



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 49/MP/2023

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, 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

आदेश दिनांक/ Date of Order: 12th of January, 2024

IN THE MATTER OF:

Petition under Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 read with Regulation 111 – 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations 1999 along with Article 12 of the Power Purchase Agreement dated 03.05.2021 executed between the Petitioner herein with Solar Energy Corporation of India Limited, inter alia seeking declaratory relief / in -principle approval of the change in law events prayed by the Petitioner in the present petition to be recognised as change in law events under the PPA and pass consequential order(s).

AND IN THE MATTER OF:

M/s Vena Energy Vidyuth Private Limited.

Office No. 2/1, First Floor, Embassy Icon Annexe,
Infantry Road, Bangalore
Karnataka – 560001

...Petitioner

Versus

1. **M/s Solar Energy Corporation of India Limited,**
6th floor, Plate-B, NBCC Office Block

Tower 2, East Kidwai Nagar,
New Delhi – 110023

2. **Madhya Pradesh Power Management Company Limited**
Shakti Bhawan, Vidyut Nagar, Rampur Jabalpur,
Madhya Pradesh

Respondents

Parties Present: Ms. Mannat Waraich, Advocate, RSWPL
Ms. Molshree Bhatnagar, Advocate, VEVPL
Shri Rishabh Sehgal, Advocate, VEVPL
Shri Nimesh Jha, Advocate, VEVPL
Ms. Tanya Sareen, Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI

आदेश/ ORDER

The Petitioner, i.e., M/s Vena Energy Vidyuth Pvt. Ltd. (VEVPL), is a generating company and is engaged in the business of generation and sale of wind power in the state of Karnataka. The Petitioner has set up a blended wind power project of 160 MW (ISTS connected RE Project with at least 80% of project capacity being wind power with up to 20% blending of solar PV power) at Village Jumalpura & Hanchinhal Kustagi Taluk, Koppal District, Karnataka. The Petitioner is seeking declaratory relief / in principle approval of the change in law events under the Power Purchase Agreement dated 03.05.2021 and pass consequential orders.

2. Respondent No. 1, Solar Energy Corporation of India Limited (SECI), has been set up under the administrative control of the Ministry of New and Renewable Energy (MNRE). SECI is an intermediary procurer as per the Electricity Act, 2003 and has executed a Power Purchase Agreement (PPA) with VEVPL for the procurement of 160 MW blended wind power.
3. Respondent No.2, Madhya Pradesh Power Management Company Limited (MPPMCL), is a nodal agency vested with the powers by the state of Madhya Pradesh (MP) to engage in the procurement of power on behalf of the distribution companies (Discoms) of the state of MP and is the ultimate beneficiary.
4. The Petitioner has made the following prayers:

- a) *Declare and hold that the introduction of the Basic Custom Duty along with change in rates of Goods & Service Tax and Safeguard Duty prior to the Cut-Off Date i.e., 28.07.2020 qualifies as 'Change in Law' 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) *Pass appropriate and necessary order(s) / direction(s) recognising, in terms of Article 12.2 of the PPAs and Article 8.2 of the PSAs, introduction of the Basic Custom Duty along with change in rates of Goods & Service Tax and Safeguard Duty prior to the Cut-Off Date i.e., 28.07.2020, if any, will be considered as Change in Law subject to the fulfilment of the conditions contained therein;*
- c) *Pass such other and further order(s) that this Hon'ble Commission may deem fit in the interest of justice, equity and circumstances of the present case.*

Factual Matrix:

5. The brief facts of the case are as under:

Location	Village Jumalपुरa & Hanchinhal Kustagi Taluk, Koppal District, Karnataka
Nodal agency	SECI
Tariff	Rs.2.99/kWh
Capacity (MW)	160 MW
Power	Wind
Date of notification of Basic Custom Duty Notification No. 1/2011 (2011 BCD Notification)	06.01.2011
Date of Notification No.1/2017-Central Tax (Rate) (2017 GST Notification)	28.06.2017
Date of notification of Safeguard Duty Notification No. 01/2018 Custom (SG) (2018 SGD Notification)	30.07.2018
RfS issued on	20.03.2020
Last date of submission of online bid	28.07.2020
Bid submitted on	28.07.2020
Date of implementation of Safeguard Duty Notification No. 2/2020-Custom (SG) dated 29.07.2020 (2020 SGD Notification)	30.07.2020
E-Reverse auction held on	14.08.2020
LOA issued on	25.09.2020
Power Sale Agreement (PSA) executed on	05.03.2021
Effective date of the PPA	31.03.2021
PPA executed on	03.05.2021
Tariff was adopted on	22.12.2021

