

- 2.19. Since the project cost incurred due to levy and payment of safeguard duty and GST, this caused additional promoter contribution in project debt. While the cost of equity is higher, the petitioner ought to be compensated for the increase in cost of interest in the project debt at the interest rate of 10.65%, at the minimum. Accordingly, it is submitted that the petitioner ought to be compensated for increase in project cost on account of additional cost of interest actuals. Thus, the petitioner ought to be compensated on account of increase in the cost of the project due to the imposition of safeguard duty.
- 2.20. In terms of clause 9.2.2 of the PPA, consequent adjustment in tariff in view of increase in project cost to be allowed based on the formula provided in the clause 9.2.2 of the PPA.
- 2.21. It is submitted that in terms of Article 9.1.1(b) of the PPA, a Change in Law includes the introduction / modification / changes in rates of safeguard duty and/or antidumping duty which has direct effect on the Project cost after the Bid Deadline.
- 2.22. The Safeguard Duty was extended pursuant to Section 8B of the Customs Tariff Act read with Rule 16 of the Safeguard Duty Rules. Extension of imposition of Safeguard Duty beyond 29.07.2020 by Notification dated 29.07.2020 is a Change in Law Event under Article 9 of the PPA since:-
- (a) The imposition of Safeguard Duty is squarely covered under Article 9.1.1 (b) of the PPA;
  - (b) As on the Bid Deadline (i.e. 06.02.2019), the Safeguard Duty levied by Notification dated 30.07.2018 was to cease in effect on 29.07.2020 since the said notification contemplates cessation of Safeguard Duty after 29.07.2020.
  - (c) The safeguard duty vide Notification dated 29.07.2020 has been imposed after 06.02.2019. Further, the Notification dated

29.07.2020 has been issued which falls within the definition of 'Law'. It has been issued by Government of India, Ministry of Finance, and falls within the definition of Indian Governmental Instrumentality.

- (d) In terms of Article 9, any modification/change in rate of Safeguard Duty after the Bid Deadlines would also amount to Change in Law.
- (e) Further, in terms of article 9.2.2 of the PPA, the Petitioner would be entitled to compensation for such change in law. As on the deadline, safeguard duty was effective upto date 29.07.2020. Therefore, the extension of safeguard duty beyond 29.07.2020 vide notification dated 29.07.2020 will qualify as changes under the PPA; and
- (f) Imposition of safeguard duty has resulted in increase in the project cost of the petition.

It is submitted that the extension of imposition of safeguard duty one Notification dated 29.07.2020 will be covered under Article 9.1.1 (b) of the PPA and the petitioner ought to be compensated for the same.

2.23. Article 9.2.2 of the PPA provides for relief on account of the imposition/levy of Safeguard Duty upon submission of proof of payment made by the Petitioner towards Safeguard Duty to GUVNL, with due approval of the Commission.

2.24. The Petitioner has in support of its claim submitted all requisite information sought by the Respondent under Article 9.2.2 of the PPA consist of the following supporting documents:-

- (i) Capacity in DC of solar modules on which safeguard duty is paid and on it GST paid.

- (ii) In terms of commissioning certificate approved by GUVNL the total installed DC capacity of the project is 175.2 MW (176.09 MW including spares). The project CUF is 26.67%. The DC:AC overloading is 1.46%.
- (iii) Bill of landing for proof of quantity both the master and house bill of landing.
- (iv) Packing list
- (v) Invoices of all solar modules imported
- (vi) Custom accessed copy of bill of entry
- (vii) Safe Duty payment challan to customs, evidence of payment of duty
- (viii) Customs out of charge order
- (ix) Marine insurance for sea and island transit
- (x) Copy of LRs for inland transport from port to projects site and E-way bill
- (xi) Relevant supply agreements entered by Juniper for the supply of Solar PV modules
- (xii) Practicing Chartered Accountant certificate substantiating and supporting the claim of Juniper for the supply of Solar PV modules
- (xiii) Certificate from an independent engineer certifying that the modules that have been imported have actually been installed at the project
- (xiv) Details of safeguard duty and IGST payment challan as well as extracts of bank statements
- (xv) RFID Details
- (xvi) Detailed compensation calculation sheet with Safeguard Duty calculation alongwith IGST and interest on it.
- (xvii) CEIG approvals and supporting documents.
- (xviii) Commissioning Certificate along with completion of transmission network, works of the line, bays, transmission etc. at connectivity sub-station

