arise and that too for the period after the due date and the same is governed by Article 10.10 of PPA. The supplementary bill needs to be raised by the Petitioner for the adjustment of the Change in Law after such claim is approved by the Commission. There cannot be any claim for late payment surcharge/ carrying cost for the period prior to the due date. In this regard, it is also relevant to mention that there is no provision in the present PPA for restitution. MPPMCL has placed its reliance on the Judgment of APTEL dated 13.04.2018 in Appeal No. 210 of 2017 in *Adani Power Limited –v- CERC and Ors*, in support of the argument that there being no provision in the PPA for restoration to the same economic position, the carrying cost will not be applicable. MPPMCL has also placed its reliance on the judgement of Hon'ble Supreme Court in the matter of *Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588*, for the argument against principles of equity and to argue that that the present case is not of amounts being denied/ withheld at appropriate time or any deprivation of amount due to actions of the procurers.

27. MPPMCL has submitted that relief for change in law in the case of PPA dated 17.04.2017 between the Petitioner and the Respondent with regard to any tax is available only *'If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).'* As per Article 17.1(c), the threshold limit has been prescribed as Rs. 20,000,000 (twenty million) for each incidence of Change in Law and the same is not to be considered on a cumulative basis. Accordingly, each incidence of taxation has to be considered independently and separately and only if the amount of claim in respect to such independent incidence of taxation exceeds the threshold limit, the claim will be admissible. The above has to be considered before determining the liability of the MPPMCL to pay for the Change in Law.
28. MPPMCL has submitted that impact of change in law, if established by the Commission, should be recovered by way of tariff. The payment by way of lump sum is financially burdensome for MPPMCL. It is also an accepted principle that the capital cost/ capital expenditure is recovered by way of tariff and not as a lump-sum payment. One of the reasons for the same is that the increased costs have been claimed to have been incurred for the purpose of supply of power and, therefore, the costs should be recovered only if the Petitioner makes available the power. If the petitioner does not supply the requisite power, the Petitioner should not be entitled to recover the cost similar to any other capital cost. On the other hand, if the Petitioner is allowed to recover it in lump sum, then the Respondents would have paid for capital cost even if the Petitioner makes short supply of power in the future.
29. MPPMCL has submitted that as stated by the Petitioner impact of the Safeguard Duty Notification is Rs 132.41 crores. This claim must be put to strict proof thereof and should be examined based on the supporting documents with regard to the import and other relevant materials before considering the claim.
30. MPPMCL has submitted that the reliance placed by the Petitioner on the Guidelines for Tariff based Competitive Bidding Process issued by the Ministry of Power by notification dated 03.08.2017 is misplaced. In the present case, the Request for Proposal was issued on 16.03.2016, Letter of Award was issued on 21.02.2017 and the PPA was executed on

17.04.2017. Therefore, the documents governing bidding and procurement process of the solar power from the Petitioner were executed prior to issuance of the Guidelines dated 03.08.2017. Further, Guidelines dated 03.08.2017 issued by Government of India have no retrospective effect but are only prospective in operation. In terms of RFS, the 750 MW solar power project was to be setup in Rewa district of Madhya Pradesh with support from MNRE in accordance with the scheme for Development of Solar Parks and Ultra Mega Solar Power Projects effective from 12.12.2014.

Rejoinder of the Petitioner

31. The Petitioner has reiterated most of the submissions already made in the petition. Therefore, the same have not been reproduced for the sake of brevity. Additionally, the Petitioner has submitted that:
- a. the business and commercial decisions made by developers, such as opting to import modules as opposed to using domestic modules or importing modules from certain countries and not others, cannot be questioned post the award of the bid since there was no Safeguard Duty imposed on import of solar cells from China and Malaysia or any other country on the date of the bid.
 - b. The Petitioner has set up the project pursuant to a competitive bid process which had factored in the price of modules and other business assumptions based on competitive rates being offered by module suppliers manufacturing modules of good quality and having the inventory to meet the Petitioner's demand within the timeframes set out under the PPAs.
 - c. Provisions of PPA nowhere specify or prescribe that modules or any goods required for setting up the project are required to be imported from a specific location or sourced domestically and it is was, therefore, left to the generator to make specific sourcing decisions based on its calculations and assumptions.
 - d. The bid was submitted on an assurance that relief for any event of Change in Law under the PPA post the submission of bid would be provided to the Petitioner. Moreover, in terms of the definition of Change in Law provided in the PPA, the date of signing the supply agreements has no relevance for the purpose of ascertaining whether an event is a Change in Law event or not.
 - e. The grant of carrying cost is in line with the principles enshrined under Section 61(b), (c) and (d) of the Electricity Act, 2003 to conduct generation, transmission and distribution