Date of notification of Basic Custom Duty Notification No. 7/2021 (2021 BCD Notification)	01.02.2021
MNRE Office Memorandum (2021 MNRE O.M.)	09.03.2021
Date of Notification of 8/2021- Central Tax (Rate) (2021 GST Notification)	30.09.2021
Scheduled Commissioning Date (SCoD) of the project	31.03.2023
Extended SCoD	30.12.2023

6. The present petition was filed on 24.01.2023 and listed for hearing on 16.05.2023. The Commission, after hearing the submissions of the parties, admitted the Petition. The Petition was further listed for hearing on 20.09.2023, and SECI, during the course of the hearing, admitted on records that they have no objection to the recognition of the events as a change in law events. After hearing the submissions of the parties, the Commission reserved the matter for orders and permitted the parties to file their respective submissions. Pursuant to the directions of the Commission, SECI filed its written submission on 11.10.2023, and the Petitioner filed its written submission on 13.10.2023.

Submissions of the Petitioner:

7. Briefly, the Petitioner has submitted as under:
- a) In terms of the PPA, any change in law event that has occurred after 28.07.2020 (last date for submission of bid), which has a direct effect on the project, shall be construed as a ‘Change in Law Event’. In the event of the occurrence of such a Change in Law Event, which results in any increase in the project cost, the Petitioner is entitled to receive compensation payments to such extent as may be determined by this Commission in accordance with the PPA and shall be effective from the date as may be decided by this Commission.
 - b) The Petitioner is now compelled to incur additional capital expenditure on the procurement of solar cells, modules/ other equipment, etc., on account of the introduction/levy of BCD, change in the rates of Safeguard Duty and GST. Such additional expenditure on the procurement of equipment for setting up the projects would lead to an increase in the capital cost of the projects and, if not compensated, would impact the viability of the Projects.
 - c) This Commission, while adopting the tariff and granting other relief(s) as prayed by SECI in its Petition No. 178/AT/2021, did not recognise the change in rates of Safeguard Duty, GST and Basic Custom Duty as prayed by SECI, since the Commission was of the view

that the treatment of such change in law events shall take place in terms of CIL Rules. Accordingly, it directed the parties to approach this Commission under Rule 8(3) of the CIL Rules at the appropriate stage. Such a decision was made by this Commission on an understanding that since CIL Rules were issued on 22.10.2021, all matters concerning change in law events shall be treated in terms of CIL Rules, and accordingly, this Commission was of the opinion that there shall be no requirement to provide an *in-principle approval/recognition* of the change in law events in terms of Article 12.1.3 of the PPA.

- d) The Ministry of Power *vide* its clarification stated that Change in Law Rules 2021 shall only be applicable prospectively and on those events that have occurred subsequent to notification of Change in Law Rules 2021.
- e) There is no dispute between the Petitioner and SECI that the relief(s) being prayed for by the Petitioner in the captioned petition are in the nature of declaratory relief, and no substantive relief(s) has been sought.
- f) SECI, *vide* its Reply dated 12.08.2023, has, in fact, admitted that it is necessary for this Commission to consider Safeguard Duty, Basic Custom Duty on Solar Inverter, and GST claimed by the Petitioner under Article 12.1.3 of the PPA to be effective from the date of the order dated 22.12.2021 i.e., the Order by way of which this Commission has adopted the tariff for the Petitioner. Therefore, there is no dispute, or the issue is no more *res-integra* that a ‘declaratory relief’ be granted in favour of the Petitioner. Thus, the present Petition is only limited to seeking declaratory relief.
- g) However, since the project is yet to be commissioned, SECI has raised certain concerns that ought to be considered by this Commission, subsequently, as and when the Petitioner may come before this Commission to seek a ‘substantive relief’ i.e., after completion of the project seeking a Change in Law relief on actuals.
- h) Reliance is placed on the Judgement of Appellate Tribunal for Electricity in *Green Infra Renewable Energy Limited v. RERC and Ors. Appeal No. 251 of 2021, dated 12.10.2021*, wherein the Tribunal categorically held that if the change in law event referred to actually constitutes, within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual impact and extent of the relief admissible to be determined at the appropriate stage.

