



नईदिल्ली
NEW DELHI

याचिकासंख्या./ Petition No.: 81/MP/2021

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
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेशदिनांक/ Date of Order: 04th of May, 2021

IN THE MATTER OF:

Petition under section 79(1)(f) read with section 79(1)(k) of the Electricity Act, 2003 along with Regulation 68 and 111-113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1994 seeking payment of Change in Law compensation from Solar Energy Corporation of India limited as a consequence of imposition of Safeguard Duty by the Central Government and the same being treated as an event of Change in Law under the terms of the Power Purchase Agreement dated 04.01.2019 read with Ministry of New and Renewable Energy directions dated 12.03.2020 and 23.03.2020.

AND IN THE MATTER OF:

SBG Cleantech Projectco Five Private Limited
1st floor, World Mark – ii, Asset area – 8
Hospitality district, Aerocity,
National highway – 8, Delhi – 110 037

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited
D-3, First Floor, A wing, District Centre,
Saket, New Delhi - 110017
2. Uttar Pradesh Power Corporation Limited
Shakti Bhawan, 14 Ashok Marg,
Lucknow, Uttar Pradesh – 226001

...Respondents

Parties Present: Shri Basava Prabhu Patil, Sr. Advocate, SCPFPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Molshree Bhatnagar, Advocate, SCPFPL
Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Sidhartha Mohapatra, SCPFPL
Ms. Neha Singh, SECI
Shri Ajay Kumar Sinha, SECI
Shri Abhinav Kumar, SECI
Shri Udaypavan Kumar Kruthiventi, SECI

आदेश/ ORDER

The Petitioner, M/s SBG Cleantech Projectco Five Private Limited, is a generating company and is setting up 200 MW solar plant in the Pavagada Solar Park being developed by Solar Park Implementation Agency in the State of Karnataka (hereinafter referred to as “Project”). The Petitioner is seeking payment of Change in Law compensation from Solar Energy Corporation of India Limited (SECI) as a consequence of imposition of Safeguard Duty by the Central Government and the same being treated as an event of Change in Law under the terms of the Power Purchase Agreement (PPA) dated 04.01.2019 read with Ministry of New and Renewable Energy (MNRE) letters dated 12.03.2020 and 23.03.2020.

2. The Respondent No. 1, Solar Energy Corporation of India Limited (SECI) is a Government of India enterprise under the administrative control of the MNRE and designated by the Government of India as the nodal agency for implementation of MNRE scheme for developing grid connected solar power capacity including Phase- II, Batch -IV of the National Solar Mission of the Government of India through VGF mode (NSM Scheme) and

plays the role of an intermediary procurer in line with the provisions of the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar Power Projects, issued by Ministry of Power, vide resolution dated 03.08.2017 (MoP Guidelines).

3. The Respondent No. 2, Uttar Pradesh Power Corporation Limited (UPPCL) is the buying utility in the State of Uttar Pradesh and is purchasing power from SECI under the power sale agreement (PSA) dated 15.11.2018.

4. The Petitioner has prayed as follows :

- a) *Declare and hold that the imposition of Safeguard Duty is a 'Change in Law' event in terms of Article 12 of the PPAs executed between the Petitioner and the SECI and that the Petitioner is entitled to relief thereunder;*
- b) *Direct the Respondent No. 1 – Solar Energy Corporation of India Limited to immediately release the payments towards the safeguard duty claims as reconciled and agreed with the Petitioner – M/s SBG Cleantech Projectco Five Private Limited herein in terms of letters dated 09.10.2020 and 14.10.2020 immediately along with consequential interest;*
- c) *Direct the Respondents to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and / or*
- d) *Pass such other further order(s) as the Commission may deem just and proper.*

Background

5. On 05.01.2018, SECI in terms of the Ministry of Power Guidelines, issued a Request for Selection (RfS) No. SECI/NSM/P2-B4-T14/RfS/KA/012018, with an intent to select Solar Power Developers (SPDs) for development of grid connected cumulative solar capacity of 200 MW.

6. On 10.05.2018, the Petitioner submitted the bid for the projects 4x50 MW capacity.

7. On 18.05.2018, the Petitioner was declared as a successful bidder for developing the Project of 200 MW cumulative capacity in the Pavagada Solar Park being developed by Solar Park Implementation Agency in the State of Karnataka with its intended sale to SECI.