on commercial principles. The impact of Change in Law event is to be passed on by way of tariff adjustment effective from the date of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law. This can be achieved only if carrying cost is considered.

- f. The legal principles/ intent as set out in the Guidelines of the Ministry of Power cannot be ignored while interpreting the contractual terms as set out in the PPA and, therefore, the same should be considered for the purpose of determination of claims of the Petitioner.

Hearing held on 07.07.2020

32. The matter was heard through video conferencing on 07.07.2020. As allowed vide record of proceedings for the hearing, the Respondents filed their written submissions on 14.07.2020 and the Petitioner filed its written submission on 23.07.2020.

Submissions of Respondent No.1 (MPPMCL) by way of written submissions

33. The Respondent No.1 MPPMCL has mostly reiterated its submissions made earlier in reply to the Petition. The same are summarised as under:
 - a. The Petitioner issued notice about change in law as mandated by Article 17 of the PPA on 20.03.2019 i.e. after 8 months.
 - b. The Petitioner has not furnished any details with regard to the imports made before and after 30.07.2018.
 - c. In terms of Article 17 of the PPA, the remedy of the Petitioner to claim compensation for payment of Safeguard Duty on account of imposition of Safeguard Duty effective from 30.07.2018 is against the EPC contractor and not against the Respondent.
 - d. The impact of change in law, if any, should be recovered by way of tariff. The payment by way of lump sum is financially burdensome. It is an accepted principle that capital costs/ capital expenditure is recovered by way of tariff and not as a lump-sum payment.
 - e. Increased costs have been claimed to have been incurred for the purpose of supply of power. These costs should be recovered only if the Petitioner makes available the power. If the petitioner does not supply the requisite power, the petitioner should not be entitled to recover the cost similar to any other capital cost.
 - f. The Petitioner's claim on Interest on Working Capital and Carrying Cost are liable to be rejected.

- g. In the event of allowing the claim on Safeguard Duty, the said relief should be confined only to 250 MW for which the PPA has been entered into by the Petitioner with the Respondent.

Submissions of Respondent No. 2 (DMRC) by way of written submissions

34. DMRC has placed its reliance on the Order dated 15.10.2019 in Petition No. 19/MP/2019 and 46/MP/2019, passed by the Commission in the matter of *ACME Jaipur Solar Power Pvt. Ltd. &Ors. v/s M.P. Power Management Company Ltd.*, wherein, while allowing the claim against reimbursement of costs incurred for procurement of the solar modules pursuant to the Safeguard Duty Notification, it was held that, “*The Commission observes that since the PPAs do not have a provision dealing with restitution principles of restoration to same economic position therefore, the claim regarding separate “Interest on Working Capital/Return on Equity/ Carrying Costs” is not admissible.*”
35. DMRC has submitted that the relevant clauses of the contract including the provisions qua Change in Law i.e. Article 17 in the instant case, are similar to the Change in law clause in the above-stated judgments. Even the date of issuance of RFP, the relevant contractual provisions under the PPA and the location of the projects is similar. Therefore, as per the ratio of the findings rendered by this Commission in the above noted judgments/ orders with regard to the claims against Interest on Working Capital, claim against carrying costs and qua relief of change in law on O&M costs is liable to be rejected, in as much as the principles laid down by this Commission squarely apply to the facts and the circumstances of the instant case.
36. DMRC has placed its reliance on the order of the Commission in the matter of *Renew Solar Power Pvt. Ltd &Ors V/s Solar Energy Corporation of India Ltd.* passed in Petition No. 14/MP/2019 as regards applicability of the Guidelines for Tariff Based Competitive Bidding process for Procurement of Power from Grid Connected Solar PV Power Projects issued by the Ministry of Power vide Notification bearing No. 23/27/2017-R&R dated 03.08.2017. Thus, the Petitioner is legally not entitled to claim carrying costs and interest on incremental working capital as prayed for in the Petition. DMRC has further placed its reliance on the Order dated 02.05.2019 passed by the Commission in the matter of *ACME Rewa Solar Energy Pvt. Ltd &Ors. V/s Solar Energy Corporation of India Ltd &Ors.* passed in the

Petition No. 342/MP/2018 and submitted that the same applies to the facts of the instant case also.