- i) The *2020 SGD Notification, 2021 BCD Notifications, and the 2021 GST Notification* fall squarely within the realm of Article 12.1.3 of the PPA and, therefore, ought to be considered for providing a declaratory relief.
- j) Further, the Petitioner has entered into a Composite Works Contract with its Solar EPC Contractor, while it has entered into separate individual contracts with various contractors for the blended wind power project. Accordingly, the treatment for change in GST rates shall be made considering the nature of the relevant works contract and not the composite contract as a whole.
- k) MNRE Office Memorandum dated 09.03.2021 (2021 MNRE O.M.) amounts to laws within the definition as prescribed under the PPA. The Petitioner has paid BCD on solar modules & cells as raised by the Customs Department and shall provide such details to SECI as and when it will be required and shall proceed to approach this Commission seeking for substantive relief.
- l) In the written submissions, the Petitioner has additionally submitted that:
 - (i) In terms of the PPA dated 03.05.2021, the relief in case of occurrence of Change in Law Events shall be in the form of compensatory payment(s) to the affected party. Such compensatory payments shall be required to be paid strictly in accordance with Clause 12.2.3 of the PPA.
 - (ii) Further, the issue of whether carrying cost is payable to the Petitioner and if yes, as per what rate, is squarely covered by the *Parampujaya Case*.
However, in the present Petition, the Petitioner is not seeking any compensatory relief/ carrying cost and is seeking a declaration of the aforesaid Change-in-law events. The Petitioner reserves its right to make submissions on these issues, as and when either a substantive petition is filed and/or reconciliation takes place with SECI.

Submissions of SECI:

- 8. Briefly, SECI has submitted as under:
 - a) In view of the clarification dated 21.02.2022 by the Ministry of Power, the Commission may consider and declare that the Safeguard duty, Basic custom duty on Solar Inverter and GST claimed by the Petitioner are change in law events under Article 12.1.3 effective from the date of tariff adoption order dated 22.12.2021.
 - b) The notification dated 29.07.2020 in regard to Safeguard Duty, notification dated 30.09.2021 in regard to GST Laws, Notification dated 01.02.2021 in regard to Basic

Custom Duty on Solar Inverters were notified prior to Change in Law Rules (notified on 22.10.2021), and accordingly these events shall be '*dealt in accordance with the prevalent dispensation/rule position at the time of occurrence of the event*' and not as per the Change in Law Rules 2021.

- c) Petitioner has claimed that MNRE issued an Office Memorandum dated 09.03.2021 dealing with Basic Custom Duty on import of Solar PV cells and modules but has not placed on record the relevant customs notification issued by Central Government imposing Basic Custom Duty on Solar Cells and Modules in pursuance of Office Memorandum dated 09.03.2021 of MNRE.
- d) For the application of the formula provided in Article 12.2.3 of the PPA for relief of Change in Law, the amount constituting the project cost cannot be considered on an estimate basis. The project cost will be available only upon the capital expenditure being incurred in respect of the concerned project up to SCoD/CoD, and such capital expenditure is subject to examination and verification of documents by SECI (as well as MPPMCL) to be submitted by the Petitioner as well as appropriate prudence check by this Commission. In the present case, the scheduled commissioning date has been revised to 30.12.2023, and the Petitioner has yet to commission the power project.
- e) APTEL, in its decision dated 15.09.2022 passed in Appeal No.256 of 2019 and connected Appeals in the case of *Parampujya Solar Energy Pvt. Ltd. –v- Central Electricity Regulatory Commission (Parampujya Case)*, has dealt with the aspect of carrying cost and allowed it to the developers. However, in terms of the Orders dated 12.12.2022 and 23.01.2022 of the Hon'ble Supreme Court, the enforceability of the Tribunal's decision dated 15.09.2022 in *Parampujya Case* has been stayed with regard to the issues of carrying cost, compensation on account of impact of change in law for the period post Commercial Operation Date of the projects and towards O&M expenses.