8. On 30.07.2018, vide Notification No. 1/2018 (SG) (Safeguard Duty Notification), the Central Government imposed safeguard duty on the import of “Solar Cells whether or not assembled in modules or panels.”

9. On 15.11.2018, SECI executed Power Supply Agreements with the State distribution companies of Uttar Pradesh Power Corporation Ltd.

10. On 30.11.2018, letters of Intent were issued in favour of the Petitioner for developing projects of 4x50 MW capacity.

11. On 04.01.2019, the Petitioner executed four independent PPAs (to set up four projects (4x50 MW)) with SECI for supply of cumulative 200 MW capacity. The Effective Date under the PPAs has been stipulated as 31.12.2018 and the tariff was agreed to be Rs. 2.82/kWh.

12. All four projects of 50 MW capacity were commissioned as under:

PROJECT DETAIL	CAPACITY	ACTUAL COD
Project 1D	50 MW	17.12.2019
Project 2D	50 MW	17.12.2019
Project 3D	50 MW	25.11.2019
Project 4D	50 MW	10.12.2019

13. On 25.04.2020 , the Petitioner furnished all documents necessary for exhibiting clear and one to one correlation between the project and supply of goods & services, duly supported by the invoices raised by the supplier for goods and service and Auditor’s Certificate.

14. On 08.06.2020, SECI approached the Commission vide its Petition No. 536/MP/2020, seeking inter alia, to adjudicate and approve the annuity calculation methodology proposed by SECI for payments to be made towards SGD and GST.

15. On 18.09.2020 SECI, has reconciled, accepted and acknowledged the amount of Rs. 103,67,46,075/- being the SGD payments.

16. On 07.10.2020 and 09.10.2020, SECI informed the Petitioner that as an interim measure, it will release SGD payments (spread over 13 years) at the annuity rate of 10.41% per annum, subject to final outcome of the Petition No. 536/MP/2020.

17. On 14.10.2020, the Petitioner submitted the requisite undertakings as sought by SECI.

18. On 18.12.2020 and 22.12.2020, UPPCL admitted and agreed to the amounts communicated by SECI.

19. The Petitioner has submitted that imposition of Safeguard Duty qualifies as ‘Change in Law’ under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs. Further, inspite of reconciliation of claims SECI has not yet released any amount towards compensation.

20. Hence the Petition.

Submissions of the Petitioner

21. On 30.07.2018, the Government of India issued Notification imposing Safeguard Duty (SGD) on import of solar panels and modules from certain specific countries including China. Imposition of SGD resulted in increase in capital cost of the Project. The rate and time period for imposition of SGD as per the said Notification on import of solar cells and modules, (whether or not assembled in modules or panels) are as under:

Time Period	Safeguard Duty
From 30.07.2018 to 29.07.2019	25%
From 30.07.2019 to 29.01.2020	20%
From 30.01.2020 to 29.07.2020	15%

22. The Petitioner has submitted that ‘Change of Law’ is covered under Article 12 of the PPA which stipulates as below:

“12 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 last date of bid submission resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- any statutory change in tax structure, i.e. change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement;*

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

12.2 Relief for Change in Law

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

12.2.2 The decision of the Appropriate 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.”

23. The Petitioner has submitted that since SGD Notification has been notified by the Department of Revenue, Ministry of Finance, it is within the ambit of the definition of ‘Law’ as provided in the PPA and therefore is an event of Change in Law as specified in Bullets 1 & 5 of Article 12 of the PPAs. Furthermore, SGD Notification was promulgated after the last date of bid submission i.e. 10.05.2018. Therefore, the imposition of Safeguard Duty qualifies as ‘Change in Law’ under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs.

24. The Petitioner has submitted that Article 12 of the PPAs envisages a relief/compensation to be granted to the Petitioner on account of additional non-recurring and recurring expenditure that the Petitioner has to incur as a result of a ‘Change in Law’ event, which shall be determined and given effect to from such date as decided by the Commission. SECI is liable in terms of the PPAs, to compensate the Petitioner by way of an upfront payment/ on annual basis (along with interest) for the additional non-recurring and recurring expenditure incurred by the Petitioner as a result of enactment of SGD Notification.

25. The Petitioner has submitted that the Ministry of Power vide its letter dated 27.08.2019 has given directions to the Central Commission 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 under the PPAs. The MoP Guidelines having statutory force and binding on both the Petitioner and SECI, provides that in case of occurrence of the Change in Law Event, the aggrieved party requires to be restituted to the same financial position as if the event did not occur.