37. DMRC has submitted that there is a breach of Article 17 of PPA by the Petitioner. Article 17 of the PPA provides for consequence of Change in Law and the process which needs to be followed by the parties for giving effect to Change in Law event, if any. However, the Petitioner has failed to comply with the terms and conditions of the Article 17.1(b) of the PPA, which envisages joint meeting of the parties for the purposes of demonstrating through evidence that all reasonable efforts for minimizing the effect of Change in Law had been made by the Petitioner. However, in the instant case, the Petitioner has not placed any document on record which in any manner evidences that the Petitioner had used any reasonable endeavour to minimise the effect of the alleged Change in Law.
38. DMRC has submitted that the PPA was executed between the parties on 17.04.2017. However, the Petitioner awarded the contract for supply of the modules only on 05.02.2018 i.e. after a period of more than 10 months from the date of signing of the PPA. Had the Petitioner awarded the contract for supply of the modules on a timely basis, no additional costs in the form of Safeguard Duty would have been borne by the Petitioner and its supplier.

Submissions of the Petitioner by way of written submissions

39. The Petitioner has reiterated the submissions made in the Petition. Additionally, the Petitioner has summarised its reply to the various objections raised by the Respondents.
40. The Petitioner has submitted that by way of the notice for Change in Law, it had notified the Respondents that introduction of the Safeguard Duty on import of solar cells qualifies as a Change in Law event under the PPAs and has resulted in a change in the incidence of tax liability on the Petitioner. It has imported more than 95% of the solar modules as required for the project and, therefore, the additional liability incurred towards taxes on account of imposition of Safeguard Duty on the import of solar modules is Rs.1,33,50,000/-. It had commissioned 235 MW capacity till the date of filing of the petition and the balance capacity was commissioned on 03.01.2020.

Introduction of the Safeguard Duty is a Change in Law event under the PPA

41. The Petitioner has submitted that the imposition of the Safeguard Duty is a Change in Law event under Article 17 read with Article 1.1 of the respective PPAs. A bare perusal of the definition as contained in the PPAs makes it abundantly clear that the introduction of any new tax resulting in a change in the incidence of tax liability would be a Change in Law event, if such event has occurred subsequent to the proposal due date as set out in the RfP i.e. 23.01.2017. Further, the Commission in its Order dated 15.10.2019 passed in 46/MP/2019 titled *Arinsun Clean Energy Private Limited vs. M.P. Power Management Company Limited and Ors.* (connected with 19/MP/2019) decided on the same issue with respect to the project of other solar power generators located in the same solar park as that of the Petitioner's i.e. in Rewa, Madhya Pradesh. It is a well settled principle that the precedents with identical facts have binding value. In this regard, the Petitioner has placed its reliance on the judgement of the Hon'ble Supreme Court dated 04.03.1975 in *Mamleshwar Prasad and Another vs. Kanahiya Lal (Dead) Though Legal Representative* (1975) 2 SCC 232 wherein it was categorically held that when a decision rendered on facts and law, indistinguishably identical, such decision must bind.

Petitioner has the right to make its commercial decisions

42. The Petitioner has submitted that the business and commercial decisions such as opting to import modules as opposed to using domestic modules or importing modules from certain countries and not others, cannot be questioned post award of the bid. It is pertinent to note that since there was no Safeguard Duty imposed on import of solar cells from China and Malaysia or any other country on the date of the bid, the Petitioner could not have taken into account the cost of the same while submitting its bid. The Petitioner has placed its reliance on the Commission's order dated 09.10.2018 passed in Petition No. 187/MP/2018 titled as *ACME Bhiwadi Solar Power Private Limited vs. SECI and Ors* in which it was held that it would not be appropriate to question such commercial decisions.