Hearing dated 20.09.2023:

9. During the hearing dated 20.09.2023, it was held as under:

During the course of the hearing, learned counsel for the Petitioner and the Respondent, SECI made detailed submissions in the matter. Learned counsel for the Petitioner, inter alia, submitted that the Petitioner vide its affidavit dated 28.7.2023 has clarified that at this stage, the Petitioner is only seeking a declaratory/in-principle approval of the Change in Law events viz. (i) imposition of Safeguard Duty by the Central Government vide Notification dated 29.7.2020, (ii) imposition of Custom Duty on imports of solar inverters by the Ministry of Finance vide Customs Notification dated 1.2.2021, (iii) imposition of Basic Custom Duty on Solar PV Cells & Modules/Panels etc. by the

Ministry of New and Renewable Energy (MNRE) vide its OM dated 9.3.2021 and (iv) changes in the rate of GST on solar modules and other solar power generator equipment from 5% to 12% w.e.f 1.10.2021, all of which have occurred after the cut-off date of 28.7.2020. Whereas, learned counsel for **the Respondent, SECI, inter-alia, submitted that the Respondent has no objection towards the recognition of the above events as Change in Law events.** In the present case, Article 12.1.3 of the Power Purchase Agreement also provides that changes in rates of Safeguard Duty, GST and Basic Custom Duty after 28.7.2020, if any, will be considered as Change in Law subject to the Appropriate Commission recognizing such provisions at the time of adoption of tariff. Learned counsel also pointed out that **MNRE's OM dated 9.3.2021 providing for the rate of Basic Custom Duty on Solar cells and Modules, may per se not constitute a Change in Law** event and the Petitioner has not placed on record the relevant Customs Notification issued by the Central Government imposing Basic Custom Duty in pursuance of the said OM. Learned counsel also added that such Notifications came to be issued by the Ministry of Finance only in February/March, 2022 i.e. after the notification of Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 on 22.10.2021.

2. Considering the request of the learned counsel for the parties, the Commission permitted the parties to file their respective written submissions, if any, within three weeks with a copy to the other side.

3. Subject to the above, the Commission reserved the matter for order.

Analysis and Decision:

10. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records and considered the submissions of the parties.
11. We note that the Petitioner, vide its additional Affidavit dated 28.07.2023, has submitted that it is only seeking declaratory and/or in-principle approval of the Commission regarding the introduction of the following events as the Change in Law events under Article 12 of the PPA dated 03.05.2021:
 - a) introduction of Notification No.02/2020-Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India (2020 SGD Notification);
 - b) introduction of Notification No. 03/2021 and Notification No. 07/2021-Customs dated 01.02.2021 issued by the Department of Revenue, Ministry of Finance, Government of India (2021 BCD Notifications);
 - c) Imposition of Basic Customs Duty on Solar PV Cells & Modules /Panels etc., by Ministry of New and Renewable Energy vide its Office Memorandum dated 09.03.2021 (2021 MNRE O.M.) and

d) *the introduction of Notification No.8/2021- GST dated 30.09.2021 issued by the Ministry of Finance, Government of India (2021 GST Notification).*

12. On the basis of the submissions of the contracting parties, the following issues arise for adjudication:

Whether the introduction of Notification No.02/2020-Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India; introduction of Notification No. 03/2021 and Notification No. 07/2021-Customs dated 01.02.2021 issued by the Department of Revenue, Ministry of Finance, Government of India; Imposition of Basic Customs Duty on Solar PV Cells & Modules /Panels etc. by Ministry of New and Renewable Energy vide its Office Memorandum dated 09.03.2021 and the introduction of Notification No.8/2021-GST dated 30.09.2021 issued by Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 03.05.2021? AND Whether the Petitioner is entitled to compensation towards additional expenditure on account of a Change in Law event in terms of Article 12.2 of the PPA?

13. The Petitioner has submitted that the Commission, vide order dated 22.12.2021 in the Petition No. 178/AT/2021, has not recognized the impugned Notifications as Change in Law events in terms of *The Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021* (the Change in Law Rules, 2021) notified by the Ministry of Power. However, the Ministry of Power vide clarification dated 21.02.2022 specified that the Change in Law Rules, 2021 shall apply prospectively. A relevant extract of the Order dated 22.12.2021 is reproduced below:

*45. The Change in Law Rules have been framed to facilitate timely recovery of costs due to Change in Law events and to provide a process and methodology to be followed. **As per the provisions of the Change in Law Rules, on occurrence of a Change in Law, the affected party (generator) and other parties (procurers) are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.***