26. The Petitioner has submitted that on 12.03.2020 and 23.03.2020, MNRE directed the Central Agencies implementing the schemes issued by MNRE, to proceed with payment of the change in law claims including the safeguard duty claims on the basis of annuity model. MNRE has also clarified that once the principles to be followed regarding change in law have been decided by the Commission, there is no need to ask every developer to go before the Commission for seeking orders in similar cases. Considering the directive of MNRE under its letters dated 12.03.2020 and 23.03.2020 which dispensed with the need for approaching the Commission to seek declaration of imposition of SGD by the Central Government as a “Change in Law Event”, and also considering various orders issued by the Commission declaring SGD as a “Change in Law Event” under the PPAs which are pari-materia to the PPA executed with the Petitioner, SECI and the Petitioner through mutually agreeable process, progressed to reconcile the SGD claims made by the Petitioner, an exercise for the amounts payable to be determined by SECI to the Petitioner. The MNRE recommended two options for making payments towards change in law compensation i.e., (A) as a lumpsum or (B) on annuity basis. In case of Option (A) where a lumpsum compensation is paid, SECI

was directed to pay the same within 60 days from the date of the order or date of submissions of the claims, whichever is later. However, in case of Option (B) where compensation is paid on annuity basis, the same will have to be paid forthwith.

27. The Petitioner has submitted that vide letter dated 25.04.2020 & subsequent email correspondences from time to time, the Petitioner furnished all documents necessary for exhibiting clear and one to one correlation between the project and supply of goods & services, duly supported by the invoices raised by the supplier for goods and service and Auditor's Certificate. SECI vide its letter dated 25.04.2020 informed that the same will be reconciled as per the prevailing directions of MNRE and Orders of CERC. However, SECI also communicated that it is in the process of approaching the Commission for approval of annuity calculation methodology. SECI has also forwarded the claims of the Petitioner to UPPCL on 18.05.2020.

28. The Petitioner has submitted that on 08.06.2020, SECI approached the Commission vide its Petition No. 536/MP/2020, seeking inter alia, the Commission to adjudicate and approve the annuity calculation methodology proposed by SECI for payments to be made towards the SGD and GST. Pending 536/MP/2020, SECI reconciled the SGD claims till 18.09.2020. SECI vide letters dated 07.10.2020 and 09.10.2020 informed that as an interim measure, it will release SGD payments (spread over 13 years) at the annuity rate of 10.41 % per annum, subject to final outcome of the Petition No. 536/MP/2020. However, as a pre-requisite for release of the payments, SECI requested certain undertakings to be given by the Petitioner, under which, both the parties will agree for the payment and release of SGD amounts, subject to final outcome of the Petition No. 536/MP/2020 and without prejudice to other legal remedies available to both the parties under law. On 14.10.2020, the Petitioner gave the requisite undertakings as sought by SECI.

29. The Petitioner has submitted that in its Petition No 536/MP/2020, while listing out details of the Projects / Developers, it has also provided the details of claims submitted by the Petitioner to the Buying Utility. However, inadvertently, SECI has failed to array the Petitioner therein in the Memo of Parties. Hence, the Petitioner filed an application seeking impleadment of the Petitioner in the Petition No 536/MP/2020.

30. The Petitioner has submitted that as on 18.09.2020, SECI has reconciled, accepted and acknowledged the amounts of Rs. 26,27,74,049/-, Rs. 26,21,10,724/-, Rs. 25,53,30,244/-, Rs. 25,65,31,058/- being the SGD payments. UPPCL vide its submissions dated 18.12.2020 and 22.12.2020, admitted and agreed that the amounts communicated by SECI vide its letters dated 07.10.2020 and 09.10.2020 are the amounts payable to the Petitioner. However, since the Commission was not conducting hearings in terms of order dated 28.8.2020 of the Hon'ble Supreme Court in Contempt Petition (c) No. 429/2020 in C.A No. 14967/2015, the Petitioner approached the Appellate Tribunal for Electricity (the Tribunal) under Section 121 of the Electricity Act, 2003 in OP No. 18 of 2020 where both SECI and UPPCL vide their respective pleadings before the Tribunal have admitted that the above mentioned amounts are payable to the Petitioner towards the safeguard duty compensation.

31. The Petitioner has submitted that owing to the non-payment of above amounts, the Petitioner is losing Rs. 1.11 Crores per month being the interest cost lost over additional capital @ 12.9% p.a. (14% x 70% + 10.41% x 30%). The Petitioner after having spent such huge amounts is still awaiting recovery of those amounts.