Prudent call

43. The Petitioner has submitted that it had submitted its bid after considering the market and economic conditions prevailing then and since the Safeguard Duty Notification was issued subsequent to the proposal due date as provided in the RFP, its impact could not be factored at the time of bid submission. The PPAs provide a clear remedy and relief in case of

occurrence of a Change in Law event. Therefore, the diligence and prudent business call made by the Petitioner cannot be questioned.

Carrying cost/Interest on Working Capital

44. The Petitioner has submitted that it is entitled to carrying cost on additional costs incurred by it on account of imposition of Safeguard Duty since the essence of Change in Law clause under Article 17 of the PPAs is to restore the affected party to the same economic position as if the said Change in Law event had not occurred. As restitution is an integral part of the compensation granted under Change in Law, carrying cost is to be allowed as part of compensation on account of the Change in Law provision.
45. The Petitioner has submitted that the ‘economic position’ which is sought to be restored in terms of the Change in Law clause does not limit itself to a simple correlation of increased expenditure and a corresponding compensation amount but also ought to include compensation in terms of carrying costs incurred with respect to the said Change in Law events. This is also supported by the principle of business efficacy, in the case of *Nabha Power Limited v. Punjab State Power Corporation Limited and Anr.* [Civil Appeal No. 179 of 2017] which provides that a contractual term can be implied in light of the express terms of the contract, commercial common sense and the facts known to both parties at the time of entering into the contract. Further, a Change in Law clause being a restitution clause, demands that the Petitioner should be compensated for all necessary and reasonable extra costs including carrying cost and/or interest on the additional cost incurred on account of Change in Law. In this regard, the Petitioner has placed reliance on the case of *Sumitomo Heavy Industries Limited v. ONGC Limited*, reported at [2010 (1J) SCC 296J].
46. The Petitioner has submitted that it is also entitled to carrying cost under the principles of *quantum meruit*. Assuming the alternative argument that there is no implied clause in the PPA for payment of carrying cost and/or interest, the principles of *quantum meruit* as statutorily enshrined in Section 70 of the Contract Act, 1872 will be attracted and the Petitioner would be entitled to carrying cost. Section 70 of the Act provides that where a person lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In view thereof, since the

Petitioner has not incurred additional capital cost on account of introduction of the Safeguard Duty gratuitously, it is entitled to compensation for the same and such compensation has to be for all reasonable costs, including carrying cost. In this regard, the Petitioner has placed reliance on the decision in the case of *Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona*, [(1970) 1 SCC 213].

Analysis and Decision

47. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.

48. The brief facts of the case are that the Respondent No.1, MPPMCL issued RfS dated 16.03.2013 for SPDs for development of Rewa Solar Project of 750 MW (3 x 250 MW). The Petitioner was declared as a successful bidder for development of one unit of 250 MW capacity of the 750 MW Rewa Solar Project. The Petitioner was awarded LOI on 21.02.2017 for project development and sale of solar power to MPPMCL and DMRC (Respondent No. 2). Thereafter, the Petitioner signed two PPAs dated 17.04.2017 with MPPMCL and DMRC respectively for 78% and 22% of the power respectively to be generated by the Project of the Petitioner, at a tariff of INR 2.979/kWh with escalation of 5 paise/kWh every year till the 16th year of the PPAs. Subsequent to signing of PPAs on 17.04.2017, the Central Government imposed Safeguard Duty vide Safeguard Duty Notification dated 30.07.2018 as per the following rates on the import of solar cells and modules:-
 - a. 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
 - b. 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
 - c. 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.

49. The Petitioner has submitted that issuance of 'Safeguard Duty Notification' has resulted in an increase in recurring and non-recurring expenditure for the Petitioner and has adversely impacted its business. The imposition of Safeguard Duty is covered under Article 17 of the PPAs which provides for Change in law and requested that relief for such Change in Law may be allowed. It is also entitled to interest on incremental 'working capital' and 'carrying

cost' to put Petitioner in the same economic position as if change in law has not occurred. Per Contra, the Respondents in their reply have submitted that application of Safeguard Duty Notification is prospective in nature; the Petitioner should rather claim compensation for payment of Safeguard Duty from its EPC contractor and it is not a change in law in terms of the PPAs. Respondents also denied claim of interest of working capital and carrying cost as there is no provision of restitution in the PPAs.