46. Petition No. 178/AT/2021 is disposed of in terms of the above.”

14. The Ministry of Power vide its Office Memorandum (OM) dated 21.02.2022 clarified as under:

2. The matter has been examined in this Ministry and the following is clarified with respect to the applicability of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021:

*i. **The Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021***

were notified by Ministry of Power, vide notification dated 22nd October, 2021 in Gazette of India. As per sub-rule (2) of Rule 1, these Rules **shall come into force on the date of their publication in the Official Gazette. These Rules have not stated to have been given any retrospective operation.**

- ii. **The aforesaid Rules are applicable on the change in law events occurred on or after the date of notification of these Rules in the Official Gazette i.e. 22nd October, 2021. The change in law events occurred prior to the notification of these Rules shall be dealt in accordance with the prevalent dispensation/rule position at the time of occurrence of the event.**
- iii. The proceedings in the petitions, related to change in law matters, pending before the Appropriate Commissions, shall be dealt in accordance with stipulations made in para (ii) above.

3. This issue with the approval of Competent Authority.

15. APTEL vide its judgment dated 05.04.2022 in O.P No. 1 of 2022 & Ors. observed as under:

“60. CIL Rules apply prospectively to matters and change in law claims initiated after 22.10.2021 and cannot be retrospectively applied to proceedings pending for adjudication before the Central Commission particularly where the cause of action had already arisen before the Rules were brought into existence for the reason the law, existing as on date of filing of proceedings, will only govern the dispute....

.....
63. As mentioned earlier, pertinent to note that the Central government which has framed and notified the CIL Rules itself has clarified, albeit subsequently, by a communication issued by MoP on 21.02.2022 that **CIL Rules will apply to Change in Law events which occur on or after 22.10.2021, such events as had occurred prior to the notification of these Rules to be dealt with in accordance with the prevalent dispensation or rule at the time of occurrence of the event.**”

16. From the above, we observe that Change in Law Rules. 2021 will apply to Change in Law events that occur on or after 22.10.2021 (the Notification date of Change in Law Rules. 2021) and that such events as had occurred prior to the notification of these Rules are to be dealt with in accordance with the prevalent dispensation at the time of occurrence of the event. We note that as the impugned notifications/ O.M. were issued prior to 22.10.2021, as such, the same are to be considered in terms of Article 12 of the PPA dated 03.05.2021.

17. We observe that Article 12 of the PPA dated 03.05.2021 stipulates as under:

Article 12: Change in Law

12.1 Definitions

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

12.1.1 In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after 28.07.2020

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 Wind Power Developer; or **(v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the wind power project and supply of power from the Project by the WPD which have a direct effect on the Project.**

.....
12.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 28.07.2020 and resulting in change in Project Cost, then such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 12.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on WPD and Buying Entity.

12.2.2 The decision of the Hon 'ble CERC 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 WPD and Buying Entity.

12.2.3 In case of Change in Law as approved by the Appropriate Commission pursuant to Article 12.2.1 or as provided under Article 12.1.3, the WPD/ SECI/ Buying Entities (as the case may be) shall be entitled for relief as follows:

Every net increase/decrease of Rs.1 lakh per MW in the Project Cost (i.e cost incurred by the WPD for the supply and services in the Project concerned, upto Scheduled Commissioning Date or extended Scheduled Commissioning Date, for reasons other than those wherein such extension is on account of payment of liquidated damages, penalty or any other charges, as the case may be), shall be liable for corresponding increase/decrease of an amount equal to Rs 0.0045 /kWh.

Any such change, shall be considered upto three digits after the decimal point, and remaining digits, if any, shall be ignored.

For e.g. in case the change in tariff **payable** is calculated as Rs. 0.14678/kWh, it shall be modified as Rs. 0.146/kWh”

12.2.4

12.2.5

12.3 Notification of Change in Law

12.3.1 In case of any decrease or increase in project cost occurs due to change in law, in accordance with Article 12 and to settle such claim under this Article, WPD shall give notice to the SECI and Buying Utility (s) of such Change in Law as soon as reasonably practicable (but no 'later than 60 days from the date of occurrence of such Change in Law).

12.3.2 Any notice service pursuant to this Article 12.3.1 and 12.1.3, shall provide, amongst other things, precise details of the Change in Law and its effect on the Project Cost,

supported by documentary evidences including Statutory Auditor Certificate to this effect so as to establish one to one correlation and its impact on the Project Cost.