Submissions of the Respondent SECI

32. SECI has submitted that vide its letters dated 09.10.2020 to the Petitioner and by letters dated 08.10.2020 to UPPCL, it has communicated the provisional reconciliation of the Safeguard Duty claims of the Petitioner till Commercial Operation Date in respect of its 4 X 50 MW projects established in Pavagada Solar Park, Karnataka. By letter dated 14.10.2020, the Petitioner has provided confirmation of the reconciled amount to SECI. UPPCL has also agreed to the reconciled amount of Rs.103,67,46,075/-. However, as per Article 12.2 of the PPA, the event of Change in Law has to be approved by the Commission. After the decision of the Commission holding the event as Change in Law, the Petitioner is required to raise supplementary bill under Article 10.7.1 ii) of the PPA. The due date for payment of the supplementary bill as defined in Article 1.1 of the PPA is the 45th day after the Supplementary bill is raised by the Petitioner and the same being received and duly accepted by SECI.

33. SECI has submitted that the Commission vide its order dated 03.02.2020 in Petition No.356/MP/2018 and Petition No.51/MP/2019 in the matter of *Azure Power India Limited – v- Solar Energy Corporation of India Limited* and connected Petition, inter-alia, decided on the payment in respect of the claim of Safeguard Duty. The relevant extract of the decision has been reproduced as under

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

Issue No. 1 and Issue No.2: The imposition of the ‘Safeguard Duty’ vide Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as the event classified as ‘Change in Law’ under Article 17 of the PPAs. The Commission directs the Petitioners to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods, duly supported by relevant invoices and Auditor’s Certificate as discussed in para 96 above. The Respondent SECI is liable to pay to the Petitioners which is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent Discoms on ‘back to back’ basis as discussed in para 103 above. The Claim based on discussions in para 96 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later failing which it will attract late payment surcharge as provided under PPAs/PSAs. Alternatively, the Petitioner and the Respondents may mutually agree to a mechanism for payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.”

34. SECI has submitted that the aspect of cut-off date with respect to Safeguard Duty has already been decided by the Commission in the order dated 04.10.2019 passed in Petition No. 14/MP/2019 and connected Petitions in the matter of *ReNew Solar Power Private Limited –v- Solar Energy Corporation of India Limited and Others*.

35. SECI has submitted that the amount as evaluated and reconciled by SECI and to the extent confirmed by UPPCL or the amount duly adjudicated by the Commission in regard to safeguard duty claims of the Petitioner is payable ‘within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later’. SECI is also entitled to claim the receipt of the said amount from UPPCL on back to back basis. The payment of reconciled amount ,to the Petitioner is also subject to the terms and conditions of the undertaking furnished by the Petitioner alongwith its letter dated 14.10.2020. The above amount, duly adjudicated as payable after hearing the Petitioner, SECI and UPPCL or

otherwise agreed to as payable between the said three parties, is to be paid on annuity basis as decided by Ministry of New and Renewable Energy, Government of India vide its letter dated 12.03.2020.

Additional Submissions of the Respondent SECI

36. SECI has submitted that the Commission may take on record the following letters sent by SECI to UPPCL informing about the reconciliation of Safeguard Duty claims of the Petitioner in respect of its 50 MW x 4 Power Projects and whereby SECI sought for payment of the reconciled claims:

- a) Letters (4) in number dated 08.10.2020 of SECI to UPPCL
- b) Letter dated 08.02.2021 of SECI to UPPCL
- c) Letter dated 09.03.2021 of SECI to UPPCL

37. SECI has submitted that in the reply dated 18.12.2020 filed before the Tribunal, UPPCL has agreed to the reconciled amount of Rs. 103,67,46,075/- as under:

9. It is submitted that basis the reconciliation undertaken taken by the Respondent No.3 based on the documents provided by Respondent No.1, the SGD claims allowable as per Respondent No.3 is demonstrated in the table below:’

SPD	Project ID	Plant capacity (MW)	Total Amount claimed (incl GST) (in Rs.)
<i>SBG Cleantech Projectco Five Private Limited</i>	<i>P2B4T14-SBEFL-B-50KA-1D</i>	<i>50</i>	<i>26,27,74,049</i>
	<i>P2B4T14-SBEFL-B-50KA-2D</i>	<i>50</i>	<i>26,21,10,724</i>
	<i>P2B4T14-SBEFL-B-50KA-3D</i>	<i>50</i>	<i>25,53,30,244</i>
	<i>P2B4T14-SBEFL-B-50KA-4D</i>	<i>50</i>	<i>25,65,31,058</i>
		<i>200</i>	<i>103,67,46,075</i>

38. SECI has submitted that it seeks issuance of effective directions by the Commission to UPPCL, the procurer of the power under the PSA to make payment on account of impact of safeguard duty on procurement of modules, panels in the present matter.