50. Before dealing with specific claims of the Petitioner, it is imperative that we first dispose of some preliminary objections raised by the Respondents. It has been submitted by the Respondents that the claim of Safeguard Duty by the Petitioner is subject to challenge to the imposition of such duty pending before the Hon'ble Supreme Court/ High Court.
51. The Commission observes that a number of writ petitions were filed before various High Courts against imposition of Safeguard Duty. In one such writ petition, WP(C) No. 12817/2018 filed before the Hon'ble Orissa High Court, the Hon'ble Court in I.A. No. 10566/2018 vide Interim Order dated 23.07.2018, instructed Union of India not to issue any notification under Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 without the leave of the Court. A special leave petition SLP (C) 24009-24010/2018 was filed in Hon'ble Supreme Court against this interim order of Hon'ble Orissa High Court. The Hon'ble Supreme Court vide order dated 10.09.2018 stayed the said interim order dated 23.07.2018 and also stayed further proceedings in WP(C) No. 12817/2018 pending before Hon'ble Orissa High Court. Therefore, there is no stay from Hon'ble Supreme Court/ High Court on the matter and therefore, we can proceed with deciding on the claims of the Petitioner. Needless to mention, if any judgement is pronounced by Hon'ble Supreme Court or High Courts, the same will be applicable.
52. We now proceed to deal with the issues on merit. From the submissions of the parties, the following issues arise for adjudication:

Issue No.1: Whether the imposition of Safeguard Duty on the import of solar modules/ panels/ cells can be considered an event covered under Change in Law in terms of the Article 17 of the PPAs? And whether there is a need to evolve a suitable mechanism to compensate the Petitioner for the increase in recurring and non-recurring expenditure incurred by the Petitioner on account of Change in Law?

Issue No. 2: *Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law through suitable mechanism? And whether the claim of Petitioner regarding interest on Working Capital and Carrying Cost for delay in reimbursement by the Respondents is sustainable?*

53. No other issue was pressed or claimed. We now discuss the issues one by one.

Issue No.1: *Whether the imposition of Safeguard Duty on the import of solar modules/ panels/ cells can be considered an event covered under Change in Law in terms of the Article 17 of the PPAs? And whether there is a need to evolve a suitable mechanism to compensate the Petitioner for the increase in recurring and non-recurring expenditure incurred by the Petitioner on account of Change in Law?*

54. ‘Change in law’ has been defined under Article 1.1 of the PPAs as under:-

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

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

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

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

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

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

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

55. Taxes has been defined under the Article 1.1 of the PPAs as under:

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

56. Article 17 of the PPAs provides for Change in Law which stipulates as under: -

“17. Change in Law

17.1 Consequences of Change in law

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

whether:

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

(b) As soon as practicable but no later than 15 (fifteen) Days after receipt of any notice from a Party under Article 17.1 (a), the Parties shall discuss the issues referred to therein and any ways in which the Parties can mitigate the effect of the Change in Law, including:

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

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

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

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

(d) If the Parties have complied with Article 17.1(b) or upon elapse of the time specified in the Article 17.1 (b) and if as a result of the Change in Law, there is a decrease in costs, or decrease

in Taxes and/or gain in revenue or net profits after Tax, then any financial benefit accruing to the SPD on account of such decrease in costs, or decrease in Taxes and/or gain in revenue or net profits after Tax shall be passed through to the Procurer in its entirety.

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

57. Additionally, the DMRC PPA has following provisions under Article 17.1 (c).

.....
.....

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

58. The Commission observes that Safeguard Duty Notification 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.

59. The Commission observes that as per part (e) of the definition of ‘Change in law’ as contained in Article 1.1 of the PPAs, “*the modification, amendment, variation, introduction, enactment or repeal of any Tax, resulting in a change in the incidence of tax liability*” is covered under 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’ in the range of

25% to 15% ad valorem as applicable 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 the Notification dated 30.07.2018.