18. The Commission observes that as per Article 12 of the PPA, ‘Change in Law’ means the enactment/coming into effect/ adoption/ promulgation/ amendment/ modification or repeal of any Law in India; change in the interpretation of any law in India; imposition of a requirement for obtaining any consents or change in tax or introduction of any tax made applicable for supply of power by the WPD as per the terms of this Agreement, resulting into any additional recurring/ non-recurring expenditure or any income to the WPD. Clause (e) in seriatim specifically stipulates that any change in rates of taxes, duties and cess, or introduction of any new tax made applicable for setting up of wind power project and supply of power by the WPD after the date of submission of the bid, shall be treated as per the terms of PPA.

Re. 2020 SGD Notification

19. As per the Safeguard Duty Notification No. 1/2018 (SG) dated 30.07.2018 (2018 SGD Notification), the Central Government imposed safeguard duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels”:

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

20. The extract of the 2020 SGD Notification is as under:

- ...
- (a) fourteen point nine per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July, 2020 to 29th January, 2021 (both days inclusive); and
 - (b) fourteen point five per cent. ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January, 2021 to 29th July, 2021 (both days inclusive).

21. From the above, we note that any application of a new tax or an amendment, modification or repeal of an existing law is covered as a ‘Change in Law’. We observe that the 2020 SGD Notification stipulated fourteen point nine per cent (14.9%) ad valorem minus anti-dumping duty payable on subject goods when imported during the period from 30.07.2020 to 29.01.2021 (both days inclusive); and fourteen point five per cent (14.5%) ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.01.2021 to 29.07.2021 (both days

inclusive). The notification provides for a 'Safeguard Duty' slab in the range of 14.9% to 14.5% applicable ad valorem on the imports from 30.07.2020 till 29.07.2021. The impact of the 'Safeguard Duty' notification is on any portion of import whose point of taxation is on or after implementation of the Notification dated 29.07.2020, and the same will be subjected to the purview of 'Safeguard Duty'. The Commission is of the view that a fresh 'Safeguard Duty' became effective from 30.07.2020, and hence 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 30.07.2020. In the present instance, the 2020 SGD Notification has imposed a fresh Safeguard Duty till 29.07.2021 and has thereby increased the rate of the Safeguard Duty from 'zero' to 14.9% & 14.5% for the period- 30.07.2020 to 29.01.2021 and 30.01.2021 to 29.07.2021, respectively. The imposition of safeguard duty w.e.f. 30.07.2020 has resulted in a change in the cost of the inputs required for generation, and the same is considered a 'Change in Law'. Further, SECI during the hearing held on 20.09.2023, has also agreed that the imposition of SGD vide *2020 SGD Notification* qualifies to be a Change in Law event. Hence, we hold that *2020 SGD Notification* is an event of Change in Law as per Article 12 of the PPA dated 03.05.2021.

Re. 2021 BCD Notifications

22. The Petitioner has further submitted that as a result of the *reversal of the Basic Custom Duty (BCD) Notification No. 1/2011-Customs dated 06.01.2011 by the BCD Notification No. 7/2021 and Notification No. 03/2021*, Custom Duty on solar Inverters was raised to 20% from the earlier applicable rate of 5%. We note that:

Notification No. 1/2011- Customs dated 06.01.2011

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the government of India in the Ministry of Finance (Department of Revenue) No. 30/2010 – Customs, dated 27th Feb. 2010, the Central Government on being satisfied that it is necessary in the public interest so to do, hereby exempts all items of machinery, including prime movers, instruments, apparatus and appliances, control gear and transmission equipment and auxiliary equipment (including those required for testing and quality control) and components, required for the initial setting up of a solar power generation project or facility, when imported into India, from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), as is in excess of 5% ad valorem, and from the whole of the Additional

Duty of Customs leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely:-

(1) the importer produces to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, a certificate, from an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of New and Renewable Energy to the effect that the goods are required for initial setting up of a project or facility for the generation of power using solar energy, indicating the quantity, description and specification thereof; and the said officer recommends the grant of this exemption ; and

(2) the importer furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, that such imported goods will be used for the purpose specified and in the event of his failure to comply with this condition, he shall be liable to pay, in respect of such goods as is not proved to have been so used, an amount equal to the difference between the duty leviable on such goods but for the exemption under this notification and that already paid at the time of importation.”