(xix) IGST paid on Safeguard Duty

(xx) Details of interest cost along with details of debt

- 2.25. The additional tariff under clause 9.2.2 should be paid from the date of commissioning since the additional project cost has been incurred prior to commissioning of the project.
- 2.26. It is clarified that the Respondent may physically verify all the materials which have been imported have been used in the project. However, such physical verifications should not affect commencement of payment of additional tariff from the date of commission. In any event, the petitioner shall provide requisite support and information to the respondent GUVNL and also an undertaking in this regard if required by the commission.
- 2.27. It is submitted that there is an additional financial impact on the Petitioner with regard to the increased interest cost. Since the Project Cost increased due to levy and payment of Safeguard Duty and GST, this necessitated additional promoter contribution and project debt. While the cost of equity is higher, the Petitioner ought to be compensated for the increase in cost of interest on the project debt at the rate of interest rate of 10.65%, at the minimum. The Petitioner ought to be compensated for the increase in project cost on account of additional cost of interest actuals up to commissioning.
- 2.28. The Respondent GUVNL has wrongly contended that there is no provision in the PPA regarding any restitutionary principle of restoration to the same economic position.
- 2.29. It is a settled position of law that Interest During Construction is a part of project cost and thus any interest incurred on additional project cost is a direct cost that increases the project cost. The petitioner has already incurred the additional interest cost and it is claiming compensation for the same.

- 2.30. The Compensation implies equivalence. Time value of money will have to be considered while awarding compensation. It is submitted that restitution is a principle governing commercial contracts which ought to be invoked in order to do substantive justice. It is a pre-existing rule of justice, equity and fair play which has also been statutorily recognized in Section 144 of Code of Civil Procedure, 1908. Hon'ble Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Limited & Ors*, reported as (2019) 5 SCC 325 held that 'carrying cost' is an integral component of the restitutive principle and that the party must be given the benefit of restitution as understood in civil law. It was held as follows:- *"10. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law...."*
- 2.31. The PPA does not prohibit compensation for interest / carrying cost. Clause 9.2.2 of the PPA talks about compensation as opposed to reimbursement. Hence, the compensation mechanism envisaged under the PPA is not a Rs. For Rs. matching, but rather to make whole of the aggregate financial impact on account of Change in Law.
- 2.32. Hon'ble Supreme Court in *South Eastern Coalfields Ltd. v. State of Madhya Pradesh & Ors.*, reported as (2003) 8 SCC 648, held that in absence of an express prohibition either in law or in the contract entered into between the parties, interest must be payable by exercise of equitable jurisdiction of the courts.
- 2.33. Hon'ble Tribunal in Judgement dated 20.10.2020 - Appeal No. 208 of 2019 titled as *Bhopal Dhule Transmission Company Ltd v. Central Electricity*

*Regulatory Commission & Ors.* has allowed the claim for Interest During Construction (IDC) in relation to certain Change in Law events even though the TSA did not provide for it explicitly.

2.34. In view of the foregoing, it is submitted that:-

- (a) Based on above the Petitioner submitted that the Petitioner ought to be compensated for the increase in project cost on account of additional cost of interest on actuals.
- (b) In terms of Clause 9.2.2 of the PPA, consequent adjustment in tariff in view of increase in project cost ought to be allowed based on the formula provided in Clause 9.2.2 of the PPA.

2.35. Clause 9.2.2 of the PPA also links the tariff increase in proportion to the change in project cost due to the Change in Law event and not to amount of safeguard duty (including additional GST on the safeguard duty) paid. Thus, while calculating the impact on Project Cost for the purpose of Clause 9.2.2 of the PPA, the interest on additional project cost on account of imposition of safeguard duty should be included.

2.36. The Petitioner Juniper deserves to be compensated on account of increase in the cost of the Project due to the imposition of Safeguard Duty. It is a settled position of law that Interest During Construction (IDC) is a part of the Project Cost and thus any interest incurred on additional project cost is a direct cost that increases the Project Cost. The Petitioner has already incurred the additional interest cost and it is claiming compensation for the same from the date of incurrance of Safeguard Duty till COD.

2.37. Interest cost is the compensation for time value of funds deployed on account of Change in Law events. The mandate of Change in Law provisions across all PPAs is compensation/ restitution i.e. relief be granted in a manner so as to place an affected party in the same economic position as if a Change in Law had not occurred. Restitution is therefore inherent to compensation.