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. Subsequently, vide order dated 15.10.2019 in Petition No. 19/MP/2019 and Petition No. 46/MP/2019, where the provisions of the PPA have the same provisions as in the instant Petition, the Commission held as under:

“74. The Commission observes that in the instant petitions, the Proposal Due Date which assumes relevance for determination of change in law event is 23.01.2017 as per Schedule 1 of the RfS dated 16.03.2016 read with Addendum-39 dated 06.01.2017. The PPAs were executed on 17.04.2017, and “Safeguard Duty” has been levied on import of “Solar Cells whether or not assembled in modules or panels” on 30.07.2018 i.e. before the SCoD of the projects which is 16.11.2018. The change in duties/ tax imposed by the Central Government has resulted in the change in cost of the inputs required for generation. Accordingly, the Commission is of the view that as per the Safeguard Duty Notification and provision of PPAs related to “change in law” the imposition of the “Safeguard Duty” is covered under “Change in Law” Article 1.1(a) and 17 of the PPAs.”

62. The Commission also observes that in the instant petition, the PPAs were executed on 17.04.2017. Further, as per Article 4.1(b) read with Article 2.1 of PPAs, SCOD works out to 16.11.2018. PPAs also provide for extension of SCOD. As such, the SCOD is 16.11.2018 or a later date as extended in terms of the provisions of PPAs. However, the petition does not mention the actual date of commissioning of the unit (s)/project(s). Safeguard Duty has been levied on import of ‘Solar Cells whether or not assembled in modules or panels’ on 30.07.2018 i.e. after the PPAs were signed and before SCOD of the projects. As per Article 1 of the PPAs, *“the occurrence of any of the following events in India, subsequent to the Proposal Due Date (as defined in the RFP), and such event(s) has/have an impact on the Unit or on any of the rights and obligations of the Parties under any of the Project Agreements”* has been defined as Change in Law. The Proposal Due Date as per PPAs is 23.01.2017. The Safeguard Duty imposed by the Central Government through the Safeguard Duty Notification has resulted in the increase in cost for the Petitioner. Accordingly, the Commission is of the view that the Safeguard Duty Notification imposing the Safeguard Duty is covered under part (a) and part (e) of the definition of Change in Law read with definition of Taxes under Article 1.1 and Article 17 of the PPAs.

63. The Respondents have contended that in terms of the Change in Law provisions, the relief for change in law is available only *‘If the additional capital expenditure, interest and associated costs that the SPD incur as a result of the Change in Law exceeds the Threshold Limit (INR 20,000,000).’* As per Article 17.1(c) of the PPA, the threshold limit has been prescribed as

Rs. 2,00,00,000 (Rs. two crores) for each incidence of Change in Law and is not to be considered on a cumulative basis. .

64. On the other hand, the Petitioner has submitted that the Threshold Limit as specified in the PPAs applies to each event constituting a Change in Law and not to each incidence of taxation. The imposition of Safeguard Duty constitutes a single event of Change in Law in terms of the relevant definitions of the PPAs, and entitles the Petitioner to claim relief under the PPAs as its financial impact exceeds the Threshold Limit set out under the PPAs.

65. Article 17.1(c) of the PPAs stipulates as under:

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

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

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

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

66. Thus, Article 17.1(c) provides that the SPD i.e. Petitioner shall bear all additional capital expenditure and/or interest and additional costs incurred to obtain any funding to the extent of the Rs. 2.00 crores (Threshold Limit). Further, the Threshold Limit shall apply to each event constituting a Change in Law and shall not be applied on a cumulative basis.

67. Plain reading of the Article 17.1(c) makes it clear that different events of change in law should not be clubbed to claim benefits of change in law on cumulative basis. Though the Respondents have raised this issue, but they have not substantiated as to how the imposition of Safeguard Duty is not a single event. In our view, the imposition of Safeguard Duty constitutes one single event of Change in Law in terms of Article 17.1(c) of the PPA and the

threshold limit of Rs. 2,00,00,000/- is to be applicable accordingly. The contention of the Respondents is, therefore, rejected.