Rejoinder by the Petitioner

39. **In relation to claim of Safeguard Duty & consequential relief**, the Petitioner has submitted that:

- i) SECI vide its pleadings dated 19.03.2021 and 26.03.2021 has admitted that the amount of Rs. 103,67,46,075/- is payable to the Petitioner towards safeguard duty compensation under the PPA dated 04.01.2019 / PSA dated 15.11.2018.
- ii) SECI in accordance with MNRE letters dated 12.03.2020 and 23.03.2020 had agreed to reconcile the compensation payable to the Petitioner and pay the same on annuity basis.
- iii) Evidently, MNRE recommended two options for making payments towards change in law compensation i.e., (A) as a lumpsum or (B) on annuity basis. In case of Option (A) where a lumpsum compensation is paid, SECI and NTPC were directed to pay the same within 60 days from the date of the order or date of submissions of the claims, whichever is later. However, in case of Option (B) where compensation is paid on annuity basis, the same will have to be paid forthwith.
- iv) SECI has decided that the Petitioner herein be paid for safeguard duty compensation following Option (B) i.e., on annuity basis. The same was also accepted by the Petitioner vide its letter dated 14.10.2020.
- v) The Petitioner and SECI have mutually agreed to a mechanism for payment of safeguard duty compensation on annuity basis. However, the rate at which such payment is required to be made by SECI i.e., the annuity rate, is pending adjudication before CERC in Petition No. 536/MP/2020.
- vi) The reconciliation of the compensatory payments between SECI and the Petitioner has been currently computed based on annuity rate of 10.41 % and with the payment spread over for a period of 13 years.
- vii) The Petitioner has reserved its rights to contest the annuity methodology suggested by SECI in its Petition No. 536/MP/2020 before the Commission, and the reply/submissions on behalf of the Petitioner are already placed on record in those proceedings.

- viii) SECI having reconciled the dues on 09.10.2020, has already enjoyed the benefit of almost 175 days, and therefore it must release the annuity payments as agreed and concluded between the Petitioner and SECI vide its letters dated 09.10.2020 and 14.10.2020, immediately, without any further delay.
- ix) UPPCL although unrepresented before the Commission during the present proceedings, has no dispute on the compensatory payments to be made by SECI to the Petitioner, as is evident from its affidavit and submissions before the Tribunal. The issue of inter se payment between SECI and UPPCL may be decided in terms of the principles already laid down by the Commission earlier in its catena of Orders.
- x) During the course of the hearing scheduled on 19.03.2021, SECI requested the Commission to clarify the cut-off date with regard to liability of payment on account of impact of Safeguard Duty on procurement of modules and panels in respect of 'Scheduled Commercial Operation Date' instead of 'Scheduled Commissioning Date'. In this regard, it is important to point out that the said issue is no more res-integra.
- xi) The Commission in its judgement dated 24.01.2021 in 365/MP/2019, has already held that the impact of the safeguard duty till the Commercial Operation Date as per the Power Purchase Agreement or till the Commercial Operation Date upon extension of Scheduled Commercial Operation Date/Scheduled Commissioning Date in terms of the Power Purchase Agreement, will be considered while reconciling claims between the developer and the intermediary procurer/procurer.

40. **In relation to claim of GST & consequential relief**, the Petitioner has submitted that:

- i) SECI in accordance with MNRE letters dated 12.03.2020 and 23.03.2020 and previous orders of the Commission laying down the principles in case of allowing imposition of GST as a change in law event, is in the process of reconciling the claims submitted by the Petitioner.
- ii) The Commission may also give suitable directions for payment of compensatory payments towards GST claims of the Petitioner, immediately upon reconciliation by SECI.
- iii) The Petitioner is entitled to be restituted to the same financial position, as if the change in law event has not occurred.

iv) The Commission in its judgement dated 30.12.2019 in 4-352-355-358-359/MP/2018, has already noted the rationale for allowing GST claims until the COD. The Commission has held that the liability of the Respondents for payment of purchase of the power from the SPDs starts from the Commercial Operation Date (COD). Accordingly, the liability of the payment for GST shall lie with the Respondents till the COD. Therefore, the impact of the GST till the COD will be considered while reconciling claims between the developer and the intermediary procurer/procurers.