Notification No. 03/2021- Customs dated 01.02.2021:

“In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India, Ministry of Finance (Department of Revenue), No. 57/2017- Customs, dated the 30th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 798 (E), dated the 30th June, 2017, namely:-

(ix) against S.No. 13, in column (3), for the entry, the following entry shall be substituted, namely: -

All goods other than the following goods, namely: -

(a) charger or power adapter;

(b) solar inverter;”

Notification No. 07/2021-Customs dated 01.02.2021:

“In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and section 3 of the Customs Tariff Act, 1975 (51 of 1975), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby rescinds the notifications of the Government of India in the Ministry of Finance (Department of Revenue), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) specified in column (2), vide corresponding G.S.R. number specified in column (3), of the Table, except as respects things done or omitted to be done before such rescission, namely:-

Table

<i>S.NO</i>	<i>Notification No.</i>	<i>GSR No.</i>
<i>1</i>	<i>1/2011-Customs, dated the 6th January, 2011</i>	<i>6 (E), dated the 6th January, 2011</i>

23. We observe that Notification No. 1/2011- Customs dated 06.01.2011 had granted exemption to solar generating units for items required for setting up of a solar power generation project when imported into India, from so much of the duty of customs leviable thereon, as is in excess of 5% ad valorem. However, subsequently, vide Notification No. 3/2021 & 7/2021, the exemptions to the extent of 5% (ad valorem) were reversed, and the basic customs duty on import of the solar inverters was increased from 5% to 20%. The change in rate of BCD from 0% to 20% w.e.f. 01.02.2021 has resulted in the change in the cost of the inputs required for generation, and the same is considered as ‘Change in Law’. Further, SECI during the hearing held on 20.09.2023, has also agreed that the revision in the rate of BCD in terms of Ministry of Finance, Department of Revenue, 2021 BCD Notifications qualifies to be a Change in Law event. Hence, we hold that *2021 BCD Notifications* are an event of Change in Law as per Article 12 of the PPA dated 03.05.2021.

Re. 2021 MNRE O.M.

24. We observe that SECI has submitted that the Petitioner has not placed on record the relevant customs’ notification issued by the Central Government imposing Basic Custom Duty on Solar Cells and Modules in pursuance of *2021 MNRE OM*. Hence, *2021 MNRE O.M.* (dated 09.03.2021) cannot be treated as a Change in Law event, and the Petitioner cannot be allowed declaratory relief. *Per Contra*, the Petitioner submitted that the *2021 MNRE O.M.* amounts to law as per the PPA and the MNRE would be construed as Indian Government Instrumentality in terms of the PPA. The Petitioner has paid ‘BCD on Solar Modules & Cells’ as raised by the Customs Department and shall provide such details to SECI as and when it will be required and shall proceed to approach this Commission seeking for a substantive relief.

25. MNRE vide its O.M. dated 09.03.2021 mandated as under:

The following proposal of MNRE to impose BCD on solar cells and modules (without grandfathering of bid out projects) has been agreed to by the Ministry of Finance:

Item	Upto 31.03.2022	w.e.f. 01.04.2022
Solar Module	0%	40%
Solar Cell	0%	25%

5. The Ministry of Finance has also advised that the customs notification in this regard shall be issued at appropriate time.'

6. In view of above, the undersigned is directed to inform all RE implementing agencies and other stakeholders, to take note of above trajectory and to include provisions in their bid documents, so that bidders take the trajectory into account while quoting tariffs, in all bids where the last date of bid submission is subsequent to this GM. **In all such bids, the imposition of BCD as per above trajectory shall not be considered as change-in-law.**

26. Relevant provisions of the PPA dated 03.05.2021 are as under:

Indian Governmental Instrumentality: shall mean the Government of India, Government of State(s) of New Delhi and Karnataka and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or the above state Government(s) or both any political sub-division of any of them; including any Court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India;

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

Article 12: Change in Law

12.1 Definitions

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

12.1.1 In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after 28.07.2020 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 Wind Power Developer; or **(v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the wind power project and supply of power from the Project by the WPD which have a direct effect on the Project.**

...