68. Another argument of MPPMCL 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. On the other hand, the Petitioner has submitted that none of the provisions of the PPAs 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. Since Safeguard Duty was not prevalent at the time of bid submission, it could not have factored in at the time of quoting the bid tariff. The Petitioner has submitted that it had 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 the Safeguard Duty.
69. The Commission is of the view that the decision for project implementation including the mode of procurement of goods and services were taken by the Petitioner at the time of bidding and prior to imposition of the Safeguard Duty. It would not be appropriate to question such commercial decisions.
70. Another point raised by MPPMCL is that the Petitioner has entered into a 'Supply and Erection & Commissioning Services Agreement' dated 05.02.2018 with Mahindra Susten Private Limited (EPC contractor) for, inter alia, supply of solar PV modules, a key component of a solar power plant constituting a major portion/ approximately 60% of a solar power project's total cost (EPC contract). In view of the above, MPPMCL has submitted that the imposition of the Safeguard Duty, if any, is on the suppliers/ importers.
71. The Commission is of the view that the Petitioner is well within its rights to execute the EPC contract and to schedule with the EPC contractor, imports to match its plans for implementation of the project. These are purely commercial decisions made by the Petitioner. Further, the Commission in its Order dated 05.02.2019 passed in Petition No. 187/MP/2017 & Others in case of *M/s Renew Wind Energy (TN2) Private Limited & Ors* has already held that the procurers/ Respondents cannot question the commercial decisions of the solar power

developers for project implementation including mode of procurement of goods and services taken by the solar power developers prior to the Change in Law event.

72. The Petitioner has requested that in order to provide relief to it, there is *'the need to evolve a suitable mechanism for compensation'*. The Respondent MPPMCL has submitted that in case the Safeguard Duty is declared as a change in law event in terms of the PPA, the amount should be recovered by way of tariff and that payment by way of lump sum is financially burdensome for the Respondents. It has submitted that the Petitioner has claimed increased costs for the purpose of supply of power and, therefore, the costs should be recovered only if the Petitioner makes available the power. If the Petitioner does not supply the requisite power, the Petitioner should not be entitled to recover the cost similar to any other capital cost. It has submitted that if the Petitioner is allowed to recover it in lump sum, the Petitioner would have recovered this cost even if there is short supply of power in the future. MPPMCL has referred to Article 17.1(e) of the PPA that provides for adjustment of the amount determined by the Commission to be payable on account of Change in Law either in tariff payment or through a lump sum payment..
73. We have considered the submissions of the parties. We note that Article 17.1(e) of the PPA provides for lumpsum payment or recovery through tariff to compensate for a change in law event. We, therefore, do not find a need to devise any separate mechanism for compensation. In our view, compensation on account of imposition of Safeguard Duty w.e.f. 30.07.2018 should be discharged by the Petitioner 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 Petitioner, whichever is later, failing which it shall attract late payment surcharge as per rates provided in 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.
74. 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 till the COD as per PPA or till the COD upon extension of SCOD in terms of PPA, duly supported by relevant invoices and Auditor's Certificate. The Respondents are

further directed to reconcile the claims for Change in Law on receipt of the relevant documents from the petitioner and pay the amount.

75. The issue is decided accordingly.

Issue No. 2: Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law through suitable mechanism? And whether the claim of Petitioner regarding interest on Working Capital and 'Carrying Cost' for delay in reimbursement by the Respondents is sustainable?

76. The Petitioner has submitted that 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' have been issued by the Ministry of Power vide notification No. 23/27/2017-R&R. dated 03.08.2017. Under the provisions of Section 63 of the Electricity Act, 2003 for the long term procurement of electricity by distribution licensees from grid-connected Solar PV Power Projects having a size of 5 MW and above through competitive bidding, Para 5.7.1 of these Guidelines states that if any Change In Law event results in any adverse financial loss/ gain to the Solar Power Developer, the Solar Power Developer/ Procurer shall be entitled to compensation by the other party in order to ensure that the Solar Power Developer is placed in the same financial position as it would have been, had it not been for the occurrence of the Change in Law event.