41. **In relation to release of payments of compensatory payments towards Safeguard Duty and GST**, the Petitioner has submitted that:

- i) in terms of the letters dated 09.10.2020 and 14.10.2020, both the parties have agreed for immediate release of payments in terms of the SGD claims, subject to submission of undertakings that have been submitted by the Petitioner and accepted by SECI. Such understanding is awaited in terms of the GST claims.
- ii) Regardless, in case found appropriate by the Commission, and if so directed, the Petitioner, without prejudice to the above, may raise four invoices, one for each of the four Project IDs, for the entire amount claimed and payable for SGD, which then may be paid based on the 'annuity model' as agreed between the Petitioner and SECI. Such payments shall be subject to adjustments based on the outcome of the Petition No. 536/MP/2020. For abundant clarity, the Petitioner shall not be required to unnecessarily raise invoices for monthly instalments payable in accordance with the aforementioned 'annuity model'. The same may be applicable for the amount claimed, reconciled & payable for GST. This is without prejudice to all the rights and remedies available to the Petitioner and SECI in law.

ROP dated 19.03.2021

42. As per the ROP dated 19.03.2021 in this case, the Commission observed that:

“2. Learned senior counsel for the Petitioner submitted that the present Petition has been filed seeking payment of Change in Law compensation from the Respondent No.1, SECI as a consequence of imposition of Safeguard Duty by the Central Government and the same being treated as an event of Change in Law in terms of Power Purchase Agreement ('PPA') dated 4.1.2019 read with Ministry of New and

Renewable Energy ('the MNRE') directions dated 12.3.2020 and 23.3.2020. Learned senior counsel submitted as under:

(a) *The Petitioner has executed the PPAs with SECI for supply of cumulative capacity of 200 MW (4*50 MW).*

(b) *Consequent to the imposition of Safeguard Duty by the Central Government w.e.f. 30.7.2018, the Petitioner and SECI proceeded to reconcile the Safeguard Duty claims of the Petitioner in terms of the MNRE's directions dated 12.3.2020 and 23.3.2020. In support of its claims, the Petitioner also furnished requisite and necessary documents.*

(c) *By its letter dated 7.10.2020, SECI confirmed the reconciliation of the Petitioner's claims as per the Commission's orders in similar Petitions and further, sent the reconciled claims to the buying entity i.e. UP Power Corporation Limited (UPPCL). It was also intimated that the methodology for payment of the claims shall be on annuity basis with discount rate @10.41% (i.e. rate of interest for loan component as per Commission's order dated 19.3.2019) and that the finalization of claim and release of payment will be subject to the decision in Petition No. 536/MP/2020 filed by SECI for approval of annuity methodology. The Petitioner was also asked to furnish an undertaking to this effect.*

(d) *The Petitioner vide its letter dated 14.10.2020 furnished the undertaking as sought for and since there was no dispute on the admitted dues, the Petitioner conveyed its acceptance to the annuity rate of 10.41% as suggested by SECI as an interim measure subject to the outcome of Petition No. 536/MP/2020. It was also submitted that to facilitate the process, the Petitioner will file an appropriate application/petition before the Commission.*

(e) *However, since the Commission was not conducting hearings in terms of order dated 28.8.2020 of the Hon'ble Supreme Court in Contempt Petition (c) No. 429/2020 in C.A No. 14967/2015, the Petitioner approached the Appellate Tribunal for Electricity (APTEL) under Section 121 of the Electricity Act, 2003 in OP No. 18 of 2020. In the proceedings before the APTEL, UPPCL also admitted and agreed to the amounts as communicated by SECI. However, the said Petition before the APTEL was withdrawn by the Petitioner to pursue the present Petition before the Commission.*

(f) *Accordingly, the Petitioner is seeking direction to the Respondent, SECI to immediately release the payment towards the Petitioner's Safeguard Duty claims as reconciled and agreed to by SECI as well as UPPCL, subject to the outcome of Petition No. 536/MP/2020.*