From the above, as per PPA, the law includes all applicable rules, regulations, orders, and notifications by an Indian Governmental Instrumentality 'pursuant to all laws', including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any of them by an Indian Governmental Instrumentality and having force of law. In the instant case, we note that the Petitioner has placed on record the 2021 MNRE O.M. We observe

that the O.M. stipulates that “the Ministry of Finance has also advised that the customs notification in this regard shall be issued at appropriate time.” We note that the Petitioner has failed to place on record the relevant customs notifications imposing BCD issued by the Ministry of Finance, Government of India. We are of the view that the 2021 MNRE O.M. is only an Office Memorandum and not a notification. In fact, the MNRE O.M. itself refers to a notification to be issued by the Ministry of Finance in pursuance of the relevant Act. Hence, we hold that the 2021 MNRE O.M., once supported by the notification issued by the Ministry of Finance in pursuance of the relevant Act, shall qualify as a Change in Law as per the PPA. Accordingly, we give liberty to the Petitioner to make submissions on this issue along with relevant custom notifications as and when a substantive petition is filed and/or reconciliation is carried out with SECI, if so advised.

Re. 2021 GST Notification

27. Further, the extract of the 2021 GST Notification, is as under:

(b) in Schedule II – 12%, -

...

(iv) after S. No. 201 and the entries relating thereto, the following S. No. and entries shall be inserted, namely: -

201 A	84, 85 or 94	Following renewable energy devices & parts for their manufacture: - (a) Bio-gas plant (b) Solar power-based devices (c) Solar power generating system (d) Wind mills, Wind Operated Electricity Generator (WOEG) (e) Waste to energy plants / devices (f) Solar lantern / solar lamp (g) Ocean waves/tidal waves energy devices/plants (h) Photo voltaic cells, whether or not assembled in modules or made up into panels.
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28. We observe that the Notification No. 8/2021-Central Tax (Rate), Notification No. 8/2021-Integrated Tax (Rate) dated 30.09.2021 has been issued by the Ministry of Finance, Government of India, in pursuance of an Act of Parliament. The change in rate of Goods and Services Tax from 5% to 12% w.e.f. 01.10.2021 has resulted in the change in the cost of the inputs required for generation, and the same is considered as a ‘Change in Law’. Further, SECI, during the hearing held on 23.08.2023, has also agreed that the revision in the rate of GST from 5% to 12% in terms of Ministry of Finance, Department of Revenue, Notification No. 8/2021 dated 30.9.2021 squarely qualifies to be a Change in Law event. Hence, the Commission holds that the

introduction of the *2021 GST Notification* is covered as a ‘Change in Law’ under Article 12.1.1 of the PPA.

29. In the instant petition, the bid was submitted by the Petitioner on 28.07.2020. PPA was executed between the Petitioner and the SECI on 03.05.2021, and the SCoD of the project was 31.03.2023 which was further revised to 30.12.2023. We observe that fresh duties/taxes were introduced by (i) introduction of Notification No.02/2020-Custom (SG) dated 29.07.2020 issued by the Department of Revenue, Ministry of Finance, Government of India; (ii) introduction of Notification No. 03/2021 and Notification No. 07/2021-Customs dated 01.02.2021 issued by the Department of Revenue, Ministry of Finance, Government of India; and (iii) the introduction of Notification No.8/2021- GST dated 30.09.2021 issued by Ministry of Finance, Government of India. As already submitted by the Petitioner it is seeking only declaratory relief in view of the specific provision in Article 12.1.3 of the PPA and no substantive relief, as such, we hold that the impugned notifications viz. *2020 SGD Notification, 2021 BCD Notifications and 2021 GST Notification* are Change in Law events as per Article 12 of the PPA dated 03.05.2021.
30. The issues are decided accordingly.
31. We observe that the Petitioner has submitted that in the present petition, it is seeking a declaration of the aforesaid Change-in-Law events and is not seeking any substantive claim (compensatory relief/ carrying cost). The Petitioner has further submitted that it reserves its right to make submissions on these issues, as and when either a substantive petition is filed and/or reconciliation takes place with SECI. In view of the above, we grant liberty to the Petitioner to approach the Commission at the relevant time in accordance with the prevailing law, if so advised.
32. The Petition No. 49/MP/2023 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
आई. एस. झा
सदस्य

Sd/-
जिष्णु बरुआ
अध्यक्ष