77. ***Per contra***, MPPMCL has submitted that reliance placed by the Petitioner on these Guidelines issued by Ministry of Power (by Notification dated 03.08.2017) is misplaced. In the present case, the Request for Proposal was issued on 16.03.2016, Letter of Award was issued on 21.02.2017 and the PPAs were executed on 17.04.2017. Therefore, the documents governing bidding and procurement process of the solar power from the Petitioner were executed prior to issuance of the Guidelines dated 03.08.2017. Further, Guidelines dated 03.08.2017 of the Government of India do not have retrospective application. DMRC has submitted that the matter in the instant petition is very similar to that in the Petition No. 19/MP/2019 and 46/MP/2019 in which the Commission has already passed Order dated 15.10.2019 in matter of *ACME Jaipur Solar Power Pvt. Ltd. & Ors. v/s M.P. Power Management Company Ltd.* DMRC has further submitted that the relevant clauses of the contract including the provisions qua Change in Law i.e. Article 17 in the instant case, are similar to the Change in law clause in the above noted judgments. Even the date of issuance

of RFP, the relevant contractual provisions under the PPA, the location of the Projects are similar. Therefore, as per the ratio of the findings rendered by this Commission in the above noted judgments/orders, the claims against Interest on Working Capital, Claim against Carrying Costs and qua relief of Change in law on O&M costs are liable to be rejected, in as much as the principles as laid down by this Commission squarely apply to the facts and the circumstances of the instant case.

78. The Commission vide order dated 15.10.2019 in Petition No. 19/MP/2019 and Petition No. 46/MP/2019 in the matter of *ACME Jaipur Solar Power Pvt. Ltd. & Ors. v/s M.P. Power Management Company Ltd.* held as under:

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

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

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

79. The above order is squarely applicable in the instant case. Therefore, claims of the Petitioner have to be decided taking into consideration only the PPAs.

80. The Petitioner has claimed carrying cost for the change in law event and prayed that it may be restored to the same economic position as if change in law had not occurred. The Petitioner has submitted that restitution is an integral part of the compensation granted under Change in Law and, therefore, carrying cost is to be allowed as part of compensation on account of the Change in Law provision. The Petitioner has submitted that the ‘economic position’ which is sought to be restored in terms of the Change in Law clause does not limit

itself to a simple correlation of increased expenditure and a corresponding compensation amount but also ought to include compensation in terms of carrying costs incurred with respect to the said Change in Law events.

81. On the other hand, the Respondents have submitted that there being no provision of carrying cost or restitution to the same economic position in the PPAs, the Petitioner cannot be allowed any carrying cost. They have referred to various orders of the Commission in this regard.
82. The issue of carrying cost has been dealt with by APTEL in its judgement dated 13.04.2018 in Appeal No. 210 of 2017 in Adani Power Limited v. Central Electricity Regulatory Commission and Ors. and it was held that since Gujarat Bid-01 PPA had no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant extract of the Judgment dated 13.04.2018 reads as under:

“ISSUE NO.3: DENIAL OF CARRYING COST

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

83. While dealing with the issue of carrying cost, in another matter, 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., 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 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 (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."

84. 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.”

85. We note that the PPAs in the instant matter do not have restitution provisions. Therefore, in view of above judgements of APTEL and Hon’ble Supreme Court, since the PPAs in the instant Petition do not have a provision dealing with restitution principles of restoration to same economic position, the claim regarding interest on Working Capital and ‘carrying cost’ is not admissible.
86. Our decisions in this Order are summed up as under:
- a. **Issue No. 1:** The imposition of the Safeguard Duty vide Notification No. 1/2018 (SG) dated 30.07.2018 is an event of Change in Law under Article 17 of the PPAs. The Commission directs the Petitioner to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the project and the supply of imported goods till the COD as per PPA or till the COD upon extension of SCOD in terms of PPA, duly supported by relevant invoices and Auditor’s Certificate. The payment shall be made 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 will attract late payment surcharge at rates provided under PPAs. To ensure time bound payment, it is directed that the Respondents shall reconcile the claim related documents within 15 days of submission of claim by the Petitioner. Alternatively, the Petitioner and

the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

- b. **Issue No. 2:** The claim regarding separate Interest on Working Capital or Carrying Cost for the period from imposition of Safeguard Duty i.e. 30.07.2018 is not admissible.

87. Accordingly, the Petition No. 365/MP/2019 is disposed of.

Sd/-

अरुण गोयल
सदस्य

Sd/-

आई. एस. झा
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