3. Learned senior counsel for the Respondent No.1, SECI submitted that SECI vide its letter dated 9.10.2020 to the Petitioner and by letter dated 8.10.2020 to UPPCL had communicated the provisional reconciliation of the Petitioner's claims toward Safeguard Duty, which have been confirmed by the Petitioner and UPPCL and as such, there is no dispute over the claimed amount. Accordingly, the Commission may pass an appropriate order in the matter subject to the outcome of Petition No. 536/MP/2020 filed by SECI whereby SECI has sought approval of annuity methodology including annuity rate. It was further requested that the Commission may also specify the timeline for the distribution licensee to make payment to SECI on account of Safeguard Duty in line with the Commission's earlier decisions on the subject matter. Learned senior counsel requested to clarify the cut-off date with

regard to liability of payment on account of impact of Safeguard Duty on procurement of modules and panels in respect of 'Scheduled Commercial Operation Date' instead of 'Scheduled Commissioning Date'.

4. After hearing the learned senior counsel for the Petitioner and the Respondent SECI, the Commission admitted the Petition and directed to issue notice to the Respondents. The Respondents were directed to file their reply, if any, by 26.3.2021 with advance copy to the Petitioner, who may file its rejoinder, if any, by 2.4.2021. The due date of filing of reply and rejoinder should be strictly complied with.

5. Subject to the above, the Commission reserved the matter for order.”

Analysis & Decision

43. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.

44. The brief facts of the Petition are that SECI issued RfS dated 05.01.2018 for development of grid connected cumulative solar capacity of 200 MW. The Petitioner submitted the bid for the projects of 4x50 MW capacity and was declared as a successful bidder. The Petitioner executed four independent PPAs (to set up four Projects of 50 MW each) with SECI for supply of cumulative 200 MW capacity. The Petitioner furnished all documents necessary for exhibiting clear and one to one correlation between the project and supply of goods & services, duly supported by invoices raised by the supplier for goods and service and Auditor's Certificate. Meanwhile, on 30.07.2018, vide Notification No. 1/2018 (SG) (Safeguard Duty Notification), the Central Government imposed safeguard duty on the import of "Solar Cells whether or not assembled in modules or panels". The Petitioner has submitted the imposition of Safeguard Duty qualifies as 'Change in Law' under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs.

45. On 08.06.2020, SECI approached the Commission vide its Petition No. 536/MP/2020, praying the Commission, inter alia, to adjudicate and approve the annuity calculation methodology proposed by SECI for payments to be made towards the SGD and GST. SECI, has reconciled, accepted and acknowledged an amount of Rs. 103,67,46,075/- as on 18.09.2020 being the SGD payments. On 07.10.2020 and 09.10.2020, SECI informed that as an interim measure it will release the SGD payments (spread over 13 years) at the annuity

rate of 10.41% per annum, subject to final outcome of the Petition No. 536/MP/2020. The Petitioner has submitted that inspite of reconciliation of claims SECI has not released any amount towards compensation.

46. *Per Contra*, SECI has submitted that it has provisionally reconciled the Safeguard Duty claims till Commercial Operation Date. UPPCL has also agreed to reconciliation. However, as per Article 12.2 of the PPA, the Change in Law has to be approved by the Commission. After the decision of the Commission holding the event as Change in Law, the Petitioner is required to raise supplementary bill under Article 10.7.1 (ii) of the PPA. The Commission vide its order dated 03.02.2020 in Petition No.356/MP/2018 and Petition No.51/MP/2019 in the matter of *Azure Power India Limited –v- Solar Energy Corporation of India Limited* and connected Petition, inter-alia, decided on the payment in respect of the claim of Safeguard Duty. Further, the aspect of cut-off date with respect to Safeguard Duty has already been decided by the Commission in the order dated 04.10.2019 passed in Petition No. 14/MP/2019 and connected Petitions in the matter of *ReNew Solar Power Private Limited –v- Solar Energy Corporation of India Limited and Others*. Further, SECI has submitted that the Commission may take on record the letters sent by SECI to UPPCL informing about the reconciliation of Safeguard Duty claims of the Petitioner in respect of its 50 MW x 4 Power Projects and whereby SECI sought for payment of the reconciled claims. Further, in the reply dated 18.12.2020 filed before the Tribunal, UPPCL has agreed to reconciliation of Rs.103,67,46,075.

47. The Commission observes that Article 12 of the PPA which stipulates as below:

“12 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 last date of bid submission resulting into any additional recurring/ non-recurring expenditure by the SPD or any income to the SPD:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*

- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPD;*
- *any statutory change in tax structure, i.e. change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of Solar Power Project and supply of power from the Project by the SPD and has direct effect on the Project, shall be treated as per the terms of this Agreement;*

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

12.2 Relief for Change in Law

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

12.2.2 The decision of the Appropriate 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.”

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

- 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
- 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
- 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.

49. The Commission observes that the Petitioner has submitted the bid on 10.05.2018 and the same was accepted and crystallised after e-reverse auction held on 18.05.2018. SGD Notification was promulgated on 30.07.2018 i.e. after the approval of the bid submitted by the Petitioner. Therefore, the imposition of Safeguard Duty qualifies as ‘Change in Law’ under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs.

50. The Commission further observes that on 18.09.2020, the Petitioner had made available to the Respondents all relevant documents exhibiting clear and one to one

correlation between the projects and the supply of imported goods, duly supported by relevant invoices and Auditor's Certificate. SECI has reconciled the claims for Rs. 103,67,46,075/- as on 18.09.2020 as covered under 'Change in Law'. UPPCL has also admitted and agreed to the amounts communicated by SECI. Since the Commission was not conducting hearings in terms of order dated 28.8.2020 of the Hon'ble Supreme Court in Contempt Petition (c) No. 429/2020 in C.A No. 14967/2015, the Petitioner approached the Tribunal under Section 121 of the Electricity Act, 2003 in OP No. 18 of 2020 where both SECI and UPPCL vide their respective pleadings before the Tribunal admitted that the above mentioned amount is payable to the Petitioner towards the safeguard duty compensation.

51. The Commission further observes that as per Record of Proceedings dated 19.03.2021, SECI has admitted that "*there is no dispute over the claimed amount*". Further, the provisional reconciliation of the Petitioner's claims toward Safeguard Duty has been confirmed by UPPCL. Further, the Petitioner has conveyed its acceptance to the annuity rate of 10.41% as suggested by SECI as an interim measure subject to the outcome of Petition No. 536/MP/2020. SECI has also submitted that the Commission may pass an appropriate order in the matter subject to the outcome of Petition No. 536/MP/2020 filed by SECI whereby SECI has sought approval of annuity methodology including annuity rate.

52. Accordingly, the Commission directs SECI to pay to the Petitioner as per mutually agreed mechanism for payment of such compensation on annuity basis, subject to the outcome of Petition No. 536/MP/2020 filed by SECI for approval of annuity methodology including annuity rate. It is clarified here that the compensation paid to the Petitioners is not conditional upon the payment to be made by the Respondent UPPCL to Respondent SECI. However, the Respondent SECI is eligible to claim the same from the Respondent UPPCL on 'back to back' basis and the Commission directs the Respondent UPPCL to expeditiously settle such claims in term of the PSA. The first instalment of the claim shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later, failing which it will attract late payment surcharge as provided under PPA/PSA.

53. The next point raised by SECI during hearing dated 19.03.2021 is to clarify the cut-off date with regard to liability of payment on account of impact of Safeguard Duty on procurement of modules and panels in respect of 'Commercial Operation Date' instead of 'Scheduled Commissioning Date'.

54. The Commission observes that as per Article 1 of the PPA stipulates as under:

"ARTICLE 1

Commissioning: shall have the meaning ascribed thereto in Article 5 of this Agreement;

Scheduled Commissioning Date: shall mean 30.12.2019

Commercial Operation Date (COD): shall mean the date on which the commissioning certificate is issued upon successful commissioning (as per provisions of this Agreement including but not limited to the witnessing of commission by the Committee Constituted by MNRE/SECI) of the full capacity of the Project or the last part capacity of the Project as the case may be (if Applicable)."

55. The Commission notes that as per definition of Commercial Operation Date (COD) provided in Article 1 of the PPA, COD will be the date on which the commissioning certificate is issued upon successful commissioning (as per provisions of the Agreement including but not limited to the witnessing of commission by the Committee Constituted by MNRE/SECI) of the full capacity of the Project or the last part capacity of the Project as the case may be (if Applicable). Accordingly, the Commission holds that the liability of payment on account of imposition of Safeguard duty on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only.

56. In view of above the Petition No. 81/MP/2020 stands disposed of in terms of the finding mentioned in paragraphs 52 and 55 of this order.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
आई. एस. झा
सदस्य

Sd/-
पी. के. पुजारी
अध्यक्ष